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)

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INTRODUCTION

In 1892, Congress enacted an in forma pauperis statute that waived filing fees for indigent litigants so that anyone, regardless of their financial ability to pay court fees and costs, could bring a federal action.[1]

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[1] Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 341 (1948). As the Supreme Court observed, the federal in forma pauperis statute opened the courthouse doors to all; no

Seventy years later, the Supreme Court reaffirmed that, so long as a case was "not clearly frivolous," in forma pauperis status should be granted, as "it is our duty to assure to the greatest degree possible . . . equal treatment for every litigant before the bar."[2] Yet, by the 1990s, federal courts faced a staggering increase in filings. Civil rights litigation, alone, experienced a spike from 18,922 actions filed in U.S. district courts in 1990 to 43,278 in 1997.[3] Several factors likely contributed to this trend—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.[4] Congress sought to control the surge. Despite the fact that imprisoned and non-incarcerated Americans contributed to the burgeoning federal caseload, prisoners bore the brunt of remedial legislation.[5] The Prison Litigation Reform Act ("PLRA") was Congress's response to the rising tide of civil rights litigation.

When the PLRA was proposed in 1995, the Act's sponsors trumpeted its "several important reforms that would dramatically reduce the number of meritless prisoner lawsuits."[6] By amending the federal in forma pauperis statute, the PLRA added financial disincentives to filing federal lawsuits.[7] Rather than allow indigent prisoners to file complaints

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longer would poverty serve as a barrier because a litigant could not "pay or secure the costs." *Id.*

[2] Coppedge v. United States, 369 U.S. 438, 446–47 (1962) (internal quotations omitted).

[3] TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUST., CIVIL RIGHTS COMPLAINTS IN U.S DISTRICT COURTS, 1990–2006 (2008), at 1. According to the March 31, 2001, Federal Judicial Caseload Statistics, district court civil cases have declined by about 3% between 1997 and 2001; however, the number of appeals to the U.S. Courts of Appeals have been on the rise during the same time period. Federal Judicial Caseload Statistics 2001, "Work of Federal Judiciary," Pub. Tbl. No. JCI, *available at http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2001* (last visited Dec. 3, 2018).

[4] *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2018) (amended 2008); Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C and 31-41c U.S.C.); Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. and 2 U.S.C.).

[5] The number of federal civil rights complaints filed in district courts by non-prisoners has nearly doubled between 1990 and 2006. *See* TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUST., CIVIL RIGHTS COMPLAINTS IN U.S DISTRICT COURTS, 1990–2006 (2008), at 4, tbl. 1 (table, "Federal subject matter jurisdiction of civil rights complaints filed in U.S. district courts, 1990–2006").

[6] 141 CONG. REC. 14,413 (1995) (Sen. Bob Dole).

[7] *See id.* at 14,571–72 (stating that the PLRA would amend 28 U.S.C. § 1915 and listing the proposed amended language); *see also id.* at 14,570 (identifying the objectives for amending §1915, including the dramatic increase in prisoner filings between 1975 and 1994, the propensity for prisoners to file meritless lawsuits, and the tendency for these actions to "tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population").

without payment of filing fees, the proposed legislation introduced a garnishment procedure, which ensured payment of all filing fees and costs over time.[8] Meanwhile, non-incarcerated Americans could continue to file frivolous lawsuits without prepayment of fees—from alleging that a fast-food chain's coffee was too hot,[9] to asserting private parties implanted "tracking chips" to control and monitor the plaintiff's body.[10] Prisoners, on the other hand, seeking to complain about the conditions of their confinement—including the wrongful use of force, inadequate medical care, violation of religious rights, failure to accommodate a disability, failure to protect, etc.—would be required to file an in forma pauperis motion, a financial affidavit alleging indigency, and a certified copy of their prison trust fund account statement; courts would then be authorized to periodically deduct funds from the prisoner's account to satisfy the balance of any filing fee they owed.[11]

The PLRA also amended 28 U.S.C. § 1915 by adding subsection (g), known as the "three strikes rule"; it prohibits prisoners from filing any litigation in forma pauperis (without prepayment of fees) if three or more actions or appeals have been dismissed as frivolous, malicious, or for failure to state a claim.[12] Because dismissal of a complaint and an appeal therefrom constitute separate strikes, prisoners—most of whom are untrained in law and are beholden to the resources in a prison law library to craft legal documents—may accumulate three strikes by filing two unsuccessful complaints and one appeal.[13] As there is no time limit on the three-strikes bar, an indigent "three strikes" prisoner facing a

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[8] The garnishment provision that was proposed is as follows: "if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of the filing fee. The court shall assess, and when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—(A) the average monthly deposits to the prisoner's account or (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal." 141 CONG. REC. 14,416 (Sec. 4, (b)(1)) (1995). After payment of the initial partial fee, "the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account." *Id.* (Sec. 4, (b)(2)).

[9] *See, e.g.*, Holowaty v. McDonald's Corp., 10 F. Supp. 2d 1078 (D. Minn. 1998); Greene v. Boddie-Noelle Enters., 966 F. Supp. 416 (W.D. Va. 1997). The number of federal lawsuits about hot coffee, alone, is surprisingly high.

[10] *See, e.g.*, Spence v. Connor, No. 3:10cv1925(MRK), 2010 WL 7865084, at *1 (D. Conn. 2010) (reviewing complaint alleging that real estate agents and physicians implanted a tracking chip in plaintiff's body, granting in forma pauperis status, and sua sponte dismissing complaint for failure to state a claim).

[11] 141 CONG. REC. 14,416 (Sec. 4. (b)) (1995); *see also* 28 U.S.C. § 1915(a)(2)–(3) (2018).

[12] *See id.* (proposed language of amendment to 28 U.S.C. § 1915); *see also* 28 U.S.C. § 1915(g) (2018).

[13] Chavis v. Chappius, 618 F.3d 162, 167 (2d Cir. 2010); Jennings v. Natrona Cty. Det. Ctr. Med. Facility, 175 F.3d 775, 780 (10th Cir. 1999); Hains v. Washington, 131 F.3d 1248, 1250 (7th Cir. 1997) (per curiam); Henderson v. Norris, 129 F.3d 481,e485 (8th Cir. 1997) (per curiam); Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996).

lengthy prison term is effectively prohibited from filing any litigation—no matter how meritorious—unless able to pay hundreds of dollars in fees at the time of filing a complaint.[14]

The only exception to the three strikes rule is if a prisoner alleges "imminent danger of serious physical injury."[15] When courts narrowly interpret the terms "imminent" and "serious physical injury," only a trickle of cases are permitted to proceed.[16] For example, a prisoner must typically allege imminent injury at the time the complaint is filed; this, however, seems to ignore the reality that a prisoner may not have access to a pen, paper, and legal resources at the time he or he is facing serious physical injury.[17] Additionally, some courts of appeals have specified that a three-strikes prisoner must not only allege imminent danger when a complaint is filed, but must also allege that he continues to face imminent injury at the time his notice of appeal is filed. As one panel of circuit judges noted, "[i]t is highly improbable that the danger would still be 'about to' occur at the time of an appeal, following entry of judgment."[18]

Because section 1915(g) uses mandatory language—in "no event *shall* a prisoner bring a civil action or appeal" in forma pauperis if the prisoner has three or more strikes—courts must resolve whatever murky

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14 28 U.S.C. § 1914 (2006) (setting forth filing fee for district court action, and noting that additional fees prescribed by the Judicial Conference of the United States are also collectable). As the Third Circuit explained, Congress "has taken away our ability as judges to grant I.F.P. status to a 'three strikes' prisoner no matter how meritorious his or her subsequent claims may be, unless the prisoner 'is under imminent danger of serious physical injury' when he or she 'bring[s] a civil action.' Congress has held trump here, and it has dealt a hand. As judges we must play it." Abdul-Akbar v. McKelvie, 239 F.3d 307, 315 (3d Cir. 2001). The Third Circuit also noted that allowing prisoners to proceed in forma pauperis to file a complaint alleging injury as a result of their incarceration "is entirely compatible with the precept that for any injury, there should be a remedy." *Id.* Yet, as the Third Circuit ably detailed, the three strikes rule imposes the danger of, for all practical purposes, barring a prisoner from bringing a meritorious lawsuit after accumulating three strikes because of the financial impossibility of paying hundreds of dollars in filing fees. *Id.* at 314–15.

15 28 U.S.C. § 1915(g) (2018).

16 *Black's Law Dictionary* defines "imminent danger" as an "immediate, real threat to one's safety that justifies the use of force in self-defense" or the "danger resulting from an immediate threatened injury sufficient to cause a reasonable and prudent person to defend himself or herself." *Imminent Danger,* BLACK'S LAW DICTIONARY (10th ed. 2014). The same dictionary defines "danger" as "[p]eril; exposure to harm, loss, pain, or other negative result." *Danger*, BLACK'S LAW DICTIONARY (10th ed. 2014).

17 Most Circuit courts have expressly ruled that a prisoner must allege the existence of imminent danger of serious physical injury at the time the complaint is filed. Asemani v. U.S. Citizenship & Immigration Services, 797 F.3d 1069, 1074–75 (D.C. Cir. 2015); Ball v. Famiglio, 726 F.3d 448, 467 (3d Cir. 2013); Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007); Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003); Malik v. McGinnis, 293 F.3d 559, 562–63 (2d Cir. 2002); *Abdul-Akbar*, 239 F.3d at 312; Medberry v. Butler, 185 F.3d 1189, 1193 (11th Cir. 1999); Baños v. O'Guin, 144 F.3d 883, 884 (5th Cir. 1998) (per curiam); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (per curiam).

18 *Abdul-Akbar*, 239 F.3d at 325 (Mansmann, J., dissenting).

§ 1915(g) issues are presented before allowing a case to proceed.[19] Many courts struggle to determine whether certain dismissals, not couched in § 1915(g)'s categories of "frivolous, malicious, or fails to state a claim," constitute strikes.[20] For example, dismissals on immunity grounds, for failure to exhaust administrative remedies, and "mixed" bases—involving strike grounds and non-strike grounds—are counted as strikes in some jurisdictions and not in others.[21] Even if a prisoner clearly has three strikes, a court's § 1915(g) review is not over; a court must then consider if a prisoner faces "imminent danger of serious physical injury."[22] Instead of allowing courts to use traditional methods to monitor and control their dockets—including fashioning sanctions to curb litigation by frequent filers—the PLRA instead requires judges to clear the many hurdles of § 1915(g) before even considering the merits of an action.[23]

In the end, the PLRA has delivered mixed results in achieving its aim to decrease prisoner litigation. Although there was an initial decline in federal prisoner filings between 1996 and 1997, there was a steady increase from 1999 to 2004; between 1990 and 2006, the number of federal prisoner lawsuits was at its highest between 2003 and 2005.[24] Federal actions filed by state prisoners sharply declined in 1997, suggesting the PLRA may have succeeded in its intended effect; filings have since plateaued and hover around 25,000 state prisoner complaints per year.[25] While there may be a savings in the number of cases being filed, courts have faced inefficiencies in resolving complex issues stemming from § 1915(g). Circuit splits have developed on a number of issues, and legislative history is of little help because there was no debate about § 1915(g) before the PLRA was enacted. Thus, it is impossible to ascertain how legislators envisioned courts to interpret this provision. The Supreme Court has considered the three strikes rule on only one occasion.[26] Given the grave consequences that attach to being a three-strikes prisoner, and the lack of consensus amongst courts of appeals on how to

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19 28 U.S.C. § 1915(g) (2018).

20 *Id.*

21 *Ball*, 726 F.3d at 460–63.

22 *Id.* at 467.

23 *See id.* (explaining that court must review to determine whether imminent danger exception applies in present case); *see also* Ciarpaglini v. Saini, 352 F.3d 328, 330–31 (7th Cir. 2003) (delineating the reach and scope of 28 U.S.C. § 1915(g)).

24 *See* TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUST., CIVIL RIGHTS COMPLAINTS IN U.S DISTRICT COURTS, 1990–2006 (2008), at 7, fig. 6 (chart, "Federal prisoner petitions filed in U.S. district court ranged from a low of 910 in 1992 to a high of 1,334 in 2004.").

25 *See id.* at 7, fig. 5 (chart, "State prison petitions declined after the Prison Litigation Reform Act of 1996.").

26 Coleman v. Tollefson, 135 S. Ct. 1759 (2015) (holding that "a prisoner who has accumulated three prior qualifying dismissals under § 1915(g) may not file an additional suit *in forma pauperis* while his appeal of one such dismissal is pending").

interpret § 1915(g), the time is ripe for Congress or the Supreme Court to revisit this provision.

