No. 18-8369

IN THE
Supreme Court of the United States

ARTHUR JAMES LOMAX,

Petitioner,

v.

CHRISTINA ORTIZ-MARQUEZ, NATASHA KINDRED, DANNY DENNIS, MARY QUINTANA,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The question presented, as stated by the Court in its order granting review, is:

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

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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INTRODUCTION

This case turns on the interpretation of the "three strikes" provision of the Prison Litigation Reform Act of 1995 (PLRA),[1] which blocks indigent prisoners from qualifying for *in forma pauperis* (IFP) status if three or more of their previous actions or appeals were dismissed on certain specified grounds. 28 U.S.C. § 1915(g). As described by this Court, the three-strikes provision seeks "to filter out the bad claims filed by prisoners and facilitate consideration of the good." *Coleman v. Tollefson*, 135 S. Ct. 1759, 1762 (2015) (alterations and quotation marks omitted). The question presented here asks whether the "bad claims" targeted by section 1915(g) include actions dismissed for failure to state a claim, where a court expressly stated that the dismissal would be entered *without* prejudice.

The answer is no. "Section 1915(g)'s mandate that prisoners may not qualify for IFP status if their suits have thrice been dismissed on the ground that they were 'frivolous, malicious, or fail[ed] to state a claim'" is best read to apply only to "nonmeritorious suits dismissed *with prejudice*." *Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999) (emphasis added). An order dismissing an action "without prejudice" is "the opposite" of a merits adjudication; the order does not reflect *any* judgment about whether the action may ultimately succeed. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-506 (2001). It would be deeply at odds with the text, structure, and intent of the PLRA to penalize indi-

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[1] Pub. L. No. 104-134, § 804, 110 Stat. 1321-66, 1321-73 to 1321-75 (1996).

gent prisoner litigants—and restrict their access to the federal courts—for filing *pro se* actions with the sort of temporary and curable procedural flaws that result in without-prejudice dismissal orders. The contrary determination by the court of appeals should be reversed.

OPINIONS BELOW

The opinion of the court of appeals is unreported; it is reproduced at J.A. 68-76. The opinion of the district court is also unreported; it is reproduced at J.A. 62-67.

JURISDICTION

The court of appeals entered judgment on November 8, 2018. The petition for a writ of certiorari was filed on February 5, 2019, and granted on October 8, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1915(g) of Title 28 of the United States Code provides as follows:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

The federal IFP statute, 28 U.S.C. § 1915, is set forth in its entirety in an appendix to this brief, as are additional provisions of the PLRA, 28 U.S.C. § 1915A, 42 U.S.C. § 1997e, and Federal Rules of Civil Procedure 12(b) and 41(b).

STATEMENT

A. Statutory Background

1. Originally passed in 1892, the federal IFP statute "is designed to ensure that indigent litigants have meaningful access to the federal courts." *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). This law furthers a central value of the Anglo-American legal tradition by ensuring that no one is "denied an opportunity to commence, prosecute, or defend an action" in any federal court "solely because his poverty makes it impossible for him to pay or secure the costs." *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948).[2]

In its original form, the IFP statute permitted "any citizen" who filed an affidavit establishing his poverty to "commence and prosecute to conclusion any . . . suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit." Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252. The statute also provided courts with authority, however, to police abuses of IFP sta-

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[2] *See also* Wayne A. Kalkwarf, *Petitions to Proceed* In Forma Pauperis*: The Effect of* In re McDonald *and* Neitzke v. Williams, 24 Creighton L. Rev. 803, 803-804 (1991) (recounting the history of IFP status and explaining that the principle recognizing that "indigents should not be barred from seeking justice" traces back to Magna Carta).

tus. Courts had discretion to dismiss actions brought under the IFP statute if "satisfied that the alleged cause of action is frivolous or malicious" or if the allegation of poverty was false. *Id.* § 4.

This Court interpreted the statutory provision authorizing dismissal of "frivolous or malicious" IFP actions in *Neitzke v. Williams*, 490 U.S. 319 (1989) and *Denton v. Hernandez*, 504 U.S. 25 (1992).

In *Neitzke*, the Court considered whether a complaint that fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) "automatically satisfie[d]" the IFP statute's "frivolousness standard" and held that it did not. 490 U.S. at 325, 331. In reaching that conclusion, the Court explained that, despite "considerable common ground" between the frivolousness and Rule 12(b)(6) standards, the concepts are distinct. *Id.* at 328. A claim is frivolous if it "lacks an arguable basis either in law or in fact." *Id.* at 325. By contrast, Rule 12(b)(6) provides for dismissal if the factual allegations, taken as true, do not establish a legal basis for relief, regardless of whether the plaintiff's theory is "outlandish" or "close but ultimately unavailing." *Id.* at 327.

Later, in *Denton*, the Court reaffirmed that district courts could dismiss IFP claims as "frivolous" when their "factual contentions are clearly baseless." 504 U.S. at 32 (citation omitted). The Court declined to impose more rigid "guidepost[s]" for a frivolousness determination, reasoning that district courts "are in the best position to determine which cases fall into this category." *Id.* at 33. Moreover, the Court recognized that because the IFP statute, as then structured, left to the district court's discretion

whether to dismiss an IFP claim as frivolous, the dismissal would not operate as "a dismissal on the merits" and a plaintiff could later "fil[e] . . . a paid complaint making the same allegations." *Id.* at 34.

2. In 1996, Congress enacted the PLRA. *See* Pub. L. No. 104-134, 110 Stat. 1321-66. The PLRA was passed "in the wake of a sharp rise in prisoner litigation in the federal courts," and contains "a variety of provisions designed to bring this litigation under control." *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). But, as one of the Act's Senate sponsors explained, the PLRA is not structured to "prevent inmates from raising legitimate claims." 141 Cong. Rec. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch). Instead, the law is designed to "reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

The PLRA made significant amendments to existing statutes, including the IFP statute. It also added several new provisions, the most significant of which are discussed below.

Sua Sponte Dismissals of IFP Actions: The PLRA made two significant changes to the subsection of the IFP statute at issue in *Neitzke* and *Denton*. First, the statute expands the bases for dismissal beyond determinations that an action or appeal is "frivolous or malicious" to include actions or appeals that "fail[] to state a claim on which relief may be granted" or "seek[] monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(ii)-(iii). Second, the statute now *requires* (instead of merely allowing) courts to dismiss

cases that fall within one of the provision's dismissal categories. *Id.* § 1915(e)(2).

The "Screening" Provision: The PLRA added section 1915A, a "screening" provision that requires federal courts to review "before docketing" or "as soon as practicable" complaints filed by prisoners that seek "redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). Upon that initial review, the court must "identify cognizable claims or dismiss the complaint, or any portion of the complaint," that is "frivolous, malicious, or fails to state a claim upon which relief may be granted," or that "seeks monetary relief from a defendant who is immune from such relief." *Id.* § 1915A(b)(1)-(2).

Administrative Exhaustion: The PLRA significantly amended 42 U.S.C. § 1997e, adding key provisions governing prisoner suits. As amended, the statute applies to all actions brought by prisoners "with respect to prison conditions" under federal law, and requires prisoners to exhaust all available administrative remedies before filing suit. 42 U.S.C. § 1997e(a). Echoing the terms of 28 U.S.C. § 1915(e)(2) and § 1915A(b), the statute also mandates dismissal of covered prisoner suits whenever a court is "satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." 42 U.S.C. § 1997e(c)(1).

