No. 18-8369

In the Supreme Court of the United States

ARTHUR J. LOMAX,
Petitioner,

v.

CHRISTINA ORTIZ-MARQUEZ, ET AL.,
Respondents.

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

BRIEF FOR COUNCIL OF STATE GOVERNMENTS, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit organizations whose missions are to advance the interests of state and local level governments and public officials, as well as the taxpayers and general public who fund and depend upon their vital services. These governments are vested with the "important responsibilities" of "protecting the health, safety, and welfare of [their] citizens." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342–43 (2007). These responsibilities "set state and local government[s] apart from" other entities. *Id*. at 343. *Amici* submit this brief on behalf of numerous governmental entities and officials, who must regularly expend scarce taxpayer dollars to defend themselves against repetitive, cumbersome, and meritless prisoner litigation. *Amici* have a compelling interest in ensuring the prompt and efficient functioning of the federal judicial system.

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. It offers regional,

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[1] Counsel for the parties have consented to this brief. Under Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief.

national, and international opportunities for its members to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national association that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for county governments and works to ensure that counties have the resources, skills, and support they need to serve and lead their communities.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with forty-nine state municipal leagues, NLC is the voice of more than 19,000 American cities, towns, and villages, representing collectively more than 200 million people. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

The United States Conference of Mayors (USCM) is the official nonpartisan organization of the more than 1,400 United States cities with a population of more than 30,000 people. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 12,000 appointed chief executives and assistants serving cities,

counties, towns, and regional entities. ICMA's mission is to advance professional local government through leadership, management, innovation, and ethics.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public-finance profession since 1906 and continues to provide leadership to government-finance professionals through research, education, and the identification and promotion of best practices. Its more than 19,000 members are dedicated to the sound management of government financial resources.

The National Sheriffs' Association (NSA), a 26 U.S.C. § 501(c)(4) nonprofit organization, was formed in 1940 to promote the fair and efficient

administration of criminal justice throughout the United States and to promote, protect, and preserve our nation's Departments/Offices of Sheriff. NSA has more than 14,000 members and is a strong advocate for more than 3,000 individual sheriffs located throughout the United States. More than 99% of our Nation's Departments/Offices of Sheriff are directly elected by the people in their local counties, cities, or parishes. The NSA promotes the public-interest goals and policies of law enforcement in our Nation, and it participates in judicial processes where the vital interests of law enforcement and its members are at stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

Convicts regularly file repetitive, meritless lawsuits against the state and local entities that operate most prisons and jails in this country. Litigating these cases costs these public entities time and money, which residents must fund with their hard-earned tax dollars. When prisoners can bring these lawsuits without even paying court fees up front, law-abiding citizens end up paying both these court fees and the costs of litigation defense. The Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996), effectively reduces these substantial financial burdens through both an initial screening and *sua sponte* dismissal regime, and, as most relevant here, a three-strikes regime that requires prisoners who insist on filing lawsuit

after lawsuit to pay their own way, up front, to file yet another suit.

This case involves one category of repetitive lawsuits: those that district courts dismiss without prejudice. Both the plain text and the PLRA's core goals strongly support the Tenth Circuit's holding that such without-prejudice dismissals fall squarely within 28 U.S.C. § 1915(g)'s strike zone.

On the statute's text, Congress sought to assign a strike to a prisoner for bringing an action "dismissed on the grounds that it is frivolous, malicious, or *fails to state a claim upon which relief may be granted*." 28 U.S.C. § 1915(g) (emphasis added). Whether one consults the understanding of that near-identical phrase in Federal Rule of Civil Procedure 12(b)(6), or contemporary legal meaning, as defined by Black's Law Dictionary, the result is the same: an action dismissed without prejudice falls within the bounds of the statutory text. Notably, at the time Congress adopted § 1915(g), it also broadly expanded the screening and *sua sponte* dismissal regime, using near-identical "fails to state a claim on which relief may be granted" language, thereby overturning this Court's decision in *Neitzke v. Williams*, 490 U.S. 319 (1989), which had prohibited *sua sponte* dismissals for failure to state a claim under Rule 12(b)(6).

