No. 18-8369

In the Supreme Court of the United States

ARTHUR JAMES 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 OF THE STATES OF ARIZONA, CONNECTICUT, AND 30 OTHER STATES 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 *AMICUS CURIAE*[1]

Amici Curiae—the States of Arizona, Connecticut, Alabama, Alaska, Arkansas, Florida, Georgia, Hawai'i, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, and Washington—have a significant interest in this case because they bear the brunt of the impact of the massive volume of suits by prisoners. Specifically, the States routinely must defend vast numbers of suits filed by prisoners who use the *in forma pauperis* statute, 28 U.S.C. § 1915, to inundate the courts with litigation without prepaying filing fees, which in other contexts serve as important economic deterrence to filing meritless lawsuits.

In 1996, Congress responded to the immense volume of suits by prisoners by enacting the Prison Litigation Reform Act ("PLRA"), which includes a number of reforms designed to reduce the volume of prisoner suits.

At issue here is one of those reforms: the "three-strike rule" of 28 U.S.C. § 1915(g), which bars prisoners from qualifying for *in forma pauperis*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. This brief is filed on behalf of states by their respective attorneys general, and therefore does not require the consent of parties under Supreme Court Rule 37.4.

status if three or more of their prior actions have been dismissed on certain specified grounds, including the failure to state a claim. The three-strike provision is a reasonable restriction that serves an important role in ameliorating the volume of meritless suits by prisoners, although the number of those suits remains vast.

Diluting the three-strike rule would frustrate the purposes of the PLRA and increase the burden on the States from prisoner litigation. For these reasons, and because the Tenth Circuit's holding comports with the PLRA's text, context, history, and purposes, the Amici States respectfully request that this Court affirm the decision below.

SUMMARY OF ARGUMENT

Suits by prisoners have long constituted a disproportionate share of suits in federal courts and imposed enormous burdens on the States. At their zenith, suits by prisoners alleging unconstitutional conditions or actions by prison officials represented over 25% of all civil suits initiated in federal court, with States defending more than 95% of those suits.[2]

Congress responded to this immense volume of suits by enacting the Prison Litigation Reform Act "to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The PLRA includes a number of reforms to

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[2] As discussed herein, "prisoner suits" and "suits by prisoners" refer only to cases challenging prison conditions and/or actions by prison officials, which are governed by the PLRA, and not petitions for habeas corpus, petitions under 28 U.S.C. § 2255, and other collateral challenges to convictions or sentences.

accomplish these goals, including the three-strike rule of 28 U.S.C. § 1915(g), which is at issue here.

The PLRA quickly achieved notable results: the number of suits declined by a third between 1995 and 1997. The rate of filings per prisoner also declined significantly, from 24.6 suits per 1,000 inmates to 15.1 in the same time period.

Although the PLRA's achievements are significant and impressive, the burden of prisoner suits on the States remains substantial. Suits by prisoners continue to constitute about ten percent of all civil filings in federal court, and more than 95% of those suits are filed by state inmates. Even with the help of the PLRA's provisions, meritless prisoner suits continue to represent a significant burden on the States.

There also has been a worrying uptick in suits recently. Prisoner suits in the last twelve months that data is available (July 2018 – July 2019) numbered 29,450—a 25% increase over the post-PLRA low of 23,541 suits in 2006. It is also up 11.3% from a more-recent low of 26,444 suits in 2015.

These statistics underscore both the benefits that the PLRA has achieved and the need not to become complacent with enforcement of the PLRA's reforms. In particular, this Court has properly stressed the need to interpret the three-strike rule in a manner that prevents it from becoming "a leaky filter." *Coleman v. Tollefson*, 135 S. Ct. 1759, 1764 (2015). Diluting the three-strike rule could easily contribute to a relapse in the direction of the pre-PLRA days.

Fortunately, this Court can prevent backsliding on the PLRA-achieved gains simply by construing

the PLRA based on traditional tools of statutory interpretation. The Tenth Circuit correctly interpreted the PLRA's three-strike provision and held that when a complaint is dismissed for failure to state a claim, it counts as a strike, whether the dismissal is with or without prejudice. The Tenth Circuit's decision is consistent with the text of the PLRA, as well as its context, history, and purposes. Ultimately, the PLRA means what it says: when a district court dismisses a complaint for failure to state a claim, that is a "dismiss[al] on the grounds that … [the complaint] fail[ed] to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g)—whether that dismissal was with or without prejudice.

