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Where is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of the Prison Litigation Reform Act's "Three Strikes" Rule

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WHERE IS THE STRIKE ZONE? ARGUING FOR A UNIFORMLY NARROW INTERPRETATION OF THE PRISON LITIGATION REFORM ACT'S "THREE STRIKES" RULE

ABSTRACT

In 1996, at the height of the prison boom and as mass incarceration began to take shape, Congress passed the Prison Litigation Reform Act (PLRA). The PLRA aimed to reduce the overloaded federal court docket, and it targeted inmate litigation as its cause célèbre. The result was immediate, and it caused inmate litigation to plummet in federal courts. One of the provisions that facilitated and continues to facilitate the drastic decline in inmate filings is § 1915(g). Section 1915(g) of the PLRA—also known as the “three strikes” rule—prohibits in forma pauperis status to indigent inmates who have had three frivolous actions or appeals dismissed in federal court. In denying in forma pauperis status to indigent inmates, the law effectively serves as a ban on accessing the courts unless inmates can afford to pay filing fees out of pocket.

Since the PLRA’s passage in 1996, courts have wrestled with how to interpret § 1915(g), and it has led to a quagmire of patchwork interpretations. This quagmire has led to the erroneous dismissal of meritorious inmate claims, while also increasing litigation that seeks to answer the following questions: What type of dismissal constitutes a “strike?” What constitutes imminent danger of serious physical harm? Can an inmate appeal their third strike? This Comment argues for a narrow, text-based interpretation of § 1915(g). Interpreting this section narrowly will maintain the statute’s effectiveness while also ensuring that inmates are not unconstitutionally restricted from exercising their fundamental right to access the courts.

| | |
|--|-----|
| INTRODUCTION | 757 |
| I. PASSAGE OF THE PRISON LITIGATION REFORM ACT | 759 |
| II. THE FUNDAMENTAL RIGHT TO ACCESS THE COURTS | 762 |
| A. <i>An Inmate's Fundamental Right to Access the Courts</i> | 764 |
| B. <i>Challenges to the Constitutionality of 28 U.S.C. § 1915(g)</i> | 766 |
| III. CIRCUIT SPLITS AND PROPOSALS | 768 |
| A. <i>Dismissing an Action</i> | 771 |
| 1. <i>Immunity</i> | 771 |
| 2. <i>Failure to Exhaust Administrative Remedies</i> | 774 |
| 3. <i>Mixed Dismissals</i> | 778 |
| B. <i>Imminent Danger of Serious Physical Injury</i> | 783 |
| 1. <i>Imminent Danger</i> | 784 |
| 2. <i>Serious Physical Injury</i> | 787 |
| C. <i>Appealing a Third Strike</i> | 789 |
| IV. IMPLICATIONS | 792 |
| A. <i>Avoiding the Constitutional Question</i> | 792 |
| B. <i>Maintaining § 1915(g)'s Effectiveness</i> | 794 |
| CONCLUSION | 795 |

INTRODUCTION

Indigent prisoners in the United States have limited access to the courts. Section 1915(g) of Title 28 of the United States Code states that indigent prisoners who have filed three “frivolous” actions in federal court and had them dismissed—thereby accumulating “three strikes”—are statutorily barred from bringing a civil claim in federal court, unless they are in “imminent danger of serious physical injury” or can pay the filing fees out of pocket.¹ While this “three strikes” rule was passed to reduce the number of cases on the federal docket, it has instead created myriad conflicting interpretations in federal courts and placed unnecessary obstacles before indigent prisoners seeking justice.² The law’s effects conflict with the importance of access to the courts, which both Congress and the Supreme Court have consistently championed. This Comment provides a remedy that will ensure that (1) indigent inmates have access to courts, (2) courts limit frivolous litigation, and (3) judges adhere to sound statutory interpretation.

The statutory culprit in this Comment is the Prison Litigation Reform Act (PLRA). The PLRA was passed in 1996 in an effort to decrease the number of filings in federal court and improve the quality of those filings.³ The pertinent provision of the PLRA that this Comment examines is the “three strikes” rule, which sharply reduced indigent inmates’ access to the courts.⁴ The “three strikes” rule is a mandatory prohibition against filing any “litigation *in forma pauperis*”⁵ (without prepayment of fees) if three or more actions or appeals have been dismissed as frivolous, malicious, or for failure to state a claim.⁶ While this may seem like a difficult bar to meet, the vast majority of prisoners file their actions *pro se*,⁷ are not legal professionals, and rely on outdated prison law libraries,⁸ so they often lack the requisite knowledge to avoid filing errors and can accumulate strikes even while trying to bring an otherwise meritorious

¹ 28 U.S.C. § 1915(g).

² See *infra* Part II.

³ Molly Guptill Manning, *Trouble Counting to Three: Circuit Splits and Confusion in Interpreting the Prison Litigation Reform Act’s ‘Three Strikes Rule’*, 28 U.S.C. § 1915(g), 28 CORNELL J.L. & PUB. POL’Y 207, 208 (2018).

⁴ § 1915(g).

⁵ *In Forma Pauperis*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“In the manner of an indigent who is permitted to disregard filing fees and court costs.”).

⁶ Manning, *supra* note 3, at 209.

⁷ *U.S. Courts of Appeals—Judicial Business 2017*, ADMIN. OFF. U.S. CTS., <https://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2017> (“Eighty-three percent of the 14,317 prisoner petitions received were filed *pro se*.”) (last visited Jan. 8, 2021).

⁸ Manning, *supra* note 3, at 209 (stating that most prisoners are “untrained in law and are beholden to resources in a prison law library to craft legal arguments”).

claim.⁹ Further, the rule has no statute of limitations, so a strike is permanent, no matter when it is issued.¹⁰ Once prisoners have accumulated those three strikes, they are not able to file a claim—regardless of its merit—unless they are in imminent danger of serious physical harm or can afford to pay the hundreds of dollars out of pocket.¹¹

When interpreting the “three strikes” rule,¹² federal courts have failed to find consensus on three broad issues. First, courts are split as to what counts as a “dismissal” deserving of a strike.¹³ Second, courts have failed to find a universal definition as to what constitutes “imminent danger.”¹⁴ Finally, courts are split as to whether a prisoner can appeal their third strike *in forma pauperis*.¹⁵ The stakes of interpretation are high. For example, when the rules as to what constitutes a strike are construed liberally, strikes are more likely to be applied, even if the dismissal is not for one of the statute’s enumerated grounds.¹⁶ Or, when courts narrowly interpret the “imminent danger” exception, prisoners’ claims of harm will be dismissed if there is no “nexus” between the alleged injury and the legal claim.¹⁷ Thus, the likelihood that an indigent prisoner will not be able to bring a civil claim can increase enormously—including claims of religious discrimination under the First Amendment and claims of cruel and unusual punishment under the Eighth Amendment—even when the claim is meritorious, solely because of a court’s interpretation of the “three strikes” rule. Even worse, if the inmate is barred from appealing their third strike, they are bound by the district court’s ruling, whether correctly or incorrectly decided.

This Comment contends that there exists a way to properly interpret 28 U.S.C. § 1915(g) that serves the government’s interest in providing efficient judicial services, while also ensuring that indigent inmates are not barred from

⁹ *Id.* at 209–10.

¹⁰ *Id.*

¹¹ *Id.* at 210; see 28 U.S.C. § 1915(g). All medically able inmates must work, but those “inmates earn 12¢ to 40¢ per hour for these work assignments.” *Work Programs*, FED. BUREAU PRISONS, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp (last visited Jan. 8, 2021). Therefore, for a prisoner to pay the \$400 filing fee in federal court, he or she would need to work forty hours a week for twenty-five weeks to eighty-four weeks, depending on the wage. See Ashwin Phatak, *Striking Out: Wrongly Keeping Indigent Prisoners Out of Court*, CONST. ACCOUNTABILITY CTR. (Mar. 12, 2018), <https://www.theusconstitution.org/blog/striking-wrongly-keeping-indigent-prisoners-court/>.

¹² While the PLRA, as a whole, was debated by Congress, this provision in particular was not debated, so there is no legislative history concerning the three strikes rule. Manning, *supra* note 3, at 213–14.

¹³ See *infra* Part III.A.

¹⁴ See *infra* Part III.B.

¹⁵ See *infra* Part III.C.

¹⁶ See *infra* Part III.A.

¹⁷ See *infra* Part III.B.

the courts. Thus, this Comment proposes a three-part solution that the Supreme Court should adopt the next time it has the opportunity to grant certiorari on this issue.¹⁸ First, courts should narrowly interpret what it means to “dismiss” a case, creating clear rules for whether a strike should be awarded. Second, courts should broadly define what it means to be in “imminent danger.” Finally, courts should permit indigent prisoners to appeal their third strike *in forma pauperis*.

Part I examines the passage of the PLRA, its purpose, and its effects, ultimately finding that Congress scapegoated prisoners in an attempt to remedy a problem that Congress itself created. Part II analyzes the Court’s interpretation of the fundamental right to access courts, including when federal courts have directly addressed the constitutionality of the PLRA. Part III then assesses the three questions of interpretation that have plagued federal courts. First, section A surveys how courts have interpreted what it means to dismiss a case and argues for a narrow, text-based interpretation. Second, section B analyzes courts’ definitions of what it means to be in imminent danger of serious physical harm and argues for a broadly construed definition. Finally, section C discusses whether to allow a prisoner to appeal their third strike *in forma pauperis*, arguing that prisoners should be able to do so. Throughout Part III, this Comment argues that a faithful application of the tools of statutory interpretation mandates that courts interpret dismissals narrowly, interpret the imminent danger exception broadly, and allow inmates to appeal their third strike to avoid unnecessarily inhibiting inmates’ access to the courts. Part IV analyzes the implications arising from the proffered solution, finding that a narrow statutory interpretation of § 1915(g) properly strikes the balance between limiting frivolous litigation and ensuring indigent inmates’ court access.

I. PASSAGE OF THE PRISON LITIGATION REFORM ACT

Congress partially restricted indigent prisoners’ access to the federal courts by passing the Prison Litigation Reform Act (PLRA) in 1996.¹⁹ In the 1990s, federal courts were increasingly inundated with filings, and Congress’s answer to stem the flow of civil litigation was to pass the PLRA.²⁰ The statute “drastically altered the corrections litigation environment” because it imposed

¹⁸ The Supreme Court recently addressed “whether a suit dismissed for failure to state a claim counts as a strike when the dismissal was without prejudice.” *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020). The Court ultimately held that the “dismissal of a suit for failure to state a claim counts as a strike, whether or not with prejudice.” *Id.* at 1727.

¹⁹ Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended in scattered sections of 19 U.S.C. and 42 U.S.C.).

²⁰ See Manning, *supra* note 3.

filing fees on all inmates, required inmates to exhaust administrative remedies before filing lawsuits, and limited the attorney fees and damages that inmates could recover.²¹

While inmates bore the brunt of this effort to decrease civil litigation, there was seemingly no single cause for the increase in filings in the 1990s. Statistics on the type of cases filed reveal an amalgamation of factors. For example, the U.S. Department of Justice found, “[T]he number of civil rights cases filed in U.S. district courts increased from 18,922 in 1990 to 43,278 in 1997.”²² Professor Molly Manning, who has written extensively on the PLRA, considered factors from “an increasingly litigious society to the expansion of civil rights law in the early 1990s, including passage of the 1990 Americans with Disabilities Act and the Civil Rights Act of 1991, as well as the amendment of the Rehabilitation Act of 1973.”²³ All told, by 1995, inmates’ “federal civil lawsuits [made up] nineteen percent of the federal civil docket.”²⁴

As a result of the steep increase in inmate litigation, Congress included the PLRA “as a rider to an appropriations bill” passed by the Senate in 1995.²⁵ However, while advocates of the PLRA touted the increase in inmate filings as a reason to pass the PLRA, the increase in prison litigation was not a result of more filings per prisoner. From 1978 to 1996, the filings per 1,000 prisoners hovered around 24.4, peaking in 1981 at 29.3 and reaching a low of 20.0 in 1991.²⁶ Instead, the real catalyst was the inmate population. The prison population has quadrupled since 1980.²⁷ Ironically, it was Congress that artificially increased the prison population—and, thus, prison litigation—through policies, sentencing, and rhetoric, and then forced prisoners to bear the burden of reducing overall litigation.²⁸

²¹ 42 U.S.C. § 1997e; see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559 (2003).

²² TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP’T OF JUST., CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990–2006, at 1 (2008).

²³ Manning, *supra* note 3.

²⁴ Schlanger, *supra* note 21, at 1558.

²⁵ *Id.* at 1559. The PLRA was part of Newt Gingrich’s (R-GA) “Contract with America,” which sought to appeal to more affluent voters by enacting welfare reform, tax cuts, and prison litigation reform, among other items. Peter Feuerherd, *The Midterms That Changed America*, JSTOR DAILY (Sept. 17, 2018), <https://daily.jstor.org/the-midterms-that-changed-america/>.

²⁶ Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 UC IRVINE L. REV. 153, 157 tbl.1 (2015).

²⁷ Schlanger, *supra* note 21, at 1557.

²⁸ See Hon. Lynn Adelman, *How Congress, the U.S. Sentencing Commission and Federal Judges Contribute to Mass Incarceration*, AM. CONST. SOC’Y: EXPERT FORUM (Jan. 23, 2018), <https://www.acslaw.org/expertforum/how-congress-the-u-s-sentencing-commission-and-federal-judges-contribute-to-mass-incarceration/> (citing the Sentencing Reform Act of 1984, the Violent Crime Control Act of 1994, and “law and order” rhetoric as aggravating factors of mass incarceration).