Deferred Payment: The PLRA added payment requirements for prisoners who qualify for IFP status. 28 U.S.C. § 1915(b)(1). Under section 1915(b), pris-

oners must "pay an initial partial filing fee" out of their prisoner trust fund accounts, followed by payments made in monthly installments. *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016). These payment requirements are designed to more closely align a prisoner's economic incentives with those of ordinary litigants, "'forc[ing] prisoners to think twice about the case and not just file reflexively.'" *Id.* at 631 (quoting 141 Cong. Rec. 14,572 (1995) (remarks of Sen. Kyl)). A statutory "safety-valve provision," however, ensures that a prisoner's inability to pay an initial partial filing fee will not bar access to court. *Id.* at 630 (citing 28 U.S.C. § 1915(b)(4)).

The "Three Strikes" Provision: Most directly relevant here, the PLRA added a "three strikes" provision to the IFP statute. 28 U.S.C. § 1915(g) declares that a prisoner may not proceed with IFP status if he has

> on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted[.]

The statute recognizes a narrow exception if "the prisoner is under imminent danger of serious physical injury." *Id.*

Prisoners who have incurred three strikes must ordinarily pay all filing fees "in full upfront." *Bruce*, 136 S. Ct. at 630. No safety valve exists for prisoners who cannot pay this fee.

B. Facts And Procedural History

1. Petitioner is an inmate at the Limon Correction Facility in Colorado. J.A. 69. This case arises from the denial of petitioner's request to proceed IFP in a civil-rights action.

Petitioner's action relates to his time at the Centennial Correctional Facility in Colorado. *Id.* Petitioner alleges that he was unlawfully expelled from Centennial's sex-offender treatment program. J.A. 19. In February 2018, he filed a civil-rights action in the United States District Court for the District of Colorado under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 and moved for leave to proceed IFP. J.A. 5. Among other things, petitioner asserted violations of his constitutional due process rights against five Centennial employees and a member of the Central Classification Committee at Offender Services in Colorado. J.A. 69.

The magistrate judge granted petitioner's motion to proceed IFP and directed him to file an amended complaint, which petitioner did. J.A. 62-63. The district court, however, later vacated the order granting petitioner IFP status, and directed him to show cause as to why he should be allowed to proceed IFP. J.A. 40.

Citing section 1915(g), the district court identified three previous actions brought by petitioner that were dismissed, which the court indicated could qualify as strikes. J.A. 38-39. The first two actions, *Lomax v. Hoffman*, No. 13-cv-03296 (D. Colo. filed Dec. 6, 2013) and *Lomax v. Hoffman*, No. 13-cv-02131 (D. Colo. filed Aug. 8, 2013), were dismissed as barred by this Court's decision in *Heck v. Humphrey*,

512 U.S. 477 (1994). J.A. 70. Both dismissals were expressly rendered "without prejudice." J.A. 73. The third case, *Lomax v. Lander*, No. 13-cv-00707 (D. Colo. filed March 18, 2013), included claims that were dismissed for lack of subject-matter jurisdiction as well as claims dismissed with prejudice for failure to state a claim upon which relief can be granted. J.A. 70.[3]

In response, petitioner argued that he should be allowed to proceed IFP because his prior two *Heck* dismissals for failure to state a claim were issued "without prejudice," and thus did not qualify as "strikes" under section 1915(g). J.A. 43, 70-71. The district court rejected that argument, denied petitioner's motion for leave to proceed IFP, and ordered him to pay the $400 filing fee or face dismissal of his complaint. J.A. 66-67. Petitioner timely filed a notice of appeal challenging the district court's decision denying him leave to proceed IFP. J.A. 7, 69.

2. The Tenth Circuit affirmed the denial of petitioner's IFP status based on section 1915(g). J.A. 76. The court explained that, under circuit precedent, the "dismissal of a civil rights suit for damages based on prematurity under *Heck* is for failure to state a claim." J.A. 72 (quoting *Smith v. Veterans Admin.*,

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[3] The courts of appeals are divided over whether an action or appeal that has claims dismissed on multiple grounds—only some of which fall within section 1915(g)—incurs a strike. *See, e.g.*, *Escalera v. Samaritan Vill.*, 938 F.3d 380, 382, 384 & n.3 (2d Cir. 2019) (joining the majority of circuits that hold "a mixed dismissal, on both § 1915(g) and non-§ 1915(g) grounds, is not a strike" but noting a split on the issue). This separate circuit split is not before the Court.

636 F.3d 1306, 1312 (10th Cir. 2011)). Although the court acknowledged that petitioner's *Heck*-barred actions were dismissed "without prejudice," the court held that the dismissals qualified as strikes because, in the Tenth Circuit, "'it is immaterial to the strikes analysis [whether] the dismissal was without prejudice,' as opposed to with prejudice." J.A. 72 (quoting *Childs v. Miller*, 713 F.3d 1262, 1266 (10th Cir. 2013)).

SUMMARY OF ARGUMENT

Congress adopted the PLRA's "three strikes" provision, 28 U.S.C. § 1915(g), to curtail abusive litigation by prisoners who have filed multiple actions or appeals that were dismissed as lacking in merit. The statute does *not* support imposing strikes for dismissals based on a failure to state a claim if the orders were entered *without* prejudice. An order dismissing an action without prejudice is the "opposite" of a merits adjudication, *Semtek*, 531 U.S. at 505, and does not determine whether the claim will ultimately succeed. Section 1915(g) should not be read to restrict court access to litigants who file actions that may raise legitimate claims but are dismissed without prejudice due to procedural defects that may be temporary or curable.

I. The PLRA's text, structure, and purposes all show that without-prejudice dismissals for failure to state a claim are not strikes under section 1915(g).

A. Section 1915(g) counts as a strike an "action or appeal" that was "dismissed" for "fail[ure] to state a claim upon which relief may be granted." That full phrase is drawn from Federal Rule of Civil Procedure 12(b)(6) and has a settled meaning. Courts uniform-

ly agree that if a district court order "dismissed" a case for "fail[ure] to state a claim upon which relief may be granted"—and is otherwise silent—the dismissal is on the merits and operates with prejudice. Section 1915(g) should be read in light of this legal backdrop. By using a common legal phrase, Congress presumptively intended to incorporate that phrase's well-established meaning. Under that meaning, only "with prejudice" dismissals for failure to state a claim should count as strikes.

B. The structure of the PLRA further shows that section 1915(g) does not impose strikes for failure-to-state-a-claim dismissals entered without prejudice. Section 1915(g) includes two bases for strikes that precede the phrase at issue: actions dismissed as "frivolous" or "malicious." Those two types of dismissals both reflect a judicial determination that a claim is "irremediably defective." *Snider*, 199 F.3d at 111. Dismissals for failure to state a claim entered *with* prejudice share this feature, but dismissals entered *without* prejudice do not. *See id.*

On the flip side, Congress excluded other types of non-merits-based dismissals from section 1915(g). For example, the PLRA includes several provisions that require *sua sponte* dismissal of actions barred by immunity. *See* 28 U.S.C. §§ 1915(e)(2), 1915A(b); 42 U.S.C. § 1997e(c). But section 1915(g) does not impose a strike for such dismissals. The most likely explanation for that gap is that sovereign immunity is a jurisdictional defense, *see, e.g.*, *United States v. Mottaz*, 476 U.S. 834, 851 (1986), and dismissing an action for lack of subject-matter jurisdiction precludes merits adjudication. That is also true of an

order dismissing an action *without* prejudice for failure to state a claim.

C. The PLRA's legislative history further supports reading section 1915(g) to exclude without-prejudice dismissals for failure to state a claim. The PLRA's sponsors emphasized that the Act targets only truly meritless and frivolous prisoner claims, and they insisted that the law would not inhibit prisoners from pursuing legitimate grievances. But imposing strikes for temporary and curable procedural errors would do precisely that.

