No. 18-8369

IN THE

Supreme Court of the United States

ARTHUR J. 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 OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER AND SUPPORTING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. Founded in 1958, NACDL has a membership of many thousands of direct members and approximately 40,000 affiliated members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases. It has a keen interest in ensuring that the doors to the nation's federal courts are not closed to indigent prisoner-plaintiffs with meritorious claims, on the basis of mere procedural deficiencies or a poorly pled complaint.

SUMMARY OF ARGUMENT

A. The Court should find a district court's dismissal of a prisoner-plaintiff's action for "fail[ure] to state a claim" that is without prejudice not to count as a strike under the "three-strikes" provision of the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915(g). The text of § 1915(g) reflects that

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[1] Pursuant to Rule 37.3, all parties received notice of the filing of this brief and written consent has been provided to *amicus*. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

Congress intended to impose a strike only for an action or appeal that "ha[s] no merit" (*Jones v. Bock*, 549 U.S. 199, 203 (2007)) – that is, one dismissed with prejudice. In contrast, a complaint that is procedurally deficient or poorly pled is, along with other categories of cases (such as those barred under this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994)), dismissed without prejudice precisely because it is potentially meritorious. Thus, counting only with-prejudice dismissals as strikes best serves the two competing goals Congress sought to balance in the PLRA: to "reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

B. Treating a without-prejudice dismissal as a strike would render those formerly lenient dismissals harsh and inequitable, contravening the lower courts' equitable authority to keep the courtroom doors open to potentially meritorious, but poorly pled, claims. Because of the unique procedural difficulties associated with prisoner suits, lower courts should not, in effect, be deprived of their equitable powers to show special solicitude to indigent *pro se* prisoner-plaintiffs.

C. Procedural errors frequently trigger without-prejudice dismissals in *pro se* prisoner cases. With prisoner-plaintiffs, almost all of whom proceed *pro se*, already at a substantial inherent disadvantage in the courts in the first place, it would be inherently inequitable to adopt an interpretation of § 1915(g) that makes it even more likely that indigent *pro se* prisoners will strike out on technicalities.

ARGUMENT

A. In Deciding When to Impose a "Strike," Congress Incorporated into § 1915(g) the Well-Established Merits-Based Distinction Between a With-Prejudice Dismissal and a Without-Prejudice Dismissal

The Tenth Circuit held in this case that "'it is immaterial to the strikes analysis [whether] the dismissal was without prejudice, as opposed to with prejudice.'" Pet. Br. at 10 (citations omitted). Ignoring this distinction, however, contravenes important canons of federal civil procedure and the spirit of the PLRA.

1. Pursuant to Federal Rule of Civil Procedure 12(b)(6), a district court might, for many reasons, dismiss a complaint for "failure to state a claim upon which relief can be granted." On one end of the spectrum, a complaint can fail to state a claim simply because it is not well-pled. It could lack "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted), a pleading defect that is, under Rule 8(a), potentially immediately curable. Or the complaint could be temporarily hobbled by other shortcomings that are potentially remediable, such as a failure to exhaust administrative or state-law remedies.

Traditionally, the courts will dismiss a complaint that does not meet these technical standards without prejudice, to permit the plaintiff another chance to get it right, and often they will set a date for when any amended pleading must be filed. *See*,

e.g., *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519-20 (7th Cir. 2015) ("Ordinarily . . . a plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to try to amend her complaint before the entire action is dismissed."); *Lopez v. Smith*, 203 F.3d 1122, 1126-30 (9th Cir. 2000) ("[I]n a line of cases stretching back nearly 50 years, we have held that in dismissing for failure to state a claim under Rule 12(b)(6), a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts") (internal quotation marks omitted).

On the other end of the spectrum, a complaint might fail to state a claim because its allegations, "however true," do not "raise a claim of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). This "basic deficiency," *see id.* (internal quotation marks and citation omitted), is not merely a matter of defective pleading, but instead goes directly to the merits of a plaintiff's claim (or the lack thereof). In such circumstances, courts are more likely to dismiss with prejudice. *See*, *e.g.*, *Runnion*, 786 F.3d at 520 ("Where it is clear that the defect cannot be corrected so that amendment is futile, it might do no harm to deny leave to amend and to enter an immediate final judgment . . . ."). Indeed, the standard for dismissing a complaint with prejudice is high, precisely "because it operates as a rejection of the plaintiff's claims on the merits and [ultimately] precludes further litigation of them." *Rudder v. Williams*, 666 F.3d 790, 794-95 (D.C. Cir. 2012) (internal quotation marks and citation omitted).