Despite the relative consistency in the filings per 1,000 prisoners, members of Congress like former Senator Orrin Hatch (R-UT) argued that the PLRA, if passed, would be “landmark legislation bring[ing] relief to a civil justice system overburdened by frivolous prisoner lawsuits.”²⁹ Former Senator Bob Dole (R-KS) lampooned outlier inmate litigation from the Senate floor and stated, “These suits can involve such grievances as insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety.”³⁰ State attorneys general followed Congress’s lead and published similar lists of frivolous lawsuits by inmates in their home newspapers to advocate for the PLRA.³¹

Yet, the PLRA implies that non-incarcerated individuals can do what indigent inmates cannot—file frivolous lawsuits. For example, in 2017 alone, non-incarcerated individuals filed frivolous lawsuits including allegations that cheese was too hot,³² a jellybean was too sugary,³³ and a date was too addicted to their cellphone.³⁴ In response to the articles that showcased frivolous lawsuits in their respective states, prisoners’ rights organizations published lists of non-frivolous inmate lawsuits.³⁵ These lawsuits included allegations of prison guards sexually assaulting female prisoners, inmates sleeping on mattresses soaked in sewage, and a prison failing to implement basic tuberculosis detection and prevention procedures.³⁶

It has been over two decades since the PLRA’s passage, and, in that time, the legislation’s effects have been substantial on both filings and relief obtained.³⁷ First, from 1996 to 2012, despite a 36% increase in the total prison

²⁹ 141 CONG. REC. 26,553 (1995).

³⁰ 141 CONG. REC. 27,042 (1995). On the other hand, then-Senator, and now President-elect, Joe Biden lamented the passage of the PLRA, stating, “[We] must not lose sight of the fact that some of these lawsuits have merit—some prisoner’s rights are violated” 141 CONG. REC. 27,044 (1995).

³¹ Schlanger, *supra* note 21, at 1568.

³² John Ingle, *Woman Sues Government over Nacho Cheese Burn*, TIMES REC. NEWS (Sept. 29, 2017, 3:20 PM), <https://www.timesrecordnews.com/story/news/local/2017/09/29/woman-sues-government-nacho-cheese-burn/716417001/>.

³³ Veronica Rocha, *California Woman Sues Jelly Belly Candy Claiming Beans Were Full of Sugar*, L.A. TIMES (May 26, 2017, 4:05 PM), <https://www.latimes.com/local/lanow/la-me-la-california-jelly-beans-lawsuit-20170526-htmlstory.html>.

³⁴ Matthew Diebel, *Texas Man Sues His Date – For Texting During Guardians of the Galaxy Vol. 2*, USA TODAY (May 17, 2017, 1:22 PM), <https://www.usatoday.com/story/news/nation/2017/05/17/texas-man-sues-his-date-texting-during-guardians-galaxy-vol-2/101786452/>.

³⁵ ACLU Nat’l Prison Project, *The Top Ten Non-Frivolous Lawsuits Filed by Prisoners*, ACLU OF OR., <http://jailfire.net/documents/aclu1.pdf> (last visited Jan. 8, 2021).

³⁶ *Id.*

³⁷ Schlanger, *supra* note 26, at 154.

population, there was an almost 41% decrease in total filings by inmates.³⁸ Put differently, the number of filings went from 23.3 per 1,000 prisoners to 10.2 filings per 1,000 prisoners.³⁹ Second, while the bill was supposed to filter out frivolous filings and leave in higher quality lawsuits, it actually made inmate civil rights cases both harder to bring and harder to win.⁴⁰ In 1996, prisoners won 12.7% of their civil rights cases, whereas in 2012, prisoners won only 11.1% of their civil rights cases.⁴¹ In contrast, non-incarcerated civil rights plaintiffs had a 48.4% success rate in 2012.⁴² Incarcerated inmates not only won with less frequency, but they also lost quicker—in 2011, the median prison civil rights case ended in 134 days, whereas the median non-incarcerated plaintiff's civil rights case ended in 265 days.⁴³

The PLRA branded inmates as “unduly litigious, making federal cases out of the most trivial mishaps,” which has led meritorious cases to be drowned out by fear of the frivolous.⁴⁴ The results of the PLRA have had a cumulative effect that contrasts with the Supreme Court's pronouncement that prisoners have a fundamental right to access the courts.⁴⁵

II. THE FUNDAMENTAL RIGHT TO ACCESS THE COURTS

An indigent party's right to access the courts is deeply rooted in England's legal history,⁴⁶ and the Supreme Court has deemed it a fundamental right for prisoners.⁴⁷ In the landmark case *Marbury v. Madison*, Chief Justice John Marshall wrote: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”⁴⁸ While

³⁸ *Id.* at 157 tbl.1.

³⁹ *Id.*

⁴⁰ *Id.* at 162.

⁴¹ *Id.* at 164 tbl.3.

⁴² *Id.* at 165 tbl.4.

⁴³ *Id.* at 166 tbl.5. As a potential explanation for such a disparity, 94.9% of prisoner-plaintiffs in civil rights cases were pro se while only 34.6% of the total plaintiffs in civil rights cases were pro se. *Id.* at 167 tbl.6.

⁴⁴ Schlanger, *supra* note 21, at 1567.

⁴⁵ Ironically, it is jail administrators who often reap the benefits of prison litigation, because court-ordered reform serves the administrator's interests by “increasing their budgets, controlling their inmate populations, and encouraging the professionalization of their workforces and the bureaucratization of their organizations.” Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 563 (2006).

⁴⁶ See John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 361–62 (1923). See generally Ben. C. Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966) (discussing the history surrounding the indigent civil litigant).

⁴⁷ See *Lewis v. Casey*, 518 U.S. 343, 346 (1996) (citing *Bounds v. Smith*, 430 U.S. 817, 828 (1977)).

⁴⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

some states found that they inherited *in forma pauperis* from the English courts,⁴⁹ it was not until 1892 that Congress enacted a law that recognized an individual’s right to access federal courts, regardless of their ability to pay.⁵⁰ The Supreme Court agreed and stated, “[I]t is our duty to assure to the greatest degree possible . . . equal treatment for every litigant before the bar.”⁵¹ To ensure that access, the Court decided that unless the action brought by an indigent plaintiff was “so frivolous that the appeal would be dismissed in the case of a nonindigent litigant,” the Court must allow the action to proceed *in forma pauperis*.⁵² That right, however, is not without its limits, as the “three strikes” provision reveals.

The Court broached the topic of limiting how indigent parties may access the courts in *Christopher v. Harbury*.⁵³ There, the Court recognized that in adjudicating indigent plaintiffs’ claims of denial of access, “the object [of litigation] is an order requiring waiver of a fee to open the courthouse door.”⁵⁴ Yet, the Court stated that the right to access the courts is contingent on an underlying injury.⁵⁵ Therefore, laws can require that the litigant “identify a ‘nonfrivolous,’ ‘arguable’ underlying claim.”⁵⁶ This leaves the courts and legislatures with the ability to establish preconditions to potential claims, namely that claims must not be frivolous to be heard in court.

Regarding inmates and the “three strikes” statute, the Supreme Court has not struck down 28 U.S.C. § 1915(g) as unconstitutional on its face after hearing multiple cases either directly or tangentially concerning the provision.⁵⁷

⁴⁹ *Martin v. Superior Court*, 168 P. 135, 138 (Cal. 1918) (holding that the common law of England, which allows one to sue *in forma pauperis*, was controlling on California law); *Willis v. Willis*, 20 Pa. D. 720, 720 (Ct. C.P. Erie Cnty. 1911) (“The ancient English [*in forma pauperis*] statute to that effect has been held to be still in force here.”); *cf. Spalding v. Bainbridge*, 12 R.I. 244, 244 (1879) (holding that the dismissal of a case because an individual cannot pay “would practically amount to a denial of justice and would be inconsistent with the Constitution”).

⁵⁰ Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 *FORDHAM L. REV.* 413, 413 (1985) (citation omitted).

⁵¹ *Coppedge v. United States*, 369 U.S. 438, 446–47 (1962).

⁵² *Id.* at 447 (quoting *Ellis v. United States*, 356 U.S. 674, 675 (1958)). Furthermore, the Court placed the burden of proof to show frivolity on the government. *Id.* at 447–48. Outside of § 1915(g), the Court defined frivolous as a claim that “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). As to the meaning of “malicious” or “fails to state a claim,” neither Congress nor the Supreme Court has defined it, so those two remain ambiguous. *See Manning, supra* note 3, at 217.

⁵³ *See Christopher v. Harbury*, 536 U.S. 403, 413 (2002).

⁵⁴ *Id.*

⁵⁵ *Id.* at 415.

⁵⁶ *Id.* As discussed later, the Court implicitly upheld the Prison Litigation Reform Act in *Christopher* and *Lewis v. Casey*. *See supra* note 78 and accompanying text.

⁵⁷ *See, e.g., Jones v. Bock*, 549 U.S. 199, 223–24 (2007) (holding that an inmate’s compliance with the PLRA’s exhaustion requirement as to some claims, but not all claims, does not warrant dismissal of entire action); *Coleman v. Tollefson*, 135 S. Ct. 1759, 1765 (2015) (holding that the dismissal of a prisoner’s prior suit

However, the Court's decisions concerning the fundamental right to access the courts must still be considered in the interpretation of the statute to ensure that it does not become too cumbersome to inmates with meritorious claims. Therefore, this Part begins with a discussion of prisoners' rights, particularly their fundamental right to access the courts. Then, this Part analyzes challenges to the constitutionality of § 1915(g), while also concluding that the statute must be interpreted with an understanding of the fundamental right to access the courts to avoid future challenges.

A. *An Inmate's Fundamental Right to Access the Courts*

Prisoners have not always had rights recognized by courts. Contrarily, prisoners used to have no rights that the government was bound to protect. In *Ruffin v. Commonwealth*, one of the earliest court cases involving prisoners' rights, the Supreme Court of Appeals of Virginia made a now-draconian pronouncement on the rights of prisoners: "[D]uring his term of service in the penitentiary, [a prisoner] is in a state of penal servitude to the State. He has . . . not only forfeited his liberty, but all his personal rights He is for the time being the slave of the State."⁵⁸ Thus, according to the court, constitutional rights did not apply to inmates because "[t]he bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead."⁵⁹

However, seventy years later, the Supreme Court charted a new course. In *Ex parte Hull*, an inmate attempted to file a writ of habeas corpus, but the prison warden prevented him from doing so.⁶⁰ The Court stepped in—for the first time on behalf of an inmate—and declared that only a federal court can determine "whether a petition for writ of habeas corpus . . . is properly drawn[.]"⁶¹ In *Cooper v. Pate*, the Supreme Court once again stepped in to protect the rights of prisoners, then marking the first time the Court authorized a prisoner to seek relief for prison conditions in federal courts.⁶² In *Cooper*, an inmate sued for relief under the Civil Rights Act of 1871 after the inmate "was placed in solitary confinement because he insisted upon obtaining a Muslim bible."⁶³ The Supreme Court reversed the lower court's dismissal, writing in only a single

counted as a strike, despite an appeal therefrom).

⁵⁸ *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

⁵⁹ *Id.*

⁶⁰ *Ex parte Hull*, 312 U.S. 546, 548–49 (1941).

⁶¹ *Id.*

⁶² *See Cooper v. Pate*, 378 U.S. 546, 546 (1964).

⁶³ *Cooper v. Pate*, 324 F.2d 165, 166 (7th Cir. 1963).

paragraph that the inmate had “state[d] a cause of action and it was error to dismiss it.”⁶⁴

Now, the Court routinely holds that inmates have a fundamental right to access the courts. In the past, however, it did so without identifying the source of the right.⁶⁵ For instance, in three of the earliest decisions where the Court broadly applied the right of prisoners to access the courts, the Court did not tie that freestanding right to a specific constitutional provision.⁶⁶ In 1974, the Court expressly tied the right to access the courts to the Due Process Clause of the U.S. Constitution, declaring in *Procunier v. Martinez*:

The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.⁶⁷

Thus, after holding that the Due Process Clause controlled prisoners’ access to the courts, the next step for courts was to determine what limits on that right were permissible.

In *Bounds v. Smith*, the Court recognized that it is “established beyond doubt that prisoners have a constitutional right of access to the courts.”⁶⁸ The majority found, “[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”⁶⁹ About twenty years later, *Lewis v. Casey* abrogated *Bounds* and determined that *Bounds* “did not create an abstract, freestanding right to a law library or legal assistance” or depart from the “actual injury requirement.”⁷⁰ In fact, the Court could not depart from the “actual injury

⁶⁴ *Cooper*, 378 U.S. at 546.

⁶⁵ See Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 562 (1999).

⁶⁶ See *Ex parte Hull*, 312 U.S. 546; *Smith v. Bennett*, 365 U.S. 708 (1961); *Johnson v. Avery*, 393 U.S. 483 (1969). In *Smith*, the Court did utilize the Equal Protection Clause, but it was only applicable because the action was a writ of habeas corpus. See 365 U.S. at 708–09.

⁶⁷ *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (citing *Ex parte Hull*, 312 U.S. 546).

⁶⁸ *Bounds v. Smith*, 430 U.S. 817, 821 (1977), abrogated by *Lewis v. Casey*, 518 U.S. 343 (1996).

⁶⁹ *Id.* at 828.

⁷⁰ *Lewis*, 518 U.S. at 351; see also *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (noting that the right to access the courts is contingent upon an underlying injury).

requirement” because injury is a constitutional prerequisite to gaining access to the courts.⁷¹ Therefore, courts must only provide “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.”⁷² Put another way, an inmate must have an actual injury to successfully claim a violation of the fundamental right to access the courts.

However, the Court in *Lewis* reaffirmed precedent—like *Ex parte Hull* and *Procunier*—in which the Court found that state prison officials failed to ensure that an inmate’s access to the courts is adequate, effective, and meaningful.⁷³ In the time between *Ex parte Hull* (1941) and *Lewis* (1996), the Court ruled in favor of inmates when state prison officials interfered with inmates’ attempts to help one another prepare legal documents,⁷⁴ forced inmates to pay docket fees⁷⁵ or transcript fees,⁷⁶ and denied appellate counsel to inmates.⁷⁷ Despite the Court’s history of actively ensuring access to the courts for inmates, the standard set forth in *Lewis* essentially ensured the legality of § 1915(g) by holding that the right to access the courts does not kick in “until some inmate [can] demonstrate that a nonfrivolous legal claim ha[s] been frustrated or [is] being impeded.”⁷⁸

B. Challenges to the Constitutionality of 28 U.S.C. § 1915(g)

Even after *Lewis*, inmates brought constitutional challenges against § 1915(g), alleging that it violated their equal protection rights⁷⁹ or First Amendment rights.⁸⁰ On equal protection grounds, only one district court struck down § 1915(g),⁸¹ but it was quickly overturned.⁸² By the time the U.S. District Court for the Eastern District of Arkansas heard a challenge in *Ayers v. Norris*, five of the U.S. Circuit Courts had already rejected equal protection claims challenging § 1915(g).⁸³ In all of these cases, the courts applied rational basis

⁷¹ *Lewis*, 518 U.S. at 351.