Part I of this article examines the PLRA's legislative history and considers what Congress aimed to accomplish by amending 28 U.S.C. § 1915. Part II focuses on how courts of appeals have interpreted this statute's "three strikes" language and explores the Circuit splits that have fissured since the PLRA's passage. Specifically, this article examines when strikes are counted for immunity-based dismissals, dismissals without prejudice for failure to exhaust, and "mixed" dismissals—based on both § 1915(g) grounds and non-§ 1915(g) grounds. Part III examines the imminent danger exception, and the varying interpretations across Circuits. Part IV considers ways that Congress could amend § 1915(g) to reduce the burden it places on the courts, such as by lifting the indefinite bar blocking three-strikes prisoners from filing lawsuits no matter their merit. It also identifies other methods by which courts can manage their dockets more effectively.

I. LEGISLATIVE HISTORY

In 1995, Senator Bob Dole introduced a bill to curb prisoner litigation regarding prison conditions.[27] "Over the past two decades, we have witnessed an alarming explosion in the number of lawsuits filed by State and Federal prisoners," from approximately 6,000 prisoner suits in 1975 to over 39,000 in 1994, he said.[28] With "little to lose and everything to gain," inmates were clogging the courts with lawsuits complaining of petty discomforts and inconveniences—including "being served creamy peanut butter instead of the chunky variety they had ordered."[29] Senator Dole proposed a regime whereby indigent prisoners would no longer be able to file lawsuits without payment of filing fees.[30] Through a "garnishment procedure," inmates would face an "economic disincentive to going to court."[31] Specifically, when an indigent prisoner wished to file a lawsuit, but was unable to pay court fees and costs at the time of commencement, the courts could deduct 20 percent of the funds in the prisoner's inmate bank account upon filing, and additional monthly deductions of 20 percent of the prisoner's income would be garnished until the full amount of costs and fees was paid.[32]

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27 141 CONG. REC. 14,570 (1995) (statement of Sen. Dole, introducing bill to reform prison litigation, to be called the Prison Litigation Reform).

28 *Id.*

29 *Id.* (listing other examples of frivolous lawsuits, such as being deprived of the opportunity to attend a wedding anniversary party and lacking sufficient storage locker space).

30 *See id.* at 14,571 (explaining that "[a]s indigents, prisoners are generally not required to pay the fees that normally accompany the filing of a lawsuit").

31 *Id.*

32 *Id.*

Over the next several months, the bill periodically reared its head on the Senate floor, with an emphasis on the most ludicrous and absurd prisoner lawsuits ever filed. Senators even compiled several David Letterman-style "top ten" lists exploring the most farcical requests for relief.[33] Cases ran the gamut—melted (not frozen) ice cream had been served, a unit manager's broadcast of country and western music constituted cruel and unusual punishment, Converse sneakers were provided rather than L.A. Gear or Reebok "pumps," prison physicians implanted mind control devices, and prison officials confiscated a death row inmate's Gameboy.[34] Senators harped on how legislation was needed to curb the otherwise unchecked propensity for prisoners to file suit anytime they experienced the slightest offense.[35] It was urged that this legislation must be passed to "put an end to the inmate litigation fun-and-games."[36]

A lone senator voiced dissent. While there was no doubt that prisoner litigation was flooding the courts and some reform was needed, "we must not lose sight of the fact that some of these lawsuits have merit—some prisoner's rights are violated," Senator Joe Biden remarked.[37] He cited a juvenile detention center that beat children with chains and other objects, and a correctional facility for women where inmates were routinely raped by correctional officials—both practices ceased after lawsuits were filed and courts intervened.[38] The bill's sponsors acknowledged that they did "not want to prevent inmates from raising legitimate claims," and stated that the bill would "not prevent those claims from being raised."[39] However, these assurances were isolated; the remainder of the sponsors' remarks focused on how prisoners abused the courts by filing nonsensical lawsuits.

Despite the promise that meritorious suits would not be hindered, the version of the bill submitted in September 1995 included a provision that would permanently bar prisoners from filing any civil litigation—

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33 *Id.* at 14,627, 13,629.

34 *Id.* at 14,629.

35 Senator Harry Reid described several cases he deemed frivolous—including being denied a "same-sex religious ceremony," being deprived of women's clothing ("[t]his was a man, of course"), and being forced to wear the wrong size footwear—and expressed frustration that "[f]orty percent of the Federal judiciary in Nevada spends their time on this garbage." 141 CONG. REC. 14,627 (1995).

36 *Id.* at 14,626 (statement by Sen. Bob Dole).

37 *Id.* at 14,628.

38 *See* Women Prisoners of District of Columbia Dep't of Corrections v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994) (describing corrective order involving class action by female prisoners who alleged various civil rights violations); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977) (challenging conditions of confinement at juvenile detention center).

39 141 CONG. REC. 14,627 (statement by Sen. Orrin Hatch) (1995).

regardless of merit—without the prepayment of all costs and fees if they had accumulated "three strikes:"

> In no event shall a prisoner in any prison 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, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious bodily harm.[40]

This sweeping language, buried in the proposed amendments to § 1915, was not debated.[41] Yet, it carried severe consequences. No one seemed to consider how prisoners serving lengthy sentences could effectively lose the ability to raise valid complaints about prison conditions—including claims of abuse, inadequate medical care, or a violation of their right to practice a religion—if they first filed insufficient pleadings or appeals. There was also no discussion of how this rule had the practical effect of barring litigation; for prisoners with limited or no income, payment of a $350 filing fee plus other court costs could be an impossibility.[42] After all, even today, federal prisoners who are assigned a job within a correctional facility earn wages as meager as $0.12 per hour.[43] Thus, even if an inmate secured a prison job, a statute of limitations could run before enough money was earned to pay filing costs.[44] Finally, there was no consideration of whether mandatory language—"no pris-

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[40] *Id.* at 14,416 (S. 1279, Sec. 7(g)) (1995).

[41] After the PLRA was signed into law in 1996, civil liberties advocates were quick to criticize and question the legislation's utility. In the words of the Executive Director of the American Civil Liberties Union of South Carolina, the PLRA was "[r]ammed through Congress without hearings or testimony, the law is predicated on bogus facts and proposes phony solutions." Steven J. Bates, *ACLU Will Challenge Constitutionality of Law*, GREENVILLE NEWS, May 21, 1996, at 6A.

[42] *See* 28 U.S.C. § 1914(a) (2006) (setting forth filing fee for district court action); *see also* 28 U.S.C. § 1914, Judicial Conference Schedule of Fees (effective Dec. 1, 2016) (listing other court costs and fees related to litigation). According to the Judicial Conference Schedule of Fees, not only would a non-IFP prisoner have to pay the filing fee, but there would also be a $50 administrative fee for filing a civil action in the district court. *See id.* ¶ 14.

[43] *See* FEDERAL BUREAU OF PRISONS, *Work Programs*, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp (last visited December 3, 2018).

[44] *See* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 124 (2005) (reaffirming that all 42 U.S.C. § 1983 claims are governed by the most analogous state statute of limitations). Circuit courts have routinely rejected challenges to§ 1915(g)'s constitutionality, essentially determining that § 1915(g) does not bar prisoner litigation, "it merely prohibits [prisoners] from enjoying IFP status." Rivera v. Allin, 144 F.3d 719, 723 (11th Cir. 1998) (quoting Carson v. Johnson, 112 F.3d 818, 821 (5th Cir. 1997)); *see also* Polanco v. Hopkins, 510 F.3d 152, 156 (2d Cir. 2007); Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002); Abdul-Akbar v. McKelvie, 239 F.3d 307, 316–17 (3d Cir. 2001) (en banc); Higgins v. Carpenter, 258 F.3d 797, 800–01 (8th Cir. 2001); Rodriguez v. Cook, 169 F.3d 1176, 1178–81 (9th Cir. 1999); White v. Colorado, 157 F.3d 1226, 1232–35 (10th Cir. 1998); Wilson v. Yaklich, 148 F.3d 596, 604–06 (6th Cir. 1998).

oner *shall*"—was necessary, or if there were less burdensome alternatives to dealing with frequent filers than requiring courts to both identify three strikes *and* ascertain whether a prisoner faced imminent danger.[45]

In the end, with minimal congressional guidance, district and circuit courts have been left to interpret § 1915(g) and attempt to discern strikes and imminent danger. Inharmonious opinions have resulted.

II. THREE STRIKES

A. *Statutory Groundwork*

Before a prisoner is barred from bringing actions in forma pauperis, a court must determine that the inmate has filed three or more actions or appeals that have been dismissed for the reasons stated in § 1915(g).[46] The unexacting terminology of § 1915(g) renders this endeavor difficult.[47] The statute does not define the terms "frivolous," "malicious," or "fails to state a claim." Orders of dismissal do not always invoke these specific terms, requiring courts to evaluate whether certain types of dismissals should be construed as falling under § 1915(g).[48] While some of this guesswork could be eliminated if the court dismissing an action had to determine whether its dismissal constituted a strike, some circuits have held that courts should refrain from taking such action. The rationale for

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[45] Most Circuits have recognized that a filing injunction (preventing a litigant from filing future complaints or appeals without first seeking leave of the court) "is appropriate when a plaintiff 'abuse[s] the process of the Courts to harass and annoy others with meritless, frivolous, vexatious or repetitive . . . proceedings." Lau v. Meddaugh, 229 F.3d 121, 123 (2d Cir. 2000) (quoting In re Hartford Textile Corp., 659 F.2d 299, 305 (2d Cir. 1981)); *see also* Ringgold-Lockhart v. Cty. of Los Angeles, 761 F.3d 1057, 1063–66 (9th Cir. 2014); Qureshi v. United States, 600 F.3d 523, 525–26 (5th Cir. 2010); Cromer v. Kraft Foods North America, Inc., 390 F.3d 812, 818–19 (4th Cir. 2004); In re Powell, 851 F.2d 427, 431 (D.C. Cir. 1988); In re Oliver, 682 F.2d 443, 445–46 (3d Cir. 1982); Pavilonis v. King, 626 F.2d 1075, 1079 (1st Cir. 1980).

[46] 28 U.S.C. § 1915(g) (2018).

[47] The statute provides:

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

Id.

[48] *See* Furnace v. Giurbino, 838 F.3d 1019, 1028 (9th Cir. 2016) (declining to assess a strike against a litigant because "'district courts do not issue these strikes one by one, in their orders of judgment,' because nothing in the PLRA requires them to do so," and "nothing in the PLRA requires us to do so at this time," and explaining that it is not until a defendant raises a three-strikes argument that the court will then determine if a prisoner has three strikes) (quoting Andrews v. King, 398 F.3d 1113, 1119 n.8 (9th Cir. 2005)); *see also* Snider v. Melindez, 199 F.3d 108, 115 (2d Cir. 1999) (noting that "it would be well for a court entering an order of dismissal to see to it that the record and judgment clarify the [basis for dismissal] for the future. The judgment should clearly state the reasons for the dismissal, including whether the dismissal is because the claim is 'frivolous,' 'malicious,' or 'fails to state a claim' . . . .").

this policy is that, unless and until a prisoner has three strikes, there is no practical consequence for announcing that a prisoner has one or two; a premature strike designation could be contested, prolonging litigation over an issue that may never become ripe.[49]

The Supreme Court has not yet addressed the meaning of § 1915(g)'s three categories of strikes. At most, the Court has dealt with § 1915(e)(2)(B), which describes the same categories of cases. The latter provision permits courts to dismiss a case at any time—regardless of whether a filing fee has been paid in whole or in part—if it is determined that: "(B) the action or appeal— (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief."[50] When the Supreme Court was forced to give meaning to the term "frivolous" under § 1915(e)(2),[51] the Court complained that the "brevity . . . and the generality of [the statute's] terms have left the judiciary with the not inconsiderable tasks of fashioning the procedures by which the statute operates and of giving content to § 1915[ ]'s indefinite adjectives."[52] The Court further remarked that neither the statute nor Congress provided any guidance on how to define § 1915(e)(2)'s inexact language.[53] Nevertheless, in a decision predating the passage of the PLRA and the enactment of § 1915(g), the Supreme Court fashioned its own definition: a complaint "is frivolous where it lacks an arguable basis either in law or in fact."[54]

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49 *See Snider*, 199 F.3d at 115 (stating that the "designation of strikes has no practical consequences until a defendant in a prisoner's lawsuit raises the contention that the prisoner's suit or appeal may not be maintained in forma pauperis pursuant to 28 U.S.C. § 1915 because the prisoner has accumulated three strikes").

50 28 U.S.C. § 1915(e)(2)(B)(i)–(iii) (2018). The Supreme Court presumes that "identical words used in different parts of the same statute" carry "the same meaning." IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2006). It is noteworthy that immunity, identified under 28 U.S.C. § 1915(e)(2)(B)(iii), is not specifically listed in § 1915(g). Thus, if a dismissal does not specify under which subsection of § 1915(e)(2)(B) it falls, it quickly becomes difficult to ascertain whether the dismissal is on strike grounds, is a "mixed" dismissal (on strike and non-strike grounds), or is wholly based on immunity and thus may not be a strike at all.

51 Neitzke v. Williams, 490 U.S. 319, 324–26 (1989). The version of 28 U.S.C. § 1915 that was in effect at the time *Neitzke* was decided is considerably different from the present-day statute. *Compare* 28 U.S.C. § 1915(d) (1989) ("The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."), *with* 28 U.S.C. § 1915(e)(2) (2018) ("Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—(A) the allegation of poverty is untrue; or (B) the action or appeal—(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.").