In contrast, the contrary rule advocated by Petitioner would constitute precisely the sort of "leaky filter" that this Court has warned against and Congress did not intend. *Coleman*, 135 S. Ct. at 1764. That sort of enfeeblement of the three-strike rule would substantially increase the burden on States by frustrating the effectiveness of an important tool for reducing the number of meritless prisoner suits.

The *Amici* States therefore urge this Court to adopt the majority rule of the Seventh, Eighth, Ninth, and Tenth Circuits, and therefore affirm the judgment of the Tenth Circuit.

STATUTORY PROVISION INVOLVED

The "three-strike" provision of the PLRA at issue here, 28 U.S.C. § 1915(g), states that:

> 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.

ARGUMENT

I. MERITLESS SUITS BY PRISONERS IMPOSE ENORMOUS BURDENS ON STATES

The period before enactment of the PLRA witnessed an explosion in the number of suits brought by prisoners alleging unconstitutional conditions or actions by correction officers: rising "from 2,000 in 1970 to 39,000 in 1994."[3] A large portion of those suits are obviously lacking in merit, but nonetheless impose significant burdens on the States defending them.

Congress responded to these burdens by enacting the PLRA in 1996. That act quickly made progress in addressing this persistent problem by substantially reducing the number of suits by prisoners. But even with the reduction effectuated

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[3] 141 Cong. Rec. S14408-01 (Sept. 19, 1995) (statement of Sen. Kyl) ("Many people think of prison inmates as spending their free time in the weight room or the television lounge. But the most crowded place in today's prisons may be the law library. Federal prison lawsuits have risen from 2,000 in 1970 to 39,000 in 1994.").

by the PLRA, suits by prisoners still impose substantial burdens on the States. And recent years have seen a worrying uptick in their numbers.

These burdens emphasize the need to enforce the PLRA's three-strike provision as actually written, as the Tenth Circuit has done. In contrast, the rule advocated by Petitioner is precisely the sort of "leaky filter" that this Court has warned against. *Coleman*, 135 S. Ct. at 1764. If adopted by this Court, it would interfere with the PLRA's hard-won gains in reducing both frivolous lawsuits by prisoners and the resulting burdens imposed on the States.

A. The PLRA Was Enacted To Address The Enormous Volume Of Prisoner Filings

"Congress enacted the Prison Litigation Reform Act … in the wake of a sharp rise in prisoner litigation in the federal courts." *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). "The PLRA contains a variety of provisions designed to bring this litigation under control." *Id.*

The years preceding enactment of the PLRA witnessed an "alarming explosion" of prisoner lawsuit filings.[4] At the time, prisoner litigation constituted *over a quarter* of all civil suits in federal court.[5]

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[4] 141 Cong. Rec. S14408-01, S14413 (Sept. 27, 1995) (statement of Sen. Dole) (number of prisoner suits filed "has grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994.").

[5] 141 Cong. Rec. S7498-01, S7526 (May 25, 1995) (statement of Sen. Kyl) ("Nationally, in 1994, a total of 238,590 civil cases

Senator Dole put the disproportionate burden imposed by prisoner suits in perspective when he observed: "45 percent of the civil cases filed in Arizona's Federal courts last year were filed by State prisoners. That means that 20,000 prisoners in Arizona filed almost as many cases as Arizona's 3.5 million law-abiding citizens." 141 Cong. Rec. S14408-01 (Sept. 27, 1995) (statement of Sen. Dole).

Congress ultimately concluded that a significant portion of these suits were patently frivolous and often involved trivial matters.[6] "Floor statements 'overwhelmingly suggested' that Congress sought to curtail suits qualifying as 'frivolous' because of their 'subject matter,' e.g., suits over 'insufficient storage locker space,' 'a defective haircut,' or 'being served chunky peanut butter instead of the creamy variety.'" *Porter*, 534 U.S. at 522 (cleaned up) (citation omitted); *see also* 141 Cong. Rec. S14408-01, S14418 (Sept. 27, 1995) (statement of Sen. Kyl) (Suit was filed over "being denied the use of a Gameboy video game.").