⁷² *Id.*

⁷³ *Id.* at 350.

⁷⁴ *Johnson v. Avery*, 393 U.S. 483, 489–90 (1969).

⁷⁵ *Burns v. Ohio*, 360 U.S. 252, 258 (1959).

⁷⁶ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

⁷⁷ *Douglas v. California*, 372 U.S. 353, 357–58 (1963) (“There is lacking the equality demanded by the Fourteenth Amendment where the rich man . . . enjoys the benefit of counsel[] . . . while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.”).

⁷⁸ *Lewis v. Casey*, 518 U.S. 343, 353 (1996) (footnote omitted).

⁷⁹ See, e.g., *Ayers v. Norris*, 43 F. Supp. 2d 1039, 1044 (E.D. Ark. 1999), *abrogated by Higgins v. Carpenter*, 258 F.3d 797 (8th Cir. 2001).

⁸⁰ See, e.g., *Rivera v. Allin*, 144 F.3d 719, 723 (11th Cir. 1998), *abrogated by Jones v. Bock*, 549 U.S. 199 (2007).

⁸¹ See *Ayers*, 43 F. Supp. 2d at 1501.

⁸² *Higgins*, 258 F.3d at 798.

⁸³ See *Rodriguez v. Cook*, 169 F.3d 1176, 1178–81 (9th Cir. 1999); *White v. Colorado*, 157 F.3d 1226,

review to determine that the law was rationally related to serve a governmental interest.⁸⁴ In *Ayers*, however, the district court held that the “three strikes” rule impinged the fundamental right to access the courts based on how *Bounds* defined the injury prerequisite to an access-to-courts claim.⁸⁵ Thus, on appeal, the Eighth Circuit held that the statute “does not impinge this fundamental right because it does not prohibit indigent inmates from having a ‘reasonably adequate opportunity’ to pursue valid lawsuits.”⁸⁶ Mirroring its sister circuits,⁸⁷ the court reasoned that because § 1915(g) only applied to civil cases and limited dismissals only to frivolous, malicious, or meritless lawsuits, it did not contravene the fundamental right to access the courts.⁸⁸ However, since *Higgins*, some circuit courts have applied the “three strikes” rule so broadly that it is beginning to contravene inmates’ fundamental right to access the courts.⁸⁹

On First Amendment grounds, courts have followed a similar line of reasoning to dispense with inmates’ challenges.⁹⁰ The Second Circuit reiterated that the right to access the courts is not unlimited and noted that “the Supreme Court recognized a judicial duty to deny *in forma pauperis* status to individuals whom the court, in its discretion, determined had abused the system.”⁹¹ However, what the Second Circuit failed to note was that § 1915(g) does not permit judicial discretion because the statutory bar to granting *in forma pauperis* status is a mandatory one.⁹²

The Tenth Circuit similarly disregarded the mandatory nature of the statute and decided that § 1915(g) does not prohibit bringing an action altogether; instead, it only denies the grant of *in forma pauperis* status.⁹³ Thus, the court concluded that the law does not trigger the fundamental right to access the courts. While the Tenth Circuit’s conclusion that § 1915(g) is not a per se bar for all prisoners is correct, the court effectively ignores the lived reality of most prisoners, who either do not have the means to pay the filing fee when they enter

1232–35 (10th Cir. 1998); *Wilson v. Sanford*, 148 F.3d 596, 604 (6th Cir. 1998); *Rivera*, 144 F.3d at 727–28; *Carson v. Johnson*, 112 F.3d 818, 821–23 (5th Cir. 1997).

⁸⁴ *Ayers*, 43 F. Supp. 2d at 1045.

⁸⁵ *Id.* at 1048.

⁸⁶ *Higgins*, 258 F.3d at 799 (quoting *Lewis v. Casey*, 518 U.S. 343, 356 (1996)).

⁸⁷ See *supra* note 78 and accompanying text.

⁸⁸ *Higgins*, 258 F.3d at 800.

⁸⁹ See *infra* Part IV.

⁹⁰ See *White v. Colorado*, 157 F.3d 1226, 1234 (10th Cir. 1998); *Rivera v. Allin*, 144 F.3d 719, 724 (11th Cir. 1998); *Carolina v. Rubino*, 644 F. App’x 68, 71–72 (2d Cir. 2016).

⁹¹ *Carolina*, 644 F. App’x at 71 (citing *In re Sindram*, 498 U.S. 177, 180 (1991)).

⁹² 28 U.S.C. § 1915(g) (“In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions . . .”) (emphasis added).

⁹³ *White*, 157 F.3d at 1233.

prison,⁹⁴ or who cannot accrue the necessary funds even when working full time.⁹⁵ Therefore, courts are disregarding the experiences of the vast majority of prisoners who have been assigned an absolute bar to litigation upon receiving their third strike.⁹⁶ Most of these suits challenging the constitutionality of the statute were filed shortly after the passage of the PLRA, when the effects of the law had not been borne out fully⁹⁷ and the courts were not yet split in their interpretations.⁹⁸ Now, as the effects of these decisions have weighed heavily on prisoners and the courts are in a quagmire of interpreting the provision,⁹⁹ it is time to unify the readings by doing the following: (1) focusing on sound statutory interpretation, and (2) adhering to an inmate's fundamental right to access federal courts to ensure that meritorious claims can be heard. The following Part chronicles the quagmire and recommends a way forward.

III. CIRCUIT SPLITS AND PROPOSALS

Since the passage of the PLRA, three distinct splits in § 1915(g)'s jurisprudence have developed in the circuit courts.¹⁰⁰ All three are addressed in this Part. These splits reveal a need for the Supreme Court to create a uniform approach, which is proposed here. First, courts disagree on what counts as a strike, in particular if dismissals are due to immunity,¹⁰¹ failure to exhaust administrative remedies,¹⁰² or partial dismissals.¹⁰³ Second, courts disagree on

⁹⁴ See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> ("We found that, in 2014 dollars, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages.") (emphasis omitted).

⁹⁵ See Phatak, *supra* note 11.

⁹⁶ See Schlanger, *supra* note 21, at 1628–29.

⁹⁷ See Schlanger, *supra* note 26, at 157–65.

⁹⁸ See *infra* Part III.

⁹⁹ See Schlanger, *supra* note 21, at 1627; Manning, *supra* note 3, at 210–11.

¹⁰⁰ For an extensive discussion of these splits, see Manning, *supra* note 3.

¹⁰¹ Compare *Collazo v. Pagano*, 656 F.3d 131, 134 (2d Cir. 2011) (holding that a dismissal based on absolute prosecutorial immunity is a strike), with *Castillo-Alvarez v. Krukow*, 768 F.3d 1219, 1220 (8th Cir. 2014) (holding that a dismissal based on prosecutorial immunity was not a strike under § 1915(g)).

¹⁰² Compare *Snider v. Melindez*, 199 F.3d 108, 112 (2d Cir. 1999) (arguing that failure to state a claim does not include failure to exhaust administrative remedies), with *Thompson v. Drug Enf't Admin.*, 492 F.3d 428, 438 (D.C. Cir. 2007) ("When a court dismisses an unexhausted complaint under Rule 12(b)(6), thus concluding that the complaint fails to state a claim, section 1915(g)'s plain text compels us to count that case as a strike.").

¹⁰³ Compare *Thomas v. Parker*, 672 F.3d 1182, 1184 (10th Cir. 2012) (affirming a district court's decision that a strike accrued when two counts were dismissed for failure to state a claim and the remaining sixteen counts were dismissed for failure to exhaust), with *Turley v. Gaetz*, 625 F.3d 1005, 1013 (7th Cir. 2010) ("[D]ismissal of an action, in part for failure to exhaust and in part as frivolous, malicious, or failure to state a claim does not constitute a strike under § 1915(g).").

what it means to be in imminent danger.¹⁰⁴ Finally, courts disagree on whether inmates can appeal their third strike *in forma pauperis*, or must pay in full or drop the case altogether.¹⁰⁵ Throughout, this Comment argues for a text-based statutory interpretation, which would understand the statute to be consistent with the fundamental right to access the courts. Ultimately, this interpretation would lead to more exacting justice by giving prisoners greater access to the courts, and it would likely reduce the caseload for federal courts because a consistent interpretation would lead to less confusion and more consistent results.

Before considering these circuit splits, one must understand the purpose of the PLRA. The PLRA was passed to limit frivolous lawsuits,¹⁰⁶ thus allowing meritorious claims to be heard with greater regularity.¹⁰⁷ The Supreme Court found that by passing the PLRA, Congress decided that the country needed “fewer and better prisoner suits.”¹⁰⁸ In *Byrd v. Shannon*, the Third Circuit added that the driving purpose of the PLRA was “preserving resources of both the courts and the defendants in prisoner litigation.”¹⁰⁹ Specifically, the court found, “This purpose is served by both (1) identifying and reducing frivolous actions and appeals by prisoners and (2) reducing litigation on whether a particular dismissal constitutes a strike.”¹¹⁰

Consider the following hypothetical, where one federal prisoner attempts to file three seemingly meritorious civil rights lawsuits against prison officials:¹¹¹

¹⁰⁴ See *infra* Part III.

¹⁰⁵ Compare *Parker v. Montgomery Cnty. Corr. Facility/Bus. Off. Manager*, 870 F.3d 144, 152–53 (3d Cir. 2017) (holding that the PLRA prevents inmates from appealing their third strike *in forma pauperis*), with *Taylor v. Grubbs*, 930 F.3d 611, 620 (4th Cir. 2019) (joining the Ninth and Tenth Circuits in affirming that a district court’s dismissal, when appealed, does not qualify as a prior dismissal).

¹⁰⁶ See *Greyer v. Ill. Dep’t of Corr.*, 933 F.3d 871, 874 (7th Cir. 2019); *Shepherd v. Annucci*, 921 F.3d 89, 95 (2d Cir. 2019) (quoting *Nicholas v. Tucker*, 114 F.3d 17, 19 (2d Cir. 1997)).

¹⁰⁷ See *Aref v. Lynch*, 833 F.3d 242, 265 (D.C. Cir. 2016) (“[M]embers of Congress also made it clear that the PLRA was not meant to bar serious, potentially meritorious claims.”) (citation omitted); *Chavez v. Robinson*, 817 F.3d 1162, 1168 (9th Cir. 2016) (“The PLRA was designed to reduce the volume of prisoner suits by ‘filter[ing] out the bad claims and facilitat[ing] consideration of the good.’” (quoting *Jones v. Bock*, 549 U.S. 199, 214 (2007))).

¹⁰⁸ *Jones*, 549 U.S. at 203; see also *Lomax v. Ortiz-Marquez*, 140 S. Ct 1721, 1723 (2020) (stating that the PLRA was passed “[t]o help staunch a ‘flood of nonmeritorious’ prisoner litigation” (quoting *Jones*, 549 U.S. at 203)).

¹⁰⁹ *Byrd v. Shannon*, 715 F.3d 117, 125 (3d Cir. 2013) (citing *Thompson v. Drug Enf’t Admin.*, 492 F.3d 428, 438 (D.C. Cir. 2007)).

¹¹⁰ *Id.* Given trends in inmate litigation, it should not surprise the reader that the Third Circuit did not even mention the importance of inmates receiving justice for their mistreatment in prison or the maladministration of the facilities in which they were housed; rather, the court viewed efficiency as the primary concern. See *Lomax*, 140 S. Ct at 1726–27. In my view, however, efficiency cannot eclipse justice.

¹¹¹ The hypothetical is assembled from cases heard in various federal courts.

The inmate is serving a life sentence in prison. While the inmate works full-time at fifteen cents an hour, they do not have the money to pay the filing fees in federal court. The inmate believes they have meritorious civil rights claims against prison officials, but the following sequence of events might mean that the inmate has three strikes, barring the inmate from bringing another action *in forma pauperis*.

First, the inmate was placed in a filthy cell—the floor, window, faucet, and walls were all covered in feces. For four days, the inmate was ignored, and they refused to eat or drink for fear of fecal matter contamination. The inmate filed suit in federal court alleging an Eighth Amendment violation on the basis of his cell conditions. Ultimately, the court dismissed the claim because the prison officials had qualified immunity.¹¹² The second claim stems from prison officials preventing the inmate from attending Muslim religious services.¹¹³ Trying to avoid dismissal and a strike, the inmate sought to exhaust the prison system's administrative remedies. While the prison grievance system states that the inmate would receive a judgment within thirty days, after forty-four days, there was still no answer. Consequently, the inmate filed suit in federal court alleging a First Amendment free exercise claim. Despite the delay, the court dismissed the claim for failure to exhaust administrative remedies because inmates were required to appeal rulings to the prison, and the prison's delay did not mean the administrative remedies were exhausted.¹¹⁴ Finally, the inmate filed suit in federal court against prison officials, alleging that they were both improperly administering their medication and not giving them enough blankets. Regarding their medication, the plaintiff stated that their HIV medication must be administered every twelve hours, but the prison officials refused to do so. Instead, the officials administered the medication anytime in a window of nine to sixteen hours between doses. The inmate stated that the uncertain intervals of medication led his white blood cell, red blood cell, and cholesterol counts to change drastically, thus limiting the effectiveness of the medication and risking progression from HIV to AIDS.¹¹⁵ The court dismissed the suit but did so using different procedural mechanisms. Regarding their medication, the court dismissed their claim because the prisoner had failed once again to exhaust all their administrative remedies in bypassing the prison's internal investigation system.