As for the PLRA's core goals, while Petitioner and his supporting *Amicus* focus on outlier hypotheticals, a better understanding of the PLRA's real-world

impacts strongly supports interpreting that provision by its plain terms. The PLRA has successfully reduced the burdens resulting from meritless prisoner *in forma pauperis* ("IFP") litigation, thereby lifting the significant hardship that such litigation imposes on governments, including the state and local governments that *Amici* represent. Excluding without-prejudice dismissals from the three-strikes provision would undermine that success, as numerous, common dismissals regularly occur without prejudice. And, importantly, excluding without-prejudice strikes from the three-strikes provision would likely remove such lawsuits from the PLRA's screening and *sua sponte* dismissal regime as well, thereby imposing additional burdens on governments, including local governments.

ARGUMENT

I. 28 U.S.C. § 1915(g) Encompasses *All* Dismissals For Failure To State A Claim, Not Only With-Prejudice Dismissals

A. When interpreting a statute, this Court endeavors to find the plain and ordinary meaning, looking to the statute's text as the first (and often only) indicator. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Courts trust that "a legislature says in a statute what it means and means in a statute what it says there." *Id.* (citation omitted); *see also Coleman v. Tollefson*, 135 S. Ct. 1759, 1763 (2015) (interpreting the PLRA based

on "what the statute literally says"). When Congress employs a legal term of art, a "cardinal rule of statutory construction" provides that Congress "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." *Molzof v. United States*, 502 U.S. 301, 307 (1992) (citation omitted). Furthermore, when interpreting undefined terms, courts routinely look to contemporary dictionaries. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362–63 (2019).

B. The PLRA governs the process for handling IFP status in connection with prisoner litigation. The PLRA permits prisoners to bring civil actions or appeals without prepaying some filing fees, upon making a threshold showing of financial need. 28 U.S.C. § 1915(a)(1)–(2). After the court's acceptance of the prisoner's claim of indigency, the PLRA sets out a detailed scheme for how the prisoner can pay required fees post-filing. *Id.* § 1915(b). Prisoners are never exempt from paying filing fees; instead, the IFP statute merely delays the collection of some of the fee—prisoners still must pay "an initial partial filing fee." *Id.* § 1915(b)(1).

The PLRA requires district courts to preliminarily screen out of court certain IFP lawsuits. *Id.* § 1915A(a)–(b). The court, after conducting a mandatory initial screening, must then *sua sponte* dismiss a complaint upon a determination that the allegation of poverty is untrue or the action "is

frivolous or malicious[, or] fails to state a claim on which relief may be granted." *Id.* § 1915(e)(2)(B)(i)–(ii); *see also* 5C Arthur R. Miller, Mary Kay Kane & A. Benjamin Spencer, Federal Practice and Procedure § 1360 (3d ed. 2019). Notably, before Congress enacted the PLRA, a district court could *sua sponte* dismiss IFP petitions only upon a finding that "the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d) (1995). After this Court in *Neitzke* construed the term "frivolous" as not applying to nonfrivolous complaints that fail to state a claim under Federal Rule of Civil Procedure 12(b)(6), 490 U.S. at 328, Congress in the PLRA added the "fails to state a claim on which relief may be granted" basis for *sua sponte* dismissal. *See* 142 Cong. Rec. S3704 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham) (articulating that the provision would permit *sua sponte* dismissal where the complaint "does not state a claim upon which relief may be granted").

Most relevant to this case, § 1915(g) operates to limit "frequent flyer" prisoner litigants from obtaining IFP status, through a three-strikes regime that Congress added for the first time in the PLRA. This provision prospectively revokes IFP status from any prisoner who "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*." 28 U.S.C. § 1915(g) (emphasis

added); *see also Skinner v. Switzer*, 562 U.S. 521, 535–36 (2011). Three strikes and the prisoner is "out": not forever out of federal court, to be sure, but barred from the privilege of not paying all court fees up front.[2]

C. The three-strikes bar applies when, as relevant here, the prisoner has three or more prior "action[s] or appeal[s]" that were "dismissed" for "fail[ure] to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). Under the only textually possible interpretation of that phrase, this strike zone applies equally to *all* prior dismissals for failure to state a claim, regardless of whether those dismissals are with or without prejudice.

The most straightforward way to decide this case is to understand that the phrase "fails to state a claim upon which relief may be granted," *id.*, is a well-known legal term of art that encompasses both with- and without-prejudice dismissals. *See* 9 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2373 (3d ed. 2019). Section 1915(g)'s language is nearly identical to that in Federal Rule of Civil Procedure 12(b)(6), which permits dismissal of a complaint for "failure to state a claim upon which relief can be granted." *Compare* 28 U.S.C. § 1915(g), *with* Fed. R. Civ. P. 12(b)(6). And Rule 12(b)(6) is the mechanism that this Court discussed in *Neitzke*, the

[2] There is an exception to the three-strikes rule that allows deferral of fees if "the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

decision that the PLRA overruled when it adopted the same language in both the screening and *sua sponte* dismissal regime, and the three-strikes regime. Rule 12(b)(6) is a well-known, "important mechanism" for eliminating claims that fail as a matter of law. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). Under Rule 12(b)(6), a defendant can attack a plaintiff's complaint for failing "to provide the grounds of his entitle[ment] to relief," a showing that "requires more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted) (alteration in original). A plaintiff's complaint must "possess enough heft to 'sho[w] that the pleader is entitled to relief,'" *id.* at 557 (alteration in original), and show that the claim has "substantive plausibility," *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 12 (2014) (per curiam).

Because Congress used the Rule 12(b)(6) term of art in the PLRA, it also "adopt[ed] the cluster of ideas that were attached to" this phrase, and that "cluster of ideas" includes dismissals with and without prejudice. *Molzof*, 502 U.S. at 307 (citation omitted). Courts routinely dismiss complaints for failure to state a claim under Rule 12(b)(6) without prejudice. *See, e.g.*, *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 279 (2014); *Robinson v. Family Dollar Inc*, 679 F. App'x 126, 129 (3d Cir. 2017); *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 775–76 (7th Cir. 2007); *see also New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1053 (6th Cir. 2011) (treating the decision to dismiss with or without prejudice as being

within a district court's discretion). This occurs regularly in the IFP prisoner context, as described below. *See infra*, pp. 19–24. Because without-prejudice dismissals for failure to state a claim are widely used under Rule 12(b)(6), they are plainly included within the PLRA's three-strikes regime.

Even if this Court decides not to look to Rule 12(b)(6), and instead simply considers the relevant dictionary definition, the result would be the same. *See Food Mktg. Inst.*, 139 S. Ct. at 2362–63. When Congress enacted the statutory phrase here—"dismissed" for "fail[ure] to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g)—in 1996, 110 Stat. 1321, that phrase covered both with-prejudice and without-prejudice dismissals for failure to state a claim. Black's Law Dictionary's Sixth Edition, published six years before the PLRA's enactment, defined "dismissal" as "[a]n order or judgment finally disposing of an action, suit, motion, etc., without trial of the issues involved." *Dismissal*, Black's Law Dictionary 469 (6th ed. 1990). That edition included separate entries for "dismissal with prejudice" and "dismissal without prejudice." *Id*. Black's Seventh Edition, published three years after the PLRA, in 1999, similarly defined "dismissal" without specifying whether prejudice must attach, as the "[t]ermination of an action or claim without further hearing, esp. before the trial of the issues involved." *Dismissal*, Black's Law Dictionary 482 (7th ed. 1999). That entry further includes both "dismissal without prejudice" and "dismissal with

prejudice" as subset terms, meaning that both fall within the confines of the general term "dismissal." *Id*.

D. Petitioner's and his supporting *Amicus'* arguments regarding the statutory text fail.

First, Petitioner relies heavily on the argument that dismissals for failure to state a claim, under Rule 12(b)(6), operate in "the ordinary course" as a with-prejudice dismissal, in "most" cases, "typically." Pet. Br. 15–20; *accord* Nat'l Ass'n Of Criminal Def. Lawyers Am. Br. In Supp. Of Pet. ("NACDL Br.") 3–5. This argument defeats Petitioner's case because it admits that Rule 12(b)(6) encompasses at least *some* without-prejudice dismissals, including, of course, dismissals based on *Heck v. Humphrey*, 512 U.S. 477 (1994). As Petitioner acknowledges, "[i]n some instances" courts will dismiss cases under Rule 12(b)(6) without prejudice. Pet. Br. 16. Since all agree that such without-prejudice dismissals properly fall within Rule 12(b)(6)'s ambit, they must fall within § 1915(g)'s near-identical text as well.

Second, Petitioner's reliance on the *noscitur a sociis* canon to claim that this language must be interpreted consistently with its companions—"frivolous" and "malicious"—is similarly self-defeating. Pet. Br. 20–23. The plain meanings of "frivolous," "malicious," and "fails to state a claim upon which relief may be granted," § 1915(g), do not relay a connection that is sufficiently "tight or so self-

evident as to demand that" this Court "rob any one of them of its independent and ordinary significance." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288 (2010) (citation omitted). To the exact contrary, Congress added the phrase "fails to state a claim upon which relief may be granted" to the screening and *sua sponte* dismissal regime at the same time it added that phrase to § 1915(g), to overrule this Court's decision in *Neitzke*. *Neitzke*, in turn, explained that dismissal for failure to state a claim can be significantly different from dismissal for frivolousness because they "were devised to serve distinctive goals." 490 U.S. at 326. In light of that historical sequence, by far the more plausible inference is that Congress agreed with this Court's conclusion that failure to state a claim can be very different from frivolousness, but nevertheless concluded that both of these categories of dismissals warrant a strike for purposes of the PLRA.

Amicus National Association of Criminal Defense Lawyers similarly argues that the "goal of the PLRA was" "deterring *frivolous* prisoner lawsuits and encouraging meritorious ones." NACDL Br. 5–7 (emphasis added). But if Congress wanted to adopt that frivolousness-focused approach, it would have only imposed strikes for the same "frivolous" or "malicious" lawsuits that were previously subject to *sua sponte* dismissal under *Neitzke*. Congress took a different approach in the PLRA, expanding the *sua sponte* dismissal regime to include failures to state a

claim, and then adopting this expanded breadth as the three-strikes zone, rather than the narrow strike zone Congress would have adopted if it shared the National Association of Criminal Defense Lawyers' more narrow policy vision.

Finally, Petitioner's constitutional-avoidance argument fails. *See* Pet. Br. 36–41.

The canon of constitutional avoidance is only applicable when there are "competing *plausible* interpretations" of statutory text that the Court must "choos[e] between." *Warger v. Shauers*, 574 U.S. 40, 50 (2014) (citation omitted). Because § 1915(g) has only one plausible interpretation and presents no ambiguity under standard textual analyses, the canon of constitutional avoidance simply "has no role to play here." *Id.*

A plain-text reading of § 1915(g) implicates no constitutional rights in any event. The Constitution does not give individuals unfettered access to the courts. Rather, in civil cases, only a "narrow category" of claims require "access to . . . judicial processes without regard to a party's ability to pay court fees," and prisoner-civil-rights claims are generally not among them. *M.L.B. v. S.L.J.*, 519 U.S. 102, 113–15 (1996) (collecting cases). Indigent individuals are not always excused from paying filing fees to initiate a civil suit, *see United States v. Kras*, 409 U.S. 434, 450 (1973), because "waiv[ing] court fees in civil cases is the exception, not the general rule," *M.L.B.*, 519 U.S.

at 114. Moreover, § 1915(g) imposes no "*permanent* restrictions on court access." Pet. Br. 38 (emphasis in original). It is a *three*-strikes law. The first two strikes do not impact a prisoner's right to file the next complaint while deferring payment of a portion of the fees until later. And, even after the third strike, a prisoner can access the federal courts by paying the filing fees up front, or without up-front fees upon a showing of imminent danger. *Id.* § 1915(g). This preserves an indigent prisoner's ability "to present to the judiciary allegations concerning violations of fundamental constitutional rights," *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974), while still acknowledging that prisoners' rights to court access fall well short of "guarantee[ing] inmates the wherewithal to transform themselves into litigating engines capable of filing everything," *Lewis v. Casey*, 518 U.S. 343, 355 (1996).

II. Atextually Excluding Without-Prejudice Dismissals From § 1915(g)'s Reach Would Undermine The PLRA's Core Goals

Understanding that without-prejudice dismissals are within § 1915(g)'s strike zone well serves the PLRA's core goals. In making contrary policy arguments, Petitioner and his *Amicus* seem to imply that the following hypothetical should trouble this Court: (1) a prisoner files an otherwise meritorious lawsuit with a readily curable problem, which is dismissed without prejudice; *and* (2) this without-prejudice dismissal leads to a "third strike," which

thereafter bars another meritorious lawsuit. *See generally* Pet. Br. 31–38; NACDL Br. 8, 13–22. Such a hypothetical will rarely, if ever, occur in the real world, as Petitioner's lack of specific examples from the many Courts of Appeals that use the Tenth Circuit's approach to the Question Presented demonstrates. A more realistic understanding of the PLRA's success in reducing serial prisoner lawsuits shows that without-prejudice dismissals for failure to state a claim, no less than with-prejudice dismissals, are critical to the statute's ongoing success.

A. The PLRA Has Successfully Reduced The Volume of Serial Prisoner Lawsuits That Governments, Especially State And Local Governments, Must Litigate

In adopting the PLRA, Congress determined that America needed "fewer and better prisoner suits." *Jones v. Bock*, 549 U.S. 199, 203 (2007); *accord Porter v. Nussle*, 534 U.S. 516, 524 (2002). In floor debates shortly before the PLRA's passage, Senator Spencer Abraham noted that the total number of prisoner lawsuits in 1995 outpaced that year's number of federal prosecutions. 142 Cong. Rec. S3703-01 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham). He further observed that the States spent roughly $81 million in 1995 defending meritless suits. *Id.* These suits included unserious claims, such as one inmate who sued "because his ice cream had melted," another who alleged that "being forced to listen to his unit manager's country and western music" was cruel and

unusual, and yet another who sued when he was served chunky, rather than smooth, peanut butter. *Id.* For these reasons, Congress designed the PLRA to, among other things, "allow a Federal judge to immediately dismiss a complaint if . . . the complaint does not state a claim upon which relief may be granted." *Id.* at S3704. As Senator Jon Kyl explained, Congress hoped to "achieve a 50-percent reduction in bogus Federal prisoner claims," to "free up judicial resources for claims with merit by both prisoners and nonprisoners." 141 Cong. Rec. S19,110-07 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl).

The PLRA has been successful in reaching many of Congress' goals. In 1995, the year before the PLRA was enacted, 42,587 of the total 248,335 civil cases filed in federal district court, over 17.1% of all filings, were prisoner-civil-rights or prisoner-mandamus cases. Admin. Office of the U.S. Courts, Judicial Facts & Figures 2018, Tables 4.4, 4.6, https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2018 (visited Jan. 21, 2020).[3] By 2018, such filings accounted for only 29,993 of the 282,936 total filings that year, or 10.6% of all lawsuits filed. *Id.*[4] In other

[3] These figures do not include prisoner motions to vacate sentence, habeas corpus filings, or death sentence appeals. When those are included, prisoner filings accounted for 25.5% of all cases filed in 1995. *Id.*

[4] When including the numbers of prisoner motions to vacate sentence, habeas corpus filings, death sentence appeals, and filings by habeas corpus alien detainees (a new category not

words, in the 23 years from the PLRA's enactment, the suits Congress wished to decrease have fallen from 17.1% to 10.6% of the federal district courts' dockets. *Id.*

What remains are "better prisoner suits." *Jones*, 549 U.S. at 203. The percentage of trials prisoners win in civil-rights lawsuits has generally increased since the year immediately preceding the PLRA's enactment. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Approaches 20*, Corr. L. Reporter, Vol. XXVIII, No. 5, at 84 tbl.3, col. (i) (Feb./Mar. 2017). And in all the years from 1996 until 2015, only three times did prisoner plaintiffs succeed at trial at a lower rate than in 1995. *Id.*

State and local governments, such as those that *Amici* represent, are among the main beneficiaries of the PLRA's success. Most prisoners reside in either state prisons or local jails. *Id.* at 71 tbl.1. For example, in 2014, 1,977,880 of the 2,187,441 total incarcerated persons (90.4%) were held in either state or local facilities.[5] *Id.* In fact, over 90% of all

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computed in 1995), prisoner filings account for just over 19% of all filings for 2018. *Id.*

[5] The Department of Justice's data is largely consistent with Professor Schlanger's research, counting approximately 744,600 individuals held in local jails in 2014, U.S. Dep't of Justice, *Correctional Populations in the United States, 2016*, at 2 tbl.1, (Apr. 2018), a*vailable at* https://www.bjs.gov/content/pub/pdf/cpus16.pdf, compared to Professor Schlanger's count of 708,141, Schlanger, *supra*, at 71 tbl.1.

incarcerated persons in this country have been held in state prisons and local jails every year this millennium. *Id*. These are the systems that bear much of the cost of meritless prisoner litigation, and thus reap many of the benefits flowing from the PLRA's success. Indeed, prisoner-civil-rights filings against nonfederal defendants have dropped from a high of 38,022 in 1995 to 22,543 in 2015. *Id.*

The same government-funding concerns that motivated Congress' enactment of the PLRA remain present to this day. With state expenditures on corrections on the rise, and federal funding for the same averaging only "about 1 percent of corrections spending in states," it remains critically important to safeguard the PLRA's success at limiting undue litigation costs on local jails and state prisons. Nat'l Ass'n of State Budget Officers, *Summary: NASBO State Expenditure Report* 6 (Nov. 21, 2019), *available at* https://tinyurl.com/rexv5yx.

B. Refusing To Count Without-Prejudice Dismissals As Strikes Would Undermine The PLRA's Ongoing Success In Reducing Serial Prison Litigation

The PLRA's significant success in decreasing and improving prisoner-initiated litigation is based, in no small part, on without-prejudice dismissals. Federal courts routinely dismiss meritless IFP complaints without prejudice, for various reasons. Two categories of such dismissals, discussed below,

overwhelm in volume and practical importance the hypothetical situations that trouble Petitioner and his *Amicus*. *See supra*, pp. 15–16. And interpreting § 1915(g) to exclude without-prejudice dismissals for failure to state a claim would likely have unintended consequences on other provisions in the PLRA, such as the screening and *sua sponte* dismissal regime.

1. Two categories of without-prejudice dismissals are particularly worth highlighting as entirely worthy of strikes, under the PLRA:

First, without-prejudice dismissals often occur when district courts throw up their hands at unintelligible IFP prisoner complaints, which is a regrettably common occurrence. Many district courts take the dismissal-without-prejudice approach after concluding that the complaint's allegations "lack[ ] any coherent factual allegations whatsoever," *Jackson v. Conner Collins*, *Inc.*, No. 5:08-cv-458, 2009 WL 44697, at *1 (M.D. Ga., Jan. 5, 2009), are "disjointed, difficult to follow, and at times nonsensical," *Hunt v. Adger*, No. 2:17-cv-1785, 2017 WL 6731500, at *3, 5 (D.S.C. Sept. 26, 2017), *adopted by* 2017 WL 6733980, at *1 (D.S.C. Oct. 12, 2017), are "unintelligible," *Mora v. North Dakota*, No. 1:07-CV-023, 2007 WL 1147060, at *3 (D.N.D. Mar. 29, 2007), *adopted by* 2007 WL 1169345, at *1 (D.N.D. Apr. 18, 2007), or when the complaint is a "confusing, unintelligible document from which the Court can ascertain neither the intended defendants nor the nature of the cause(s) of action," *Shorts v. Allen*, No.

09-cv-6793, 2009 WL 4110374, at *2 (E.D. La. Nov. 24, 2009). This is but a sampling. *See, e.g.*, *Lyles v. Talbot Cty. Superior Court Clerk*, No. 4:18-cv-00196, 2019 WL 137595, at *3–5 (M.D. Ga. Jan. 8, 2019); *Hobbs v. Att'y Gen. of Okla.*, No. 16-cv-337, 2016 WL 7116186, at *1, *3 (W.D. Okla. Oct. 31, 2016), *adopted by* 2016 WL 7116193, at *1 (W.D. Okla. Dec. 12, 2016); *Shorts v. Allen*, No. 12-cv-2245, 2012 WL 5363787, at *2 (E.D. La. Oct. 1, 2012), *adopted by* 2012 WL 5363374, at *1 (E.D. La. Oct. 30, 2012).

While courts may well have dismissed many of these incoherent lawsuits as frivolous in the era before the PLRA (at least after *Neitzke* made clear that mere failure to state a claim did not qualify for *sua sponte* dismissal, *see supra*, pp. 7–8), they now can simply dismiss these lawsuits, *sua sponte*, for failure to state a claim. Notably, such dismissals without prejudice generally *benefit* the prisoner over and above with-prejudice dismissals because without-prejudice dismissals "do[ ] not have a res judicata effect." *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990). Accordingly, when district courts take this generous approach, the dismissal does not bar a future, more coherent lawsuit by that prisoner about the same dispute, as a matter of "res judicata." *Id.* As Judge Shedd has noted, "district courts often dismiss prisoner cases—including those that wholly lack merit—for failure to state a claim without prejudice simply to avoid burdening the prisoner with potential res judicata implications that a dismissal with prejudice may cause." *McLean v. United States*,

566 F.3d 391, 408 (4th Cir. 2009) (Shedd, J., dissenting).

If this Court adopts Petitioner's approach, thereby excluding this large category of dismissals from the PLRA's three-strikes bar, it will have one of two consequences, likely both, in some combination: (1) some district courts may start more regularly dismissing these incoherent complaints with prejudice, thereby potentially barring future lawsuits by prisoners, the opposite of the policy goal that Petitioner and his *Amicus* seek to forward, and (2) other district courts will continue to dismiss these often-incoherent cases without prejudice, but those lawsuits will no longer count as strikes, contrary to the statutory text. The latter approach would impose upon prison systems, including local jails who can least afford it, the burden of defending against additional meritless lawsuits from serial, often incoherent prisoner filers.