The vast majority of prisoner suits were brought by inmates in state prisons: in 1995, for example, state inmates brought 38,022 of the 39,053 total suits—or more than 97 percent. *See* Schlanger, Margo, *Trends in Prison Litigation as the PLRA Approaches 20 (hereinafter, "Trends in Prison*

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were brought in U.S. district court. More than one-fourth of these cases—60,086—were brought by prisoners.").

6 *See*, *e.g.*, 141 Cong. Rec. S7498-01, S7524 (May 25, 1995) (statement of Sen. Dole) ("Frivolous lawsuits filed by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population.").

Litigation: 2017"), 28 Corr. Law Reporter 69, 71 (2017) (Table 1).[7] Federal inmates, in contrast, brought only 1,031. *Id.*

The differences between states were also vast, and often defy simple explanation. In 1995, for example, Iowa prisoners were the most litigious in the U.S. and filed suit at a rate of 101.7 actions per thousand prisoners. *Id.* at 73 (Table 2). In contrast, North Dakota prisoners were the least litigious and filed less than a tenth as many: 7.2 suits per thousand prisoners. *Id.* Differences in circuit precedent cannot explain that differential: both are in the Eighth Circuit.

Congress also identified two of the chief causes of the flood of prisoner suits: First, prisoners often incur no financial cost for filing lawsuits.[8] Indeed, as far back as "1982, 'Congress recognized … that a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.'" *Coleman*, 135 S. Ct. at 1762 (cleaned up) (citation omitted). Second, "[p]risoners have ample time on

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[7] The article is available at https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Publications/Trends%20in%20Prisoner%20Litigation%20as%20the%20PLRA%20Aproaches%2020.pdf.

[8] 141 Cong. Rec. S14408-01 (Sept. 27, 1995) (statement of Sen. Dole) ("When average law-abiding citizens file a lawsuit, they recognize that there could be an economic downside to going to court. … so too should a convicted criminal"). By doing so, legislators hoped to reduce the total number of filings. *Id.* ("[W]hen prisoners know that they will have to pay these costs … eventually-they will be less inclined to file a lawsuit in the first place").

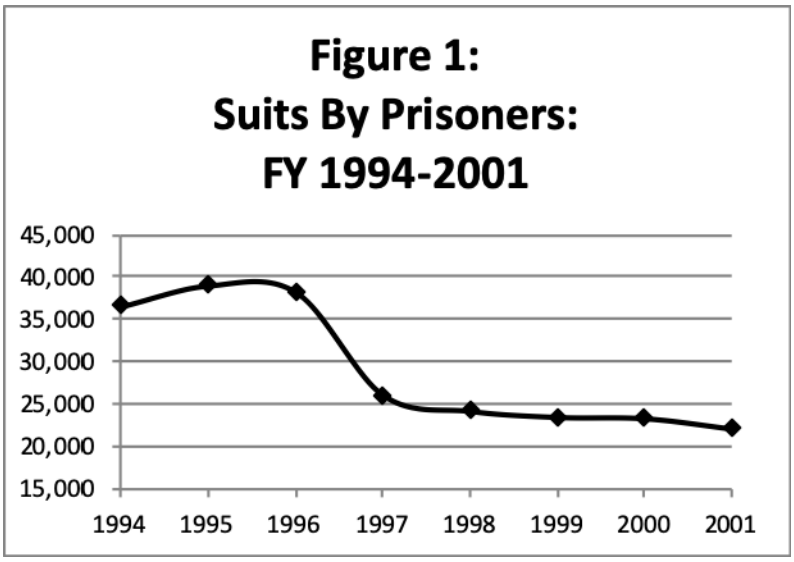
their hands and have demonstrated a proclivity for frivolous suits to harass their accusers, the guards, and others who caused or manage their captivity." *Lewis v. Sullivan*, 279 F.3d 526, 528-29 (7th Cir. 2002).