¹¹² These facts and judgment come from *Taylor v. Stevens*, 946 F.3d 211, 218–19, 227 (5th Cir. 2019).

¹¹³ These facts come from *Williams v. Handmen*, No. 11 Civ. 6918 (LBS), 2013 WL 34702, at *1 (S.D.N.Y. Jan. 29, 2013).

¹¹⁴ These facts come from *Jamison v. Franko*, No. 12 C 0242, 2013 WL 5166626, at *2–3 (N.D. Ill. Sept. 13, 2013).

¹¹⁵ These facts come from *Reberger v. Koehn*, No. 3:15-cv-00551-MMD-CBC, 2019 WL 2114151, at *1 (D. Nev. Feb. 8, 2019).

Regarding the blankets, the courts dismissed their claim for failure to state a claim. Thus, it was a mixed dismissal. Now, the prisoner seeks to appeal their third dismissal *in forma pauperis*.

The above hypothetical, which uses facts derived from actual cases, serves as an aid to illustrate how the fundamental right to access the courts is essential to inmates’ health and safety, and it is being violated by unnecessarily broad interpretations of the statute. As this Comment progresses through each major circuit split, this hypothetical is revisited to illustrate the effects that the disparate interpretations have on prison litigation outcomes.

A. *Dismissing an Action*

Section 1915(g) requires that an inmate receive a strike if the prisoner’s suit is “frivolous, malicious, or fails to state a claim upon which relief may be granted.”¹¹⁶ The difficulty in making this determination comes from the fact that the statute does not define any of the three bases upon which a strike should be ordered. Making matters more complicated, the language in § 1915(g) was not debated in Congress.¹¹⁷ Nor has the Supreme Court clarified what each of the three bases for dismissal mean.¹¹⁸ And, since courts are not required to label a dismissal as a strike, there are a number of circuit splits as to what types of dismissals count as strikes. Three are discussed in this section: (1) immunity dismissals, (2) failure to exhaust administrative remedies dismissals, and (3) partial dismissals.

1. *Immunity*

While courts are not required to specify the provision under which a claim is being dismissed, they will sometimes provide the specific provision anyways.¹¹⁹ This practice is often determinative as to whether the dismissal counts as a strike; however, circuit courts are split as to whether a dismissal based on immunity counts as a strike. There are generally three approaches that courts have taken: (1) a literal interpretation,¹²⁰ (2) a broad interpretation,¹²¹ or (3) a hybrid of the two.¹²² All three interpretations are discussed below, but this

¹¹⁶ 28 U.S.C. § 1915(g).

¹¹⁷ Manning, *supra* note 3, at 211.

¹¹⁸ *Id.* at 216. In a decision predating the PLRA, the Court defined a frivolous claim as one that “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (citations omitted).

¹¹⁹ Manning, *supra* note 3, at 218–19.

¹²⁰ *See Castillo-Alvarez v. Krukow*, 768 F.3d 1219, 1220 (8th Cir. 2014).

¹²¹ *See Collazo v. Pagano*, 656 F.3d 131, 134 (2d Cir. 2011).

¹²² *See Ball v. Famiglio*, 726 F.3d 448, 463 (3d Cir. 2013), *partially abrogated on other grounds by*

Comment argues in favor of the literal interpretation, which would require a less-searching inquiry by appellate judges, and thus would save judicial resources and result in better outcomes for prisoner-plaintiffs.

The literal approach to an immunity dismissal provides that because immunity, whether qualified or absolute, is not mentioned as a strike in the statute,¹²³ it should not be considered a strike. The Eighth Circuit faithfully endorses this interpretation, stating that for a strike to be applied to an indigent inmate it must be one of the enumerated reasons in the statute—it must be frivolous, malicious, or fail to state a claim.¹²⁴ Most recently, the Ninth Circuit explained the rationale underlying the Eighth Circuit’s approach.¹²⁵ In *Harris*, the Ninth Circuit stated, “The language and structure of the PLRA make clear that immunity-based dismissals generally do not fall within § 1915(g).”¹²⁶ As to the language of the statute, the court reasoned that while § 1915(e)(2) states that a court can dismiss for immunity purposes, the strike provision in § 1915(g) specifically omits immunity as grounds for a strike.¹²⁷ The court held that immunity dismissals do not count as strikes because § 1915A(b), a screening procedure,¹²⁸ has the same language as § 1915(e)(2) but is excluded in § 1915(g); thus, Congress intended for immunity to be found in the screening process.¹²⁹ Therefore, allowing an immunity dismissal to count as a strike under § 1915(g) is not only outside of the statute’s text, but also unnecessarily burdens inmates filing meritorious claims.

The broad approach to an immunity dismissal provides that while immunity is not explicitly included as a strike under the statute, a dismissal on such grounds necessarily means that the case is frivolous on its face.¹³⁰ In making the determination that immunity is included as a strike under § 1915(g) despite its absence from the statute, the Second Circuit found that filing suit against someone who is immune to recovery is inherently frivolous.¹³¹ The Second Circuit has ruled on this question twice. First, in *Mills v. Fischer*, after an indigent inmate attempted to file suit against his trial judge, the Second Circuit counted it as a strike and held, “The [*in forma pauperis*] statute does not

Coleman v. Tollefson, 135 S. Ct. 1759, 1765 (2015).

¹²³ See 28 U.S.C. § 1915(g).

¹²⁴ *Castillo-Alvarez*, 768 F.3d at 1220.

¹²⁵ *Harris v. Harris*, 935 F.3d 670, 675–76 (9th Cir. 2019).

¹²⁶ *Id.* at 675.

¹²⁷ *Id.*

¹²⁸ See 28 U.S.C. § 1915A.

¹²⁹ *Harris*, 935 F.3d at 675–76.

¹³⁰ See *Collazo v. Pagano*, 656 F.3d 131, 134 (2d Cir. 2011).

¹³¹ *Mills v. Fischer*, 645 F.3d 176, 177 (2d Cir. 2011).

explicitly categorize as frivolous a claim dismissed by reason of judicial immunity, but we will: Any claim dismissed on the ground[s] of . . . immunity is ‘frivolous’ for purposes of 28 U.S.C. § 1915(g).”¹³² Without clarifying its reasoning for reading immunity dismissals into § 1915(g), the Second Circuit affirmed *Mills*, writing that it is equally frivolous to file a “claim against a prosecutor for ‘initiating a prosecution [or for] presenting the State’s case.’”¹³³

The Tenth Circuit followed suit, stating that its process to determine whether there is a strike “is not formalistic or mechanical; rather, we must consider the nature of the dismissal and, if the district court did not make it clear, whether the dismissal fits within the language of § 1915(g).”¹³⁴ Following that determination, the court held that a trial court’s dismissal based on qualified immunity “was subsumed in frivolousness or appellant’s failure to state a claim,” and therefore was a strike under § 1915(g).¹³⁵ This approach requires the appellate court to make a more detailed inquiry into the nature of the trial court’s dismissal, which is generally not in the purview of federal appellate courts.¹³⁶

The final approach to determine whether an immunity dismissal counts as a strike is a hybrid approach, whereby an immunity dismissal can count as a strike when it is labeled as such.¹³⁷ Specifically, the court must “explicitly and correctly conclude[] that the complaint reveals the immunity defense on its face . . . or expressly state[] that the ground for the dismissal is frivolousness.”¹³⁸ The Third Circuit takes this approach and even recognizes that “[t]he text of the PLRA . . . treats dismissal for frivolousness as separate and distinct from dismissal on grounds of immunity,” and that dismissal on grounds for immunity is not an enumerated strike under § 1915(g).¹³⁹ As such, the court recognized that dismissal based on immunity is not “a *per se* dismissal for frivolousness for purposes of the PLRA’s three strikes rule.”¹⁴⁰ However, because the Third

¹³² *Id.* (footnote omitted).

¹³³ *See Collazo*, 656 F.3d at 134 (quoting *Burns v. Reed*, 500 U.S. 478, 486 (1991)).

¹³⁴ *Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1178 (10th Cir. 2011), *abrogated on other grounds as recognized by Carr v. Zwally*, 760 F. App’x 550, 558 (10th Cir. 2019).

¹³⁵ *Id.*

¹³⁶ *See Williams v. Paramo*, 775 F.3d 1182, 1189–90 (9th Cir. 2015) (“[T]he limited office of § 1915(g) in determining whether a prisoner can proceed in forma pauperis counsels against an overly detailed inquiry into the allegations . . . when an inquiry must be conducted by a court of appeals, which, unlike a district court, is ill-equipped to engage in satellite litigation and adjudicate disputed factual matters.” (first citing *Andrews v. Cervantes*, 493 F.3d 1047 (9th Cir. 2007); then citing *Von Kennel Gaudin v. Remis*, 282 F.3d 1178, 1183 (9th Cir. 2002))).

¹³⁷ *See Ball v. Famiglio*, 726 F.3d 448, 463 (3d Cir. 2013).

¹³⁸ *Id.*

¹³⁹ *Id.* at 461–62.

¹⁴⁰ *Id.* at 462.

Circuit counts a suit dismissed under Federal Rule of Civil Procedure 12(b)(6) as a strike,¹⁴¹ the court concluded that a “dismissal based on immunity of the defendant, whether absolute or qualified,” will be counted as a strike if explicitly stated in a Rule 12(b)(6) dismissal.¹⁴²

Returning to the hypothetical, the inmate tried to file his claim against the prison guards who left him in a feces-covered cell for four days, which prohibited the inmate from consuming water and food. Applying a broad interpretation to the hypothetical would mean that the prisoner has a permanent strike, as circuit courts that utilize this interpretation find that all immunity dismissals are inherently frivolous.¹⁴³ A hybrid interpretation would not necessarily result in a strike, but a court would have to take the extra step of labeling the dismissal as frivolous for the prisoner to incur a strike, which could require greater time and litigation on the court’s part. However, applying the narrow interpretation to the hypothetical would not result in a strike for the inmate because immunity is not an enumerated ground for a strike under § 1915(g).¹⁴⁴

As such, the best approach to determine whether an immunity dismissal counts as a strike is the literal interpretation. This approach remains faithful to sound statutory analysis, considers the inmate’s right to access the court, and adheres to the driving purpose of the statute.

2. *Failure to Exhaust Administrative Remedies*

One of the provisions in the PLRA designed to reduce prison litigation is the requirement that prisoners exhaust administrative remedies before they bring a lawsuit in federal court.¹⁴⁵ Ordinarily, a dismissal for failure to exhaust

¹⁴¹ *Byrd v. Shannon*, 715 F.3d 117, 124 (3d Cir. 2013).

¹⁴² *Ball*, 726 F.3d at 463.

¹⁴³ Of course, this determination would also depend on how the court interpreted the “imminent danger” exception, which is addressed later in the Comment. *See infra* Part III.B.

¹⁴⁴ This Comment does not analyze the doctrine of qualified immunity, though this author, federal judges, academics, and the public believe that the current regime cannot stand. *See* *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at *25–26 (S.D. Miss. Aug. 4, 2020) (urging the Supreme Court to throw qualified immunity into “the dustbin of history”); Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2109–2113 (2018) (advocating two separate proposals that would make qualified immunity both more accountable and formalistic); *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020), https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/?utm_source=AdaptiveMailer&utm_medium=email&utm_campaign=20-07-09%20Policing%20policies%20GEN%20DISTRO&org=982&lvl=100&ite=6605&lea=1459151&ctr=0&par=1&trk= (finding that 66% of Americans believe civilians need to have the power to sue police officers).

¹⁴⁵ Schlanger, *supra* note 21.

administrative remedies is without prejudice, and the lawsuit can be re-filed upon exhaustion.¹⁴⁶ The circuit split here is whether a dismissal fashioned as a failure to exhaust administrative remedies counts as a strike under § 1915(g).

There are two lines of interpretation that courts use to determine whether a failure to exhaust counts as a strike: (1) a narrower interpretation, and (2) a broader, more searching interpretation. The narrower interpretation holds that because a failure to exhaust is not explicitly mentioned in § 1915(g),¹⁴⁷ it cannot be counted as a strike.¹⁴⁸ The broader, more searching interpretation holds that the court must make a post-hoc determination as to whether the failure to exhaust is akin to one of the three enumerated grounds of dismissal under § 1915(g).¹⁴⁹ The prudent approach is the narrower interpretation because it (1) adopts the plain meaning of the statute, (2) reduces the work of the appellate courts, and (3) ensures that courts are not unnecessarily closed off to indigent prisoners.

The narrower interpretation uses a textualist approach and is illustrated by the Second Circuit’s decision in *Snider v. Melindez*, which found that a strike should not be imposed on a prisoner who fails to exhaust their administrative remedies for two reasons.¹⁵⁰ The first is purely text-based. The Second Circuit stated that because the statute does not enumerate failure to exhaust as a strike-worthy offense, it cannot be considered a strike under the enumerated “failure to state a claim” language of § 1915(g).¹⁵¹ The second is procedural. The court reasoned that “[f]ailure to exhaust administrative remedies is often a temporary, curable, procedural flaw,” and it does not get to the underlying merits of the claim, so the prisoner can reinstate their claim after exhausting their administrative remedies.¹⁵² The court’s view was supplemented by the trial court’s dismissal of the prisoner’s claim without prejudice due to prematurity,

¹⁴⁶ Manning, *supra* note 3, at 220–21.

¹⁴⁷ 28 U.S.C. § 1915(g).

¹⁴⁸ See *Snider v. Melindez*, 199 F.3d 108, 112 (2d Cir. 1999) (arguing that failure to state a claim under § 1915(g) does not include failure to exhaust administrative remedies).

¹⁴⁹ See *Thompson v. Drug Enf’t Admin.*, 492 F.3d 428, 438 (D.C. Cir. 2007) (“When a court dismisses an unexhausted complaint under Rule 12(b)(6), thus concluding that the complaint fails to state a claim, section 1915(g)’s plain text compels us to count that case as a strike.”).