II. Respondents' interpretation of section 1915(g) is overinclusive because it would impose strikes in circumstances that sweep far beyond Congress's intent—to the point of raising constitutional concerns about the resulting restrictions on court access for indigent prisoners. Petitioner's statutory interpretation, on the other hand, avoids those problems while still advancing the PLRA's goals.

A. Respondents' reading of section 1915(g) would impose strikes in cases that are unsupported by a fair reading of the PLRA. For example, under their view, a claim dismissed without prejudice for failure to state a claim based on the non-exhaustion of administrative remedies would result in a strike—even though failure to exhaust "is often a temporary, curable, procedural flaw." *Snider*, 199 F.3d at 111. Indeed, on their account, a prisoner would incur a strike for bringing the suit too early even if he later *prevailed* after refiling.

B. Respondents' interpretation also raises constitutional doubts about section 1915(g), which this Court should avoid. By preventing indigent prison-

ers from accessing the federal courts, section 1915(g) touches on an area of constitutional concern. *See Thomas v. Holder*, 750 F.3d 899, 905-907 (D.C. Cir. 2014) (Tatel, J., concurring). Although Congress may limit IFP eligibility for prisoners who abuse the judicial system, respondents' reading would strip away any tailoring from the law by restricting court access to prisoners who merely make procedural mistakes when presenting legitimate claims.

C. Finally, respondents' overly broad interpretation of section 1915(g) is unnecessary to further the PLRA's purposes. A prisoner who brings an action that is dismissed without prejudice may still face consequences—but only where those consequences are appropriate. For example, courts may dismiss a premature or procedurally defective action as "frivolous" or "malicious" if those labels fit, which would result in a strike under section 1915(g). Courts also have other tools to police abuse of the IFP process and to deter vexatious lawsuits by prisoners.

III. The Court should reverse the Tenth Circuit's decision affirming the denial of petitioner's IFP status under section 1915(g). Two of the three purported strikes identified by the Tenth Circuit were without-prejudice dismissals for failure to state a claim, which are not strikes under the proper reading of section 1915(g).

ARGUMENT

I. A Dismissal For "Failure To State A Claim" That Is Entered Without Prejudice Does Not Count As A Strike Under The PLRA's "Three Strikes" Provision.

The PLRA's "three strikes" provision limits an indigent prisoner's ability to "commence a civil action without prepaying fees or paying certain expenses." *Coleman*, 135 S. Ct. at 1761. The Tenth Circuit concluded that petitioner incurred three strikes under section 1915(g), reasoning that two previous actions dismissed without prejudice for prematurity under *Heck* were "dismissed on the ground[] that [they] . . . fail[] to state a claim upon which relief may be granted" within the meaning of section 1915(g). *See* J.A. 72-73. The court reached that conclusion even though a "[d]ismissal without prejudice is a dismissal that does *not* operate as an adjudication upon the merits," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (emphasis added) (alterations, citation, and quotation marks omitted), and thus does *not* convey any view on whether the plaintiff may ultimately have a legitimate basis for relief.

The Tenth Circuit's interpretation of section 1915(g) contradicts the ordinary understanding of "dismissed" for "fail[ure] to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g)—a commonly used legal phrase that implies the dismissal was rendered *with* prejudice. The court's interpretation also conflicts with the PLRA's structure and purposes, all of which indicate that section 1915(g) imposes strikes for actions or appeals that are "irremediably defective." *Snider*, 199 F.3d at 111. Ac-

tions dismissed without prejudice for failure to state a claim do not satisfy this standard.

A. Section 1915(g) Incorporates A Common Legal Phrase With An Established Meaning.

1. The PLRA does not define the familiar phrase "fails to state a claim upon which relief may be granted," but it is a well-known legal concept. The phrase mirrors Federal Rule of Civil Procedure 12(b)(6), which lets defendants in civil suits file a motion to dismiss on the ground that the suit "fail[s] to state a claim upon which relief can be granted."

In the ordinary course, a "dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits.'" *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) (citing *Angel v. Bullington*, 330 U.S. 183, 190 (1947), and *Bell v. Hood*, 327 U.S. 678 (1946)). Such a dismissal establishes that the complaint's allegations do not provide a plausible basis to infer "that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, this Court has described "the motion to dismiss for failure to state a claim" under Rule 12(b)(6) as an "important mechanism for weeding out *meritless* claims." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014) (emphasis added).

Because most Rule 12(b)(6) dismissals are merits adjudications, the order typically operates "with prejudice" and is entitled to *res judicata* effect. *See* Restatement (Second) of Judgments § 19 cmt. b(b) (Am. Law. Inst. 1982); *see also* 2 James Wm. Moore *et al.*, *Moore's Federal Practice* § 12.34(6)(a) (3d ed.

2019) ("A dismissal for failure to state a claim is a judgment on the merits" and has "claim preclusive effect."). Thus, dismissal of an action with prejudice "precludes a second action," even "on an improved complaint." 18A Charles Alan Wright & Edward H. Cooper, *Federal Practice & Procedure* § 4439, Westlaw (database updated Aug. 2019).

In some instances, however, the district court will dismiss an action "without prejudice." Such a dismissal is "the *opposite*" of an "adjudication upon the merits." *Semtek*, 531 U.S. at 505 (emphasis added). It does not represent a judgment that a plaintiff's claim is hopeless; rather, it is appropriate when a complaint suffers from a "temporary, curable, procedural flaw," *Snider*, 199 F.3d at 111-112, or is simply "inartfully pleaded," *McLean v. United States*, 566 F.3d 391, 397 (4th Cir. 2009). And because a "[d]ismissal without prejudice is a dismissal that does *not* operate as an adjudication upon the merits," it "does *not* have a res judicata effect." *Cooter & Gell*, 496 U.S. at 396 (emphasis added) (alterations and quotation marks omitted).

To dismiss an action without prejudice, a court must expressly qualify its dismissal order. "[A] district court order that dismisses a case under Rule 12(b)(6) without stating whether it is with or without prejudice operates as a dismissal with prejudice." *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 132 (D.C. Cir. 2012) (Kavanaugh, J., concurring);[4] *cf.*

[4] The courts of appeals uniformly follow this rule. *See U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 241 (1st Cir. 2004); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 221

Johnson v. Williams, 568 U.S. 289, 308 (2013) (Scalia, J., concurring in the judgment) (discussing the longstanding presumption "that a dismissal in equity, without qualifying words"—such as "without prejudice"—"is a final decision *on the merits*" (quoting *Swift v. McPherson*, 232 U.S. 51, 55-56 (1914))). Federal Rule of Civil Procedure 41(b) codifies this presumption for involuntary dismissals, establishing that "[u]nless the dismissal order states otherwise," a dismissal for failure to state a claim will "operate[] as an adjudication on the merits."

2. Section 1915(g) should be interpreted in light of this legal backdrop. "[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (citation and quotation marks omitted); *accord Morissette v. United States*, 342 U.S. 246, 263 (1952).