The PLRA responded to these distorted incentives by implementing "'a variety of reforms designed to filter out the bad claims filed by prisoners and facilitate consideration of the good.'" *Coleman*, 135 S. Ct. at 1762 (quoting *Jones v. Bock*, 549 U.S. 199, 204 (2007)) (cleaned up). "Among those reforms was the 'three strikes' rule," which was at issue in *Coleman*, and is again presented here. *Id.*

B. The PLRA Achieved A Significant Reduction In Prisoner Suits

The PLRA quickly began making meaningful progress in achieving its goals: "the decrease [in prisoner suits] between 1995 and 1997 was thirty-three percent, and it occurred notwithstanding a ten percent increase in the incarcerated population." Margo Schlanger, *Inmate Litigation (hereinafter, "Inmate Litigation: 2003")*, 116 Harv. L. Rev. 1555, 1634 (2003). That decrease in suits continued for several years, as shown in Table 1 and Figure 1.

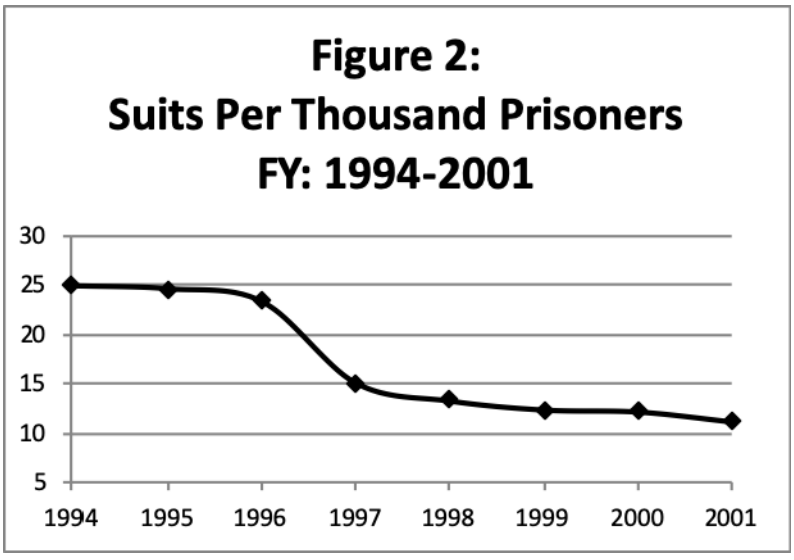
Table 1: Prisoner Suits in FY 1994-2001	
Fiscal Year	**Suits By Prisoners**
1994	36,595
1995	39,053
1996	38,262
1997	26,095
1998	24,220
1999	23,512
2000	23,358
2001	22,131
Source: *Trends in Prison Litigation: 2017* (Table 1)	



Suits by prisoners also decreased on a per-prisoner basis: "In 1995 prisoners filed 39,008 federal civil-rights suits, or 24.6 suits per 1,000 inmates. In 2001 they filed 22,206 such suits, at a rate of 11.4 per 1,000 inmates." *Johnson v. Daley*,

339 F.3d 582, 595 (7th Cir. 2003) (citing *Inmate Litigation: 2003*). That decrease can be seen in Table 2 and Figure 2.

Table 2: Suits Per Thousand Prisoners FY 1994-2001	
Fiscal Year	**Suits Per Thousand Prisoners**
1994	24.9
1995	24.6
1996	23.3
1997	15.1
1998	13.3
1999	12.4
2000	12.2
2001	11.2
Source: *Trends in Prison Litigation: 2017* (Table 1)	



Suits by state inmates continue to represent the overwhelming majority of prisoner suits. In 2015, for example, state inmates brought 22,543 of the 23,433 total suits—or more than 95 percent. *Trends in Prison Litigation: 2017*, 28 Corr. Law Reporter at 71 (Table 1). Federal inmates, in contrast, brought only 890. *Id.*

C. Prisoner Litigation Continues To Impose Significant Burdens On The States

Even with the salutary gains achieved by the PLRA, however, prisoner litigation continues to impose a substantial burden on the States, as well as federal courts. Suits by prisoners continue to represent *ten percent* of all civil filings in federal court: 29,450 of the 293,520 civil suits filed in federal court for the most recently available year.[9] And recent years have witnessed a troubling uptick in prisoner suits that underscores the need to preserve the progress attained by the PLRA and enforce its provisions as written.