¹⁵⁰ See *Snider*, 199 F.3d at 111; see also *Turley v. Gaetz*, 625 F.3d 1005, 1013 (7th Cir. 2010) (“[N]either the dismissal of a complaint in its entirety for failure to exhaust nor the dismissal of unexhausted claims from an action containing other viable claims constitutes a strike under § 1915(g).” (citing *Pointer v. Wilkinson*, 502 F.3d 369, 372, 374–75 (6th Cir. 2007))); *Owens v. Isaac*, 487 F.3d 561, 563 (8th Cir. 2007) (per curiam) (citations omitted) (“The first case was dismissed without prejudice for failure to exhaust administrative remedies; such a dismissal is not a strike under section 1915(g).”).

¹⁵¹ *Snider*, 199 F.3d at 111.

¹⁵² *Id.* at 111–12.

as opposed to a dismissal with prejudice or a dismissal carrying preclusive effect.¹⁵³

The Fourth Circuit similarly applies the narrower interpretation to routine dismissals for failure to exhaust, but the court uses slightly different reasoning and retains the trial judge's discretion for non-routine dismissals. In addition to the text-based reasoning, the Fourth Circuit's analysis also includes legislative intent.¹⁵⁴ The "failure to exhaust" requirement in the PLRA immediately precedes the strike-worthy dismissals.¹⁵⁵ Thus, the Fourth Circuit in *Green v. Young* reasoned that "Congress nonetheless declined to include a dismissal on exhaustion grounds as one of the types of dismissals that should be treated as a strike," and the court must honor what it considered to be a deliberate omission of failure to exhaust from § 1915(g).¹⁵⁶ The Fourth Circuit went further than the Second Circuit by considering how a failure to exhaust could be construed as a strike in some circumstances. The Fourth Circuit explained that the trial judge has discretion to dismiss certain failure-to-exhaust cases as frivolous if they are "non-routine."¹⁵⁷ For example, if a prisoner has their case dismissed for failure to exhaust, and they refile the same exact complaint without curing the complaint's defects, then the complaint is no longer "routine," and the court can dismiss it as frivolous, thus counting it as a strike for § 1915(g) purposes.¹⁵⁸

While the narrower interpretation treats routine dismissals for failure to exhaust as curable and thus not a strike, the broader approach is not as clear and requires a procedural inquiry to determine whether the dismissal will count as a strike.¹⁵⁹ Circuit courts that allow a dismissal for failure to exhaust administrative grievances to count as a strike—like the D.C. Circuit in *Thompson v. DEA*—begin with the baseline reasoning: "[T]here is no categorical answer to the question whether failure to exhaust administrative

¹⁵³ *Id.* at 112.

¹⁵⁴ See *Green v. Young*, 454 F.3d 405, 409 (4th Cir. 2006) ("[W]e must honor Congress's deliberate omission from § 1915(g) of dismissals for failure to exhaust and conclude that a routine dismissal for failure to exhaust administrative remedies does not count as a strike under § 1915(g)." (citing *Snider*, 199 F.3d at 112)); *Ball v. Famiglio*, 726 F.3d 448, 458 (3d Cir. 2013) ("[T]he language of § 1915(g) does not include failure to exhaust in the list of enumerated strike grounds, indicating that Congress did not intend for a dismissal based on exhaustion to count as a strike."), *partially abrogated on other grounds by Coleman v. Tollefson*, 135 S. Ct. 1759, 1765 (2015).

¹⁵⁵ See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 803–804, 110 Stat. 1321, 1321-71, 1321-74 (1996) (codified as amended in scattered sections of 19 U.S.C. and 42 U.S.C.)

¹⁵⁶ *Green*, 454 F.3d at 409.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 409–10.

¹⁵⁹ See *Thompson v. Drug Enf't Admin.*, 492 F.3d 428, 438 (D.C. Cir. 2007).

remedies counts as failure to state a claim [for § 1915(g) purposes].”¹⁶⁰ The D.C. Circuit reasoned that a categorical rule cannot exist because statutes can require a plaintiff to plead exhaustion, or even when exhaustion is “treated as an affirmative defense, it may be invoked in a Rule 12(b)(6) motion if the complaint somehow reveals the exhaustion defense on its face.”¹⁶¹ Therefore, if a court dismisses a claim for failure to exhaust, and it does so under a Rule 12(b)(6) motion, “thus concluding that the complaint fails to state a claim, section 1915(g)’s plain text compels [the court] to count that case as a strike.”¹⁶² Conversely, if the complaint is dismissed under a Rule 12(b)(1) motion or “failure to exhaust is treated as an affirmative defense and appears nowhere on the face of the complaint, the defense will not be raised on a Rule 12(b)(6) motion and the dismissal will not count as a strike.”¹⁶³

If the inmate in the hypothetical filed in the D.C. district court, then they would be at risk of having their potentially meritorious claim—a claim implicating the First Amendment because the prison was disallowing the inmate’s religious expression—dismissed as a strike. The hypothetical inmate, in good faith and due to the lack of a response from the prison,¹⁶⁴ included their failure to exhaust in their pleading, which means that exhaustion appears on the face of the complaint and is at risk of a Rule 12(b)(6) dismissal. If the court allowed a failure to exhaust on the face of the complaint to serve as a Rule 12(b)(6) dismissal, then the inmate’s strike would count. Conversely, unless the prisoner filed the same exact complaint twice, they would not incur a strike in the Second or Fourth Circuits, because those two circuits adopt the narrower, textualist interpretation. Thus, the narrower interpretation relieves an unnecessary burden on prisoners and requires less work of federal judges, because it (1) keeps the courtroom open to indigent prisoners who cure their failure to exhaust, and (2) does not require any searching inquiry for the appellate courts.

¹⁶⁰ *Id.* Going further than these circuits, the Eleventh Circuit has held that failure to exhaust will always count as a strike. *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998) (“A claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted.”) (citations omitted), *abrogated by* *Jones v. Bock*, 549 U.S. 199, 203 (2007).

¹⁶¹ *Thompson*, 429 F.3d at 438 (citations omitted).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ This, of course, brings up another hurdle inmates must navigate when attempting to exhaust administrative remedies—when does the administrative remedy become a dead-end? The Seventh Circuit has held that, even if the prison says they must rule on inmate appeals within sixty days of the filing, a failure to do so after six months does not excuse the inmate from the internal appeals process. *Ford v. Johnson*, 362 F.3d 395, 400 (7th Cir. 2004). Therefore, the court ruled that the inmate had not exhausted his administrative remedies. *Id.*

3. *Mixed Dismissals*

The final circuit court split pertaining to the definition of a strike-worthy dismissal concerns whether a mixed dismissal can count as a strike. A mixed dismissal occurs when “[a dismissal is] based in part on a § 1915(g) ground, and in part on other grounds.”¹⁶⁵ Section 1915(g) states that an inmate receives a strike for bringing “*an action or appeal* in a court of the United States . . . [if] it is frivolous, malicious, or fails to state a claim.”¹⁶⁶ The difference in interpretation turns on the words “action or appeal,” and whether that means an entire action, or just part of the action. Once again, there are two divergent interpretations, one that is a narrower, text-based interpretation, and the other that is a broader, more inclusive interpretation.

The narrower, text-based interpretation holds that a mixed dismissal cannot constitute a strike. The basis for such an interpretation is twofold. First, the circuit courts rely on the plain language of the word “action.”¹⁶⁷ Second, the circuit courts that have decided “mixed dismissal” cases after 2007 rely on the Supreme Court’s decision in *Jones v. Bock*, which dealt with a different provision of the PLRA that considered the definition of “action.”¹⁶⁸ The most prudent approach is the narrower interpretation, because it utilizes the plain language of the word “action,”—which mirrors the Supreme Court’s interpretation of other sections of the PLRA—and it does not apply unnecessary strikes on indigent prisoners.

Before *Jones*, the Eighth Circuit dealt with the issue in *Powells v. Minnehaha County Sheriff Department* after the district court dismissed three actions brought by an indigent prisoner.¹⁶⁹ Therefore, when the inmate tried to file two more actions, the district court would not allow them to proceed, because the prisoner had received three strikes under § 1915(g).¹⁷⁰ The Eighth Circuit found that the second of three actions dismissed stated three claims.¹⁷¹ First, the prisoner alleged that a prison guard allowed the prisoner’s white cellmate¹⁷² an extra mattress and blanket, while refusing him the same

¹⁶⁵ *Byrd*, 709 F.3d at 219.

¹⁶⁶ 28 U.S.C. § 1915(g) (emphasis added).

¹⁶⁷ See *Powells v. Minnehaha Cnty. Sheriff Dep’t*, 198 F.3d 711, 713 (8th Cir. 1999).

¹⁶⁸ See *Washington v. L.A. Cnty. Sheriff’s Dep’t*, 833 F.3d 1048, 1057 (9th Cir. 2016); *Byrd*, 715 F.3d at 1225; *Turley v. Gaetz*, 625 F.3d 1005, 1013 (7th Cir. 2010); *Tolbert v. Stevenson*, 635 F.3d 646, 652 (4th Cir. 2011); *Thompson*, 492 F.3d at 432.

¹⁶⁹ *Powells*, 198 F.3d at 712.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² The plaintiff is a person of color. *Id.*

accommodations.¹⁷³ Second, the prisoner alleged that another prison guard placed him in solitary confinement “for racially discriminatory reasons.”¹⁷⁴ Third, the prisoner alleged that prison officials had opened his mail when he was not present.¹⁷⁵ The court concluded that those three allegations were stated claims within the entire action, and because “dismissing a claim . . . is not dismissing an ‘action,’” the prisoner’s third strike would be rescinded.¹⁷⁶ Therefore, the prisoner’s subsequent claims were to be remanded to allow the prisoner to proceed *in forma pauperis*.¹⁷⁷

While *Powells* concerned a mixed dismissal that included stated claims, subsequent circuits clarified further why the same reasoning can be applied to cases where the entire action is dismissed, but only partially on § 1915(g) grounds. In *Turley v. Gaetz*, the Seventh Circuit heard an appeal from a prisoner who had received a strike for an action that was “dismissed in part for failure to state a claim and in part for failure to exhaust [administrative remedies.]”¹⁷⁸ In its decision, the Seventh Circuit reaffirmed its holding in *Walker v. Thompson* that “a district court may dismiss a complaint if the existence of a valid affirmative defense, such as the failure to exhaust, is so plain from the face of the complaint that the suit can be regarded as frivolous,” but found that the failure to exhaust here did not reach such a threshold.¹⁷⁹ Therefore, the Seventh Circuit found that the dismissal of the prisoner’s claims for failure to exhaust was statutorily separate from the enumerated dismissals in § 1915(g).¹⁸⁰ That reasoning left the prisoner with a mixed dismissal, whereby some claims were dismissed for failure to state a claim and others were dismissed for failure to exhaust.¹⁸¹ The Seventh Circuit looked to the plain language of § 1915(g), which applies strikes to dismissed *actions* and “does not employ the term ‘claim’ to describe the type of dismissal that will incur a strike.”¹⁸² Therefore, the court concluded that the mixed dismissal must not count as a strike to be “consistent with the plain language of the PLRA.”¹⁸³

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 713 (quoting *Moore v. Doan*, No. 98C–2307, 1998 WL 887089, at *5 (N.D. Ill. Dec. 10, 1998)).

¹⁷⁷ *Id.*

¹⁷⁸ *Turley v. Gaetz*, 625 F.3d 1005, 1013 (7th Cir. 2010).

¹⁷⁹ *Id.* (citing *Walker v. Thompson*, 288 F.3d 1005, 1009–10 (7th Cir. 2002)).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 1008.

¹⁸³ *Id.* at 1013.

Beyond the plain language of § 1915(g), circuit courts that find mixed dismissals do not warrant a strike are strengthened by the Supreme Court's decision in *Jones v. Bock*. In *Jones*, the Court addressed "how courts should address complaints in which the prisoner has failed to exhaust some, but not all, of the claims asserted in the complaint" under § 1997e(a) of the PLRA.¹⁸⁴ The Court had to determine whether lower courts, when faced with this issue, are to dismiss only the unexhausted claims, or the entire action.¹⁸⁵ The relevant language of § 1997e(a) that the Court had to interpret is nearly the same as the introductory language in § 1915(g): "no action shall be brought."¹⁸⁶ The Court found the answer in the plain language of the statute, which it regarded as "boilerplate."¹⁸⁷ Of the many instances in which statutes refer to an action, the Court found, "[S]uch language has not been thought to lead to the dismissal of an entire action if a single claim fails to meet the pertinent standards."¹⁸⁸ Regarding the policy arguments, the Court discarded the argument from the prison warden that dismissing some claims and not the others "turns judges into editors of prisoner complaints, rather than creating an incentive for prisoners to exhaust properly."¹⁸⁹ Instead, the Court reasoned that such a holding could run contrary to the PLRA's purpose of reducing inmate litigation because "the effect of a total exhaustion rule could be that inmates will file various claims in separate suits, to avoid the possibility of an unexhausted claim tainting the others."¹⁹⁰

Notwithstanding the Supreme Court's decision in *Jones*, the Sixth Circuit held that a mixed dismissal could count as a strike under § 1915(g).¹⁹¹ In

¹⁸⁴ *Jones v. Bock*, 549 U.S. 199, 219 (2007).

¹⁸⁵ *Id.* at 220.

¹⁸⁶ Compare 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."), with 28 U.S.C. § 1915(g) ("In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed . . .").

¹⁸⁷ *Jones*, 549 U.S. at 220.

¹⁸⁸ *Id.* The Court recognized that there exists a "total exhaustion" requirement in habeas corpus cases but distinguished habeas corpus cases from the PLRA for policy reasons. *Id.* at 221. The Court reasoned that petitioners in habeas suits make multiple claims that "seek the same relief from custody," whereas petitioners in PLRA suits "may combine a wide variety of discrete complaints, about interactions with guards, prison conditions, generally applicable rules, and so on, seeking different relief on each claim." *Id.* at 221–22. Therefore, the failure to exhaust some claims in habeas suits might be indicative of the entire action, which is not generally true of PLRA claims. *Id.*

¹⁸⁹ *Id.* at 223.