Second, and most directly relevant to this particular case, courts routinely dismiss prisoner suits without prejudice on the basis of this Court's *Heck* decision, issued very shortly before the PLRA's passage. There, this Court analogized to the common-law tort of malicious prosecution and held that a prisoner "*has no cause of action* under [42 U.S.C.] § 1983" to challenge his conviction or imprisonment "unless and until" his conviction is "reversed, expunged, invalidated, or impugned by the grant of a writ of habeas." *Heck*, 512 U.S. at 489 (emphasis

added). While prisoners have a *theoretical* possibility that one of those events will occur in the future, that rarely happens. Resp. Br. 37–38. Unless it does, the plaintiff has not alleged sufficient facts—including the fact of reversal, expungement, invalidation, or impugnment—"to provide the grounds of his entitle[ment] to relief." *Twombly*, 550 U.S. at 555 (citation omitted) (alteration in original). And most Courts of Appeals require *Heck* dismissals to be entered without prejudice. *See Razzoli v. Fed. Bureau of Prisons*, 230 F.3d 371, 376 (D.C. Cir. 2000), *overruled on other grounds by Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660, 666 (D.C. Cir. 2013); *White v. Gittens*, 121 F.3d 803, 807 (1st Cir. 1997); *Amaker v. Weiner*, 179 F.3d 48, 52 (2d. Cir. 1999); *Curry v. Yachera*, 835 F.3d 373, 379 (3d. Cir. 2016); *Sampson v. Garrett*, 917 F.3d 880, 882 (6th Cir. 2019); *Johnson v. Rogers*, 944 F.3d 966, 968 (7th Cir. 2019); *Thomas v. Eschen*, 928 F.3d 709, 713 n.6 (8th Cir. 2019); *Belanus v. Clark*, 796 F.3d 1021, 1025 (9th Cir. 2015); *Fottler v. United States*, 73 F.3d 1064, 1065 (10th Cir. 1996).

These *Heck* dismissals constitute "a substantial number" of strikes under the PLRA. *See* Note, *Defining the Reach of* Heck v. Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access To Habeas Corpus?*, 121 Harv. L. Rev. 868, 868 (2008). Petitioner himself has had two actions dismissed without prejudice under *Heck*. JA 72. Accordingly, excluding these dismissals from the three-strikes regime will force state and local

governments to defend against many more meritless lawsuits, filed by repeat prisoner litigants.

2. Adopting Petitioner's position would likely have another perverse add-on effect, which will impose an additional category of needless costs on governments, including state and local governments. Recall that the nearly identical statutory phrase—"fails to state a claim upon which relief may be granted"—governs both the three-strikes regime *and* the regime for what lawsuits district courts have the authority and obligation to screen and dismiss *sua sponte*. *See supra*, pp. 7–9. If this Court concludes that the phrase "dismissed on the grounds that it . . . fails to state a claim upon which relief may be granted," as used in § 1915(g), excludes without-prejudice dismissals, then, presumably, that phrase would exclude without-prejudice dismissals in the screening and *sua sponte* dismissal regime as well, *id.* §§ 1915A, 1915(e)(2)(B)(ii); *see Clark v. Martinez*, 543 U.S. 371, 378 (2005) ('To give these same words a different meaning for each category would be to invent a statute rather than interpret one.").

Accordingly, if Petitioner prevails in this case, district courts would no longer be required to screen for and dismiss, *sua sponte*, lawsuits for *Heck* violations, or other clear bases for without-prejudice dismissals. And those courts that wanted to avoid with-prejudice dismissals as a measure of benevolence to IFP prisoner litigants, *see supra*, pp. 20–22, would no longer take those steps at the

screening and *sua sponte* dismissal stage. Rather, governments across the country, including state and local governments, would need to incur the costs of appearing in these cases and moving to dismiss on the basis of *Heck* or utter incoherence, thereby undermining the PLRA's core goals.

CONCLUSION

This Court should affirm the Tenth Circuit's judgment.

Respectfully submitted,

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