52 *Neitzke*, 490 U.S. at 324–25.

53 *Id.* at 325.

54 *Neitzke*, 490 U.S. at 325 (1989) (explaining that the term "frivolous" encompasses "not only the inarguable legal conclusion, but also the fanciful factual allegation"). Several Circuits have cited *Neitzke* in the course of analyzing whether a dismissal constitutes a "strike"

Given the "presumption that a given term is used to mean the same thing throughout a statute,"[55] the definition for "frivolous" should be the same under § 1915(e)(2) and § 1915(g).[56]

Still, the meaning of the "remaining strike grounds" remains ambiguous, as neither Congress nor the Supreme Court have considered them. The burden has largely fallen on federal courts of appeals to wrangle over the parameters of the terms "malicious" and "fails to state a claim." As to the former term, slightly different meanings have been adopted across the country. The Third Circuit requires a "subjective inquiry into the litigant's motivations at the time of the filing of the lawsuit to determine whether the action is an attempt to vex, injure or harass the defendant."[57] The Fifth Circuit has pegged duplicative lawsuits to be malicious under § 1915(e)(2)(B)(i).[58] The Eighth Circuit has interpreted "malicious" to apply to situations where pleadings included knowing false allegations, or abusive and disrespectful language.[59] The Ninth Circuit, relying on *Webster's Third New International Dictionary*, has stated an action is malicious if it is "filed with the 'intention or desire to harm another.' "[60]

As to the phrase "fails to state a claim," the Supreme Court has cautioned that a complaint that is dismissed under Federal Rule of Civil

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on the grounds of frivolousness. Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007); Day v. Maynard, 200 F.3d 665, 667 (10th Cir. 1999); Gibbs v. Cross, 160 F.3d 962, 967 (3d Cir. 1998); Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998). However, it should be noted that the Second Circuit's reliance on *Neitzke* in *Tafari* may be misplaced, as the parenthetical that follows the citation to *Neitzke* states that the latter case was "emphasizing that 'not all unsuccessful cases qualify as a strike under § 1915(g).' " *Tafari*, 473 F.3d at 443. The quoted language does not appear in *Neitzke*—nor does any reference to § 1915(g) appear because *Neitzke* preceded the passage of the PLRA (and § 1915(g)) by 7 years.

55 Brown v. Gardner, 513 U.S. 115, 118 (1994).

56 It should be noted that the Supreme Court has recognized that "this presumption is not absolute" and it "yields readily to indications that the same phrase . . . is one that speakers can easily use in different ways without risk of confusion." Barber v. Thomas, 560 U.S. 474, 484 (2010). However, Circuit courts generally ascribe to the view that the presumption applies to § 1915. *See, e.g.*, Brown v. Johnson, 387 F.3d 1344, 1347–48 (11th Cir. 2004) (noting that "three separate provisions of the PLRA" contains the phrase "fails to state a claim" and that when a district court invokes one of them, the dismissal constitutes a strike. The three provisions are: (1) § 1915(g); (2) 28 U.S.C. § 1915(e)(2)(B)(ii), which "directs the district court to dismiss the complaint of any plaintiff proceeding *in forma pauperis* if the court determines that the complaint 'fails to state a claim on which relief may be granted' "; and (3) 28 U.S.C. § 1915A, which "directs the district court to dismiss the complaint of a prisoner if it fails to state a claim").

57 Deutsch v. United States, 67 F.3d 1080, 1086 (3d Cir. 1995).

58 Pittman v. Moore, 980 F.2d 994, 995 (5th Cir. 1993).

59 *See* In re Tyler, 839 F.2d 1290, 1293–94 (8th Cir. 1988) (per curiam) (using disrespectful and abusive language); Horsey v. Asher, 741 F.2d 209, 212, 213 (8th Cir. 1984) (involving false accusations, and a pattern of vexatious and abusive pleadings).

60 Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005). *Black's Law Dictionary* defines "malicious" as "[s]ubstantially certain to cause injury" or "[w]ithout just cause or excuse." *Malicious*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Procedure 12(b)(6) (which governs motions to dismiss for "failure to state a claim upon which relief can be granted")[61] is not automatically frivolous under § 1915(e)(2).[62] Most circuit courts have nevertheless drawn parallels between Rule 12(b)(6) and § 1915(g). The District of Columbia Circuit has ruled that when a district court dismisses a 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."[63] The Ninth Circuit has similarly held that "if a claim is dismissed for failure to state a claim under rule 12(b)(6), it counts as a strike for PLRA purposes," and the Eleventh and Fourth Circuits have invoked analogous reasoning.[64] Yet, the Third Circuit has attributed "some persuasive effect" to an argument that Rule 12(b)(6) and § 1915(g) are distinct, as the former uses the clause "fails to state a claim upon which relief *can* be granted" and the latter states "fails to state a claim upon which relief *may* be granted."[65] Thus, there is no consensus regarding the pertinence of Rule 12(b)(6) to a three-strikes analysis under § 1915(g).

Considering the varying meanings that have been attributed to § 1915(g)'s strike language, it should come as no surprise that an impressive array of issues involving the application of these words has plagued courts and frustrated the PLRA's aims to lessen the strain on the judiciary. Trying to figure out whether a prisoner has accumulated three strikes can involve extensive analysis that yields no definitive answers. However, because § 1915(g) uses mandatory language, courts are forced to first tackle the question of whether three strikes exist. Three of the most contested issues amongst federal courts of appeals are discussed below. They are whether a strike is warranted for: (1) immunity-based dismissals, (2) dismissals without prejudice for failure to exhaust administrative remedies, and (3) "mixed" dismissals—on § 1915(g) grounds and non-§ 1915(g) grounds.

B. Immunity

When a district court dismisses an action sua sponte or in the early stages of litigation, it is common for the court to cite the relevant portion

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61 FED. R. CIV. P. 12(b)(6).

62 Neitzke v. Williams, 490 U.S. 319, 320 (1989).

63 Thompson v. DEA, 492 F.3d 428, 438 (D.C. Cir. 2007).

64 El-Shaddai v. Zamora, 833 F.3d 1036, 1043 (9th Cir. 2016); *see also* Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998); McLean v. United States, 566 F.3d 391, 396 (4th Cir. 2009) (remarking that § 1915(g)'s "fails to state a claim" language "closely tracks the language of Federal Rule of Civil Procedure 12(b)(6)," and determining that the treatment of dismissals under Rule 12(b)(6) is instructive for purposes of counting strikes under § 1915(g)).

65 Byrd v. Shannon, 715 F.3d 117, 124 (3d Cir. 2013) (emphasis in original).

of § 1915(e)(2)(B) in support.[66] Any guesswork as to how to classify a dismissal can be eliminated when a district court specifies that an entire action fails under §§ 1915(e)(2)(B)(i) or (ii), both of which are categorically strike grounds.[67] However, when a dismissal order cites § 1915(e)(2)(B)(iii), which governs dismissals on immunity grounds, circuit courts diverge on whether the dismissal can count as a strike.[68] The same is true when a dismissal order cites to the broad umbrella of § 1915(e)(2)(B)—which includes immunity—without specifying on what grounds the case is being dismissed.

Circuits have reached different conclusions about whether immunity alone should serve as an exclusive basis for a strike. The Second Circuit has held that dismissals based on absolute prosecutorial immunity and judicial immunity are akin to frivolous dismissals, and they are strikes under § 1915(g).[69] The Ninth Circuit has ruled in an unpublished memorandum decision that when a qualified immunity defense is apparent on the face of the complaint, and a case is dismissed under Federal Rule of

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[66] *See, e.g.*, Milan v. Wetheimer, 808 F.3d 961, 963 (2d Cir. 2015) (stating that the district court sua sponte dismissed a complaint pursuant to 28 U.S.C. § 1915(e)(2)(B), for failure to state a claim); Hughes v. Lott, 350 F.3d 1157, 1158 (11th Cir. 2003) (reviewing district court's sua sponte dismissal, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (e)(2)(B)(ii), of prisoner 42 U.S.C. § 1983 lawsuit); Curley v. Perry, 246 F.3d 1278, 1281 (10th Cir. 2001) (noting the district court sua sponte dismissed prisoner's civil rights action under 28 U.S.C. § 1915(e)(2) and Rule 12(b)(6) for failure to state a claim); Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000) (reviewing district court sua sponte dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii), and likening the "failure to state a claim" standard under that statute to a Fed. R. Civ. P. 12(b)(6) dismissal).

[67] *Compare* 28 U.S.C. § 1915(e)(2)(B)(i)–(ii) (2018), *with* 28 U.S.C. § 1915(g) (2018).

[68] *But see* Hafed v. Fed. Bureau of Prisons, 635 F.3d 1172, 1178 (10th Cir. 2011) (holding that when an "immunity ground for dismissal was subsumed in frivolousness or appellant's failure to state a claim, because appellant *affirmatively asserted* facts showing that he could not meet [an exception to a party's immunity], so he had no 'legally viable claim[.]'").

[69] *See, e.g.*, Collazo v. Pagano, 656 F.3d 131, 134 (2d Cir. 2011) (holding that dismissal based on absolute prosecutorial immunity is a strike); Mills v. Fischer, 645 F.3d 176, 177 (2d Cir. 2011) (holding that "[a]ny claim dismissed on the ground of absolute judicial immunity is 'frivolous' for purposes of 28 U.S.C. § 1915(g)."). The Second Circuit has not considered whether other immunity determinations—such as qualified immunity—could similarly be deemed a strike. In a footnote in *Collazo,* the Second Circuit narrowed its holding. Specifically, the Court stated:

> We recognize that, unlike absolute judicial immunity, absolute prosecutorial immunity can be difficult to adjudicate. . . . We also recognize that a *pro se* plaintiff is unlikely to be able to distinguish between a meritorious and a frivolous case in many instances. We therefore limit our holding to dismissals for that readily distinguishable heartland of immune prosecutorial conduct that was spelled out by the Supreme Court twenty years ago in *Burns*—conduct that is 'intimately associated with the judicial phase of the criminal process.' . . . Accordingly, our holding does not extend to cases in which the claimed injury arises ou[t] of investigatory or other non-immune conduct by a prosecutorFalse Neither does it extend to cases in which the complaint is not dismissed *sua sponte* pursuant to 28 U.S.C. § 1915(g).

Collazo, 656 F.3d at 134 n.2 (quoting Burns v. Reed, 500 U.S. 478, 486 (1991)) (other internal citations omitted).

Civil Procedure 12(b)(6), it may constitute a strike.[70] On the other hand, the Eighth Circuit has rejected the proposition that an action dismissed because of prosecutorial immunity is a strike, and the Third Circuit has held that absolute immunity cannot form the basis for a strike.[71]

These differing outcomes could be reconciled if the Supreme Court or Congress clarify whether § 1915(g) should be interpreted narrowly, or if courts have discretion to consider the character of a dismissal in determining whether it fits within the "strike" criteria. For example, the Second and Ninth Circuits acknowledge that immunity is not specifically mentioned in § 1915(g), but reason that when the basis for dismissal is obvious, it is essentially frivolous—even if the district court did not label it so.[72] The Eighth Circuit interprets § 1915(g) more literally, reasoning that because the three-strikes rule omits immunity as a basis for a strike, it is improper for a court to hold otherwise.[73] And, the Third Circuit seems to adopt a hybrid approach. It reasons that immunity dismissals do "not constitute a PLRA strike, including a strike based on frivolousness, unless a court explicitly and correctly concludes that the complaint reveals the immunity defense on its face and dismisses the unexhausted complaint under Rule 12(b)(6) or expressly states that the ground for the dismissal is frivolousness."[74] Thus, the Third Circuit has left open the possibility that an immunity-based dismissal could constitute a strike, but the onus is on the court dismissing an action to explicitly weave one of the § 1915(g) grounds (frivolous, malicious, failure to state a claim) into the language of its order. Until the Supreme Court or Congress acts, courts will likely continue to reach differing conclusions as to whether an immunity-based dismissal may constitute a strike.

C. Exhaustion

The PLRA requires prisoners to exhaust administrative remedies before bringing an action in federal court.[75] A failure to exhaust these remedies typically results in a dismissal of a federal complaint without

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70 Reberger v. Baker, 657 F. App'x 681, 684 (9th Cir. 2016).

71 Castillo-Alvarez v. Krukow, 768 F.3d 1219, 1220 (8th Cir. 2014) (holding dismissal based on prosecutorial immunity was not a strike under § 1915(g)); Ball v. Famiglio, 726 F.3d 448, 463 (3d Cir. 2013) ("[W]e hold that dismissal based on the immunity of the defendant, whether absolute or qualified, does not constitute a PLRA strike.").

72 *See Collazo*, 656 F.3d at 134; *Mills*, 645 F.3d at 177; *Reberger*, 657 F. App'x at 684.