The relevant phrase in section 1915(g)—"dismissed on the ground[] that [an action] . . . fails to state a claim upon which relief may be granted"—

(2d Cir. 1963); *Millhouse v. Heath*, 866 F.3d 152, 162 (3d Cir. 2017); *Carter v. Norfolk Cmty. Hosp. Ass'n, Inc.*, 761 F.2d 970, 974 (4th Cir. 1985); *Nelson v. Citibank Mastercard*, 3 F.3d 439 (5th Cir. 1993); *Pratt v. Ventas, Inc.*, 365 F.3d 514, 522 (6th Cir. 2004); *Kamelgard v. Macura*, 585 F.3d 334, 339 (7th Cir. 2009); *Reed v. Sturdivant*, 176 F.3d 1051, 1054 (8th Cir. 1999); *Hampton v. Pac. Inv. Mgmt. Co.*, 869 F.3d 844, 846 (9th Cir. 2017); *Lacey v. Homeowners of Am. Ins. Co.*, 546 F. App'x 755, 758 (10th Cir. 2013); *Eiber Radiology, Inc. v. Toshiba Am. Med. Sys., Inc.*, 673 F. App'x 925, 929 (11th Cir. 2016).

clearly borrows from Rule 12(b)(6).[5] And that "complete phrase has a well-established legal meaning." *McLean*, 566 F.3d at 396. Indeed, section 1915(g) calls for the same backward-looking inquiry that courts undertake when evaluating a Rule 12(b)(6) dismissal's preclusive effect. Specifically, "[b]y using the phrase 'was dismissed' in the past tense and the phrase 'on the grounds that,' the [PLRA] instructs [courts] to consult the prior order that dismissed the action or appeal and to identify the reasons that the court gave for dismissing it." *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016) (emphasis omitted).

As discussed, pp. 15-17, *supra*, in the Rule 12(b)(6) context, courts uniformly read an order specifying that an action "was dismissed on the ground that it . . . fails to state a claim upon which relief can be granted" as a dismissal *with* prejudice that must have failed on the merits. No court would read the order to have dismissed the action "without prejudice" unless the order was expressly qualified. The nearly identical text in section 1915(g) should be read in the same manner: because the statute refers to actions that were "dismissed" (past tense) for "fail[ure] to state a claim upon which relief may be granted"—and includes no further elaboration—it is meant to capture only dismissals "with prejudice" that represent an actual "judgment on the merits." *McLean*, 566 F.3d at 396.

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[5] *Compare* Fed. R. Civ. P. 12(b)(6) ("failure to state a claim upon which relief can be granted"), *with* 28 U.S.C. § 1915(g) ("fails to state a claim upon which relief may be granted").

Contrary to the position put forward by courts that have adopted respondents' view on the question presented, this interpretation of section 1915(g) "does not read an additional requirement into the statute." *Millhouse v. Heath*, 866 F.3d 152, 162 (3d Cir. 2017) (quoting *McLean*, 566 F.3d at 398-399). Rather, the exclusion of "without-prejudice" dismissals from section 1915(g) follows directly from "Congress' use of the familiar phrase 'dismissed . . . [for] fail[ure] to state a claim.'" *Id.* Because "[a]n unqualified dismissal for failure to state a claim is presumed to operate with prejudice[,] the addition of the words 'with prejudice' to modify such a dismissal is simply not necessary." *Id.*

Reading section 1915(g) to mirror the "usual practice" in civil litigation aligns with how this Court has approached other interpretive questions involving the PLRA. For example, in *Jones v. Bock*, 549 U.S. 199 (2007), the Court considered whether to treat the PLRA's exhaustion mandate, 42 U.S.C. § 1997e(a), as a pleading requirement or an affirmative defense. In adopting the latter approach, the Court explained that the PLRA's silence on the issue provided "strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense." *Jones*, 549 U.S. at 212. Similarly, in *Coleman*, the Court turned to "[t]he ordinary rules of civil procedure" when construing section 1915(g). 135 S. Ct. at 1764. Specifically, the Court supported its holding that dismissals may give rise to strikes before the completion of appellate review by reference to "the way in which the law ordinarily treats trial court judg-

ments"—*i.e.*, allowing the judgment to "take[] effect despite a pending appeal." *Id.*

As relevant here, the "usual practice" under Rules 12(b)(6) and 41 is clear: if a court "dismissed" an action for "failure to state a claim," that dismissal is *with* prejudice. *See* pp. 15-17, *supra*. Nothing in section 1915(g) suggests that Congress intended to depart from that well-established understanding of a commonly used legal phrase when it called upon courts to impose a strike for an action that "was dismissed on the ground[] that it . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g).

B. The PLRA's Structure Reinforces That Without-Prejudice Dismissals For Failure To State A Claim Are Not Strikes Under Section 1915(g).

Even on its own, the best reading of the phrase "was dismissed" for "fail[ure] to state a claim" would exclude without-prejudice dismissals. *See* Part I.A, *supra*. But the phrase does not stand alone, and statutory language "must be read in context [since] a phrase gathers meaning from the words around it." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (citation and quotation marks omitted); *see also Maracich v. Spears*, 570 U.S. 48, 60 (2013) (recognizing that the Court looks to "the structure of the statute and its other provisions" when resolving statutory ambiguity). Here, both the surrounding text in section 1915(g) itself and the PLRA's overall structure confirm that section 1915(g) is best read to imposes a strike for dismissals based on the failure

to state a claim *only* if those dismissals were rendered *with* prejudice.

The two other grounds for dismissal listed in section 1915(g)—for actions that are "frivolous" or "malicious"—apply to actions that cannot succeed. By contrast, the PLRA identifies other grounds for dismissal that do not imply any view of the action's merit—and, conspicuously, those grounds are omitted from section 1915(g). The best inference to draw from these choices is that Congress intended to impose strikes only for actions or appeals that are rejected on the pleadings as irredeemable—a category that necessarily excludes "without-prejudice" dismissals for failure to state a claim. *See Cooter & Gell*, 496 U.S. at 396.

1. Section 1915(g) counts as a strike an action or appeal that was dismissed on the ground that it (1) was "frivolous," (2) was "malicious," or (3) "fail[ed] to state a claim upon which relief may be granted." The legal meaning of the terms in the first two dismissal categories should inform this Court's interpretation of the third. "[U]nder the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps.'" *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). This canon "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.*

As used in section 1915, the term "frivolous" means "lack[ing] an arguable basis either in law or in fact." *Neitzke*, 490 U.S. at 325. A claim "lacks an arguable basis in law or fact" if "it relies on an indis-

putably meritless legal theory," *Taylor v. Johnson*, 257 F.3d 470, 472 (5th Cir. 2001) (per curiam), or advances factual allegations that are "fanciful," "fantastic," and "delusional," *Denton*, 504 U.S. at 32-33. "Malicious," in turn, refers to an action or appeal that is "plainly abusive of the judicial process." *Crisafi v. Holland*, 655 F.2d 1305, 1309 (D.C. Cir. 1981). This encompasses actions that waste judicial resources because they "merely repeat[] pending or previously litigated claims," *Day v. Toner*, 530 F. App'x 118, 121 (3d Cir. 2013), as well as actions that are abusive because they were "filed with the intention or desire to harm another," *Butler v. Dep't of Justice*, 492 F.3d 440, 443 (D.C. Cir. 2007) (quoting *Tafari v. Hues*, 473 F.3d 440, 442 (2d Cir. 2007)); *see also Pittman v. Moore*, 980 F.2d 994, 995 (5th Cir. 1993) (affirming dismissal of action as "malicious" where it merely "duplicate[d] allegations of another pending federal lawsuit by the same plaintiff").

These two terms—"frivolous" and "malicious"—cover different types of abusive suits, but they share a common core: they refer to actions that cannot succeed and should not return to court. That key area of overlap should also "cabin the contextual meaning" of section 1915(g)'s third category of dismissals. *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015). As discussed, pp. 15-17, *supra*, a dismissal for failure to state a claim *with prejudice* likewise reflects a judgment by the court that the plaintiff cannot assert a plausible legal basis for relief, and it precludes the plaintiff from refiling the complaint.