¹⁹⁰ *Id.*

¹⁹¹ *Pointer v. Wilkinson*, 502 F.3d 369, 376–77 (6th Cir. 2007).

Pointer v. Wilkinson, the Sixth Circuit implemented “a simpler approach.”¹⁹² Their so-called simpler approach provides that, “if a complaint is dismissed in part for failure to exhaust and in part for failure to state a claim or other grounds stated in § 1915(g), the dismissal is a strike, at least insofar as the new suit does not simply re-file previously non-exhausted claims.”¹⁹³ The court adopted the D.C. Circuit’s failure to exhaust interpretation, where a failure to exhaust should be considered a strike if dismissed by a Rule 12(b)(6) motion,¹⁹⁴ and narrowly held that this mixed dismissal would grant the inmate a strike for purposes of § 1915(g).¹⁹⁵ The Sixth Circuit’s holding seems narrow because it explicitly limits mixed dismissals to count as a strike if “the new suit does not simply re-file previously non-exhausted claims,”¹⁹⁶ or if “a complaint is dismissed in part without prejudice for failure to exhaust administrative remedies.”¹⁹⁷

The Tenth Circuit addressed the same question in *Thomas v. Parker*, and it aligned itself with the Sixth Circuit in an order of dismissal.¹⁹⁸ The inmate in *Thomas* filed eighteen claims—most of which were filed under the Religious Land Use and Institutionalized Persons Act—alleging that the guards burdened his ability to practice his Muslim faith.¹⁹⁹ Of those claims, two were dismissed for failure to state a claim, and sixteen were dismissed for failure to exhaust.²⁰⁰ The Tenth Circuit explicitly eschewed the Seventh Circuit test, instead aligning itself with the Sixth Circuit “because it appear[ed] to be the better-reasoned decision.”²⁰¹ The Tenth Circuit gave two explanations for its holding. First, the court found that none of the sixteen claims dismissed for failure to exhaust “were found to have merit or state a claim.”²⁰² Second, the court maintained that the purpose of the PLRA was to reduce inmate litigation, and that abstaining from awarding a strike would allow prisoners to “repeatedly escape imposition of a strike and thus evade the bar imposed by the three-strikes rule.”²⁰³

¹⁹² *Id.* at 376.

¹⁹³ *Id.*

¹⁹⁴ *Id.* (citing *Thompson v. Drug Enf’t Admin.*, 429 F.3d 428, 438 (D.C. Cir. 2007)).

¹⁹⁵ *Id.* at 377.

¹⁹⁶ *Id.* at 376.

¹⁹⁷ *Id.* at 377.

¹⁹⁸ *Thomas v. Parker*, 672 F.3d 1182, 1184–85 (10th Cir. 2012).

¹⁹⁹ *Id.* at 1183; *see also* *Thomas v. Parker*, No. CIV–07–599–W, 2008 WL 2894842, at *3 (W.D. Okla. July 25, 2008) (“Plaintiff claims prison officials have substantially burdened his ability to practice his Muslim faith and have established Christianity as the State religion.”).

²⁰⁰ *Thomas*, 672 F.3d at 1183.

²⁰¹ *Id.* at 1184.

²⁰² *Id.* (citing *Pointer*, 502 F.3d at 374).

²⁰³ *Id.* (first quoting *Pointer*, 502 F.3d at 374; then citing *Clemons v. Young*, 240 F. Supp. 2d 639, 642 (E.D. Mich. 2003)); *see Clemons*, 240 F. Supp. 2d at 642 (“The entire purpose of § 1915(g) would be subverted if prisoners could skirt its procedural bar merely by appending unexhausted claims to a complaint otherwise

Hardly a “simpler approach,” allowing some mixed dismissals to count as strikes requires more work of the trial and appellate judges and raises questions that litigation will have to answer. This line of reasoning puts the onus on either the trial judge to intentionally fashion a dismissal to properly apply a strike to the inmate for the purposes of § 1915(g), or the appellate judge to search the factual record to determine whether a strike should be applied. For example, if some of the inmate’s claims were dismissed for failure to exhaust as an affirmative defense or a different procedural mechanism rather than a Rule 12(b)(6) motion, would that mixed dismissal count as a strike, or is the holding extended to all dismissals for failure to exhaust? What if a minority of the claims that were dismissed for failure to exhaust stated a claim? The “simpler” interpretation leaves ample room for inmates to attempt to distinguish their case from either *Pointer* or *Thomas*, and it ignores the circumstances that make inmates more prone to procedural mistakes.²⁰⁴

Even if the inmate in the hypothetical had only part of his complaint dismissed for failure to exhaust, the Sixth and Tenth Circuits might still award a strike. At best, the inmate would have to distinguish their case from *Pointer* and *Thomas*. Conversely, even if the inmate were in the Eleventh Circuit, which would award them a strike for failure to exhaust by itself, they may not incur a strike if it were a mixed dismissal.

Here, once again, the textualist approach provides clarity and consistency, which will have the secondary effect of limiting inmate litigation concerning whether a previous mixed dismissal caused the inmate to incur a strike. The PLRA was meant to reduce frivolous inmate litigation and award meritorious claims greater scrutiny,²⁰⁵ and both approaches to mixed dismissals do just that. However, it is only the narrower, textualist interpretation that would preserve inmate litigation that is meritorious.²⁰⁶ The same argument that the prison warden espoused in *Jones v. Bock* could be made: the broader approach would “turn[] judges into editors.”²⁰⁷ However, the Supreme Court has already dismissed such an argument in the PLRA context.²⁰⁸ The Court adhered to a

subject to summary dismissal on the merits.”).

²⁰⁴ See *supra* notes 7–11 and accompanying text.

²⁰⁵ See *supra* notes 106–07 and accompanying text.

²⁰⁶ See *Tafari v. Hues*, 539 F. Supp. 2d 694, 702 (S.D.N.Y. 2008) (“In the interest of reaching a balance between enabling prisoners to bring meritorious suits and reducing the burden on the courts of frivolous suits, strikes should be imposed only when entire actions are dismissed for one of the stated reasons within section 1915(g).”); *Ortiz v. McBride*, 380 F.3d 649, 658 (2d Cir. 2004).

²⁰⁷ See *Jones v. Bock*, 549 U.S. 199, 223 (2007); *supra* note 190.

²⁰⁸ See *Jones*, 549 U.S. at 219. While the Supreme Court applied this reasoning to 42 U.S.C. § 1997e(a), it did not address how to interpret the language in 28 U.S.C. § 1915(g), which is why it is still considered to be

textualist interpretation of 42 U.S.C. § 1997e(a) by using the presumption of consistent usage, and held that courts should “proceed[] with the good and leave[] the bad.”²⁰⁹ The Court’s reasoning implies that prison litigation should be treated the same as litigation in other contexts, and doing otherwise could risk running contrary to the Court’s decision in *Lewis v. Casey*.²¹⁰

B. *Imminent Danger of Serious Physical Injury*

Generally, most circuits agree on a fairly low bar as to § 1915(g)’s requirements for pleading imminent danger of serious physical injury.²¹¹ That low bar is essentially an instruction to construe inmates’ complaints liberally,²¹² especially in the courts of appeals,²¹³ and allow actions to proceed if there is even a “plausible allegation” of imminent danger.²¹⁴ Thus, this section focuses mostly on the cases that have addressed “imminent danger” and “serious physical injury,” respectively. The circuit split concerning imminent danger is whether the inmate has to establish a “nexus” between the imminent danger and their legal claim.²¹⁵ As it pertains to serious physical injury, there is not so much a circuit split as there are unclear general parameters.²¹⁶ Therefore, this section argues for an interpretation of “imminent danger” that includes ongoing and recurring harm, and an interpretation of “serious physical injury” that includes incremental harms.

a circuit split.

²⁰⁹ *Id.* at 221.

²¹⁰ *Lewis v. Casey*, 518 U.S. 343 (1996). This argument is discussed in detail in Part IV of this Comment.

²¹¹ Manning, *supra* note 3, at 229.

²¹² See Brown v. Johnson, 387 F.3d 1344, 1350 (11th Cir. 2004) (citations omitted) (“[W]e turn to [the inmate’s] complaint, which we must construe liberally and the allegations of which we must accept as true.”); Jackson v. Reese, 608 F.2d 159, 160 (5th Cir. 1979) (“It is axiomatic that courts are required to liberally construe pro se complaints.” (citing Haines v. Kerner, 404 U.S. 519 (1972))).

²¹³ See Williams v. Paramo, 775 F.3d 1182, 1189–90 (9th Cir. 2015).

²¹⁴ See *id.* at 1189 (“[W]e have held that a prisoner need only make a ‘plausible allegation’ that he is in ‘imminent danger.’” (citing Andrews v. Cervantes, 493 F.3d 1047 (9th Cir.2007))); Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) (“[W]e are obligated to draw the most favorable inferences that [the inmate’s] complaint supports[.]”).

²¹⁵ Compare Williams, 775 F.3d at 1190 (allowing imminent danger of physical harm to be pled without referring to any nexus), with Pettus v. Morgenthau, 554 F.3d 293, 297 (2d Cir. 2009) (“[W]e adopt the view of the district court that there must be a nexus between the imminent danger a three-strikes prisoner alleges to obtain [*in forma pauperis*] status and the legal claims asserted in his complaint.”).

²¹⁶ Manning, *supra* note 3, at 234. There is a question of whether inmates, who file *in forma pauperis* under the imminent danger exception, can proceed with all of their claims, or just the claims that relate to the imminent danger. The circuit courts that have addressed this question have all held that the inmate can proceed with their entire action, and the courts base these rulings on the plain language of the statute. See, e.g., Chavis, 618 F.3d at 171–72 (internal footnotes omitted) (“All four circuit courts to consider the question have, accordingly, found that a plaintiff filing [*in forma pauperis*] on the basis of the imminent danger exception can proceed with all claims in her complaint, and we agree.”)

1. *Imminent Danger*

The majority of circuit courts allow ongoing or recurring harm to qualify as “imminent danger,”²¹⁷ but the Second and Third Circuits have held that there must be a “nexus” between the legal claim and the imminent danger claim.²¹⁸ When an inmate argued imminent danger in *Williams v. Paramo*, she alleged that a prison official spread rumors that the inmate was a sex offender and added the designation to her record, and “that as a result of her designation as a sex offender, members of the Two–Five prison gang threatened her and stated that they would ‘get’ her.”²¹⁹ According to her complaint, other inmates “constantly threatened to kill her with ‘inmate manufactured weapons’ and to unlock their handcuffs with ‘cuff keys’ in order to kill her.”²²⁰ On appeal, the prison argued that the inmate “failed to show a ‘nexus’ between her lawsuit and her newly alleged imminent danger.”²²¹

The Ninth Circuit, following the majority of circuits, rejected the “nexus requirement” and reasoned that the statute required imminent danger to be present on appeal as well as when the complaint is filed, but liberally construed the type of injury that is sufficient to be considered imminent danger.²²² Therefore, the Ninth Circuit held, “[I]t is sufficient for the prisoner to allege that he faces an ‘ongoing danger,’ even if he is not ‘directly exposed to the danger at the precise time he filed the complaint.’”²²³ The court was compelled to “proceed with caution” and liberally construe the injury requirement, because, “as scholars and judges have noted, the three-strikes provision raises grave constitutional concerns.”²²⁴

Using a similarly liberal approach, other circuits have expanded imminent danger to include a variety of injuries. For example, the Sixth Circuit declined to answer whether § 1915(g) necessitates the “nexus requirement”²²⁵ and overturned a district court decision that did not allow the inmate to proceed

²¹⁷ See *Williams*, 775 F.3d at 1190; *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998); *Vandiver v. Prison Health Servs. Inc.*, 727 F.3d 580, 586 (6th Cir. 2013); *Brown v. Johnson*, 387 F.3d 1344, 1350 (11th Cir. 2004).

²¹⁸ See *Pettus*, 554 F.3d at 297; *Ball v. Hummel*, 577 F. App’x 96, 96 n.1 (3d Cir. 2014) (“To fulfill the ‘imminent danger’ requirements, she must demonstrate an adequate nexus between the claims[s] he seeks to pursue and the ‘imminent danger [s]he alleges.’” (citing *Pettus*, 554 F.3d at 296)).

²¹⁹ *Williams*, 775 F.3d at 1186.

²²⁰ *Id.* at 1187.

²²¹ *Id.*

²²² *Id.* at 1189.

²²³ *Id.* (quoting *Andrews v. Cervantes*, 493 F.3d 1047, 1056 (9th Cir.2007)).

²²⁴ *Id.*

²²⁵ *Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 588 (6th Cir. 2013).

under the imminent danger exception.²²⁶ The Sixth Circuit found that the inmate properly “alleged that the defendants [were] . . . withholding necessary medical treatment from [the inmate] and that as a result of these actions, [he was] in danger of amputations, coma, and even death.”²²⁷ Thus, the allegations were “sufficient for him to proceed [*in forma pauperis*] pursuant to the imminent-danger exception.”²²⁸ The Eleventh Circuit also overturned a district court decision that did not find imminent danger where an inmate was denied medication for HIV and hepatitis.²²⁹ The State argued that Brown’s “allegations d[id] not show that his treatment put[] him in imminent danger.”²³⁰ The Eleventh Circuit disagreed and instead used the ongoing or recurring harm standard to find imminent danger.²³¹ The court stated, “Liberally construed, [the inmate] allege[d] a total withdrawal of treatment for serious diseases, as a result of which he suffer[ed] from severe ongoing complications, [was] more susceptible to various illnesses, and his condition [would] rapidly deteriorate.”²³²

The Second and Third Circuits require a nexus between the imminent danger a three-strikes prisoner alleges and the legal claims asserted in his complaint, and they make their inquiry in two steps.²³³ The Second Circuit first enunciated such a test when an inmate filed an action stating that he was incorrectly classified—he was placed in “a so-called supermax facility for especially violent offenders” and “surrounded by hostile, aggressive, violent inmates who beat, rob, assault, extort, and sexually abuse him—and had been denied access to needed medication.”²³⁴ This inquiry requires the court to decide two questions in determining whether a nexus exists: “(1) whether the imminent danger of serious physical injury that a three-strikes litigant alleges is *fairly traceable* to

²²⁶ *Id.* at 589.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Brown v. Johnson*, 387 F.3d 1344, 1350 (11th Cir. 2004).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* (“Although some of the specific physical conditions about which Brown complains may not constitute serious injury, the issue is whether his complaint, as a whole, alleges imminent danger of serious physical injury.”)