73 *See Castillo-Alvarez*, 768 F.3d at 1220 ("Dismissals based on immunity are not among the types of dismissals listed as strikes in section 1915(g), and . . . the dismissal of this action is not a strike under section 1915(g)."); *Ball*, 726 F.3d at 463.

74 *Ball*, 726 F.3d at 463.

75 42 U.S.C. § 1997e(a) (2013) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

prejudice to refiling once exhaustion is achieved. Whether such a dismissal is a strike depends on the circuit analyzing the issue.

As the language of § 1915(g) does not specifically mention exhaustion as a basis for a strike, courts typically look to whether a dismissal order invokes the language that the action or appeal was "frivolous," "malicious," or "fails to state a claim."[76] Circuits that adopt the most literal and narrow interpretation of § 1915(g) generally hold that dismissal for failure to exhaust should not count as a strike.[77] Other courts consider whether the failure to exhaust is tantamount to filing a frivolous or malicious action, or whether the failure to exhaust is akin to a determination that a complaint fails to state a claim.[78]

The Second Circuit was one of the first Circuits to address the issue of whether a dismissal on exhaustion grounds should constitute a strike. The Court held that an exhaustion-based dismissal could not constitute a strike because the "[f]ailure to exhaust administrative remedies is often a temporary, curable, procedural flaw," and that "a prisoner who brings suit without having exhausted these remedies can cure the defect simply by exhausting them and then reinstituting his suit."[79] Because exhaustion has no bearing on the underlying merits of a claim, and exhaustion is "curable," the Second Circuit ruled that § 1915(g) was not "meant to impose a strike upon a prisoner who suffers a dismissal because of the prematurity of his suit."[80] The Court specifically stated that § 1915(g)'s reference to "fails to state a claim" did not encompass a failure to exhaust administrative remedies.[81]

The Fourth Circuit joined the Second Circuit's holding, stating that "a routine dismissal for failure to exhaust administrative remedies does not amount to a strike."[82] However, the Fourth Circuit employed differ-

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76 28 U.S.C. § 1915(g) (2018).

77 *See, e.g.*, Snider v. Melindez, 199 F.3d 108, 111–12 (2d Cir. 1999).

78 *See, e.g.*, Pointer v. Wilkinson, 502 F.3d 369, 373 (6th Cir. 2007). The Supreme Court has considered whether exhaustion must be sufficiently pleaded in a prisoner complaint (a requirement that the Sixth Circuit once imposed), or if it is an affirmative defense. The Supreme Court ruled that the Sixth Circuit incorrectly required prisoners to plead exhaustion, and that it is an affirmative defense. *See* Jones v. Bock, 549 U.S. 199, 212 (2007). In doing so, the Supreme Court noted that while the PLRA broadened the grounds for sua sponte dismissal (for actions that are frivolous, malicious, fail to state a claim, or seek monetary damages from a defendant immune from such relief), exhaustion is notably omitted from this more expansive framework. *See id.* at 214.

79 *Snider*, 199 F.3d at 111–12.

80 *Id.* The Second Circuit has similarly ruled that an appeal taken from a non-final order is also a "curable" flaw that should not generate a strike. *See* Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007).

81 *See Snider*, 199 F.3d at 112. The Second Circuit noted, however, that if a failure to exhaust might "permanently bar[ ] the suit," a different outcome might be appropriate. *Id.* However, because this posture was not presented, this reasoning is arguably dicta. *See id.*

82 Green v. Young, 454 F.3d 405, 408 (4th Cir. 2006); *see also* Tolbert v. Stevenson, 635 F.3d 646, 653–54 (4th Cir. 2011) (addressing argument that prisoners could "immunize" them-

ent reasoning to get to this conclusion. Adopting a narrow interpretation of § 1915(g), the Fourth Circuit explained that the PLRA's exhaustion requirement was passed in the same breath as § 1915(g), and it was significant that the latter provision omitted exhaustion grounds as a basis for a strike.[83] The Third Circuit has ruled that dismissal for failure to exhaust administrative remedies cannot constitute a strike unless a court's order of dismissal explicitly states the complaint failed to state a claim."[84] The Seventh Circuit has also joined this faction.[85]

Other circuits have determined that a failure to exhaust administrative remedies can constitute a strike. The District of Columbia Circuit has ruled that when "a court dismisses an unexhausted complaint under Rule 12(b)(6), thus concluding that the complaint fails to state a claim, [§] 1915(g)'s plain text compels us to count that case as a strike," but when the "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."[86] Under this reasoning, it would serve a prisoner well to avoid discussing exhaustion in a complaint. The Sixth Circuit has reasoned that when some claims are dismissed without prejudice for failure to exhaust, it is appropriate to treat the dismissal as a strike so long as the dismissal order does not indicate that any claims have merit.[87]

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selves from the three strikes rule by adding an unexhausted claim to a complaint, and ruling that if a prisoner were to take such an action, a strike could be appropriate on the grounds of malice or frivolousness).

83 *Green*, 454 F.3d at 409.

84 Ball v. Famiglio, 726 F.3d 448, 460 (3d Cir. 2013), *abrogated in part by* Coleman v. Tollefson, 135 S. Ct. 1759, 1763 (2015). The *Ball* court seems to focus on whether the dismissal of a complaint on exhaustion grounds can be raised in a Rule 12(b)(6) motion, or if exhaustion is too complicated to be obvious at the early stages of litigation. *See id.*

85 *See* Turley v. Gaetz, 625 F.3d 1005, 1013 (7th Cir. 2010) (holding that "the dismissal of an action for failure to exhaust . . . does not incur a strike."). *Turley* further noted that, as the Sixth Circuit had reasoned, "a dismissal for failure to plead adequately exhaustion is distinct from a dismissal for failure to state a claim, and neither 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)." *Id.* (citing Pointer v. Wilkinson, 502 F.3d 369, 373, 376 (6th Cir. 2007)).

86 Thompson v. DEA, 492 F.3d 428, 438 (D.C. Cir. 2007). The District of Columbia Circuit's focus is on whether the dismissal can fall under the language of Fed. R. Civ. P. 12(b)(6). *See id.* It further clarifies this point by remarking, in dicta, that if exhaustion was a jurisdictional requirement, "then the court will dismiss the unexhausted complaint pursuant to Rule 12(b)(1) and the dismissal will not count as a strike." *Id.*

87 Pointer v. Wilkinson, 502 F.3d 369, 373 (6th Cir. 2007). Admittedly, it is difficult to pinpoint the Sixth Circuit's exact stance when it comes to exhaustion-based dismissals. While *Pointer* involved a "mixed" dismissal—involving a single decision based on § 1915(g) grounds and non-§ 1915(g) grounds—it squarely ruled that when a court relied even in part on a failure to exhaust in support of dismissal, this still constituted a strike. *Id.* The *Pointer* court distinguished the Second Circuit's reasoning in *Snider v. Melindez*, 199 F.3d at 115, stating that "*Snider* addresses the status of a dismissal *entirely* without prejudice, whereas [the Sixth Circuit was examining a dismissal] in part with prejudice." *Pointer*, 502 F.3d at 374–75. The

It is difficult to reconcile the conflicting directions that the courts of appeals have taken with respect to exhaustion. In general, it seems exhaustion can be treated as a basis for a strike if the fact of non-exhaustion is obvious from the face of the complaint and thus renders the complaint frivolous or unable to state a claim. Admittedly, this ignores the Second Circuit's cogent point that exhaustion is usually curable, and the failure to exhaust has no bearing on whether the underlying claims may have merit once they are exhausted. Many courts have also acknowledged that exhaustion can be difficult to determine, and this weighs in favor of not treating a failure to exhaust as a basis for a strike.[88]

D. Mixed Dismissals

Immunity and exhaustion are two issues that further complicate yet another common problem that arises in three strikes cases: "mixed dismissals." Courts have defined "mixed dismissals" as "those dismissals that are based in part on a § 1915(g) ground, and in part on other grounds."[89] Circuit courts are split on whether a mixed dismissal should count as a § 1915(g) strike. On the one hand, if § 1915(g) is read narrowly, it would suggest that a strike arises only when an *entire* action or appeal is dismissed as frivolous, malicious, or for failure to state a claim.[90] On the other hand, some circuits have expressed concern that prisoners could circumvent § 1915(g) by simply adding unexhausted claims, or claims involving immune defendants, so that a portion of an action or appeal cannot be dismissed on the enumerated grounds in § 1915(g).[91]

Sixth Circuit also focused on *Snider*'s consideration of whether exhaustion is curable and possibly a permanent bar. *Id.* at 375. Despite the hardline approach taken in *Pointer*, an unpublished Sixth Circuit case that was decided the following year determined that sua sponte dismissals for failure to specifically plead exhaustion of administrative remedies were not strikes. Feathers v. McFaul, 274 F. App'x 467, 469 (6th Cir. 2008) (citing *Snider*, 199 F.3d at 112).

88 *See, e.g.*, Millhouse v. Sage, 639 F. App'x 792, 794 (3d Cir. 2016).

89 *See, e.g.*, Byrd v. Shannon, 709 F.3d 211, 219 (3d Cir. 2013).

90 28 U.S.C. § 1915(g) (2018) (emphasis added) ("In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more occasions . . . brought *an action or appeal* in a court of the United States that *was dismissed* on the grounds that it is frivolous, malicious, or fails to state a claim . . . .").

91 *See, e.g.*, *Pointer*, 502 F.3d at 374 ("the congressional purpose of§ 1915(g) would be subverted if, by adding unexhausted claims to a complaint that otherwise does not state a claim upon which relief may be granted, a prisoner could repeatedly escape imposition of a strike and thus evade the bar imposed by the three-strikes rule"). The *Pointer* court's reliance on "congressional purpose" is somewhat disingenuous, as there was no congressional debate about the language of purpose of§ 1915(g). Presumably, the Sixth Circuit was referring to the congressional debates about the PLRA as a whole. However, those debates did not clarify whether Congress intended to have prisoners accumulate strikes only when filing the most frivolous litigation (such as the actions that made it into Senator's "top ten" lists), leaving prisoners with some opportunity to still avail themselves of in forma pauperis status. 141 CONG. REC. 14,627, 13,629 (listing "top ten" prisoner lawsuits based on frivolousness). On

Most circuits have explicitly considered whether "mixed dismissals" constitute strikes. The Sixth and Tenth Circuits favor the view that mixed dismissals can be strikes.[92] The Sixth Circuit confronted the issue of mixed dismissals in considering whether a strike accrues when a district court dismisses several counts with prejudice for failure to state a claim, and other counts without prejudice for failure to exhaust administrative remedies.[93] The Sixth Circuit reasoned that "although some claims were dismissed without prejudice for failure to exhaust, none of the claims were found to have merit or to state a claim," and section "1915(g) contemplates that such a meritless filing be deemed a strike."[94] However, this ignores that a determination that claims were unexhausted is not akin to a determination that the unexhausted claims lack merit. The Sixth Circuit seemed to adopt the contrapositive of this idea, stating that the "inclusion of unexhausted claims in a complaint in which all other counts fail to state a claim will not 'inject merit into the action' and transform counts that do not state a claim into ones that do."[95] Thus, a dismissal without prejudice to refiling after exhaustion—at least when grouped with other meritless claims—was a strike.[96] The Sixth Circuit,

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the other hand, the debates over the PLRA also indicate a general frustration with the increasing burden on courts, and it is possible that legislators intended to severely limit prisoners' ability to file actions. 141 CONG. REC. S7,524 (daily ed. May 25, 1995) (citing the burden on the courts).

92 Thomas v. Parker, 672 F.3d 1182, 1184 (10th Cir. 2012) (adopting the Sixth Circuit's reasoning in *Pointer* and determining that a district court's mixed dismissal—whereby two counts were dismissed for failure to state a claim and the remaining sixteen counts were dismissed, by summary judgment motion, for failure to exhaust—constituted a strike); *Pointer*, 502 F.3d at 376.

93 *Pointer*, 502 F.3d at 370 (describing the district court dismissal in *Pointer v. Jorgensen-Martinez*, No. 00-861 (S.D. Ohio Oct. 13, 2000), in which "the district court dismissed all eight counts of Pointer's complaint," but had "dismissed only six of them with prejudice for failure to state a claim upon which relief may be granted," and had dismissed the other two counts "without prejudice to refiling because Pointer had failed to exhaust all available prison administrative remedies").

94 *Id.* at 373–74. The Sixth Circuit's reasoning seems flawed. A determination that an action contains unexhausted claims has no bearing on whether the underlying claims—when exhausted—may have merit. Indeed, the Supreme Court, in evaluating the PLRA exhaustion requirement, has stated that there are two main purposes to administrative exhaustion: (1) an agency is provided with the opportunity to correct its own mistakes, with the possibility of federal legal proceedings serving as a deterrent for an agency to disregard its own policies and procedures; and (2) it promotes efficiency by availing an agency of the opportunity to rectify a grievance internally rather than forcing it into a federal court in the first instance. Woodford v. Ngo, 548 U.S. 81, 88–91 (2006). The Supreme Court seems to contemplate PLRA exhaustion as a procedural hurtle to securing merits review of a claim in federal court; it does not discuss exhaustion as involving any type of merits-based determination. *Id.*

95 *Pointer*, 502 F.3d at 373 (quoting Clemons v. Young, 240 F. Supp. 2d 639, 641 (E.D. Mich. 2003)).