Interpreting the phrase "was dismissed" for "fail[ure] to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g), to describe only *with*

prejudice dismissals would thus harmonize the three grounds for strikes enumerated in section 1915(g). So construed, all three dismissal grounds would be orders that "finally terminate[] the action because of a determination that it ultimately cannot succeed." *Snider*, 199 F.3d at 111 (emphasis omitted); *see id.* ("Section 1915(g)'s mandate that prisoners may not qualify for IFP status if their suits have thrice been dismissed on the ground that they were 'frivolous, malicious, or fail[ed] to state a claim' was intended to apply to nonmeritorious suits dismissed with prejudice.").

By contrast, if section 1915(g)'s third category were interpreted to include "without-prejudice" dismissals, it would create a clear "inconsisten[cy] with its accompanying words" in that provision. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). A prisoner's *pro se* action could be dismissed "without prejudice for failure to state a claim" even if it was "potentially meritorious" merely because it was "inartfully pleaded," *McLean*, 566 F.3d at 397, or had "a temporary, curable, procedural flaw," *Snider*, 199 F.3d at 111. Regardless of the precise reason for the dismissal, the "without prejudice" designation *means* that the order does *not* represent a judgment about whether the action can "ultimately . . . succeed." *Id.*

2. The PLRA's surrounding text is instructive not only for the other types of dismissals that section 1915(g) includes, but for what it leaves out. *Cf. Lagos v. United States*, 138 S. Ct. 1684, 1689 (2018) ("[W]e find here both the presence of company that suggests limitation and the absence of company that suggests breadth."). Specifically, section 1915(g)

does not impose strikes on other types of dismissals that are not merits adjudications.

One striking example is dismissals for lack of subject-matter jurisdiction. This omission from section 1915(g) is especially notable because other PLRA sections invite dismissal on grounds that include a lack of subject-matter jurisdiction. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation omitted)).

Specifically, the PLRA includes three sections that specify bases for *sua sponte* dismissal, each of which covers claims that (1) are frivolous, malicious, or fail to state a claim, or (2) "seek[] monetary relief from a defendant who is immune from such relief." *See* 28 U.S.C. §§ 1915(e)(2), 1915A(b); 42 U.S.C. § 1997e(c). Yet section 1915(g) includes only the first category of dismissals—actions dismissed on the basis of immunity are left off the list. Why?

The best explanation is that immunity-based dismissals include actions barred by sovereign immunity.[6] And unlike other potential defenses, an assertion of sovereign immunity deprives a federal court of subject-matter jurisdiction. *See, e.g.*, *Mottaz*,

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[6] *See, e.g.*, 22 Am. Jur. 1st *Trials*, Prisoner's Rights Litigation § 47, Westlaw (database updated Nov. 2019) ("The defense of sovereign immunity is raised repeatedly in prisoners' rights actions[.]").

476 U.S. at 841 ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction."); 5B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1350 n.7, Westlaw (database updated Aug. 2019) (collecting decisions that dismiss claims barred by sovereign immunity for lack of jurisdiction under Rule 12(b)(1)). As a result, "claims barred by sovereign immunity can be dismissed only under Rule 12(b)(1) and not with prejudice." *Warnock v. Pecos Cty.*, 88 F.3d 341, 343 (5th Cir. 1996); *see also* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2373, Westlaw (database updated Aug. 2019) ("[D]ismissals that do not reach the merits because of a lack of jurisdiction, . . . must be considered to have been dismissed without prejudice."); Fed. R. Civ. P. 41(b) ("Unless the dismissal order states otherwise, . . . any dismissal not under this rule—*except one for lack of jurisdiction*, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." (emphasis added)).

In addition to sovereign immunity, other potential grounds for dismissing prisoner claims left out of section 1915(g) also share this feature: they do not "express any view on the merits" of the action. *Daker*, 820 F.3d at 1284 (holding that dismissals for want of prosecution and lack of jurisdiction, respectively, did not count as strikes); *see also Washington v. L.A. Cty. Sheriff's Dep't*, 833 F.3d 1048, 1060 (9th Cir. 2016) (holding that dismissals based on *Younger* abstention are not strikes); *Butler*, 492 F.3d at 444 (holding that a dismissal for failure to prosecute did not count as a strike because it was "made without

regard to the merits of the claim"); *Tafari*, 473 F.3d at 442 (holding that an appeal dismissed as premature did not count as a strike because the dismissal "had nothing to do with the merits").

Interpreting section 1915(g) to impose strikes for actions dismissed without prejudice for failure to state a claim would thus create a strange discrepancy: it would mean that, although Congress carefully excluded from section 1915(g) all other types of dismissals that are "made without regard to the merits of the claim," *Butler*, 492 F.3d at 444, it adopted an exception for actions dismissed for failure to state a claim—even though without-prejudice dismissals on this ground likewise do not represent "an adjudication upon the merits," *Cooter & Gell*, 496 U.S. at 396 (citation omitted), or convey a view about the action's ultimately likelihood of success. There is no basis to "attribute[] to Congress" such an "odd intent." *Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113 (1998).

C. The PLRA's Legislative History Further Confirms That Without-Prejudice Dismissals For Failure To State A Claim Are Not Strikes Under Section 1915(g).

The available legislative history for the PLRA[7] offers further support for interpreting section 1915(g)

[7] The legislative record for the PLRA is "relatively sparse" because the Act "was attached as a rider to an omnibus appropriations bill." *See* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can*

to penalize only truly meritless suits—not actions dismissed without prejudice because of a temporary and potentially curable defect.

As this Court has explained, Congress adopted the PLRA and its "three strikes" rule to "filter out the bad claims filed by prisoners and facilitate consideration of the good." *Coleman*, 135 S. Ct. at 1762 (alterations, citation, and quotation marks omitted). The legislative record indicates that the "bad claims" targeted by Congress are those that are irredeemably defective. The PLRA's sponsors repeatedly emphasized that they sought to weed out and deter only truly meritless and frivolous actions. As Senator Dole, a co-sponsor of the PLRA, described, "[t]hese suits can involve such grievances as insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety." 141 Cong. Rec. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole). Senator Hatch, another co-sponsor, likewise asserted that legislative action was needed to slow the "endless flood of frivolous litigation" brought by inmates. 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch); *see also Prison Reform:*

Learn from It, 86 Cornell L. Rev. 483, 488 & n.12 (2001). As a result, the available legislative history "consists primarily" of statements from legislators. *Id.* at 488 n.12. In addition, a House Report was prepared that discusses two House bills "that were the precursors to the PLRA," and hearings were held in the House and Senate that addressed "the precursory legislation." *Id.*

Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930 and H.R. 667 Before the S. Comm. on the Judiciary, 104th Cong. 111-112 (1995) (prepared testimony in connection with PLRA precursor legislation citing thirteen factually meritless claims as examples of the "wasteful and frivolous suits" filed in federal court by prisoners).

At the same time, legislators made clear that the PLRA was not designed "to prevent inmates from raising legitimate claims." 141 Cong. Rec. S18,136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch); *see also* 141 Cong. Rec. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl) (explaining that the PLRA would "free up judicial resources for claims with merit by both prisoners and nonprisoners"). There is no indication that members of Congress wished to penalize prisoners who raised potentially "legitimate claims" that were dismissed without prejudice because of some pleading error or procedural barrier. "To treat as equivalent nonmeritorious suits dismissed with prejudice and those dismissed without prejudice for failure to state a claim by counting both as strikes would [thus] cut against the . . . goal" expressed by members of Congress and reflected in the PLRA's text and structure. *McLean*, 566 F.3d at 397.