Filings per prisoner experienced a substantial decrease after the enactment of the PLRA, which was followed by incremental gains for several years. As indicated in Tables 2 and 3 and Figure 3, filings per thousand inmates decreased from 23.3 in 1996 to 15.1 in 1997 and 13.3 in 1998. From there slow additional gains were made until filings reached a low in 9.6 per thousand prisoners in 2007. The rate was largely flat for the next five years, but spiked

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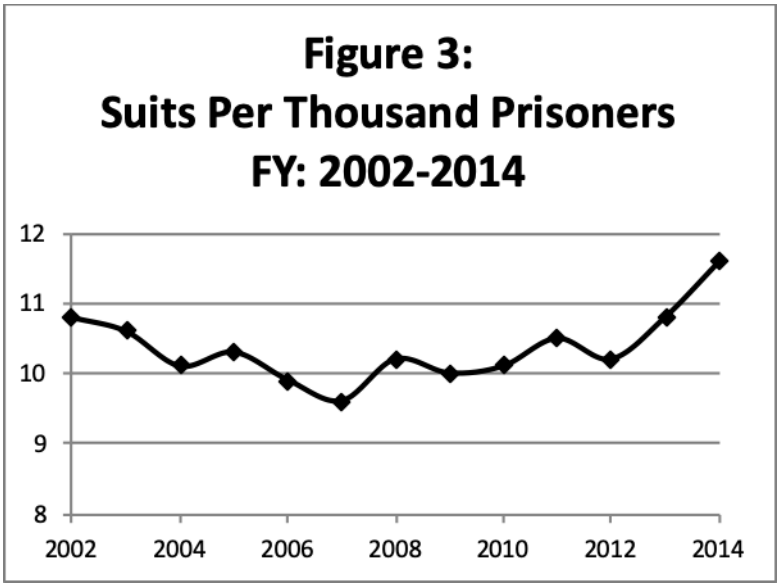
9 *See* U.S. Courts, *Table C-2 U.S. District Courts - Civil Cases Filed, by Jurisdiction and Nature of Suit* (2019) *available at* https://www.uscourts.gov/file/26574/download.

from 10.2 in 2012, to 10.8 in 2013 and 11.6 in 2014—nearly 20% above its floor.

Table 3: Suits Per Thousand Prisoners FY 2002-14	
Fiscal Year	**Suits Per Thousand Prisoners**
2002	10.8
2003	10.6
2004	10.1
2005	10.3
2006	9.9
2007	9.6
2008	10.2
2009	10.0
2010	10.1
2011	10.5
2012	10.2
2013	10.8
2014	11.6
Source: *Trends in Prison Litigation: 2017* (Table 1)	



Filings in absolute numbers are broadly similar. As indicated in Table 4 and Figure 4, filings for 2000-09 averaged 24,434.3 suits while filings for 2010-18 were noticeably higher at 27,768.1.[10] And a marked increase began after 2014: jumping from 26,444 to 31,989 in 2015, followed by relative highs at 31,183 28,195, and 27,914 for 2016, 2017, and 2018, respectively. And filings for the most recent

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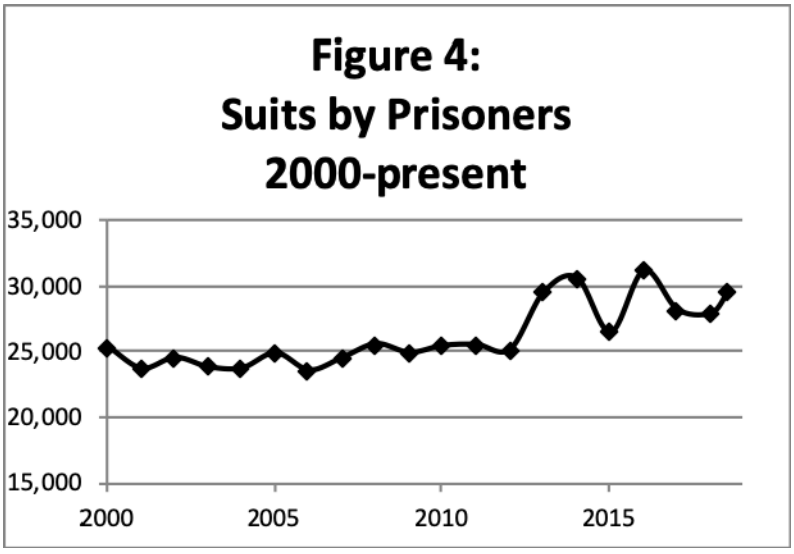
10 The statistics for Table 4 and Figure 4 are taken from official publications of the United States Courts. Specifically, the numbers are derived from Table C-2 ("U.S. District Courts - Civil Cases Filed, by Jurisdiction and Nature of Suit") for each year, and combine the subcategories "Civil Rights" and "Prison Conditions" from "Total Prisoner Petitions. This does not include habeas corpus, sentence challenges, etc. These tables are available at https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=c-2&pn=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=

twelve-month period for which data is available (July 2018 – June 2019) were 29,450.

Table 4: Prisoner Suits By Calendar Year	
Year	**Prisoner Suits**
2000	25,314
2001	23,676
2002	24,506
2003	23,775
2004	23,710
2005	24,862
2006	23,541
2007	24,509
2008	25,558
2009	24,892
2010	25,423
2011	25,498
2012	25,135
2013	29,498
2014	30,623
2015	26,444
2016	31,183
2017	28,195
2018	27,914
July 2018 - June 2019	29,450
Source: U.S. Courts (Table C-2 for each year)	



The importance of the three-strike rule is particularly acute in the case of the most litigious prisoners. And it is most apparent when the rule fails to be effective. For example, one prisoner in Arizona filed a remarkable *3,613* suits in *2014 alone*.[11] If the PLRA had successfully limited that inmate to three suits, it would have represented a *thousand-fold* decrease.

The differences between states continue to be substantial. In 2014, Montana had the most litigious inmates, with 46.7 per thousand prisoners, while Ohio had less than a tenth that rate: 3.7. *Trends in Prison Litigation: 2017*, 28 Corr. Law Reporter at 73 (Table 2).

Filings in the Fourth Circuit—which began refusing to count dismissals without prejudice as

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[11] DePillis, Lydia, *An Arizona inmate filed 3,613 lawsuits from prison last year*, Washington Post (Mar. 20, 2015) *available at* https://www.washingtonpost.com/news/wonk/wp/2015/03/20/an-arizona-inmate-filed-3613-lawsuits-from-prison-last-year/

strikes in 2009, *McLean v. United States*, 566 F.3d 391 (4th Cir. 2009)—are notably higher. *Every* state in the Fourth Circuit was in the top twenty for filings per thousand inmates in 2014: South Carolina (ranked 5), Maryland (11), West Virginia (12), Virginia (16) and North Carolina (18). That stands in stark contrast to 1995—pre-*McLean*—where only one state in the Fourth Circuit was in the top twenty: Virginia (6), West Virginia (25), South Carolina (26), Maryland (31), and North Carolina (34).

* * * * *

The upshot is that although the PLRA accomplished a laudable decrease in suits by prisoners, meritless suits continue to impose substantial burdens on the States and courts, and there has been a recent upturn in that burden. The PLRA's three-strike rule is an important tool in combatting this surge and reducing these burdens. And the rate of suits is disproportionately high in the Fourth Circuit—precisely where Petitioner's proposed rule is in effect.

II. DISMISSALS WITHOUT PREJUDICE ARE PROPERLY REGARDED AS STRIKES UNDER THE PLRA

As demonstrated above, despite the PLRA's three-strike provision and other reforms, the tide of frivolous prisoner litigation remains a significant problem that still commands a disproportionate share of the dockets of federal courts. Fortunately, this Court need simply read the PLRA three-strike provision as it is written to help address this burden. Doing so is not only consistent with the statutory text, but also its purposes, context, and history.

A. The PLRA's Plain Language Supports Respondents

This Court has long held that "[s]tatutory construction must begin with the language employed by Congress," *Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011), and "absent provisions cannot be supplied by the courts." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (cleaned up). Because the PLRA's three-strike provision only asks whether a dismissal was on the basis that the complaint was "frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted," 28 U.S.C § 1915(g)—and not whether it was with or without prejudice—the Tenth Circuit's decision is correct and should be affirmed.

When adding the three-strike provision to the *in forma pauperis* statute, Congress was silent as to whether dismissal with prejudice was a requirement for being considered a strike under section 1915(g). The words "with prejudice" or "without prejudice" simply cannot be found there. Those omissions should be given effect. *See*, *e.g.*, *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) ("'When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" (citation omitted) (cleaned up)).