96 *Id.* The Tenth Circuit essentially adopts this same reasoning. Day v. Maynard, 200 F.3d 665, 667 (10th Cir. 1999) (per curiam) ("a dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim"). In reaching this determination, the Tenth Circuit relied on *Rivera v. Allin*, 144 F.3d

arguably in dicta, remarked that when a dismissal for failure to exhaust was coupled with a determination that some claims had merit, the dismissal could not constitute a strike.[97] At bottom, the Sixth Circuit's analysis suggests that if a dismissal order indicates that there may be some merit to any claim, a dismissal of some claims cannot constitute a strike; however, if there is no merit to some claims, and other claims are dismissed without prejudice, the dismissal may still constitute a strike.[98] The Tenth Circuit has found the Sixth Circuit's reasoning persuasive.[99]

The Third, Fourth, Seventh, Ninth, and District of Columbia Circuits disagree with the Sixth and Tenth Circuits.[100] The backbone of their reasoning is that a strike exists only when an entire dismissal is on § 1915(g) grounds, as evidenced by the plain language of the statute. The Seventh Circuit confronted a mixed dismissal in which a portion of a

719, 731 (11th Cir. 1998), in which the Eleventh Circuit treated as a strike a dismissal without prejudice when a complaint failed to allege exhaustion of administrative remedies. Specifically, the Eleventh Circuit ruled that 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." *Id.* The Supreme Court, however, has since ruled that "failure to exhaust is an affirmative defense under the PLRA, and inmates are not required to specially plead or demonstrate exhaustion in their complaints." Jones v. Bock, 549 U.S. 199, 212 (2007). Thus, it would follow that a prisoner's failure to allege exhaustion in a complaint is not tantamount to failing to state a claim. *Id.* The Supreme Court's holding in *Jones* therefore calls into question the Tenth and Eleventh Circuits' reasoning regarding "without prejudice" dismissals on exhaustion grounds and whether they can be treated as strikes.

97 *Id.* at 372 (quoting *Clemons*, 240 F. Supp. 2d at 641–42).

98 *Id.* at 372–74.

99 Thomas v. Parker, 672 F.3d 1182, 1183–84 (10th Cir. 2012) (adopting the proposition that "a strike can properly be assessed under § 1915(g) when . . . the plaintiff's claims are dismissed in part for failure to state a claim and in part for failure to exhaust administrative remedies, and no claims are allowed to proceed on the merits."). Curiously, the Tenth Circuit also considered the case law from other Circuits holding that section 1915(g)'s reference to the dismissal of "actions" and not "claims" resulted in the "well established [principle] that a partial dismissal based on one of the grounds enumerated in § 1915(g) is generally not a proper basis for assessing a strike." *Id.* at 1183 (citing Thompson v. DEA, 492 F.3d 428, 432 (D.C. Cir. 2007); Turley v. Gaetz, 625 F.3d 1005, 1012 (7th Cir. 2010); Tolbert v. Stevenson, 635 F.3d 646, 651 (4th Cir. 2011)). The Tenth Circuit did not attempt to reconcile the fact that failure to exhaust is not an enumerated ground in§ 1915(g). Nor did the Tenth Circuit identify which of the enumerated grounds—frivolousness, maliciousness, or failure to state a claim—a failure to exhaust is subsumed into. *Id.* at 1183–84. The Tenth Circuit instead seemed to suggest that if the majority of a case is dismissed on strike grounds, and no claim is specified as having merit, a strike may be generated. *Id.* at 1184 (explaining that a strike was not imposed "due to the prisoner's failure to exhaust," but, rather, "because the prisoner had asserted several claims that failed to state a claim for relief" in addition to unexhausted claims).

100 Washington v. Los Angeles Cty. Sheriff's Dep't, 833 F.3d 1048, 1057 (9th Cir. 2016); Byrd v. Shannon, 715 F.3d 117, 124–25 (3d Cir. 2013); Turley v. Gaetz, 625 F.3d 1005, 1013 (7th Cir. 2012); Tolbert v. Stevenson, 635 F.3d 646, 652 (4th Cir. 2011); *Thompson*, 492 F.3d at 432. The Fifth Circuit, albeit indirectly, also seems to ascribe to the view that a partial dismissal on strike grounds does not generate a strike. *See* Powells v. Minnehaha Cty. Sheriff Dep't, 198 F.3d 711, 713 (8th Cir. 1999) (concluding that a litigant no longer had three strikes after Circuit reversal, and observing, parenthetically, that the dismissal of a claim is not the equivalent of dismissal of an "action," the latter of which is required by § 1915(g)).

case was dismissed for failure to state a claim, and the remaining portion was dismissed at the summary judgment phase for failure to exhaust administrative remedies.[101] The Seventh Circuit acknowledged the Sixth Circuit's position that a partial dismissal on exhaustion grounds could still support a strike, but ruled that a "failure to exhaust administrative remedies is statutorily distinct from his failure to state a claim upon which relief may be granted."[102] Further, considering the plain language of the statute, the court stated: "Section 1915(g) literally speaks in terms of prior *actions* that were dismissed as frivolous, malicious or for failure to state a claim. The statute does not employ the term 'claim' to describe the type of dismissal that will incur a strike."[103] This reasoning was in accord with a Supreme Court case that considered 42 U.S.C. § 1997e(a), a provision of the PLRA, and distinguished the meaning of the terms "action" and "claim."[104] Specifically, the Supreme Court stated: "statutory references to an 'action' have not typically been read to mean that every claim included in the action must meet the pertinent requirement before the 'action' may proceed."[105] Accordingly, the Seventh Circuit ruled that, "consistent with the plain language of the PLRA, . . . dismissal of an action, in part for failure to exhaust and in part as frivolous, malicious or for failure to state a claim does not constitute a strike under § 1915(g)."[106]

The Fourth Circuit has expanded on the "plain meaning" of the PLRA to hold that a mixed dismissal can never support a strike.[107] Like the Seventh Circuit, the Fourth Circuit emphasized § 1915(g)'s use of the terms "action or appeal," and not the word "claim."[108] Drawing off of the Federal Rules of Civil Procedure, the Fourth Circuit cited Rules 1, 2, 3, and 54(b), all of which use the term "action" to refer to "an entire

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101 *Turley*, 625 F.3d at 1013 (evaluating whether a strike is properly assessed when "the district court dismissed [an action] in part for failure to state a claim and in part for failure to exhaust administrative remedies," with the latter partial dismissal occurring "at summary judgment").

102 *Id.* (citing *Jones*, 549 U.S. at 211–12). The Seventh Circuit acknowledges *Pointer*'s rationale that when a failure to exhaust is coupled with viable claims, the dismissal is not a strike. *Id.* However, *Turley* expands greatly on this principle and reaches a contrary holding from the Sixth Circuit. *Id.*

103 *Id.* at 1008. In support of this conclusion, the Seventh Circuit noted that the terms "action" and "claim" "have well-defined meanings in the pleading context." *Id.* (citing FED. R. CIV. P. 3, 8(a), 18(a)).

104 *Id.* at 1009 (citing *Jones*, 549 U.S. at 221).

105 *Id.* The Ninth Circuit has also relied on *Jones*'s interpretation of another provision of the PLRA to conclude that "action" and "claim" are distinct terms of art that should not be used interchangeably. *See* Andrews v. Cervantes, 493 F.3d 1047, 1054 (9th Cir. 2007).

106 *Turley*, 625 F.3d at 1009.

107 *See Tolbert*, 635 F.3d at 651.

108 *See id.* at 650.

suit."[109] The Fourth Circuit reasoned that section 1915(g) attributed the same meaning to the term "action" as the Federal Rules of Civil Procedure did.[110] In further support, the Fourth Circuit highlighted four other subsections of § 1915 that used the word "action" and determined that this word consistently referred to an "entire suit"; accordingly, when § 1915(g) referred to an "action," principles of statutory construction required that the term carry the same meaning.[111] Other circuits have focused less on the Federal Rules of Civil Procedure and other subsections of § 1915 and have instead focused on the plain language of § 1915(g) itself. The District of Columbia Circuit has reasoned that 1915(g) "speaks of the dismissal of 'actions and appeals,' not 'claims,'" and thus "actions containing at least one claim falling within none of the three strike categories . . . do not count as strikes."[112] The Ninth and Third Circuits have employed nearly identical analyses.[113]

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[109] *See id.* at 650–51. Specifically, Federal Rule of Civil Procedure 1 refers to "civil actions," Rule 2 refers to "one form of action—the civil action," Rule 3 describes the commencement of a "civil action," and Rule 54(b) specifies that "an 'action' may contain several 'claims' so that 'any order or other decision . . . that adjudicates fewer than all the *claims* . . . does not end the *action* as to any of the *claims*.'" *Id.* at 651 (quoting FED. R. CIV. P. 1, 2, 3, 54(b) (emphasis in *Tolbert* at 651)).

[110] *Id.*

[111] As the Fourth Circuit noted, section 1915(a)(2) identifies forms a prisoner must file to "bring a civil action or appeal a judgment in a civil action." *Id.* (quoting 28 U.S.C. § 1915(a)(2)) Section 1915(b) provides that a prisoner who "'brings a civil action or files an appeal' IFP" must gradually pay the filing fee in installments. *Id.* (quoting 28 U.S.C. § 1915(b)(1)). Section 1915(e)(2) "explains that the court 'shall dismiss *the case*,' notwithstanding partial payment of fees, if the 'action or appeal' does not state a claim or is frivolous or malicious." *Id.* (quoting 28 U.S.C. § 1915(e)(2)(B)(i)). Additionally, section 1915(f)(1) interchangeably uses "action" and "suit." *Id.* (quoting 28 U.S.C. § 1915(f)(1)). In support of the proposition that language used within the same statute is presumed to have the same meaning, the Fourth Circuit cited *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998).

[112] Thompson v. DEA, 492 F.3d 428, 432 (D.C. Cir. 2007). Although the District of Columbia Circuit's holding on this point seems to cover all mixed dismissals, it bears noting that the Circuit seems to stray into the terrain of the Sixth Circuit—contemplating a situation where a mixed dismissal involves some claims with merit and some without. *Id.* ("[I]t would make no sense to say—where one claim within an action is dismissed for failing to state a claim and another succeeds on the merits—that the 'action' had been dismissed for failing to state a claim."). This example—where part of a case has merit and part does not—is not the procedural posture that is typically most vexing for courts. The far more difficult scenario is when a mixed dismissal involves immunity or exhaustion issues—which do not, on their own, squarely fall within the terms "frivolous," "malicious," or "fails to state a claim"—and claims dismissed on strike grounds.

[113] Andrews v. Cervantes, 493 F.3d 1047, 1054 (9th Cir. 2007); *see also* Washington v. Los Angeles Cty. Sheriff's Dep't, 833 F.3d 1048, 1057 (9th Cir. 2016) ("[W]e assess a PLRA strike only when the 'case as a whole' is dismissed for a qualifying reason under the Act."); Byrd v. Shannon, 715 F.3d 117, 125 (3d Cir. 2013) (holding that the Third Circuit agreed "with the majority of our sister courts of appeals that § 1915(g) requires that a prisoner's entire action be dismissed on enumerated grounds for the dismissal to count as a strike"). The Third Circuit went a step beyond all other circuits, adopting an explicit rule that:

Given the divergent—and irreconcilable—interpretations of § 1915(g)'s three strikes rule, there is no obvious resolution to the circuit split over mixed dismissals. It will likely persist until the Supreme Court visits the issue or Congress amends the statute.

III. IMMINENT DANGER

Even when a court determines that a prisoner has accumulated three or more strikes, in forma pauperis status is still available if the litigant alleges "imminent danger of serious physical injury."[114] This standard can be broken into two main components: (1) whether a prisoner faces "imminent" danger; and (2) whether a physical injury is "serious."[115] As with the three strikes terminology, the PLRA "does not define the term 'imminent danger.'"[116] However, most courts of appeals agree that in assessing whether a danger is "imminent," courts must assess the conditions the prisoner faced at the time the complaint was filed.[117] Some

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> [A] strike under § 1915(g) will accrue only if the entire action or appeal is (1) dismissed explicitly because it is 'frivolous,' 'malicious,' or 'fails to state a claim' or (2) dismissed pursuant to a statutory provision or rule that is limited solely to dismissals for such reasons, including (but not necessarily limited to) 28 U.S.C. §§ 1915A(b)(1), 1915(e)(2)(B)(i), 1915(e)(2)(B)(ii), or Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Id. at 126.

114 28 U.S.C. § 1915(g) (2018). There are various issues regarding the imminent danger exception for which there is little published case law. For example, if the face of a complaint does not allege imminent danger, but the allegations in the complaint suggest that a prisoner may be able to allege imminent danger, is a district court required to order a prisoner to show cause (or file a response or brief explaining) why the complaint should not be dismissed under § 1915(g)? Or, may a district court simply dismiss the complaint because a prisoner has three strikes? In other words, it is not clear whether a litigant must foresee the applicability of the three-strikes rule and preemptively allege imminent danger, or if a court has an obligation to develop the record as to imminent danger.

115 Brown v. Johnson, 387 F.3d 1344, 1349 (11th Cir. 2004) (recognizing that the "imminent danger of serious physical injury" requirement consists of two "portions"—imminent danger, and serious physical injury).

116 Ibrahim v. District of Columbia, 463 F.3d 3, 6 (D.C. Cir. 2006).

117 *See, e.g.*, *Andrews,* 493 F.3d at 1053 ("[I]t is the circumstances at the time of the filing of the complaint that matters for purposes of the 'imminent danger' exception . . . ."); Cairpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (holding that when a prisoner alleges "only a past injury that has not recurred, courts deny them leave to proceed IFP"); Malik v. McGinnis, 293 F.3d 559, 562–63 (2d Cir. 2002) (holding that because "§ 1915(g) uses the present tense in setting forth the imminent danger exception, it is clear from the face of the statute that the danger must exist at the time the complaint is filed."); Abdul-Akbar v. McKelvie, 239 F.3d 307, 312 (3d Cir. 2001) (en banc) ("[A] prisoner may invoke the 'imminent danger' exception only to seek relief from a danger which is 'imminent' at the time the complaint is filed."); Medberry v. Butler, 185 F.3d 1189, 1193 (11th Cir. 1999) ("Congress' use of the present tense in § 1915(g) confirms that a prisoner's allegation that he faced imminent danger sometime in the past is an insufficient basis to allow him to proceed in forma pauperis . . . ."); Baños v. O'Guin, 144 F.3d 883, 884 (5th Cir. 1998) (per curiam) ("the language of § 1915(g), by using the present tense, clearly refers to the time when the action or appeal is filed."); Ashely v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (per curiam) ("[T]he statute's use of the present

circuits have also held that "a three-strikes prisoner may be required to demonstrate imminent danger at the time the notice of appeal is filed in order to proceed in forma pauperis on appeal."[118] As the Ninth Circuit has conceded, however, "if a prisoner is denied forma pauperis status on appeal on the ground that he no longer faces an imminent danger, his inability to pay the filing fee may deprive a court of appeals of the opportunity to correct any errors committed by the district court."[119] The rigidity of § 1915(g) may be the reason most circuits have adopted a malleable pleading standard for the imminent danger exception. After all, a prisoner facing mistreatment by corrections officers, serious injuries requiring medical attention, confinement in a special housing unit, or any number of other circumstances may not have immediate access to writing materials to dash off a federal complaint or notice of appeal.

A. Pleading Imminent Danger

On the whole, most courts of appeals have set a low bar for establishing imminent danger so as to allow an action to proceed. The Second and Seventh Circuits have acknowledged that courts "'should not make an overly detailed inquiry into whether the allegations qualify for the [imminent danger] exception,' because § 1915(g) 'concerns only a threshold question,' while '[s]eparate PLRA provisions are directed at screening out meritless suits early on.'"[120] The Ninth Circuit has cautioned that courts should liberally construe prisoner complaints and that the relevant inquiry is whether a facial review shows that there is "a plausible allegation" of imminent danger so as to warrant a grant of in

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tense verbs 'bring' and 'is' demonstrates [that] an otherwise ineligible prisoner is only eligible to proceed IFP if he is in imminent danger *at the time of filing* (emphasis in original)).

118 Williams v. Paramo, 775 F.3d 1182, 1189 (9th Cir. 2015); *see also* Ball v. Famiglio, 726 F.3d 448, 467 (3d Cir. 2013); Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003); Choyce v. Dominguez, 160 F.3d 1068, 1070–71 (5th Cir. 1998).

119 *Williams*, 775 F.3d at 1089. The Ninth Circuit added: "Although the PLRA was intended to impose the costs of litigation on prisoners, its purposes do not extend as far as immunizing erroneous district court decisions." *Id.*

120 Chavis v. Chappius, 618 F.3d 162, 169–70 (2d Cir. 2010) (quoting *Andrews*, 493 F.3d at 1055); *see also* Ciarpaglini v. Saini, 352 F.3d 328, 331 (7th Cir. 2003) (explaining that § 1915(g) "is not a vehicle for determining the merits of a claim," and noting that to treat imminent danger as anything more than a facial, threshold issue would require "a complicated set of rules about what conditions are serious enough, all for a simple statutory provision governing when a prisoner must pay the filing fee for his claim. This is not required . . . ."). The Second Circuit has also applied the standard that pro se pleadings should be construed liberally and that pro se complaints should not be dismissed without leave to amend when a liberal reading suggests that a colorable claim may be stated. *Chavis*, 618 F.3d at 170. The Third, Sixth, Eighth, and District of Columbia Circuits have also required that imminent danger allegations be construed liberally. Vandiver v. Prison Health Servs., 727 F.3d 580, 585 (6th Cir. 2013); Ibrahim v. District of Columbia, 463 F.3d 3, 6 (D.C. Cir. 2006); McAlphin v. Toney, 281 F.3d 709, 710 (8th Cir. 2002); Gibbs v. Cross, 160 F.3d 962, 966 (3d Cir. 1998).

forma pauperis status.[121] The Ninth Circuit added that this lenient standard for pleading imminent danger is especially appropriate for a court of appeals, "which, unlike a district court, is ill-equipped to engage in satellite litigation and adjudicate disputed factual matters."[122] The Sixth Circuit has referred to the "imminent danger exception [as] essentially a pleading requirement" where a prisoner must merely allege facts from which a reasonable inference can be drawn that there was an existing danger when the complaint was filed.[123] The Eleventh Circuit has instructed that, even when some allegations of imminent danger may be insufficient, courts must examine a "complaint, as a whole," and "must construe [the complaint] liberally," accepting as true the allegations within.[124] Under this beneficent interpretation, when a complaint has some allegation of imminent danger, the Eleventh Circuit has allowed it to proceed in forma pauperis.[125]

B. What Is "Imminent?"

While there seems to be a consensus that imminent danger must exist at the time of filing, what qualifies as "imminent" is less clear. What about dangers that are lurking, recurring, part of a pattern, or ongoing? In cases where a serious danger looms or poses a threat of happening, is it "imminent?"[126]

The circuits that have addressed this issue have generally added elasticity to the "imminent danger" requirement, albeit on a case-by-case basis. The Second Circuit has determined that an "allegation of a recent brutal beating, combined with three separate threatening incidents, some of which involved officers who purportedly participated in that beating, is clearly the sort of ongoing pattern of acts that satisfies the imminent danger exception."[127] The Ninth Circuit found imminent danger when confronted with allegations that a prisoner was receiving "'constant, daily threats of irreparable harm, injury and death, due to the prison officials and defendants revealing to other inmates (where the appellant is incarcerated) that the appellant is, allegedly, a convicted sex offender and

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

122 *Id.* at 1190.

123 *Vandiver*, 727 F.3d at 585 (quoting Taylor v. First Med. Mgmt., 508 F. App'x 488, 492 (6th Cir. 2012)).

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

125 *Id.* at 1349.

126 *See, e.g.*, Ibrahim v. District of Columbia, 463 F.3d 3, 6 (D.C. Cir. 2006) (considering whether "allegations of an ongoing injury, a recurring injury, or a pattern of misconduct likely to produce imminent harm" fulfill the "imminent danger" requirement).

127 *Chavis*, 618 F.3d at 170. The Second Circuit noted that "the additional assertions that Chavis included in his motion for a preliminary injunction—that some sixteen Defendants had threatened him with injury or death on about a dozen occasions in the previous several weeks—render his claim to the imminent danger exception even stronger." *Id.* at 170–71.

child molester, which is not true.'"[128] Similarly, the Eighth Circuit has ruled that imminent danger exists when there is a pattern of threats and harm spanning several years.[129]

Because "imminent danger" involves a fact-specific inquiry, case law provides only a handful of guiding principles. For example, the Seventh Circuit has acknowledged that a past injury that has not returned cannot be imminent, but this suggests that a recurring injury may be imminent.[130] The Third Circuit has specified that an imminent danger is one that is "about to occur at any moment or [is] impending," but if a danger has already occurred, it is not "imminent."[131] The Ninth Circuit has adopted a broad benchmark for assessing persisting dangers: "it 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.'"[132] To this end, the Ninth Circuit has ruled that a prisoner alleging that "prison officials continue with a practice that has injured him or others similarly situated in the past will satisfy the 'ongoing danger' standard" for purposes of both the filing of a complaint or an appeal with in forma pauperis status.[133]

While most courts of appeals have extended "imminent" to mean "ongoing" or "recurring," few have specified whether a prisoner must allege that there is a connection between the imminent danger and the underlying allegations. Only the Second Circuit has held that "there must be a nexus between the imminent danger a three-strikes prisoner alleged to obtain [in forma pauperis] status and the legal claims asserted in his

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128 *Williams*, 775 F.3d at 1190. The Ninth Circuit had issued an order to show cause why her in forma pauperis status should not be revoked, and Williams, a prisoner, responded that she faced imminent danger because the defendants had spread a rumor that she was a convicted child molester and inmates threatened to kill her and specified how they would do it. *Id.* at 1187, 1190.

129 *See* Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998). Specifically, in *Ashley*, an inmate informed prison officials in 1993 that he was being housed near inmates on his "enemy list." *Id.* In June 1996, corrections officials threatened to move Ashley near a known enemy with the intention that Ashley would be harmed, and in July 1996 Ashley was attacked when he was placed near an enemy. *Id.* In May 1997, Ashley again notified corrections officials that he was being housed near listed enemies, and in June 1997 he was again attacked by an enemy. *Id.* Ashley filed a federal complaint in July 1997. *Id.* at 716.

130 Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003).

131 Abdul-Akbar v. McKelvie, 239 F.3d 307, 315 (3d Cir. 2001) (en banc).

132 *Williams*, 775 F.3d at 1189 (quoting Andrews v. Cervantes, 493 F.3d 1047, 1056 (9th Cir. 2007)).

133 *Andrews*, 493 F.3d at 1056–57; *see also Williams*, 775 F.3d at 1189 (adopting *Andrews* and applying it to the consideration of "imminent danger" at the time a notice of appeal is filed).

complaint."[134] Several courts of appeals have mentioned the nexus issue, but have declined to reach it.[135]

C. *Serious Physical Injury*

Even if a prisoner can allege "imminent danger," he must also show that he faces "serious physical injury."[136] General, conclusory assertions are insufficient to show serious physical injury; rather, there must be "specific fact allegations."[137] The types of "serious physical injury" that have satisfied this exception run the gamut.

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[134] Pettus v. Morgenthau, 554 F.3d 293, 297 (2d Cir. 2009) (stating "we think that the statute requires that the prisoner's complaint seek to redress an imminent danger of serious physical injury and that this danger must be fairly traceable to a violation of law alleged in the complaint."). The Third Circuit, in an unpublished decision, has indicated in dicta that a nexus is required. Ball v. Hummel, 577 F. App'x 96, 96 n.1 (3d Cir. 2014) (per curiam).

[135] *Hummel*, 577 F. App'x at 96 n.1. The Ninth Circuit, in dicta, seems to adopt the nexus test. *Williams*, 775 F.3d at 1187, 1190 (noting that defendants argued that there was no nexus between the imminent danger alleged on appeal and the allegations in the underlying complaint and concluding that a response to an order to show cause "alleges an ongoing danger . . . that arises from the conduct of the original Defendants."). The Eleventh, District of Columbia, and Sixth Circuits have declined to reach the issue. *See* Barber v. Krepp, 680 F. App'x 819, 821 (11th Cir. 2017) (per curiam) ("[W]e need not decide in the present case whether § 1915(g)'s 'imminent danger' exception requires proof of such a nexus [between an imminent physical injury and the claims in the complaint]."); Asemani v. U.S. Citizenship and Immigration Services, 797 F.3d 1069, 1074 (D.C. Cir. 2015) ("[T]his court has not resolved whether § 1915(g) requires that there be some nexus between the imminent danger alleged and the prisoner's underlying claim," and "[w]e do not resolve that issue in this case."); Vandiver v. Prison Health Services, Inc., 727 F.3d 580, 588 (6th Cir. 2013) ("[W]e decline to reach whether § 1915(g) incorporates a nexus requirement.").

[136] 28 U.S.C. § 1915(g) (2018). The modified "physical" may be construed to prevent prisoners suffering from imminent mental or emotional injury from satisfying the "imminent danger" exception. The Seventh Circuit has so held. *See* Sanders v. Melvin, 873 F.3d 957, 959–60 (7th Cir. 2017) (rejecting claim that a "deteriorating mental state" satisfied the imminent danger exception, explaining that "[m]ental deterioration . . . is a psychological rather than a physical problem" and that "[p]risoners facing long-term psychological problems can save up during that long term and pay the filing fee."). The Seventh Circuit seems to presume that a prisoner suffering from psychological problems is eligible for, and capable of, maintaining a paying job inside of a prison. In any event, despite the distinction the Seventh Circuit drew between physical and psychological harms, the Circuit nonetheless found that Sanders could allege imminent danger of serious *physical* harm because the prison had classified Sanders as "seriously mentally ill" and he had previously "attempted self-harm multiple times." *Id.* at 960. The Seventh Circuit thus crafted the following standard: "When the prospect of self-harm is a consequence of the condition that prompted the suit, a court should treat the allegation (if true) as imminent physical injury." *Id.* at 961.

[137] Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003) (determining that "conclusory assertions that defendants were trying to kill Martin by forcing him to work in extreme conditions despite his blood pressure condition" was insufficient to allege serious physical injury); *see also* Hafed v. Fed. Bureau of Prisons, 635 F.3d 1172, 1180 (10th Cir. 2011) (reiterating pleading standard for serious physical injury described in *White*); White v. Colorado, 157 F.3d 1226, 1231–32 (10th Cir. 1998) (determining that "vague and utterly conclusory assertions" and a complaint containing "no specific reference as to which of the defendants may have denied him what medication or treatment for what ailment on what occasion" was insufficient to establish a serious physical injury under § 1915(g)).

The Eleventh Circuit has found "serious physical injury" when a prisoner with HIV and hepatitis was deprived of medications for these "deteriorating" conditions, causing him to suffer "prolonged skin and newly developed scalp infections, severe pain in the eyes and vision problems, fatigue and prolonged stomach pains" and the possibility of exposure to "'opportunistic infections, such as pneumonia, esophageal candidiasis, salmonella, and wasting syndrome,' which would cause him to die sooner."[138] The Eighth Circuit considered a claim of serious physical injury based on the denial of three "immediate dental extractions," which caused an infection of the gums to spread, the need for two additional extractions, and pain so extreme that the prisoner attempted suicide.[139] The Eighth Circuit reasoned that the risk that the infection would spread, coupled with impending additional tooth extractions, satisfied serious physical injury "as a matter of law."[140] The Third Circuit found serious physical injury when a prisoner alleged that he was "forced to breathe particles of dust and lint which were continuously being dispersed into his cell through the ventilation system," causing "'severe headaches, change in voice, mucus that is full of dust and lint, and watery eyes.'"[141] And the Seventh Circuit has determined that the deprivation of medication to treat bipolar, attention deficit, and panic disorders—causing a prisoner to endure "heart palpitations, chest pains,

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138 Brown v. Johnson, 387 F.3d 1344, 1350 (11th Cir. 2004) ("HIV and hepatitis, and the alleged danger of more serious afflictions if he is not treated constitute imminent danger of serious physical injury.").

139 McAlphin v. Toney, 281 F.3d 709, 710 (8th Cir. 2002) (detailing allegations in the complaint relevant to serious physical injury); *see also* Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (concluding that repeated threats of harm and two inmate attacks was sufficient to satisfy imminent danger exception).

140 *McAlphin*, 281 F.3d at 710.

141 Gibbs v. Cross, 160 F.3d 962, 965 (3d Cir. 1998). The Third Circuit rejected the defendants' argument that the prisoner merely had a "dusty cell." *Id.* at 965. Rather, the court stated that "[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. After all, it is the prison administration, not the inmates, who are in the best position to determine the precise nature of any such contaminants in those situations where health hazards are not readily apparent to the unaided senses."). *Id.* at 965–66. The Second Circuit, in a case involving alleged mold exposure in a gym shower at a correctional facility, found that there was no serious physical injury. *See* Polanco v. Hopkins, 510 F.3d 152, 154–55 (2d Cir. 2007). The Second Circuit's decision does not detail the allegations regarding the mold, how frequent the exposure was, and if there were any side effects from the exposure. *Id.* at 155. ("Nor did the District Court err in determining that Polanco's 'allegations cannot support a determination that he was in imminent danger' of serious physical injury with respect to his claims relating to the health risks associated with his exposure to mold or to his claim of unjust discipline."). It is possible—although the Second Circuit did not state this—that the absence of such specific allegations doomed the serious physical injury claim.

labored breathing, choking sensations, and paralysis in his legs and back"—constituted a serious physical injury under § 1915(g).[142]

Some courts of appeals have drawn more general parameters in defining serious physical injury. For instance, the Sixth Circuit has held "that a plaintiff who alleges a danger of serious harm due to a failure to treat a chronic illness or condition satisfies the imminent-danger exception under § 1915(g), as incremental 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."[143] The District of Columbia Circuit has also held that "a chronic disease that could result in serious harm or even death constitutes 'serious physical injury.'"[144] On the other hand, the Third Circuit has observed that merely residing in prison, which a prisoner alleged to be "a hostile and dangerous environment," did not trigger imminent danger of serious physical injury.[145]

In the end, most circuits have framed their "serious physical injury" analysis in such specific terms that no clear test emerges. However, most courts of appeals have introduced some flexibility in the application of this exception, recognizing that the pleading standard for an imminent danger claim is low, and that seemingly minor conditions can become exacerbated to the point that they may ultimately present serious physical injury.

IV. POLICY CONSIDERATIONS FOR AMENDMENT

The inefficiencies of § 1915(g) described above coupled with recent prominent cases of prison abuses[146] beg the question: should Congress revisit this flawed statute, which effectively prevents three-strike prison-

142 Ciarpaglini v. Saini, 352 F.3d 328, 329–30 (7th Cir. 2003). Despite the determination that the prisoner sufficiently alleged serious physical injury, the Seventh Circuit affirmed the district court's dismissal of the complaint because the prisoner's detailed complaint established that the prisoner simply disagreed with prison doctors' treatment decisions. *Id.* at 331.

143 Vandiver v. Prison Health Servs., 727 F.3d 580, 587 (6th Cir. 2013).

144 Ibrahim v. District of Columbia, 463 F.3d 3, 7 (D.C. Cir. 2006).

145 Parker v. Montgomery Cty. Corr. Facility/Bus. Office Manager, 870 F.3d 144, 154 n. 12 (3d Cir. 2017).

146 Rikers Island, alone, sheds light on the innumerable types of abuses that can occur within a correctional facility, and how dangerous the three strikes bar can be if an inmate is experiencing abuse but is unable to file a complaint because of the financial impossibility of paying the full filing fee. *See* Benjamin Weiser, *Ex-Rikers Guard Kicked Ill Inmate to Death, Prosecutor Says at Trial*, N.Y. TIMES, Dec. 2, 2016; Benjamin Weiser, *City to Pay $5.75 Million Over Death of Mentally Ill Inmate at Rikers Island*, N.Y. TIMES, Sept. 27, 2016; Christopher Mele, *Correction Officer Is Charged With Raping Rikers Island Inmate*, N.Y. TIMES, Aug. 26, 2016; Winnie Hu & Kate Pastor, *Trial of 5 Rikers Guards Brings Out Culture of Violence at Jail*, N.Y. TIMES, June 8, 2016 (describing correction officers' wanton use of excessive force against inmates, planting of "evidence" to frame an inmate, and securing lengthy punishment in solitary confinement for the trumped-up charges and guilty determinations).

ers from bringing potentially meritorious lawsuits (unless they can pay hundreds of dollars in filing fees) and largely fails to aid court efficiency? Relatedly, should other exceptions—such as for meritorious lawsuits—be added? And, should Congress omit § 1915(g)'s mandatory language so that courts may exercise their discretion on how to most efficiently process the cases before them?

A. *The Fiction that All Prisoners Can "Save Up" and Pay a Filing Fee*

When three-strikes prisoners have challenged § 1915(g) because it effectively "block[s] a prisoner's access to the federal courts," judges have routinely pointed out that § 1915(g) "only denies the prisoner of the privilege of filing before he has acquired the necessary filing fee."[147] This retort, however, assumes that prisoners are able to earn sufficient income while incarcerated to pay a filing fee. In the federal prison system, "[s]entenced inmates who are physically and mentally able to work are required to participate in the work program"; however, "drug treatment programming, education, or vocational training may be substituted for all or part of the work program."[148] For those able to work, their hourly salary may range from $0.12 to $0.40 in the federal system.[149] Whether an inmate is assigned to full-time, part-time, or no work detail is determined on a case-by-case basis.[150] Thus, not every prisoner is employed while incarcerated, and, if given a job, the number of hours of work assigned can fluctuate.

Additionally, the Bureau of Prisons has a financial plan whereby prisoners who have financial obligations must pay them in the following priority: "(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."[151] Consequently, even those prisoners who secure regular employment may not be able to save sufficient funds to pay a filing fee because other obligations must be paid first. Accordingly, some prisoners, if subject to the three-strikes bar, may effectively be prevented from filing any federal litigation—including meritorious claims. It is a fiction to believe that all prisoners can, in the words of the Seventh Circuit, "save up . . . and pay the filing fee."[152]

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147 *See* Abdul–Akbar v. McKelvie, 239 F.3d 307, 314 (3d Cir. 2001).

148 28 C.F.R. § 545.20(a)(2) (1996).

149 *See* FEDERAL BUREAU OF PRISONS, *Work Programs*, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp (last visited December 3, 2018).

150 28 C.F.R. § 545.23(a) (1996).

151 28 C.F.R. § 545.11(a) (1999).

152 Sanders v. Melvin, 873 F.3d 957, 959 (7th Cir. 2017) (stating that "[p]risoners facing long-term psychological problems can save up during that long term and pay the filing fee.").

Considering how difficult it is for courts to undergo the mental arithmetic to determine whether certain dismissals are strikes, it should come as no surprise that prisoners may not know that they are subject to the three strikes rule until after filing a complaint and learning they are liable for the entire filing fee.[153] Under these circumstances, courts typically provide a prisoner thirty days to pay the full filing fee, or their action will be dismissed without prejudice.[154] If a prisoner does not have hundreds of dollars at his immediate disposal, the three strikes determination is effectively dispositive—even if the underlying lawsuit has merit. Yet, this outcome seems at odds with the legislative history for the PLRA. As Senator Orrin Hatch, one of the PLRA's sponsors, stated during congressional debate: "I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."[155] Yet, with the primary focus on three strikes and imminent danger, § 1915(g) does not allow even the most cursory review of a complaint or appeal to be sure no meritorious claims are being wholesale dismissed.

Not only do three-strikes prisoners bear the burden of accumulating sufficient funds to pay a filing fee and costs, they must do so before the applicable statute of limitations period runs. Because state-law statutes of limitation apply to suits in federal court raised under 42 U.S.C. § 1983, there is no single limitations period that applies.[156] Some limitations periods are as short as one year.[157] Whether a prisoner earning as a little as $0.12 an hour, who may be obligated to pay special assessments or court-ordered restitution before any other fees or costs, can earn $350 or more

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153 *See* Furnace v. Giurbino, 838 F.3d 1019, 1028 (9th Cir. 2016) (explaining that it is not until a defendant raises a three-strikes argument that the court will then determine if a prisoner has three strikes); Snider v. Melindez, 199 F.3d 108, 115 (2d Cir. 1999) (cautioning against counting individual strikes before a prisoner has accumulated three of them).

153 *See Snider*, 199 F.3d at 115, 116 (stating that the "designation of strikes has no practical consequences until a defendant in a prisoner's lawsuit raises the contention that the prisoner's suit or appeal may not be maintained in forma pauperis pursuant to 28 U.S.C. § 1915 because the prisoner has accumulated three strikes.").

154 *See, e.g.*, McFadden v. U.S. Dep't of Justice, 270 F. Supp. 3d 82, 87–90 (D.D.C. 2017) (explaining that prisoner had three strikes and did not fall within the imminent danger exception to 28 U.S.C. § 1915(g), and that, rather than dismiss the complaint outright, the "better procedure" was to revoke in forma pauperis status, order payment of the full filing fee within thirty days, and dismiss the action without prejudice if the prisoner failed to pay within that time frame).

155 141 CONG. REC. 14,627 (1995) (statement of Sen. Hatch).

156 *See* Bd. of Regents v. Tomanio, 446 U.S. 478, 484 (1980) (stating that "Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983 . . . . When such a void occurs, this Court has repeatedly 'borrowed' the state law of limitations governing and analogous cause of action.").

157 *See, e.g.*, Berndt v. Tennessee, 796 F.2d 879, 883 (6th Cir. 1986) (stating that "Tennessee's limitations period for actions brought under federal civil rights statutes or for personal injuries is one year.").

to pay a federal filing fee (and other costs) within one year of an incident is questionable.[158] Further, there is a dearth of litigation exploring whether equitable tolling could save a complaint filed late because a three-strikes prisoner lacked funds to pay a filing fee within the limitations period.[159]

B. Courts are in the Best Position to Manage Their Dockets and Frequent Filers

Although the PLRA was supposed to ease the burden on courts, and, presumably, § 1915(g) was meant to enable courts to quickly identify three-strike litigants, this has not been the case. As the discussion above shows, it is surprisingly tricky to determine whether certain dismissals constitute strikes. When a lower court's § 1915(g) analysis is flawed, a case may be appealed, remanded, and appealed again—simply on the threshold issue of whether a litigant is eligible to file a complaint in forma pauperis.[160] Alternatively, a prisoner may forgo appellate review of a three strikes determination, unable to afford an appellate docketing fee, and any errors in a district court's three strikes arithmetic may go uncorrected.[161] Rather than go through this time-consuming game of ping-pong, consuming judicial resources over a threshold determination, courts may be better served by having the discretion to simply proceed to a 28 U.S.C. § 1915A screening.

Under § 1915A, courts "shall review . . . a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity," and "dismiss the complaint, or any portion of the complaint, if the complaint—(1) is frivolous, mali-

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158 *See* 28 C.F.R. § 545.11(a) (1999) (setting forth a "financial plan" for federal prisoners and establishing the order in which financial obligations are paid from a prisoner's account); 28 U.S.C. § 1914(a) (2006) (filing fee for district court action is $350).

159 *See* Menominee Indian Tribe of Wis. v. United States, 136 S. Ct. 750, 755–56 (2016) (explaining that equitable tolling involves a two-prong test: (1) that a litigant has pursued his rights diligently; and (2) "where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control").

160 *See* Tolbert v. Stevenson, 635 F.3d 646,655 (4th Cir. 2011) (reversing and remanding because litigant did not have three strikes); *see also* Brown v. Johnson, 387 F.3d 1344, 1351 (11th Cir. 2004) (reversing and remanding because litigant's proposed amended complaint alleged imminent danger of serious physical injury and litigant was not barred by the three strikes rule).

161 *See* Abdul-Akbar v. McKelvie, 239 F.3d 307, 319–20 (3d Cir. 2001) (Mansmann, J., dissenting) (outlining dangers of three strikes bar and its ability to prevent prisoners from proceeding with "potentially meritorious litigation at the filing stage, with no opportunity for substantive review or appeal."). The dissent in *Abdul-Akbar* noted that a lenient interpretation of § 1915(g) was necessary considering the "preclusive effect" of this provision, and that the denial of in forma pauperis status and "resultant dismissal of prison litigation made pursuant thereto will be effectively unreviewable, as a truly indigent plaintiff will no more be able to afford the requisite filing costs for appeal of that dismissal than for the underlying action." *Id.* at 321.

cious, or fails to state a claim upon which relief may be granted . . . ."[162] When a complaint raises the baseless types of claims discussed during congressional hearings about the PLRA—complaints about being served creamy rather than chunky peanut butter and dissatisfaction with the brand of prison-issued sneakers[163]—it would be far more efficient to simply dismiss a case at the screening stage rather than force courts to go through the rigmarole of identifying three distinct strikes and evaluating whether there is any indication of imminent danger of serious physical harm. The screening process would also eliminate the possibility of dismissing meritorious claims—something PLRA sponsors insisted would *not* happen—simply because a prisoner is unable to pay the full filing fee.[164]

Replacing a mandatory three strikes scheme with § 1915A's simple screening mechanism is especially important when considering prisoners serving lengthy or life sentences. Because § 1915(g) has no time limit, if a prisoner accumulates three strikes in the early years of serving a sentence, all manner of non-physical harm may befall him and, unless sufficient funds can be raised, the prisoner is barred from seeking federal redress. As several Third Circuit judges acknowledged in a dissenting opinion, some prisoners "whose 'strikes' were racked up without any bad faith or abuse" subsequently face § 1915(g)'s bar of even "potentially meritorious litigation at the filing stage, with no opportunity for substantive review or appeal."[165]

A final shortcoming presented by § 1915(g) is that it forces judges through the maze of calculating strikes and evaluating imminent danger while depriving them of the opportunity to triage a case in a more effective manner and tailor appropriate sanctions when presented with a frequent filer. Outside of § 1915(g), litigants—prisoners and non-prisoners alike—who abuse the litigation process are subject to a variety of sanctions fashioned to meet the degree of misconduct presented. Authority to impose sanctions comes from various sources—28 U.S.C. § 1927; Federal Rules of Civil Procedure 11, 26, 37, and 41(b); and, as the Supreme Court has observed, "a district court possesses inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"[166] Accordingly, sanctions may take a vari-

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162 28 U.S.C. § 1915A(a), (b)(1) (1996).

163 141 CONG. REC. 14,629 (1995) (statement of Sen. Kyl) ("Top 10 Frivolous Inmate Lawsuits Nationally").

164 141 CONG. REC. 14,627 (1995) (statement of Sen. Hatch).

165 *Abdul-Akbar*, 239 F.3d at 320 (Mansmann, J., dissenting).

166 Dietz v. Boudlin, 136 S. Ct. 1885, 1891 (2016); *see also* 28 U.S.C. § 1927 (1980) (stating that any person "who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and

ety of appearances—from monetary sanctions to the imposition of filing injunctions, or even civil or criminal contempt.[167] Filing injunctions can be molded to fit a particular litigant's style of abuse—from "completely foreclosing the filing of designated categories of cases" to imposing the "less drastic remedy of subjecting a vexatious litigant to a 'leave of court' requirement with respect to future filings."[168] In imposing sanctions, courts typically provide a litigant with notice and an opportunity to be heard; courts may consider a litigant's response—and whether he provides a satisfactory explanation, or expresses repentance—to determine what sanction, if any, would be most appropriate.[169] Generally, when fashioning a sanction to curb a vexatious litigant's misconduct, courts are instructed to weigh alternative lesser sanctions and impose the least restrictive, yet effective, penalty.[170]

Considering the variety of mechanisms courts have to manage vexatious litigants, it is curious that § 1915(g) eliminates this panoply of sanctions and instead invokes a single, nationwide filing injunction once a prisoner has filed three unsuccessful actions or appeals. Indeed, when a non-prisoner is subjected to a filing injunction of similar scope and force, it is only after exhibiting such a complete disregard and abuse of the litigation process—such as by filing hundreds of frivolous actions and appeals—that no lesser sanction could be effective.[171] And, even when a

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attorneys' fees reasonably incurred because of such conduct."); FED. R. CIV. P. 11(c) (permitting a court, on motion or on its own initiative, to sanction a litigant—after providing notice and an opportunity to respond—so as to "deter repetition of the conduct"; stating the sanction may consist of a monetary penalty or "nonmonetary directives"); FED. R. CIV. P. 26(g)(3) (providing for sanctions for improper certification); Fed. R. Civ. P. 37 (providing for sanctions for various discovery abuses); FED. R. CIV. P. 41(b) (providing for involuntary dismissal of an action for failure to prosecute).

167 In re Martin-Trigona, 9 F.3d 226, 228–29 (2d Cir. 1993) (collecting cases to show that the Supreme Court and other courts of appeals have all imposed filing bars on vexatious litigants).

168 *Id.*

169 *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (observing that, "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.").

170 Ringgold-Lockhart v. Cty. of Los Angeles, 761 F.3d 1057, 1064 (9th Cir. 2014) (stating that, in fashioning a sanction, "courts should consider whether other, less restrictive options, are adequate to protect the court and parties."); *see also* In re Ross, 858 F.3d 779, 787 (3d Cir. 2017) (determining that a filing injunction is an "'extreme remed[y]' that 'should be narrowly tailored and sparingly used.'" (quoting In re Packer Ave. Assocs., 884 F.2d 745, 747 (3d Cir. 1989))).

171 *See* In re Martin-Trigona, 737 F.2d 1254, 1256 (2d Cir. 1984) (reviewing a district court order that "broadly enjoins appellant, *inter alia*, from instituting litigation in any . . . federal court without fulfilling certain conditions."). The Second Circuit noted that the litigant being sanctioned had filed "literally hundreds of lawsuits, motions and miscellaneous pleadings, all but a [ ] fraction of which lack any merit whatsoever." *Id.* Accordingly, the Court ruled that it viewed "the restrictions placed upon Martin-Trigona's bringing of new actions in all federal district courts as necessary and proper." *Id.* at 1262. Other Circuits have also expressed caution in the breadth of a filing injunction, and what behavior necessitates the imposi-

filing injunction is entered, a litigant may still seek leave of a court to file a new action or appeal—and may even seek to do so in forma pauperis.[172]

Given the variety of resources for courts to manage their dockets, § 1915(g)'s filing bar should be eliminated. It is at odds with the procedure applicable to imposing a sanction in any other context, and it operates so as to bar prisoners who are financially unable to pay the full filing fee from presenting *any* claims, no matter how meritorious. As even the Supreme Court has acknowledged, "[a]n erroneous trial court dismissal might wrongly deprive a prisoner of *in forma pauperis* status with respect to lawsuits filed after a dismissal but before its reversal on appeal."[173] By returning the sanctioning power back to the courts and eliminating the reflexive application of the three-strikes bar, judges will be in a position to manage their dockets in the most effective manner without permanently precluding indigent prisoners from seeking redress in the federal courts.

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tion of one. *See* Gagliardi v. McWilliams, 834 F.2d 81, 83 (3d Cir. 1987) (considering whether a filing injunction was appropriate after a litigant filed seven actions, and remanding to the district court because the filing injunction was imposed on a pro se litigant without adequate notice and opportunity to respond); *see also* Pavilonis v. King, 626 F.2d 1075, 1079 (1st Cir. 1980) (stating that "litigiousness alone will not support an injunction against a plaintiff," "the use of such measures against a pro se plaintiff should be approached with particular caution," and that the court expected that "injunctions against litigants will remain very much the exception to the general rule of free access to the courts.").

172 *See* In re Green, 669 F.2d 779, 786–87 (D.C. Cir. 1981) (determining that filing injunction imposed against litigant who "deluged" the courts with a "parade of pleadings, petitions and other papers" was proper, and noting that the pro se litigant could still file "a new and legitimate complaint" and was "free to seek to proceed in the district court (and this court on appeal, if necessary) in forma pauperis" so long as he first sought leave of the court and indicated on what basis he believed his new claims had merit).

173 Coleman v. Tollefson, 135 S. Ct. 1759, 1764 (2015). The Supreme Court concluded that the risk that a prisoner will be barred from appealing an erroneous three strikes determination did not "seem great," and relied on representations by the Solicitor General that he was only able to find two instances when a Court of Appeals reversed a district court's issuance of a third strike. *Id.* However, a review of three strikes appeals shows more than two published opinions where courts of appeals reversed a district court's three strikes determination. *See, e.g.*, Turley v. Gaetz, 625 F.3d 1005, 1012–14 (7th Cir. 2010) ("we conclude that Mr. Turley has not incurred three strikes . . . and remains eligible for IFP status," and "the judgment of the district court is reversed, and the case is remanded with instructions to reconsider whether Mr. Turley may proceed IFP" based on indigence); *see also* Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005) (determining that the district court's three strikes analysis was erroneous because the court failed to "consider[e] the underlying order[e] or mak[e] an independent assessment of whether the prior cases were frivolous or malicious or failed to state a claim" so as to fall under§ 1915(g)); *see also* Tolbert v. Stevenson, 635 F.3d 646, 655 (4th Cir. 2011) ("Because none of these actions counts as a strike under § 1915(g), we find that the district court erred in denying Tolbert the right to proceed IFP in this suit on the ground that he had three strikes."); Owens v. Isaac, 487 F.3d 561 (8th Cir. 2007), 563 (determining prisoner had one strike and district court incorrectly assessed three strikes and barred prisoner from proceeding IFP under § 1915(g)).

CONCLUSION

To the extent the PLRA sought to achieve a reduction in prisoner filings, its garnishment procedure and screening mechanism in § 1915A combine to create an economic disincentive to filing and a swift procedure for courts to dismiss bogus claims. Section 1915(g), however, goes too far. The three-strikes language has proven problematic for courts to apply and has generated inconsistent approaches across courts of appeals. Its indefinite bar from future in forma pauperis filings is overly broad, and there is no mechanism to save meritorious claims unless an indigent three-strikes prisoner is able to somehow obtain hundreds of dollars for filing costs and fees. The latter, in particular, runs afoul of Congress's intent in passing the first in forma pauperis statute in 1892. As the Supreme Court has recognized, "that statute is intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, 'in any court of the United States' solely because his poverty makes it impossible for him to pay or secure the costs."[174] Indeed, prior to the passage of § 1915(g), the Supreme Court held that "[u]nless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, . . . the request of an indigent for leave to appeal in forma pauperis must be allowed."[175] For § 1915(g) to operate so as to require a three-strikes litigant to pay the full filing fee as a condition precedent to filing a potentially meritorious claim defies not only the purpose of the original in forma pauperis statute, but of the fundamental right to seek redress for wrongs in a court of law.[176]

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[174] *Adkins*, 335 U.S. at 342.

[175] Ellis v. United States, 356 U.S. 674, 675 (1958) (per curiam).

[176] As the Supreme Court recognized in *Marbury v. Madison*, the "essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 5 U.S. 137, 163 (1803).