II. Respondents' Interpretation Of Section 1915(g) Unduly Restricts Prisoners' Access To Federal Courts.

Respondents' broad reading of section 1915(g) would impose strikes in contexts that—judging from the PLRA's text, structure, and purposes—Congress did not intend. The over-inclusive nature of re-

spondents' interpretation is especially problematic because section 1915(g) touches on an area of constitutional concern: the right of indigent prisoners to access the courts. Reading section 1915(g) to exclude without prejudice dismissals avoids the problems created by respondents' approach while still providing courts with ample tools to weed out and deter burdensome prisoner suits.

A. Respondents' Interpretation Of Section 1915(g) Would Impose Strikes For Legitimate Claims That Suffer From Temporary And Curable Procedural Flaws.

Interpreting section 1915(g) to treat all dismissals for failure to state a claim as strikes—including dismissals expressly issued without prejudice—would impose penalties in a way that conflicts with the PLRA's structure and congressional intent.

1. The treatment of dismissals based on a prisoner's failure to exhaust administrative remedies that is implied by respondents' interpretation of section 1915(g) reveals serious problems with their approach. Because failure to exhaust administrative remedies under the PLRA is an affirmative defense, "inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones*, 549 U.S. at 216. Nevertheless, this Court recognized that failure to exhaust may provide the basis for a motion to dismiss if that failure is clear on the face of the complaint. *See id.* at 215; *see also Thompson v. Drug Enf't Admin.*, 492 F.3d 428, 438 (D.C. Cir. 2007) ("[E]ven when failure to exhaust is treated as an affirmative defense, it may be invoked in a Rule

12(b)(6) motion if the complaint somehow reveals the exhaustion defense on its face."). When a court dismisses an action for failure to exhaust, the dismissal must be issued without prejudice, because the order does not reach the merits and the plaintiff could renew his claims after completing the administrative-review process. *See, e.g.*, *Bargher v. White*, 928 F.3d 439, 447-448 (5th Cir. 2019).[8]

Respondents' interpretation of section 1915(g) would thus create a serious anomaly. Even courts of appeals on respondents' side of the circuit divide recognize that an order barring a prisoner's suit for failure to exhaust generally will *not* qualify as a strike because non-exhaustion is not included in section 1915(g). *See, e.g.*, *El-Shaddai v. Zamora*, 833 F.3d 1036, 1043-1044 (9th Cir. 2016) (explaining that a dismissal for failure to exhaust does not count as a strike unless it is made pursuant to Rule 12(b)(6)); *Malek v. Reding*, 195 F. App'x 714, 716 (10th Cir. 2006) ("[F]ailure to exhaust is not considered a strike, since it is not a dismissal pursuant to § 1915(e)(2)(B)."). But in those same circuits, if the prisoner's failure to exhaust is apparent on the face of the complaint, the resulting order dismissing the complaint without prejudice *would* count as a strike. *See Thompson*, 492 F.3d at 438. That discrepancy makes little sense. It would mean that a prisoner would be punished for candor: a prisoner who alleged

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[8] *See also, e.g.*, *Chaidez v. Ford Motor Co.*, 937 F.3d 998, 1008 (7th Cir. 2019); *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1213 (10th Cir. 2003), *abrogated on other grounds by Jones*, 549 U.S. at 216; *Booth v. Churner*, 206 F.3d 289, 300 (3d Cir. 2000), *aff'd*, 532 U.S. 731 (2001).

facts that revealed his failure to exhaust on the face of his complaint would incur a strike, but a prisoner whose complaint ignored the issue would not—even though disposing of the latter action on summary judgment would require *more* judicial time-investment and would also burden prison officials by requiring them to respond and potentially participate in discovery.

In addition to this incongruity, the fact that respondents' interpretation would impose strikes for non-exhaustion is a serious mark against it. As the Second Circuit has explained, "[f]ailure to exhaust administrative remedies is often a temporary, curable, procedural flaw." *Snider*, 199 F.3d at 111. For the reasons set forth in Part I, *supra*, section 1915(g) should not be read to impose a strike "upon a prisoner who suffers a dismissal because of the prematurity of his suit but then exhausts his administrative remedies and successfully reinstitutes it." *Id.* at 112. Yet consider the following examples that may result in strikes under respondents' interpretation:

- An indigent prisoner's complaint is dismissed without prejudice for failure to exhaust administrative remedies; he fixes the error identified by the court by completing the administrative process and refiles his complaint; he then successfully obtains a judgment against a defendant. Under respondents' approach, he will have accrued a strike even though a court ultimately granted judgment *in his favor*.[9]

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[9] *See, e.g.*, *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 24-25, 40 (D.D.C. 2002) (entering judgment for inmates on their claims

- An indigent prisoner files a complaint that pleads facts that plausibly support a section 1983 claim based on the violation of his First Amendment rights, but also reveals that he has not exhausted available administrative remedies. The prisoner then cures the defect by properly exhausting his claims. If the original dismissal was his third strike, he could not refile to vindicate his constitutional rights.

A fair reading of section 1915 does not support punishing curable procedural errors in this way.

2. Actions like petitioner's dismissed for failure to state a claim based on *Heck v. Humphrey* raise similar problems. In that context, much like the exhaustion context, a dismissal is grounded in prematurity and does not evaluate whether the underlying allegations of a civil-rights violation have merit.

Under *Heck*, a prisoner who is seeking damages for an "allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," must first have the conviction or sentence reversed on appeal or otherwise declared

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that a Federal Bureau of Prisons' policy unconstitutionally burdened their exercise of religion after their initial complaint was dismissed for failure to exhaust and they subsequently refiled); *cf. Fuller v. Sherve*, No. 12-861, 2014 WL 1347430, at *2-3 (W.D. Mich. Apr. 4, 2014) (counting as a strike an action that was partially dismissed without prejudice for failure to exhaust, and partially with prejudice for other reasons, even though plaintiff later exhausted his administrative remedies, re-filed his claims in a new action, and eventually presented those claims to a jury).

invalid. 512 U.S. at 486-487; *see also Wilkinson v. Dotson*, 544 U.S. 74, 78-85 (2005) (discussing *Heck* and related precedents). This Court made clear in *Heck* that its holding did not "engraft an exhaustion requirement upon § 1983, but rather den[ied] the existence of a cause of action" in that context. 512 U.S. at 489. In practice, however, a *Heck* dismissal functions much like a dismissal for failure to exhaust administrative remedies: "Like dismissals for lack of administrative exhaustion, *Heck* dismissals do not reflect a final determination on the underlying merits of the case." *Washington*, 833 F.3d at 1056. Rather, they "reflect a matter of judicial traffic control" by "prevent[ing] civil actions from collaterally attacking existing criminal judgments." *Id.* (citation and quotation marks omitted). As a result, *Heck* dismissals are issued "without prejudice" because a plaintiff "could renew . . . claims [barred by *Heck*] if he ever succeeds in overturning his conviction." *Perez v. Sifel*, 57 F.3d 503, 505 (7th Cir. 1995) (per curiam); *see also Curry v. Yachera*, 835 F.3d 373, 379 (3d Cir. 2016) (holding that dismissing a *Heck*-barred action "with prejudice" was in error, and collecting decisions in support); *Amaker v. Weiner*, 179 F.3d 48, 52 (2d Cir. 1999) (collecting decisions in support of this same proposition).

Because a dismissal under *Heck* "do[es] not concern the adequacy of the underlying claim for relief," but is rather based on prematurity, it should not result in the routine imposition of a strike. *Mejia v.*

Harrington, 541 F. App'x 709, 710 (7th Cir. 2013).[10] As discussed in Part I, *supra*, section 1915(g) is structured to impose strikes only for actions that are "irremediably defective." *Snider*, 199 F.3d at 111. Dismissing an action because it was filed too early does not express a judgment on "the merits of the underlying claim." *Tafari*, 473 F.3d at 442.