More generally, this Court has explained that it does not "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. ICE*, 543 U.S. 335, 341 (2005). But that is precisely what Petitioner is contending: that although the PLRA omits discussion of even the concept of dismissal with-versus-without prejudice entirely, Congress

nonetheless intended to mandate that only dismissals with prejudice count as strikes.

This Court's decision in *Coleman* further supports the Tenth Circuit's reasoning. There, this Court focused on the statutory text of § 1915(g) and held that a district court decision counts as a strike even when it is being appealed. In reaching this conclusion, this Court relied upon the plain language of the statute and found that it simply describes a strike as an action that "was dismissed." Noting that "[t]hat, after all, is what the statute literally says," with no mention of any requirement that the dismissal have been affirmed on appeal, this Court refused to engraft such an atextual requirement onto the PLRA's three-strike rule. *Coleman*, 135 S. Ct. at 1763.

This case similarly requires nothing more than implementing "what the statute literally says." *Id.* Indeed, Petitioner never explains how a district court has any power to dismiss a claim under Rule 12(b)(6) in a manner that would not also count as a strike. Rule 12(b)(6) only permits dismissal where a complaint "fail[s] to state a claim upon which relief can be granted," much as the PLRA counts as a strike dismissal for "fail[ure] to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). The standard for dismissal under Rule 12(b)(6) thus *cannot* be satisfied until section 1915(g) is also triggered.

Petitioner argues (at 20) that "if a court 'dismissed' an action for 'failure to state a claim,' that dismissal is [necessarily] with prejudice." But a complaint either states a claim or it does not. If it does actually state a claim, a district court has no business dismissing it under Rule 12(b)(6) *at all*,

either with *or* without prejudice. And if a complaint "fails to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g)—and thus is dismissable under Rule 12(b)(6)—it *literally and necessarily* satisfies section 1915(g) to a "T." Satisfying the standard for Rule 12(b)(6) thus necessarily satisfies the requirements of 28 U.S.C. § 1915(g).

Petitioner also stresses (at 10) that dismissals without prejudice often result from "procedural defects that may be temporary or curable." But curability is also a concept utterly unmentioned in section 1915(g), which is only concerned with whether the dismissal was on the basis of "failure to state a claim"—not whether the grounds for dismissal might be curable.

The Tenth Circuit is hardly alone in reaching this conclusion. Multiple other circuits have similarly refused to read into the three-strike provision an atextual requirement that a dismissal must be with prejudice to count as a strike. *See, e.g.*, *Orr* v. *Clements,* 688 F.3d 463, 465 (8th Cir. 2012) ("[W]e see no reason why a dismissal without prejudice should not count as a strike under § 1915(g). The text of § 1915(g) draws no distinction between dismissals with prejudice and dismissals without prejudice…Either way, an action has been dismissed on one of the grounds specified in § 1915(g)") (internal citations and quotation marks omitted.); *Paul v. Marberry*, 658 F.3d 702, 704 (7th Cir. 2011) ("A dismissal is a dismissal, and provided that it is on one of the grounds specified in section 1915(g) it counts as a strike."); *O'Neal v. Price*, 531 F.3d 1146, 1154-1155 (9th Cir. 2008) ("[A] dismissal without prejudice may count as a strike ... We decline to

read into the statute an additional requirement not enacted by Congress").

All of these courts have reached the correct result, which is the one that the plain text of the PLRA fairly demands. Nor does this result unduly bar access to federal courts. It only means that the prisoner who has acquired three strikes (and does not allege imminent physical injury) may not proceed *in forma pauperis* and is required to pay the initial court costs and filing fees in order to bring a new action. In essence, the prisoner is only required to take into account the factors that every non-indigent litigant must consider, thus ameliorating the problem that prisoners "'lack[] an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.'" *Coleman*, 135 S. Ct. at 1762 (citation omitted) (cleaned up).

B. The Tenth Circuit's Interpretation Is Consistent With The Purposes Of The PLRA And Its Context And History

Construing a dismissal for failure to state a claim as a strike, regardless of whether it is with or without prejudice, is also consistent with Congress' intent that the PLRA reduce meritless prisoner litigation, as well as the statute's context and history.

The three-strike provision was a direct response to the filing of multiple actions by prisoners who see the filing of litigation more as a sport than a legitimate avenue for correcting alleged constitutional violations. Interpreting the three-strike provision in a clear, bright-line fashion

comports with the overall design and purposes of the PLRA.

A comparison of this Court's holding in *Neitzke v. Williams*, 490 U.S. 319 (1989), decided pre-PLRA, and the subsequent amendments in the PLRA, demonstrates Congress's intent to broaden the class of cases that should be dismissed and designated as strikes. Prior to the passage of the PLRA, indigent prisoners sought refuge in the *in forma pauperis* statute under then § 1915(d) to file the great bulk of claims. Under this iteration of the statute, a case could be dismissed if a court found that the prisoner's allegation of poverty was untrue or the action was frivolous or malicious. There was no provision for dismissal based on the prisoner's failure to state a claim. In *Neitzke,* this Court was asked to find that a complaint dismissed for failure to state a claim was necessarily frivolous under § 1915(d). A unanimous Court held that the two standards were distinct, and that failure to state a claim was not the same as frivolousness. In so holding, this Court explained that "[t]o conflate the standards of frivolousness and failure to state a claim … would thus deny indigent plaintiffs the practical protections against unwarranted dismissal generally accorded paying plaintiffs." *Neitzke,* 490 U.S. at 330. Recognizing the implications that merging a Rule 12(b)(6) defect with frivolousness would have on indigent litigants, this Court declined to accept such an interpretation.

Following the *Neitzke* decision, and fully aware of it, Congress in the PLRA specifically added language to the *in forma pauperis* statute that tracked Rule 12(b)(6), thus expressly directing district courts to dismiss cases for failure to state a claim and thereby

significantly increasing the number of *in forma pauperis* prisoner cases subject to dismissal.

This Court recognized in *Booth* v. *Churner*, 532 U.S. 731 (2001), that Congress took notice of its prior decisions regarding prisoner actions and drafted the PLRA as a direct response. At issue in *Booth* was whether the exhaustion provision of 42 U.S.C. § 1997e(a), as amended by the PLRA, was to be applied to prisoners even when they only sought monetary damages not generally provided for in most administrative schemes adopted by state prison systems. Looking to language of the PLRA's predecessor, this Court found "[b]efore § 1997e(a) was amended by the Act of 1995, a court had discretion (though no obligation) to require a state inmate to exhaust such ... remedies as are available, but only if those remedies were plain, speedy, and effective." *Id.* at 739 (citation omitted). Then, after reviewing the statutes after the PLRA amendments, this Court stated "[t]hat scheme, however, is now a thing of the past, for the amendments eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be plain, speedy, and effective before exhaustion could be required." *Id.* (internal quotation marks omitted). This Court understood that Congress had read its prior decisions and drafted the PLRA specifically to eliminate issues it saw with the administration of prisoner litigation. *See id.* at 737 ("Congress … may well have thought we were shortsighted.")

Since *Booth*, every time this Court has been asked to limit the PLRA to a minimal and specific set of circumstances, or otherwise create special exceptions in derogation of the statute's clear and plain meaning, it has properly declined to do so. *See*

Porter, 534 U.S. 516 (holding the exhaustion requirement in 1997e(a) applied to claims of single acts of excessive force); *Woodford*, 548 U.S. 81 (holding full and proper exhaustion of administrative remedies required under statute); *Coleman*, 135 S. Ct. 1759 (holding dismissal of a prior action counts as strike even if currently subject to appeal); *Ross v. Blake*, 136 S. Ct 1850 (2016) (holding special circumstances not an excuse for failure to exhaust administrative remedies); *Bruce v. Samuels*, 136 S. Ct. 627 (2016) (holding fees to be collected simultaneously under *in forma pauperis* statute when prisoners have multiple actions).

Construing a dismissal for failure to state a claim as a strike for purposes of the three-strike provision, regardless of whether it is with or without prejudice, thus creates a clear rule that is consistent with this precedent and with Congress' intent that the PLRA be construed broadly to reduce the massive volume of meritless prisoner litigation in the federal courts.

CONCLUSION

For the foregoing reasons, this Court should hold that dismissals for failure to state a claim count as "strikes" under the PLRA whether they are with or without prejudice, and the judgment of the Tenth Circuit should therefore be affirmed.

Respectfully submitted,

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