²³³ See *Pettus v. Morgenthau*, 554 F.3d 293, 297 (2d Cir. 2009); *Ball v. Hummel*, 577 F. App’x 96, 96 n.1 (3d Cir. 2014) (citing *Pettus*, 554 F.3d at 296).

²³⁴ *Pettus*, 554 F.3d at 295–96; see *id.* at 299 (“Given that both causation and redressability are components of § 1915(g)’s nexus requirement, a three-strikes prisoner cannot proceed [*in forma pauperis*] against law enforcement personnel involved in his criminal trial to whom prison conditions are not fairly traceable or in circumstances in which it is speculative to assert that judicial relief will actually redress these allegedly unlawful conditions.”).

unlawful conduct asserted in the complaint and (2) whether a favorable judicial outcome would *redress* that injury.”²³⁵

To the first prong, the court found that the allegation was not fairly traceable to the unlawful conduct;²³⁶ it reasoned the majority of the inmate’s “claims for relief are directed at asserted wrongs—such as his allegedly improper prosecution and inmate classification—that are much too attenuated from the imminent danger of serious physical injury he alleges to conclude that this danger may fairly be traced back to the asserted wrongs.”²³⁷ To the second prong, the court held that the relief was too speculative to constitute sufficient redress.²³⁸

The Third Circuit adopted and applied the test in the footnote of an unreported case.²³⁹ In her complaint, the inmate alleged that correctional officers used excessive force when they extracted her from her cell.²⁴⁰ The inmate’s complaint stated, “[T]he extraction involved use of an electric body immobilizer device . . . , causing burns and continuing headaches, nausea and blurred vision, and sexual assault by female guards in front of male guards.”²⁴¹ The district court denied—and the Third Circuit affirmed—the inmate’s *in forma pauperis* status because she did not allege “renewed threats” in her complaint,²⁴² so her complaint failed to allege imminent danger.²⁴³

Given that courts generally have a low bar for pleading and construe inmates’ claims in the light most favorable to the plaintiff,²⁴⁴ it does not seem logically consistent to then require a nexus between the alleged harm and the legal claims in the inmate’s complaint. The goal of § 1915(g) is to reduce frivolous inmate litigation and allow meritorious litigation to get to the courts.²⁴⁵ The vast majority of inmates bring claims *pro se*,²⁴⁶ so the nexus requirement is

²³⁵ *Id.* at 298–99.

²³⁶ *Id.* at 299.

²³⁷ *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 167 (1997)).

²³⁸ *Id.*

²³⁹ *Ball v. Hummel*, 577 F. App’x 96, 96 n.1 (3d Cir. 2014) (citing *Pettus*, 554 F.3d at 296).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 98. The court did find that the appeal successfully pled imminent danger, but still affirmed the district court’s denial because the complaint failed to properly allege imminent danger. *Id.*

²⁴³ *Id.* at 96, n.1. The court found that if the inmate’s complaint had the same allegations as was in her appeal, then it would have met the nexus requirement. *Id.*

²⁴⁴ *See Brown v. Johnson*, 387 F.3d 1344, 1350 (11th Cir. 2004) (citations omitted).

²⁴⁵ *See supra* notes 106–07 and accompanying text.

²⁴⁶ *See supra* note 43 and accompanying text; *infra* Part IV.

an added hurdle to a statute that already raises serious constitutional concerns.²⁴⁷ Therefore, the courts should allow ongoing and recurring harm to constitute an imminent danger, regardless of any sort of nexus.

2. *Serious Physical Injury*

Serious physical injury is generally a fact-intensive inquiry, so circuit courts mostly hold true to the precept that plaintiffs’ complaints should be liberally construed in the light most favorable to them.²⁴⁸ For inmates, that means that all circuits will dismiss their claim of serious physical injury if it only contains “conclusory assertions.”²⁴⁹ The greatest disagreement as to what constitutes serious physical injury is whether psychological injuries can be considered “serious physical injuries,”²⁵⁰ and whether incremental harms, which are not necessarily serious on their own, can add up to constitute a serious physical injury.²⁵¹

In dicta, the Seventh Circuit stated that the statute distinguishes psychological harm from physical harm, but did not offer a test for determining which harms are psychological and which harms are physical.²⁵² In *Sanders v. Melvin*, the inmate claimed, in part, that mental deterioration brought on by prison conditions caused serious physical injury due to self-harm.²⁵³ The district court dismissed the inmate’s complaint, calling the claims “self-serving.”²⁵⁴ The Seventh Circuit reasoned that purely psychological harms would not satisfy the serious physical injury requirement, but if those psychological problems, which

²⁴⁷ See *Williams v. Paramo*, 775 F.3d 1182, 1189 (9th Cir. 2015).

²⁴⁸ See *Jackson v. Reese*, 608 F.2d 159, 160 (5th Cir. 1979); *Williams*, 775 F.3d at 1189–90.

²⁴⁹ See *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003) (determining that “conclusory assertions” that correctional officers “were trying to kill Martin by forcing him to work” were insufficient to allege serious physical injury); *Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1180 (10th Cir. 2011) (“[H]is allegations of imminent harm are vague and conclusory, and they do not satisfy the imminent-danger exception to the three strikes rule”); *White v. Colorado*, 157 F.3d 1226, 1231–32 (10th Cir. 1998) (finding that the inmate’s claim were “largely a collection of vague and utterly conclusory assertions”).

²⁵⁰ See *Sanders v. Melvin*, 873 F.3d 957, 959–60 (7th Cir. 2017) (“Physical problems can cause psychological ones, and the reverse, but the statute supposes that it is possible to distinguish them. A claim of long-term psychological deterioration is on the psychological side of the line. Prisoners facing long-term psychological problems can save up during that long term and pay the filing fee.”).

²⁵¹ See *Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 587 (6th Cir. 2013) (“[I]ncremental harm that culminates in a serious physical injury may present a danger equal to harm that results from an injury that occurs all at once.”); *Ibrahim v. District of Columbia*, 463 F.3d 3, 7 (D.C. Cir. 2006) (“[W]e have no difficulty concluding that a chronic disease that could result in serious harm or even death constitutes ‘serious physical injury.’”).

²⁵² *Sanders*, 873 F.3d at 959–60.

²⁵³ *Id.* at 960. The inmate in *Sanders*—who the prison classified as “seriously mentally ill”—“ha[d] twice tried to commit suicide and at least once engaged in self-mutilation.” *Id.*

²⁵⁴ *Id.*

were a “consequence of the condition that prompted the suit,” led to self-harm, the psychological harm would then become a “serious physical injury.”²⁵⁵ While the court seemingly attempted to keep the court open to inmates, it essentially did so by incentivizing self-harm.

If a prisoner were suffering from psychological injuries alone, the court indicated that the prisoner would still be able to save up and pay the \$400 filing fee over time.²⁵⁶ This may seem prudent because, on its face, it would deter inmate litigation, but it actually places inmates in worse danger than if psychological injuries alone could be considered physical injuries. First, while all medically able inmates must work, they only earn 12¢ to 40¢ per hour.²⁵⁷ Thus, it would take an inmate twenty-five to eighty-four weeks of full-time work to pay the filing fee.²⁵⁸ Second, if a prisoner knows that they cannot get to the courts under the serious physical injury exception unless they harm themselves, then it is likely that a greater number of prisoners will resort to those extreme measures.

Other circuits have adhered more firmly to the precept that plaintiffs’ complaints should be liberally construed, and those circuits allow incremental harms to add up to serious physical injury.²⁵⁹ For example, in *Gibbs v. Cross*, the Third Circuit distinguished the Eighth Amendment’s injury requirement²⁶⁰ from § 1915(g)’s injury requirement by looking at the purpose of the section’s passage.²⁶¹ Since § 1915(g) has an imminent danger provision, the court reasoned that Congress intended to leave room for prisoners to seek redress for their injuries.²⁶² Therefore, the court concluded that it did not need to strictly interpret what injuries were speculative as opposed to serious, because “[i]nmates ought to be able to complain about ‘unsafe, life-threatening condition[s] in their prison’ without waiting for something to happen to them.”²⁶³

²⁵⁵ *Id.* at 961.

²⁵⁶ *Id.* at 960.

²⁵⁷ See *Work Programs*, *supra* note 11.

²⁵⁸ See *supra* note 11.

²⁵⁹ See *supra* note 244 and accompanying text; *Ibrahim v. District of Columbia*, 463 F.3d 3, 7 (D.C. Cir. 2006).

²⁶⁰ *Gibbs v. Cross*, 160 F.3d 962, 966 (3d Cir. 1998) (“An Eighth Amendment claim requires a showing of ‘wanton and unnecessary infliction of pain [or conditions that are] grossly disproportionate to the severity of the crime warranting imprisonment[.]’” (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981))).

²⁶¹ *Id.* at 966–67 (“Congress was also fully cognizant of the need to afford redress to any indigent prisoner whose circumstances created an ‘imminent danger of serious physical injury.’ Had Congress wanted to limit the latter concern to only those inmates who alleged a violation of the Eighth Amendment, it would have said so.”).

²⁶² *Id.*

²⁶³ *Id.* at 965.

When courts are compelled to construe inmates’ complaints liberally, they are still able to meet the mandate of § 1915(g). First, the courts can—at their discretion—filter out the bad claims from the good claims, thus limiting frivolous inmate litigation and allowing meritorious litigation to proceed. Second, inmates face a number of obstacles in getting to court outside of the PLRA itself, so it is incumbent on courts to liberally construe inmates’ complaints to ensure that they have access to the court system.

C. *Appealing a Third Strike*

The final circuit split to be addressed is a question that the Supreme Court declined to answer in *Coleman v. Tollefson*: whether the PLRA affords “a prisoner *in forma pauperis* status with respect to an appeal from a *third* qualifying dismissal—even if it does not allow a prisoner to file a *fourth* case during that time.”²⁶⁴ The circuit split revolves around statutory interpretation, with both sides claiming to be in line with the plain language of the statute and Supreme Court precedent.

The correct approach uses the plain meaning of the word “prior” in the statute. The relevant language of § 1915(g) states that inmates cannot file *in forma pauperis* if they have “on [three] or more *prior* occasions” had an action or appeal dismissed because it was frivolous, malicious, or failed to state a claim.²⁶⁵ The Fourth, Ninth, and Tenth Circuits focus their attention on the word “prior” to reach the conclusion that the statute permits an inmate to appeal their third strike *in forma pauperis*.²⁶⁶ Conversely, the Third Circuit bases its reasoning on what Congress did not do: “[T]he statute does *not* create an express exception to § 1915(g) treating an appeal from an order imposing a third strike differently from any other instance in which the prisoner wishes to bring an action or appeal.”²⁶⁷

The circuit courts that allow an inmate to proceed *in forma pauperis* to appeal their third strike find that the statute’s inclusion of the word “prior” mandates that a district court dismissal of the underlying claim cannot be considered a “prior occasion” when the same claim is on appeal.²⁶⁸ When *Coleman* was in front of the Supreme Court, the Solicitor General of the United

²⁶⁴ *Coleman v. Tollefson*, 135 S. Ct. 1759, 1765 (2015).

²⁶⁵ 28 U.S.C. § 1915(g).

²⁶⁶ See *Richey v. Dahne*, 807 F.3d 1202, 1209 (9th Cir. 2015); *Dawson v. Coffman*, 651 F. App’x 840, 842 n.2 (10th Cir. 2016); *Taylor v. Grubbs*, 930 F.3d 611, 620 (4th Cir. 2019).

²⁶⁷ *Parker v. Montgomery Cnty. Corr. Facility/Bus. Off. Manager*, 870 F.3d 144, 152 (3d Cir. 2017).

²⁶⁸ See, e.g., *Taylor*, 930 F.3d at 619.

States argued, “[T]he phrase ‘prior occasions’ is most sensibly read as referring to strikes imposed in prior-filed suits, not to those imposed in an earlier stage of the same suit.”²⁶⁹ The Fourth Circuit agreed with the Solicitor General and reasoned, “[A]lthough a district court’s dismissal of an action is surely an ‘occasion’ from the perspective of the court of appeals, it is not a ‘*prior occasion*.’”²⁷⁰ If the court were to count the third dismissal as a strike, then the word “prior” would be surplus language and have no meaning.²⁷¹ The Tenth Circuit used similar reasoning when looking at the face of a complaint filed in district court.²⁷² When the district court’s order listed cases as strikes, they “list[ed] only two prior cases. The third case listed [was] the present case.”²⁷³ Therefore, the court concluded that the present case could not be considered a prior case for § 1915(g) purposes.²⁷⁴

The circuit courts that grant *in forma pauperis* status for third-strike appeals also claim to be in line with the Supreme Court’s holding in *Coleman* for two reasons. First, the Court specifically left this question unaddressed. Thus, when the Court stated that “[t]he *in forma pauperis* statute repeatedly treats the trial and appellate stages of litigation as distinct,”²⁷⁵ the Court was not considering whether the word “prior” referred to the strike at issue in the case.²⁷⁶ The Ninth Circuit understood *Coleman* to advocate for continuing “the way in which the law ordinarily treats trial court judgments.”²⁷⁷ This means that judgments carry a preclusive effect on successive suits, but not suits on appeal.²⁷⁸ Second, *Coleman* was concerned with a “leaky filter,” whereby inmates could continue filing actions while they were appealing their third strike.²⁷⁹ However, the circuit courts are only granting *in forma pauperis* status in appeals of a third strike, and “not in any later-filed suits,” which avoids the concern identified by the Court

²⁶⁹ *Id.* at 616 (internal quotation marks omitted).

²⁷⁰ *Id.* at 617.

²⁷¹ *Id.* at 617, 619.

²⁷² See *Pigg v. FBI*, 106 F.3d 1497, 1498 (10th Cir. 1997) (holding the district court erred in considering the present action as one of the three prior actions).

²⁷³ *Id.*

²⁷⁴ *Id.* The Ninth Circuit added to this rationale and stated that “[d]enying [*in forma pauperis*] review of a district court’s third strike dismissal would prevent us from performing our ‘appellate function’ and would ‘freeze out meritorious claims or ossify district court errors.’” *Richey v. Dahne*, 807 F.3d 1202, 1209 (9th Cir. 2015) (quoting *Henslee v. Keller*, 681 F.3d 538, 543 (4th Cir. 2012)), *abrogated on other grounds* by *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015)).

²⁷⁵ *Coleman*, 135 S. Ct. at 1763.

²⁷⁶ *Taylor*, 930 F.3d at 618–19.

²⁷⁷ *Richey*, 807 F.3d at 1209 (internal quotation marks omitted) (quoting *Coleman*, 135 S. Ct. at 1764).

²⁷⁸ *Id.*

²⁷⁹ *Coleman*, 135 S. Ct. at 1764.

in *Coleman*.²⁸⁰ Thus, the circuits argue that their holdings are in line with Supreme Court precedent.

The Third Circuit is the only circuit that refuses to grant *in forma pauperis* status to inmates appealing their final strike.²⁸¹ The Third Circuit has lambasted its sister circuit—the Ninth Circuit—for relying on “perceived unfairness” and a “policy consideration,” instead of the text of the statute.²⁸² The “perceived unfairness” mentioned by the Third Circuit is that an indigent inmate would have to “pay the filing fee . . . to reverse the district court’s erroneous third strike, which would ironically make him eligible again for [*in forma pauperis*] status in successive suits.”²⁸³ Furthermore, according to the Third Circuit, the “policy consideration” used by the Ninth Circuit was the inability of the court to use its “appellate function” to remedy potential district court errors.²⁸⁴ In its interpretation of the statute, the Third Circuit relied on *Coleman* and a “textual void” in § 1915(g).²⁸⁵ *Coleman* treated appeals and actions as distinct,²⁸⁶ so the Third Circuit considered the initial action which incurred a third strike as final.²⁸⁷ Bolstering this reasoning, the court pointed to the absence of any exception in the statute directing courts to treat the third strike differently.²⁸⁸

Yet, the Third Circuit’s reasoning contradicts itself, fails to give any consideration to the true plight of indigent inmates, erroneously chalks up the court’s appellate function as a policy consideration, and overlooks the statutory interpretation utilized by other courts. The Third Circuit contradicted its assertion of “perceived unfairness” because it readily admitted that the plaintiff in *Richey* incurred a third strike erroneously.²⁸⁹ Thus, not only was the unfairness in *Richey* cognizable, but the Third Circuit also ignored the realities of indigent inmate litigation—almost all inmate litigation is done *pro se*, and the prospect of saving enough money to pay the filing fee is practically impossible on an

²⁸⁰ *Taylor*, 930 F.3d at 619.

²⁸¹ See *Parker v. Montgomery Cnty. Corr. Facility/Bus. Off. Manager*, 870 F.3d 144, 153 (3d Cir. 2017). In *Taylor*, Judge Richardson disagreed with the majority’s statutory analysis and argued that courts need not be beholden to avoid surplusage; he reasoned that “a court should not give a word an entirely fanciful meaning to avoid a minor redundancy.” *Taylor*, 930 F.3d at 624 (Richardson, J., dissenting).

²⁸² *Parker*, 870 F.3d at 151.

²⁸³ *Id.* (quoting *Richey*, 807 F.3d at 1209).

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 152.

²⁸⁶ The Court specifically left open the question of whether the third strike can be appealed *in forma pauperis*. *Id.* (citing *Coleman v. Tollefson*, 135 S. Ct. 1759, 1763 (2015)).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 151.

inmate's working wage.²⁹⁰ Although the Third Circuit painted its sole function of appellate review as a "policy consideration," it is clear that disallowing *in forma pauperis* status for inmates' third strikes would effectively make district courts the first and final arbiter of inmate justice. Finally, the Third Circuit overlooked its sister circuits' interpretation of the word "prior" in the statute as applying to different cases, not the initial action in the same case.²⁹¹

Returning to the hypothetical for the final time, the disastrous consequences of refusing to grant *in forma pauperis* status to inmates appealing their third strike are inescapable. At this point in the litigation, the inmate is attempting to appeal the claim that his health is deteriorating due to the correctional officers' refusal to administer his medication every twelve hours. The inmate admitted in the complaint that his administrative remedies were not exhausted, so the inmate incurred a third and final strike. If the inmate is in the Third Circuit, it is the proverbial end of the road, and the only prospect for judicial review is for him to pay the \$400 filing fee, which could take anywhere from twenty-five to eighty-four weeks to earn given the wage range for inmate labor.²⁹² The fundamental unfairness of effectively barring an inmate from appellate review is not just perceived; it pushes the boundaries of the constitutionality of section 1915(g) of the PLRA by restricting access to the courts.

IV. IMPLICATIONS

Interpreting § 1915(g) of the PLRA has left courts tangled in a web of conflicting interpretations. At its worst, these interpretations taken together in their most expansive form present legal challenges to the statute and insurmountable obstacles for current inmates, without the benefit of decreased inmate litigation. Yet, if courts were to use a narrow, text-based interpretation of § 1915(g), then they would avoid a constitutional question, and would more effectively eliminate the practical obstacles inmates face in bringing litigation without losing the statute's effectiveness.

A. *Avoiding the Constitutional Question*

The courts have largely settled the constitutional question of § 1915(g).²⁹³ However, the PLRA and § 1915(g) were passed in 1996, and the last

²⁹⁰ See *supra* note 246 and accompanying text.

²⁹¹ Taylor v. Grubbs, 930 F.3d 611, 616 (4th Cir. 2019).

²⁹² See *supra* note 11 and accompanying text.

²⁹³ See *supra* note 83 and accompanying text.

constitutional challenge to the section was in 2001.²⁹⁴ Since then, the statute has become more difficult to understand, and in some circuits, courts have interpreted the statute to expand its reach, making strikes easier to incur.²⁹⁵ Considering the language used in cases upholding the constitutionality of § 1915(g), if the more expansive interpretations are taken together, the statute may be reaching its constitutional limits.

Originally, the Eighth Circuit followed its sister circuits and held that the fundamental right to access the courts is not violated by § 1915(g),²⁹⁶ and reasoned that the statute “does not impinge [the] fundamental right [to access the courts] because it does not prohibit indigent inmates from having a ‘reasonably adequate opportunity’ to pursue valid lawsuits.”²⁹⁷ Therefore, the court concluded that, because § 1915(g) only applied to civil cases and only limited dismissals to frivolous, malicious, or meritless lawsuits, it did not invoke the fundamental right to access the courts.²⁹⁸ However, courts are no longer limiting the grant of strikes to the enumerated grounds set forth in the statute.²⁹⁹ The most expansive interpretations of the statute have led courts to go beyond the plain language of the statute to restrict an indigent inmate’s access to the courts. First, courts routinely apply strikes for unenumerated grounds like immunity,³⁰⁰ failure to exhaust administrative remedies,³⁰¹ and mixed dismissals.³⁰² Additionally, the Third Circuit does not allow an inmate to appeal their third strike, effectively ending appellate review for indigent inmates making their final claim *in forma pauperis*.³⁰³ Finally, the Supreme Court, in *Lomax v. Ortiz-Marquez*, ruled that dismissals without prejudice for failure to state a claim are strike-worthy.³⁰⁴ Justice Kagan, writing for the Court, upheld the lower court’s ruling that the inmate “had struck out,” and “[i]n line with [the Court’s] duty to call balls and strikes,” it was an “easy call.”³⁰⁵ Despite Justice Kagan’s pithy baseball analogies, she ignores the fact that even baseball has parity mechanisms to level the playing field.³⁰⁶ These court-made additions to

²⁹⁴ See *Higgins v. Carpenter*, 258 F.3d 797 (8th Cir. 2001).

²⁹⁵ See *supra* Part III.

²⁹⁶ *Higgins*, 258 F.3d at 800.

²⁹⁷ *Id.* at 799 (citing *Lewis v. Casey*, 518 U.S. 343, 356 (1996)).

²⁹⁸ *Id.* at 800.

²⁹⁹ See *supra* Part III.

³⁰⁰ See *supra* Part III.A.1.

³⁰¹ See *supra* Part III.A.2.

³⁰² See *supra* Part III.A.3.

³⁰³ See *supra* Part III.C.

³⁰⁴ *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1727 (2020).

³⁰⁵ *Id.* at 1724, 1727.

³⁰⁶ See generally Tyler Charlton, Preventing a Labor Stoppage: Addressing Market Inefficiencies Created by the Major League Baseball Collective Bargaining Agreement (Feb. 17, 2020) (unpublished comment) (on

§ 1915(g), taken together, have expanded the strike-zone to such an extent that it may no longer allow inmates a reasonably adequate opportunity to air their grievances in court. Therefore, unless narrower interpretations are adopted, § 1915(g) may run afoul of the Constitution, requiring the justice system's umpires to strike it down.

B. *Maintaining § 1915(g)'s Effectiveness*

When one considers the added practical difficulties that inmates face in attempting to pay court fees, § 1915(g) loses its already unsteady footing. Inmates face extraordinary difficulty in raising money to pay court fees.³⁰⁷ This difficulty ultimately debunks the myth that props up the argument that § 1915(g) does not violate the fundamental right to access the courts—the myth that inmates can “save up . . . and pay the filing fee” when they are denied *in forma pauperis* status.³⁰⁸

The Prison Policy Initiative found that “incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages.”³⁰⁹ When an inmate gets to prison, they can work if medically able, but the inmate will only “earn 12¢ to 40¢ per hour for these work assignments.”³¹⁰ Theoretically, then, an inmate could save every penny earned while working full time and be able to pay the \$400 filing fee in twenty-five to eighty-four weeks.³¹¹ In reality, however, inmates often have other financial obligations that the Federal Bureau of Prisons orders to be paid before even attempting to save for a filing fee.³¹² This makes it even less likely that inmates will be able to save up sufficient money to pay the \$400 filing fee before the applicable statute of limitations runs.³¹³

file with author) (discussing the mechanisms embedded in Major League Baseball's collective bargaining agreement that seek to create a more level playing field for mid-market teams).

³⁰⁷ See *infra* notes 310–13. Consequently, inmates regularly conduct their own legal defense, which requires them to wade through patchwork interpretations of the very statute that determines their ability to access the court.

³⁰⁸ Sanders v. Melvin, 873 F.3d 957, 960 (7th Cir. 2017).

³⁰⁹ Rabuy & Kopf, *supra* note 94 (emphasis omitted).

³¹⁰ Work Programs, *supra* note 11.

³¹¹ See *supra* note 11.

³¹² See 28 C.F.R. § 545.11(a) (1999) (providing that inmates are required to pay the following obligations “in the priority order as listed: (1) Special Assessments imposed under 18 U.S.C. 3013; (2) Court-ordered restitution; (3) Fines and court costs; (4) State or local court obligations; and (5) Other federal government obligations”).

³¹³ Manning, *supra* note 3, at 236.

The express purpose of the PLRA is a twofold effort to filter out frivolous inmate claims and filter in meritorious inmate claims.³¹⁴ First, the statute seeks to deter “frivolous prisoner lawsuits and appeals.”³¹⁵ Second, the result would “allow meritorious claims to be filed.”³¹⁶ On its face, that is what the statute demands with its enumerated grounds for dismissal.³¹⁷ However, because there are so many circuit splits and courts often allow dismissals for unenumerated grounds, the result is more litigation about the interpretation of the statute.³¹⁸ Therefore, a narrower, text-based interpretation would reduce litigation, permit greater filings of meritorious inmate claims while filtering out frivolous inmate litigation, and safely stay within the constitutional bounds.

CONCLUSION

Congress passed the Prison Litigation Reform Act to reduce the increasing amount of inmate litigation in federal courts, but the PLRA was an incorrect solution to a problem of Congress’s own making. Claims per inmate stayed relatively stagnant—even dropping from the highwater mark in 1981—but the number of those incarcerated spiked. The plight of the indigent inmate, who finds it nearly impossible to obtain the necessary funds to pay a court filing fee, was made more difficult by the PLRA.

The constitutionality of the PLRA has been upheld but has not been recently challenged. In the nearly twenty-four years since its passage, courts have not settled on how to interpret the statute’s different provisions. Many courts have gone beyond the statute to apply strikes to inmates on grounds that are not provided in the statute itself. Consequently, § 1915(g) is in jeopardy of becoming unconstitutional because it is restricting inmates from filing meritorious actions. This is even more true after the Supreme Court’s decision in *Lomax v. Ortiz-Marquez*.

This Comment presents a way forward based on sound, text-based statutory interpretation, and it seeks to fulfill the PLRA’s purpose without overburdening our nation’s incarcerated population. The narrower interpretation provides

³¹⁴ See *Aref v. Lynch*, 833 F.3d 242, 265 (D.C. Cir. 2016) (citations omitted); *Chavez v. Robinson*, 817 F.3d 1162, 1168 (9th Cir. 2016).

³¹⁵ *Shepherd v. Annucci*, 921 F.3d 89, 95 (2d Cir. 2019).

³¹⁶ 141 CONG. REC. 27,044 (1995) (statement of Sen. Strom Thurmond) (“This amendment will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates.”).

³¹⁷ 28 U.S.C. § 1915(g) (counting as strikes only those actions or appeals “dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted”).

³¹⁸ See *supra* Part III.

uniformity and clarity, which would reduce litigation surrounding the statute. The result is that inmates will be able to successfully file meritorious claims *in forma pauperis*. America's inmates do not lose their fundamental right to access the courts by virtue of being incarcerated, and the narrower interpretation of the statute ensures its constitutionality by protecting inmates' right to access the courts.

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