The contrary approach urged by respondents once again yields results that conflict with the PLRA's structure and purpose. Consider, for example, the situation presented in *In re Jones*, 652 F.3d 36 (D.C. Cir. 2011) (per curiam). The prisoner there successfully litigated a Fourth Amendment challenge all the way up to this Court, resulting in a unanimous decision in his favor. *See United States v. Jones*, 565 U.S. 400 (2012). But Jones filed his section 1983 claim challenging that unlawful search too early, which resulted in the dismissal of his claim under *Heck*. *See Jones v. Kirchner*, No. 07-1063, 2008 WL 2202220, at *1 (D.D.C. May 27, 2008). The D.C. Circuit held that Jones incurred three strikes from three *Heck*-barred dismissals (including *Kirchner*) that were entered when "his conviction had not yet been overturned." *In re Jones*, 652 F.3d at 38. According to that court, the fact that Jones's previous actions had only been dismissed for being "premature," and that his conviction was later "reversed" did not matter; he still lost access to the federal

[10] As discussed, pp. 41-42, *infra*, a court may dismiss a *Heck*-barred claim as frivolous or malicious in some circumstances, which would result in a strike.

courts as an indigent prisoner. *Id.* at 39.[11] Recognizing that section 1915(g) does not reach without-prejudice dismissals for failure to state a claim would avoid this needlessly harsh result.

3. Finally, respondents' interpretation unreasonably exposes indigent prisoners to multiple strikes for efforts to pursue the same action, even if their first action is dismissed without prejudice.

For example, in *Orr v. Clements*, 688 F.3d 463 (8th Cir. 2012), the Eighth Circuit addressed a case in which the plaintiff's initial action had been dismissed based on a pleading deficiency, even as the district court recognized that "the underlying [E]ighth [A]mendment claim asserted in the complaint would usually survive review under 28 U.S.C. § 1915e(2)(B)." *Id.* at 465 (citation omitted). The district court accordingly entered the dismissal "without prejudice," and instructed the plaintiff "to file an amended complaint within thirty days to correct" the pleading deficiency. *Id.* After the plaintiff submitted an amended complaint, the district court struck it as untimely but advised him to "file his amended complaint as a new civil action" instead. *Id.* at 465-466 (citation omitted). The plaintiff followed the court's instructions, but the district court ultimately dismissed the new action for failure to state a claim. *Id.* at 466. The Eighth Circuit held that the plaintiff had earned *two* strikes based on

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[11] The D.C. Circuit referenced its own decision dismissing Jones's conviction, which was subsequently affirmed by this Court. *See In re Jones*, 652 F.3d at 38-39 (citing *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010)).

this course of events: following the court's guidance, he had filed two separate actions, and both were dismissed for failure to state a claim. *Id.* Under respondents' statutory interpretation, the fact that the first action was dismissed without prejudice—and that the district court *invited* the plaintiff to file a new action as an alternative to amendment—does not matter.[12]

This same pattern could repeat anytime a prisoner's suit is dismissed for failure to state a claim based on non-exhaustion: a plaintiff would incur a strike based on his procedural error in failing to exhaust and then another strike if the district court dismissed the action on the merits. *See* pp. 29-32, *supra.* This approach creates a trap for unwary *pro se* litigants, jeopardizing their access to the federal courts. Section 1915(g) should not be interpreted in a manner that would cause indigent *pro se* litigants to "risk forfeiting [their] rights inadvertently." *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 (2002).

B. Respondents' Interpretation Of Section 1915(g) Raises Serious Constitutional Questions.

Imposing strikes for legitimate, meritorious claims that suffer from curable defects would also

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[12] In *Day v. Maynard*, 200 F.3d 665 (1999), the Tenth Circuit reserved the question "whether a case dismissed without prejudice, then refiled and dismissed a second time would count as two separate strikes." *Id.* at 667 n.1. But there is no apparent basis for avoiding this result under respondents' interpretation of section 1915(g).

raise serious questions about section 1915(g)'s constitutionality. This Court should avoid any constitutional doubt by holding that without-prejudice dismissals for failure to state a claim fall outside section 1915(g)'s scope. *See Zadvydas v. Davis*, 533 U.S. 678, 689-690 (2001) (applying the constitutional avoidance canon); *see also Clark v. Martinez*, 543 U.S. 371, 381 (2005) (describing constitutional avoidance as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

This Court has "established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). That "right of access . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). Indeed, "[b]ecause a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because [it is] preservative of all rights.'" *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (citation omitted).[13] And while pris-

[13] *See also Griffin v. Illinois*, 351 U.S. 12, 24-25 (1956) (States must supply indigent defendants with a free trial transcript if necessary for their criminal appeal); *Ex parte Hull*, 312 U.S. 546, 548-549 (1941) (holding that a state could not prohibit prisoners from filing habeas petitions that a "legal investigator" for the state's parole board had found "[im]properly drawn").

oners are not guaranteed "the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims," they must be provided with the means at least "to challenge the conditions of their confinement." *Lewis v. Casey*, 518 U.S. 343, 355 (1996).

Moreover, this Court also has held that fee-assessments on court filings may sometimes impose unconstitutional burdens on the right of the indigent to pursue certain forms of judicial relief, including in "a narrow category of civil cases." *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996) (invaliding a record fee in a parental rights termination action); *see also Little v. Streater*, 452 U.S. 1, 16-17 (1981) (State required to bear the cost of a blood group test in a paternity action); *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971) (acknowledging that a facially valid divorce filing fee may "offend due process because it operates to foreclose a particular party's opportunity to be heard"); *Smith v. Bennett*, 365 U.S. 708, 712-713 (1961) (filing fee for habeas petitions must be waived for those who cannot afford it). These decisions, which are grounded in equal protection principles, ensure that indigent litigants can access the courts when "fundamental interest[s]" are at stake. *M.L.B.*, 519 U.S. at 113.

The *permanent* restrictions on court access imposed by section 1915(g) directly implicate the constitutional rights recognized by these two lines of precedent. "[N]ot only does the three-strikes provision require prisoners to pay all filing fees upfront, but it applies even to claims involving fundamental constitutional rights. If prisoners have no ability to pay these fees then . . . they face a 'total barrier' to

bringing their claims." *Thomas*, 750 F.3d at 906-907 (Tatel, J., concurring) (discussing the constitutional concerns raised by section 1915(g)). The only exception is if "the prisoner is under imminent danger of serious physical injury," 28 U.S.C. § 1915(g), which offers no help to prisoners seeking to vindicate fundamental constitutional rights that are not connected to safety, such as free speech or religious exercise, *see, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

Of course, the fact that section 1915(g) restricts prisoners' right of court access does not, on its own, mean that the law is unconstitutional. Both Congress and the courts have a legitimate interest in protecting federal dockets from abusive and frivolous litigation, which plainly justifies certain restrictions on IFP status. Indeed, even before section 1915(g), federal courts attempting to control overly litigious and abusive litigants sometimes entered prospective injunctions restricting further IFP filings.[14] In these cases, however, courts carefully tailored their prospective injunctions to bar future IFP filings only to the extent needed "to carry out [their] constitutional functions against the threat of onerous, multiplicitous, and baseless litigation." *Safir v. U.S. Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986) (citation omitted); *see also Martin v. D.C. Court of Appeals*, 506 U.S. 1, 3-4 (1992) (per curiam); *Abdul-Akbar v. Watson*, 901 F.2d 329, 332 (3d Cir. 1990); *In re Tyler*, 839 F.2d

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[14] *See* Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May Be Effective, But Is It Constitutional?*, 70 Temp. L. Rev. 471, 482-489 (1997) (collecting cases).