When Congress enacted § 1915(g)'s three-strikes provision, it employed a phrase ("fails to state a claim upon which relief may be granted") that mirrors the language of Rule 12(b)(6) ("failure to state a claim upon which relief can be granted"). *See* Pet. Br. at 15. It is therefore presumed that Congress adopted the "cluster of ideas" attached to that language as well as the "meaning its use will convey to the judicial mind." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *see also* Pet. Br. at 17 (citing *FAA v. Cooper*, 566 U.S. 284, 292 (2012)). This includes the distinction between a dismissal with prejudice and a dismissal without prejudice, *see* Pet. Br. at 17-20, and the "usual practice" under Rule 12(b)(6). *Id.* at 20. In a nutshell, that practice reflects that "if a court 'dismissed' an action for 'failure to state a claim,' th[e] dismissal is *with* prejudice." *Id.* Unlike a without-prejudice dismissal, which must be expressly labeled as such, it is understood that "a district court order . . . dismiss[ing] 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). "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.'" Pet. Br. at 20 (quoting 28 U.S.C. § 1915(g)).

2. In light of what Congress was trying to achieve through the PLRA, it makes sense that Congress knowingly employed the term of art imbedded in § 1915(g)'s phrasing. *See Dolan v. U.S. Postal Serv.*,

546 U.S. 481, 486 (2006). The goal of the PLRA was not to deter frivolous prisoner cases at all costs, but to curb frivolous prisoner cases while also guaranteeing that prisoners could still bring meritorious claims. As this Court has recognized, Congress sought to ensure "that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones v. Bock*, 549 U.S. 199, 203 (2007); *see* 141 Cong. Rec. S14627 (daily ed. Sept. 29, 1995) (Statement of Sen. Hatch) ("I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."); 141 Cong. Rec. S7256 (daily ed. May 25, 1995) (Statement of Sen. Kyl) (asserting that the PLRA was meant to "free up judicial resources for claims with merit by both prisoners and nonprisoners").

Counting only with-prejudice dismissals as strikes would avoid violence to the PLRA's competing objectives – deterring frivolous prisoner lawsuits and encouraging meritorious ones. Moreover, the elevation of one of the PLRA's statutory goals, namely, the deterrence of frivolous prisoner lawsuits, over the other purposes – which would be the result if without-prejudice dismissals are counted as strikes – is unnecessary in light of the statute's other ample tools for deterring frivolous prisoner actions. *See* Pet. Br. at 41-43. And deterring frivolous prisoner suits by taking a "meat-axe approach," *McLean v. United States*, 566 F.3d 391, 398 (4th Cir. 2009), conflicts with our nation's long history of keeping the courtroom doors open to prisoners with meritorious claims. As this Court has held time and again, "[o]ur legal system . . . remains committed to guaranteeing that prisoner claims of

illegal conduct by their custodians are fairly handled according to law." *Jones*, 549 U.S. at 203; *see also Bounds v. Smith*, 430 U.S. 817, 821, 824-25, 828 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts."); *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country. . . . [Prisoners] retain right of access to the courts.").

3. Counting only with-prejudice dismissals as strikes would also align with other important judicial doctrines. First, a dismissal with prejudice "essentially has the effect of invoking the principles of res judicata," because it is a final judgment on the merits. Yoichiro Hamabe, *Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach*, 15 Campbell L. Rev. 119, 191 (1993); *see* Pet. Br. at 11; Restatement (First) of Judgments § 53 cmt. c (Am. Law Inst. 1942) ("If . . . the dismissal is not without prejudice, the plaintiff's cause of action is terminated and he cannot maintain a new suit for the same cause of action."). When doling out strikes, equating a with-prejudice dismissal and a without-prejudice dismissal undermines the res judicata doctrine's distinction between adjudications on the merits and those not on the merits.[2]

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[2] *See* Hamabe, *supra*, at 194-195 (describing the categories of 12(b)(6) dismissals – some on the merits and some on procedural grounds – and arguing that "a ruling under Rule 12(b)(6) for technical or procedural [reasons] should not be considered to be on the merits and its res judicata effect should be limited to issue preclusion. Since the claim is not substantively litigated and determin[ed], [such] dismissals . . . should not have a claim preclusion effect").

Second, a dismissal without prejudice is normally not a final judgment and is therefore not ordinarily or "practical[ly]" immediately appealable unless under the collateral order doctrine. *See* 28 U.S.C. §§ 1291, 1292; *see also Martinez v. Martinez*, 294 F. App'x 410, 412-13 (10th Cir. 2008) ("The requirement of finality is to be given a practical rather than a technical construction") (internal quotation marks omitted). If without-prejudice dismissals count as strikes, the practical impact is that a prisoner could strike out on the basis of three without-prejudice dismissals without the benefit of an appeal. This has the potential of creating a situation where a prisoner who has raised serious constitutional issues could collect three strikes on procedural or technical defaults even in the same case, without the district court ever considering the substance of those claims (and certainly an appellate court never considering the substance). *See* Pet. Br. at 35-36.

Petitioner's case further demonstrates why it would be fundamentally unfair to count without-prejudice dismissals as strikes. A dismissal is labeled a "strike" only retroactively. In this case, when the district court considered whether Petitioner had struck out, it examined whether two prior dismissals based on *Heck v. Humphrey*, 512 U.S. 477 (1994), both of which were entered expressly without prejudice, also counted as strikes. *See* Pet. Br. at 8-9. Petitioner was unable to rely on the face of those two decisions dismissing claims *without prejudice* and trust that he could re-file without collateral consequences. "[P]risoners, who typically act pro se, are entitled to take dismissals 'at face value' and 'should not be required to speculate on the grounds the judge could or even

should have based the dismissal on.'" *Millhouse v. Heath*, 866 F.3d 152, 164 (3d Cir. 2017).

B. Treating a Dismissal Without Prejudice As a Strike Undermines the Judiciary's Inherent Equitable Power to Leave the Courthouse Doors Open to Meritorious Claims Brought by Indigent Prisoners

A judge exercises inherent equitable authority when deciding whether to dismiss a claim or set of claims without prejudice. *See*, *e.g.*, *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1161-62 (10th Cir. 2007) (discussing judge's discretion under Rule 41(b) to dismiss a case without prejudice).[3] As just noted, without more, an action dismissed under Rule 12(b)(6) is with prejudice and, by default, on the merits. *See supra* p. 5; *see also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits.") (citation and internal quotation marks omitted). Thus, it is assumed that when a judge takes the affirmative action of dismissing without prejudice on 12(b)(6) grounds, the decision is deliberate. *See* Pet. Br. at 12.[4]

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[3] *See also* Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 Nev. L.J. 1397 (2015) (summarizing the stages in civil litigation where a judge may exercise equitable authority).

[4] While dismissals without prejudice under *Heck* should be deemed equitable, they are not discretionary. *Heck*-based dismissals must be issued without prejudice "because a plaintiff 'could renew . . . claims [barred by *Heck*] if he ever succeeds in overturning his conviction.'" *See* Pet. Br. at 33 (quoting *Perez v. Sifel*, 57 F.3d 503, 505 (7th Cir. 1995) (per curiam)).

Exercising that equitable authority, courts can deal with any number of procedural difficulties associated with a potentially meritorious claim through a dismissal without prejudice for failure to state a claim. For example, the district court in a PLRA case, *Milhouse v. Heath*, No. 1:15-cv-00468, 2015 WL 6501461 (M.D. Pa. Oct. 27, 2015), dismissed the prisoner's complaint without prejudice as a matter of judicial economy. *Id.* at *4-5 & n.5. The prisoner had a separate related action "already pending in th[e same] court and ha[d] filed at least one other case along with [another inmate]." *Id.* at *4 n.5. Emphasizing the without-prejudice dismissal, the Third Circuit held that it was "not appropriate" to treat the lower court's decision as a strike. *Millhouse v. Heath*, 866 F.3d 152, 164 (3d Cir. 2017).[5]

Or a court, particularly in the prisoner context, might utilize a without-prejudice dismissal to provide leniency for refiling a pleading that is inadequate but potentially meritorious. While leave to amend can obviate the need for dismissal of an action without prejudice, the leave-to-amend route (as alluded to earlier) typically requires adherence to timing obligations set by the court for refiling. That is, an imprecise or insufficient pleading may trigger an order provisionally dismissing the claims, subject to a certain time period then indicated for the plaintiff to correct pleadings; once timely corrected, the plaintiff can proceed with a potentially meritorious action. In categories of litigation where plaintiffs are regularly represented by counsel, a plaintiff, through counsel, can be

[5] The district court and the court of appeals adopted different spellings of the prisoner's last name.

expected to have the resources and expertise to comply timely. In contrast, where a prisoner is litigating *pro se*, there is less likelihood that the prisoner can or will satisfy the strict time constraints usually accompanying a dismissal of claims with leave to amend. *See infra* pp. 13-17. Instead, in order to avoid clogging its docket and in order to give the prisoner ample opportunity in the future to return to the courthouse with a better-pled claim, the court might dismiss the case without prejudice for the time being. The prisoner then, when it is opportune for him or her, can return to court with the corrected pleading.

Without-prejudice dismissals of these sorts would become obsolete in situations involving indigent prisoners, if the dismissals counted as a PLRA strike. The dismissals would become harsh and inequitable because they would result in a strike, rather than show leniency. As a result, a court that wished to show special solicitude for the prisoner's situation through a procedural dismissal of a potentially meritorious claim would avoid that route, lest a strike occur. "[U]nique" circumstances are "a summons to a court of equity to mould its plastic remedies in adaptation to the instant need." *Atl. Coast Line R.R. Co. v. Florida*, 295 U.S. 301, 316 (1935) (Cardozo, J.). Yet, for indigent prisoners, who are perhaps the category of individuals most in need of equitable grace, the usual equitable authority a court might invoke to adapt to the instant need would – if exercised through a without-prejudice dismissal – become a tool (via the accompanying strike) for possibly preventing the prisoner from ever returning to court at any time in the future.

Removing an equitable device from the lower courts' arsenal by treating without-prejudice dismissals as strikes is especially problematic given that attaching strikes to dismissals for failure to state a claim is already often ill-fitting to Congress's overarching objectives. As already mentioned, *see supra* p. 6, Congress enacted the PLRA out of concern for prisoners filing frivolous litigation, not to squelch meritorious cases. Whereas accruing strikes for dismissals of the first two types of cases on the strike list – for "frivolous" or "malicious" matters, 28 U.S.C. § 1915(g) – makes sense in light of Congress's purposes, issuing strikes for 12(b)(6) dismissals does not as easily fit (arguably even when they are *with prejudice*). This Court has warned that "[c]lose questions of federal law, including claims filed pursuant to 42 U.S.C. § 1983, have on a number of occasions arisen on motions to dismiss for failure to state a claim, and have been substantial enough to warrant this Court's granting review, under its certiorari jurisdiction, to resolve them." *Neitzke v. Williams*, 490 U.S. 319, 328 (1989) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968)). The *Neitzke* Court cited *Brower v. County of Inyo*, 489 U.S. 593 (1989), as an example of a dismissal of a complaint based on § 1983 where, "by a 9-to-0 vote," the Court found the plaintiff to have, "in fact, stated a cognizable claim – a powerful illustration that a finding of failure to state a claim does not invariably mean that the claim is without arguable merit." 490 U.S. at 329.

If it is a rough fit with Congress's overarching objective of stemming abusive litigation for a

prisoner to incur a strike in the situation where he or she raises an important, legally arguable claim (through a Rule 12(b)(6) dismissal with prejudice), it is even less suited to the PLRA regime for a prisoner to be assessed a strike when he or she has a potentially *winning* claim on the merits that, through initial inartful pleading or other circumstances, garnered a dismissal without prejudice. In sum, to preserve a lower court's equitable authority to deal with the unique circumstances posed by prisoner filings, the Court should not hamper the PLRA with a construction that counts as strikes (and therefore, as a practical matter, forecloses) dismissals without prejudice.

C. Treating a Without-Prejudice Dismissal As a Strike Penalizes Poor Prisoners for Proceeding *Pro Se* and Stifles Meritorious Claims

1. As this Court has recognized, "[j]ails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Johnson v. Avery*, 393 U.S. 483, 487 (1969). As of 1997, "41% of inmates in the Nation's State and Federal prisons and local jails . . . had not completed high school or its equivalent." *See* Caroline Wolf Harlow, U.S. Dep't of Justice, Bureau of Justice Stats., *Special Report: Education and Correctional Populations* at 1 (Jan. 2003, revised Apr. 15, 2003), https://www.bjs.gov/content/pub/pdf/ecp.pdf.
"Whether due to this lack of education or the fact that, for many, English is not their first language, prisoners also tend to have lower literacy abilities than the general population." Ira P. Robbins,

Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts, 23 Geo. J. of Legal Ethics 271, 280 (2010). A majority of the prison population also suffers from mental illness. *See* Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice, Bureau of Justice Stats., *Special Report: Mental Health Problems of Prison and Jail Inmates* at 1 (Sept. 2006, revised Dec. 14, 2006), http://www.bjs.gov/content/pub/pdf/mhppji.pdf ("At midyear 2005 more than half of all prison and jail inmates had a mental health problem, including 705,600 inmates in State prisons, 78,800 in Federal prisons, and 479,900 in local jails.").

Across the board, prisoners additionally tend to be overwhelmingly poor and lack the financial resources to retain counsel. According to one study "of non-habeas corpus, non-bankruptcy pro se litigation in the United States District Court for the Southern District of New York," approximately 95% of inmates sought *in forma pauperis* status when filing a civil complaint, and the applications were granted 99% of the time. Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 Fordham Urb. L.J. 305, 311, 326 (2002).

Yet, despite the "increasing complexity of prisoner litigation," Robbins, *supra*, at 277, and even though "many prisoners are unable to prepare legal materials and file suits without assistance," *Rhodes v. Robinson*, 612 F.2d 766, 769 (3d Cir. 1979), the overwhelming majority of prisoner-plaintiffs must bring suit *pro se*. *See* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417, 420 n.8

(1993) ("More than 95% of prisoner suits are filed *in forma pauperis*. With rare exceptions, all such cases are filed *pro se*.") (citing William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 617 (1979)); *see also* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1624 (2003) ("[N]early all inmate civil rights cases are filed pro se.").

It should go without saying that *pro se* litigants as a whole (not just prisoners) face an uphill battle in terms of drafting pleadings that are allowed to proceed to discovery. But prisoner-plaintiffs must contend with even more barriers. They are not only subject to the same motions to dismiss with which any ordinary plaintiff must contend, but they also face the PLRA's *sua sponte* dismissal and screening provisions. *See* 28 U.S.C. § 1915A(a)-(b) (mandating review of all prisoner complaints seeking "redress from a governmental entity or officer or employee of a governmental entity" and requiring dismissal of all such complaints found to be "frivolous, malicious, or [that] fail[] to state a claim upon which relief may be granted" or that "seek[] monetary relief from a defendant who is immune from such relief"); *id.* § 1915(e)(2)(B) ("[T]he court shall dismiss the case at any time if the court determines that . . . 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.").

These possible "early exits" loom large when considering that prisoners are already at an "inherent disadvantage" when attempting to craft a complaint that will pass muster. Robbins, *supra*, at

273. Prisoners have "restricted access to libraries, legal materials, computers, the Internet, and even items that the non-incarcerated take for granted – such as paper, pens, and telephones." *Id.* "[M]any of the extensive websites, hotlines, workshops, and books about litigating pro se are not accessible to prisoners or may lack specific information on post-conviction litigation." *Id.* at 278-79. And, "[f]urther, the limited resources available within prisons themselves are often inadequate to allow prisoners to represent themselves effectively; libraries may have limited hours, for example, or case reporters may be missing key pages" when they are available at all. *Id.* at 279.

"Although it is essentially true . . . that a . . . civil rights complaint need only set forth facts giving rise to the cause of action . . . it hardly follows that a law library or other legal assistance is not essential to frame such documents." *Bounds v. Smith*, 430 U.S. 817, 825 (1977). "It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and type of relief available." *Id.* "Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action." *Id.* "If a lawyer must perform such preliminary research, it is no less vital for a *pro se* prisoner." *Id.* at 825-26. If anything, "[i]t is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing *in forma pauperis* and may dismiss the case" outright. *Id.* at 826.

It should come as no surprise, then, that even though the courts construe *pro se* complaints liberally, *see*, *e.g.*, *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013), prisoners' procedural mistakes frequently lead to dismissals. *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 167, Table 6 (2015) (prisoner civil rights cases comprised 94.9% of the total *pro se* litigation terminated in U.S. District Courts in 2012). Equally unsurprising, "[i]n those few cases in which the prisoner was represented by counsel, this fact made a decisive difference." Turner, *supra*, at 624.[6]

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[6] In *Walker v. Bowersox*, 526 F.3d 1186 (8th Cir. 2008), for example, the court of appeals found "trialworthy issues" in a *pro se* prisoner's Eighth Amendment excessive-force complaint, including those pertaining to the prisoner's allegations that he was restrained to a bench for 24 hours without access to food, water, certain medications, or a bathroom. *Id.* at 1187-89. On remand, the district court appointed counsel and the prisoner demonstrated that the defendants intentionally destroyed evidence relating to his restraint. *Walker v. Bowersox*, No. 05-cv-3001, 2009 WL 10720161, at *1-2 (W.D. Mo. Oct. 26, 2009). The case proceeded to trial before a jury, and the plaintiff was permitted a related negative-inference instruction. *Id.* at *3. In another case, the district court dismissed with prejudice a *pro se* prisoner's § 1983 claim. *Akhtar v. Mesa*, 698 F.3d 1202, 1205, 1208-09 (9th Cir. 2012). On appeal, the prisoner was represented by the King Hall Civil Rights Clinic at the University of California, Davis, School of Law, and the Ninth Circuit reversed. *See id.* at 1205, 1215. After the prisoner filed a second amended complaint while represented by two Certified Law Students and the Supervising Attorney from the Clinic, the case proceeded to discovery and, from there, to motions for summary judgment. *See Akhtar v. Mesa*, No. 2:09-cv-2733, 2013 WL 1785893, at *1, *7 (E.D. Cal. Apr. 25, 2013); *Akhtar v. Mesa*, No. 2:09-cv-2733, 2014 WL 6946142, at *2 (E.D. Cal. Dec. 9, 2014).

2. With prisoner-plaintiffs, almost all of whom proceed *pro se*, already at a disadvantage, it would be inherently inequitable to adopt an interpretation of § 1915(g) making it even more likely that indigent *pro se* prisoners will strike out on technicalities.

Justice Brennan warned against this very sort of inequity in *In re McDonald*, 489 U.S. 180 (1989), when dissenting from the Court's order barring a *pro se* prisoner from proceeding *in forma pauperis* when seeking extraordinary writs from the Court:

> This Court annually receives hundreds of petitions, most but not all of them filed *in forma pauperis*, which raise no colorable legal claim whatever, much less a question worthy of the Court's review. Many come from individuals whose mental or emotional stability appears questionable. It does not take us long to identify these petitions are frivolous and to reject them. . . . To rid itself of a small portion of this annoyance, the Court now needlessly departs from its generous tradition and improvidently sets sail on a journey whose landing point is uncertain. We have long boasted that our door is open to all. We can no longer. . . .
>
> I am most concerned, however, that if, as I fear, we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim. It is rare, but it does happen on occasion that we grant review and even decide in favor of a litigant who previously had presented multiple unsuccessful petitions on the same issue.

Id. at 187-88 (Brennan, J., dissenting).

A number of compelling examples of *pro se* prisoner claims, allowed to proceed to the merits after having been dismissed, support Justice Brennan's concerns about being too quick to close the courthouse doors to litigants with potentially meritorious claims. In addition to *Brower v. County of Inyo*, 489 U.S. 593 (1989), *see supra* p. 12, and the cases brought to the Court's attention in Petitioner's brief, *see* Pet.'s Br. at 31-33, others warrant discussion:

- In *Rollie v. Kemna*, 124 F. App'x 471 (8th Cir. 2005), the Eighth Circuit reversed the dismissal of the Eighth Amendment claims brought by 23 prisoners against prison officials who allegedly permitted "double-celling" of maximum-security prisoners with other prisoners, which led to "assaults, rapes, and fights, all of which went undetected due to the use of solid and soundproof boxcar doors." *Id.* at 472-73 (internal quotation marks and citation omitted). One prisoner also alleged "that after he complained about double-celling, [one of the defendants] retaliated by extending [the prisoner's] sentence in solitary confinement from six months to one year, and [other defendants] retaliated by issuing conduct-violation reports against [the prisoner]. *Id.* at 473. The Eighth Circuit concluded that the prisoner had, in fact, "stated a failure-to-protect claim" based on the unauthorized double-celling as well as "a retaliation claim" based on actions taken by the defendants after the prisoner complained about the double-celling. *Id.* at 474-75.

- The Eighth Circuit again reversed the dismissal of a prisoner's complaint in *Blackmon v. Lombardi*, 527 F. App'x 583 (8th Cir. 2013). In that case, which was dismissed by the district court preservice, the court of appeals found the prisoner had sufficiently alleged four claims: a First Amendment retaliation claim based on the prisoner filing a grievance appeal; conditions-of-confinement claims under the Eighth Amendment stemming from the conditions of his segregation unit; an access-to-the-courts claim, "based on his allegations that [one of the defendants] refused to allow him access to the law library and that [the defendant's] refusal hindered him in 'preparing a petition for legal redress in the court'"; and a failure-to-protect claim alleging that one of the defendants (a prison employee) "tried to attack him and had a reputation for violence against inmates" and other defendants (including the warden and assistant warden) knew of this safety threat but did nothing about it. *Id.* at 584-85 (citation omitted).
- In *Gee v. Pacheco*, 627 F.3d 1178 (10th Cir. 2010), another *pro se* prisoner was allowed to proceed beyond the pleading stage on several constitutional claims after the district court had earlier dismissed his case with prejudice. The Tenth Circuit found that the prisoner had sufficiently pled a First Amendment claim stemming from the intentional confiscation and destruction of letters sent to him by persons outside the prison; another First Amendment claim relating to a prison official's refusal to process the prisoner's

> outgoing mail; a First Amendment retaliation claim; and an Eighth Amendment claim concerning the prisoner's transport between prisons where he went without food or water for more than 24 hours. *Id.* at 1187-90. As to other claims, the court of appeals held that the prisoner should have been permitted an opportunity to amend his complaint. *See id.* at 1195 ("The plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him, should be allowed to amend his complaint.") (internal quotation marks omitted).[7]

Moreover, a large number of civil rights claims challenging conditions of confinement are dismissed under *Heck* because the claims are premature while a state conviction remains in place – not because the claims lack merit. *See Washington v. Los Angeles Cty. Sheriff's Dep't*, 833 F.3d 1048, 1055 (9th Cir. 2016) ("[P]laintiffs may have meritorious claims that do not accrue until the underlying criminal proceedings have been successfully challenged."); *see also 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, 868-69 (2008) ("Courts have used *Heck*'s rule to dismiss a substantial number of § 1983 cases brought by imprisoned criminals; such claims can be brought only through habeas.").

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[7] The Tenth Circuit ultimately dismissed those claims because the prisoner failed to timely amend, notwithstanding his allegations that prison officials had confiscated his legal materials. 495 F. App'x 942 (10th Cir. 2012) (Gorsuch, J.).

To be sure, frivolous prisoner litigation exists. *See* Pet. Br. at 27-28. But as one legal scholar has persuasively articulated,

> there are also real abuses that take place within the prison system. Prisoners have, among other things, been raped, shot, and beaten to death by guards. For those wrongs, there should be remedies. *A rule that controls access to courts not by examining the merits of a claim but by shutting the door on uncounseled inmates who fail to navigate a procedural minefield is not a good one.*

Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 Emory L.J. 1771, 1776 (2003) (emphasis added).

Thus, a rule that would "treat as equivalent nonmeritorious suits dismissed with prejudice and those dismissed without prejudice for failure to state a claim by counting both as strikes," *McLean v. United States*, 566 F.3d 391, 397 (4th Cir. 2009), would not be "a good one." *See* Roosevelt, *supra*, at 1776. Such a rule would not only penalize poor prisoners for proceeding *pro se*, but it would also both deprive the lower courts of the ability to exercise their inherent equitable authority in the unique circumstances posed by prisoner filings, *see supra* pp. 9-13, and stifle meritorious claims, which is not what Congress intended, *see supra* pp. 5-7.

CONCLUSION

The Court should reverse the judgment of the Tenth Circuit, which affirmed the denial of Petitioner's application to proceed *in forma pauperis*.

Respectfully submitted,

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