1290, 1294 (8th Cir. 1988) (per curiam); *In re Green*, 669 F.2d 779, 786 (D.C. Cir. 1981) (per curiam).

In enacting section 1915(g), Congress tried to follow a similar path. *See Jones*, 549 U.S. at 203 (recognizing that the challenge addressed by Congress in the PLRA was "ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit"). And lower courts confronted with constitutional challenges to section 1915(g) have upheld the law in reliance, in part, on the government's interest in preventing abuse of the judicial process, which interferes with the adjudication of legitimate claims. *See, e.g.*, *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 318 (3d Cir. 2001) (en banc); *White v. Colorado*, 157 F.3d 1226, 1234 (10th Cir. 1998); *Carson v. Johnson*, 112 F.3d 818, 822 (5th Cir. 1997).

Respondents' interpretation of section 1915(g) would alter the constitutional balance because it would result in the imposition of strikes for actions that may have merit but suffer from a "temporary, curable, procedural flaw." *Snider*, 199 F.3d at 111. On the one hand, the congressional interest in penalizing such litigants is reduced because an order dismissing an action without prejudice does not imply that a prisoner has been vexatiously consuming judicial resources by filing meritless litigation. And on the other hand, the burden imposed on prisoners is increased, because unsophisticated *pro se* litigants risk losing access to courts by making procedural mistakes even while pursuing legitimate civil-rights claims. Those indigent prisoners will then effectively be blocked for the duration of their time in prison from having "the opportunity to present" allegations

to federal courts "concerning violations of fundamental constitutional rights." *Wolff*, 418 U.S. at 579.

These constitutional difficulties go away if section 1915(g) is interpreted to impose strikes only on with prejudice dismissals. Because that reading is "fairly possible"—indeed, it is the *better* reading of the statute, *see* Part I, *supra*—this Court should adopt it "to avoid" the constitutional doubts raised by respondents' approach. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (citation omitted).

C. The PLRA Provides Ample Tools For Courts To Weed Out And Deter Vexatious Prisoner Suits Without Resort To Respondents' Overly Broad Interpretation Of Section 1915(g).

The sweep of respondents' interpretation of section 1915(g) is not only excessively punitive; it is unnecessary. Interpreting section 1915(g) to apply only to dismissals for failure to state a claim entered with prejudice leaves courts with ample tools under the PLRA to "filter out the bad [prisoner] claims" and deter vexatious lawsuits. *Coleman*, 135 S. Ct. at 1762.

First, courts could still rely on section 1915(g) to penalize abusive use of the court system, even as to actions dismissed for defects such as prematurity under *Heck* or failure to exhaust available administrative remedies. For example, if a prisoner refiled a complaint that had previously been dismissed as unexhausted without taking any steps to remedy that procedural failure, a district court could dismiss the second action as "frivolous" or "malicious." *See, e.g.*, *Green v. Young*, 454 F.3d 405, 409-410 (4th Cir. 2006); *see also* pp. 21-23, *supra*.

Even without a repetitive filing, district courts may sometimes reasonably conclude that an action with a procedural defect is "frivolous" or "malicious." A prisoner might, for instance, "contend, frivolously or maliciously, that a suit is compatible with *Heck*," which would result in a strike if the district court explicitly "find[s]" that that suit "deserve[s] those labels." *Mejia*, 541 F. App'x at 710. That does not mean that *every* action barred by *Heck* should be dismissed as frivolous or malicious. *See Washington*, 833 F.3d at 1055 ("[A] complaint dismissed under *Heck*, standing alone, is not a per se 'frivolous' or 'malicious' complaint."). That is because in some cases, *Heck*'s application is reasonably debatable, and imposing a strike would be inappropriate. *Cf. Flagler v. Trainor*, 663 F.3d 543, 551 (2d Cir. 2011) (Calabresi, J., concurring) (explaining that, although claims dismissed based on absolute prosecutorial immunity may sometimes be "considered 'frivolous' for purposes of 28 U.S.C. § 1915(g)," that label does not fit claims presenting a "serious" basis for liability). But, certainly, courts have dismissed *Heck*-barred claims as frivolous,[15] and nothing about petitioner's interpretation of section 1915(g) calls those decisions into question.

Second, courts have discretionary authority to deny IFP status to prisoners who abuse the judicial process apart from section 1915(g). Judicial authori-

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[15] *See, e.g.*, *Ruth v. Richard*, 139 F. App'x 470, 471 (3d Cir. 2005) (per curiam) (affirming district court's dismissal of *Heck*-barred claims as "frivolous"); *Price v. Cty. Court Clerk of Hill Cty.*, 73 F. App'x 80 (5th Cir. 2003) (per curiam) (same); *Smith v. Washington*, 103 F.3d 133 (7th Cir. 1996) (same).

ty to deny IFP status in appropriate cases "derives from both the PLRA itself" and from the "more general supervisory authority [of courts] to manage [their] docket so as to promote[] the interests of justice." *Butler*, 492 F.3d at 444-445 (quotation marks omitted) (citing 28 U.S.C. § 1915(a) and *In re McDonald*, 489 U.S. 180, 184 (1989)). Thus, if a prisoner abuses the IFP privilege but somehow does not incur three strikes, courts still have discretion to deny IFP status.

Third, the PLRA's deferred-payment provision requires prisoners to bear some of the expense of initiating litigation, which helps to discourage abusive filings. *See* 28 U.S.C. § 1915(b). As discussed, pp. 6-7, *supra*, section 1915(b) requires prisoners to "pay an initial partial filing fee" out of their prisoner trust fund accounts, followed by payments in monthly installments. *Bruce*, 136 S. Ct. at 629. Thus, as with other civil litigants, prisoners now must "think twice about the case" before filing meritless actions. *Id.* at 631 (quoting 141 Cong. Rec. 14,572 (1995) (remarks of Sen. Kyl)).

In short, the Court need not resort to an overly broad reading of section 1915(g)'s "fail[ure] to state a claim" provision to ensure that the PLRA accomplishes its objectives.

III. The Tenth Circuit Erred By Counting Petitioner's Previous Without-Prejudice Dismissals For "Failure To State A Claim" As Strikes.

Under the correct interpretation of section 1915(g), the Tenth Circuit's decision affirming the denial of petitioner's application to proceed IFP must

be reversed. The court's decision rests on the faulty premise that "it is immaterial to the strikes analysis" under section 1915(g) whether a dismissal for failure to state a claim "was without prejudice, as opposed to with prejudice." J.A. 72 (quotation marks omitted). The court thus counted as strikes two previous dismissal orders that were expressly issued "without prejudice." J.A. 73. Because those dismissals are not strikes, petitioner has fewer than three strikes under section 1915(g), and the court of appeals erred in finding him ineligible for IFP status.

CONCLUSION

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

Respectfully submitted.

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RELEVANT STATUTES AND RULES

1. 28 U.S.C. § 1915, as effective from April 26, 1996 through the present, provides:

§ 1915. Proceedings in forma pauperis

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and,

when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such

printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

2. 28 U.S.C. § 1915, as effective from October 10, 1979 through April 25, 1996, provided:

§ 1915. Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

3. 28 U.S.C. § 1915A, as effective from April 26, 1996 through the present, provides:

§ 1915A. Screening

(a) Screening.--The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal.--On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

(c) Definition.--As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

4. 42 U.S.C. § 1997e, as effective from April 26, 1996 through March 6, 2013, provided:

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the

court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to

participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

5. The current version of Federal Rule of Civil Procedure Rule 12(b) provides:

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

* * *

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

6. The current version of Federal Rule of Civil Procedure Rule 41(b) provides:

Rule 41. Dismissal of Actions

* * *

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to

dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits.