Nos. 24-2441, 24-2442, 24-2443, 24-2444

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD B. SPENCER,
Plaintiff-Appellant,
v.
A. BARAJAS, CORRECTIONAL OFFICER, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Defendants-Appellees.

EDWARD B. SPENCER,
Plaintiff-Appellant,
v.
RICHARD MILAN, SUPERVISOR OF BUILDING TRADES AT SATF,
Defendant-Appellee.

EDWARD B. SPENCER,
Plaintiff-Appellant,
v.
J. JASSO, S. HILLMAN, MAIL ROOM SUPERVISOR,
Defendants-Appellees.

EDWARD B. SPENCER,
Plaintiff-Appellant,
v.
L. PULIDO-ESPARZA, CORRECTIONAL OFFICER AT SATF, C. SMITH, CORRECTIONAL LIEUTENANT AT SATF, STUART SHERMAN, WARDEN AT SATF, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of California, Nos. 1:23-cv-1033-JLT-GSA, 1:20-cv-00682-JLT-GSA, 1:20-cv-00909-JLT-GSA, 1:20-cv-01176-JLT-GSA
The Honorable Jennifer L. Thurston

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for Mr. Spencer respectfully request oral argument. These appeals raise an important question of statutory interpretation that has divided district courts in this Circuit and has not yet been addressed by this Court: whether a prisoner-plaintiff's voluntary dismissal of an action under Federal Rule of Civil Procedure 41(a)(1) counts as a "strike" under the Prison Litigation Reform Act. Counsel for Mr. Spencer submit that this Court's decisional process will be aided significantly by oral argument. *See* FED. R. APP. P. 34(a)(2).

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STATEMENT OF JURISDICTION

The district court had federal question jurisdiction over Mr. Spencer's complaints, which alleged federal constitutional and statutory claims relating to his incarceration, under 28 U.S.C. § 1331. On March 18, 2024, the district court issued orders revoking Mr. Spencer's *in forma pauperis* status and declaring him a "three strikes litigant" within the meaning of 28 U.S.C. § 1915(g). 1-ER-2-5; 1-ER-6-9; 1-ER-10-13; 1-ER-14-17. Mr. Spencer filed timely notices of appeal, which the district court entered on April 15, 2024. 2-ER-300-301; 2-ER-302-303; 2-ER-304-305; 2-ER-306-307. This Court has jurisdiction under 28 U.S.C. § 1291. *See Hymas v. United States Dep't of the Interior*, 73 F.4th 763, 765 (9th Cir. 2023).

INTRODUCTION

This appeal concerns a question of first impression for this Court: whether an incarcerated plaintiff's voluntary dismissal of an action pursuant to Federal Rule of Civil Procedure 41(a)(1) counts as a "strike" under the Prison Litigation Reform Act (PLRA). Based on the statutory text, the answer is clearly "no."

The PLRA's "three strikes" provision blocks incarcerated litigants from proceeding *in forma pauperis* if three or more of their prior actions were "dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). In revoking Plaintiff-Appellant Edward Spencer's *in forma pauperis* status, however, the court below did not identify three or more prior actions dismissed on any of those grounds. Instead, the district court counted as "strikes" actions Mr. Spencer had voluntarily dismissed under Rule 41(a)(1).

That was wrong. Plain meaning and common sense dictate that voluntary dismissals do not constitute a dismissal on any of section 1915(g)'s enumerated grounds. Moreover, dismissal on those grounds must be an act of the court, not a party, as only a court can decide that an action should be dismissed because it is malicious, frivolous, or fails to state a claim. Rule 41(a)(1) voluntary dismissals are in a different category altogether; they do not require any "grounds" and are effective upon filing by the plaintiff, without any court action. That is why courts across the

country—including the Eleventh, Fourth, and Tenth Circuits—have held that such dismissals *cannot* constitute strikes.

Tellingly, in reaching the opposite conclusion, the district court barely considered the text of the PLRA or the unique nature of Rule 41(a)(1) voluntary dismissals. The court instead rooted its analysis in precedent that, by its own admission, does not address Rule 41(a)(1), and its own assumptions about the underlying "purpose" of the PLRA. But inapposite case law and abstract policy concerns cannot override the plain text of the "three strikes" provision.

To make matters worse, the district court never should have considered the strike-worthiness of Mr. Spencer's voluntary dismissals in the first place. Three years earlier, another judge in the same district, overseeing a case brought by Mr. Spencer against staff members at the same prison facility at issue here, considered whether Mr. Spencer's prior voluntary dismissals could count as strikes under the PLRA. That judge ruled in Mr. Spencer's favor, specifically with respect to one of the voluntary dismissals deemed a strike in this case. The doctrine of collateral estoppel exists to avoid exactly what followed here: the relitigation of the identical issue between identical parties or their privies, resulting in inconsistent results.

This Court should reverse the district court's judgments and remand with instructions to reinstate Mr. Spencer's *in forma pauperis* status.

ISSUES PRESENTED

I. Whether the district court erred in concluding that Mr. Spencer's voluntary dismissals of prior actions pursuant to Federal Rule of Civil Procedure 41(a)(1) are "strikes" under the PLRA.

II. Whether collateral estoppel bars relitigation of another district court's determination, in a case involving defendants' privies, that Mr. Spencer's prior voluntary dismissals do not constitute strikes under the PLRA.

STATEMENT OF THE CASE

A. The Prison Litigation Reform Act

"The federal *in forma pauperis* statute, enacted in 1892 and presently codified as 28 U.S.C. § 1915, is designed to ensure that indigent litigants have meaningful access to the federal courts." *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). To that end, section 1915(a) "allows a litigant to commence a civil or criminal action in federal court *in forma pauperis* by filing in good faith an affidavit stating, *inter alia*, that he is unable to pay the costs of the lawsuit." *Id.*

In 1996, Congress enacted the PLRA, which amended section 1915 to add what is known as the "three-strikes provision." Pub. L. No. 104-134, 110 Stat. 1321 (1996). That provision generally prevents a prisoner from proceeding *in forma pauperis* if he or she has brought three or more "action[s]" that were "dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g).

The PLRA also added section 1915A, which requires district courts to screen prisoner complaints for possible dismissal on those same grounds. 28 U.S.C. § 1915A. If the screening court finds a curable defect, it can dismiss the complaint with leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). Or if the complaint "lacks merit entirely," the court can dismiss the action outright. *Id.* at 1129.

B. Procedural History

Mr. Spencer is currently incarcerated at the California Substance Abuse Treatment Facility (SATF) in Corcoran, California. In 2020, proceeding *pro se* and *in forma pauperis*, he filed three different lawsuits in the U.S. District Court for the Eastern District of California against various SATF staff and (in one case) the California Department of Corrections and Rehabilitation, alleging First Amendment, due process, deliberate indifference, and Americans with Disabilities Act claims. *See* 2-ER-157-202; 2-ER-203-238; 2-ER-239-264; 2-ER-265-279; 2-ER-280-299. After sitting for over a year, all three actions cleared PLRA screening, and defendants filed answers. *See* 2-ER-79-101; 2-ER-102-124; 2-ER-136-147; 2-ER-150-156.

In 2023, Mr. Spencer, again proceeding *pro se* and *in forma pauperis*, filed an additional deliberate-indifference lawsuit against a SATF correctional officer and the California Department of Corrections and Rehabilitation. *See* 2-ER-125-135.

Six months passed without any screening determination or other meaningful court action.

Then, in January 2024, the magistrate judge assigned to the cases issued an identical order in each, instructing Mr. Spencer to show cause why his *in forma pauperis* status should not be revoked. 2-ER-68-78. The order listed four prior cases that, in the magistrate judge's view, "qualify as strikes" under section 1915(g):

- *Spencer v. Beeler*, No. 13-cv-1624 (E.D. Cal.), in which Mr. Spencer voluntarily dismissed the action after the magistrate judge on PLRA screening found that Mr. Spencer's complaint failed to state a claim but concluded that the defects could be cured and thus granted leave to amend;
- *Spencer v. Kokor*, No. 17-cv-597 (E.D. Cal.), in which Mr. Spencer voluntarily dismissed the action after the magistrate judge issued a recommendation, never adopted by the district court, to dismiss Mr. Spencer's action for failure to state a claim;
- *Spencer v. Sherman*, No. 17-cv-1025 (E.D. Cal.), in which the district court dismissed Mr. Spencer's action for failure to state a claim; and
- *Spencer v. Kokor*, No. 17-cv-1561 (E.D. Cal.) ("*Kokor II*"), in which the district court dismissed Mr. Spencer's action for failure to state a claim.[1]

2-ER-72-73.

[1] The defendant in this case was docketed as "W.M. Kokol," but it appears that the "l" was a typo. The magistrate judge below thus referred to the case as "*Spencer v. Kokor*." For consistency, Mr. Spencer will do the same here.

Although Mr. Spencer did not contest the magistrate judge's view with respect to the last two actions (*i.e.*, *Sherman* and *Kokor II*), he took issue with the inclusion of the first two (*i.e.*, *Beeler* and *Kokor*)—the only actions at issue in this appeal, either of which would result in Mr. Spencer receiving a third "strike." Specifically, Mr. Spencer argued that *Beeler* and *Kokor* do not give rise to strikes because they were not dismissed by a court on any grounds enumerated in section 1915(g). 2-ER-53. Rather, Mr. Spencer explained, he *voluntarily* dismissed both actions under Federal Rule of Civil Procedure 41(a)(1). *Id.*

The magistrate judge rejected that argument and recommended that Mr. Spencer's *in forma pauperis* status be revoked under section 1915(g). 2-ER-52-55. The magistrate judge recognized that this Court "has not directly considered" whether a Rule 41(a)(1) voluntary dismissal can constitute a strike. 2-ER-47. The magistrate judge also acknowledged that the court in *Spencer v. Beard*, No. 1:19-cv-1615-DAD-HBK, 2021 WL 2778524 (E.D. Cal. July 2, 2021), *report and recommendation adopted*, 2021 WL 3418677 (E.D. Cal. Aug. 5, 2021)), had ruled in Mr. Spencer's favor on this exact question, and did so with respect to one of the same voluntary dismissals. 2-ER-48 n.11.

In particular, the magistrate judge explained that in *Beard*, a suit between Mr. Spencer and SATF staff, the SATF defendants had argued that Mr. Spencer's voluntary dismissal in *Beeler* constituted Mr. Spencer's third "strike." 2-ER-48

n.11. The *Beard* court disagreed, stressing that there was no court-ordered dismissal in *Beeler*. 2021 WL 3418677, at *1. Rather, "the case ended because [Mr. Spencer] *voluntarily* dismissed it." *Id.* "[I]n light of the well-recognized rule that a plaintiff has an absolute right to voluntarily dismiss their action and concluding that nothing in the PLRA dictates a contrary conclusion," the *Beard* court found "no reason to penalize a *pro se* prisoner litigant who exercises his procedural right to elect a voluntary dismissal by holding that the voluntary dismissal constitutes a strike." *Id.* (internal quotation marks omitted).

Notwithstanding that decision, the magistrate judge here concluded that this Court's precedent and the "underlying intent and purpose" of the PLRA "[s]upport" the conclusion that Mr. Spencer's voluntary dismissals *do* constitute strikes. 2-ER-44-46. According to the magistrate judge, what matters is that the voluntary dismissals followed an initial recommendation or determination that Mr. Spencer had "failed to state a claim." 2-ER-46-47.

Mr. Spencer filed objections to the magistrate judge's report and recommendation, highlighting that the *Beard* court had already ruled that the same voluntary dismissal of *Beeler* does not count as a strike, and arguing that collateral estoppel barred relitigating that issue here. 2-ER-19-31. The district court rejected Mr. Spencer's objections, "adopted in full" the magistrate judge's findings and recommendations, revoked Mr. Spencer's *in forma pauperis* status, and ordered the

Clerk of Court to "identify [Mr. Spencer] as a three strikes litigant within the meaning of 28 U.S.C. § 1915(g)." 1-ER-17 (emphasis and capitalization omitted).

SUMMARY OF THE ARGUMENT

I. A straightforward reading of the "three-strikes" provision—which refers to actions "dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted"—makes clear that Mr. Spencer's Rule 41(a)(1) voluntary dismissals do not count as strikes.

For starters, a Rule 41(a)(1) dismissal terminates a case only because the plaintiff voluntarily decided to withdraw it. There is no other legal basis for the case's termination, and voluntariness is not one of section 1915(g)'s enumerated grounds. For that reason alone, courts across the country have held that a Rule 41(a)(1) voluntary dismissal cannot constitute a strike.

Moreover, by requiring that a strike be dismissed based on a finding of frivolousness, maliciousness, or lack of merit, section 1915(g) necessarily limits strikes to *court*-ordered dismissals. Only courts can decide whether certain grounds are met such that dismissal is warranted. Yet Rule 41(a)(1) voluntary dismissals operate by action of the plaintiff alone; they do not involve the court at all.

In concluding that Mr. Spencer's voluntary dismissals nevertheless constitute strikes, the district court made several mistakes. First, the court ignored the text of section 1915(g), and thus missed that the provision by its terms excludes all Rule

41(a)(1) voluntary dismissals. Next, the court attributed motives to Mr. Spencer's voluntary dismissals that were not only irrelevant, but also inconsistent with the record. The court then tried to shore up its conclusions by citing precedent from this Court that, at most, confirms the need to focus on a *court's* rationale for dismissing a particular action—which did not occur in any of Mr. Spencer's prior litigations.

Finally, the district court pointed to its view of the PLRA's "purpose." But this Court has said time and again that the PLRA's purpose cannot override section 1915(g)'s plain terms. Nor is it clear that excluding Rule 41(a)(1) voluntary dismissals would be inconsistent with the district court's intuitions about that purpose. District courts can still dismiss frivolous, malicious, or unmeritorious actions, while plaintiffs voluntarily dismiss their actions for any number of reasons unrelated to section 1915(g)'s enumerated grounds.

II. In the alternative, this Court should hold that the doctrine of collateral estoppel bars relitigation of whether Mr. Spencer's voluntary dismissals constitute strikes. The SATF defendants in *Beard* already litigated that issue, and in fact did so with respect to one of the voluntary dismissals at issue here. The *Beard* court, however, rejected the SATF defendants' arguments, and refused to hold that a voluntary dismissal constitutes a strike. The SATF defendants in these appeals, the *Beard* defendants' privies, cannot litigate the same issue anew.

STANDARD OF REVIEW

This Court reviews de novo the district court's "interpretation and application" of section 1915(g), *Moore v. Maricopa Cnty. Sheriff's Off.*, 657 F.3d 890, 893 (9th Cir. 2011), as well as the application of collateral estoppel, *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000).

ARGUMENT

I. THE PLRA'S THREE-STRIKES PROVISION DOES NOT APPLY TO MR. SPENCER

The district court's order declaring Mr. Spencer a "three strikes litigant" rested on its conclusion that a Rule 41(a)(1) voluntary dismissal of an action counts as a "strike." Under the plain text of section 1915(g), however, such dismissals do not meet the requirements for assessing strikes—for reasons borne out by the record in this case.

A. Rule 41(a)(1) Voluntary Dismissals Do Not Constitute "Strikes" Under Section 1915(g)

1. Courts strictly construe the text of section 1915(g).

Section 1915(g) provides that a prisoner accrues a strike for every "action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). As the Supreme Court has made clear, a court may not "insert[] words [into that provision that] Congress chose to omit." *Lomax v. Ortiz-Marquez*, 140 S.

Ct. 1721, 1725 (2020). Instead, section 1915(g) must be interpreted "strictly and narrowly." *Harris v. Harris*, 935 F.3d 670, 676 (9th Cir. 2019).

Consistent with those admonitions, both the Supreme Court and this Court have concluded that a dismissal counts as a strike only if section 1915(g)'s requirements are "literally" satisfied. *Coleman v. Tollefson*, 575 U.S. 532, 537 (2015). Thus, because section 1915(g) refers to an "action," the dismissal of individual claims does not qualify as a strike if other claims are allowed to proceed. *See Washington v. Los Angeles Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1057 (9th Cir. 2016). Nor does dismissal of a complaint with leave to amend "because the suit continues." *Lomax*, 140 S. Ct. at 1724 n.4.

This Court has also declined to expand the grounds for dismissal that render a case a strike. *See Harris*, 935 F.3d at 676 ("Unless an incarcerated litigant has accrued three strikes on grounds plainly enumerated in § 1915(g), she is entitled to [*in forma pauperis*] status."). For example, a dismissal for lack of subject-matter jurisdiction, which section 1915(g) does not mention, cannot be a strike. *See Moore*, 657 F.3d at 894; *see also Harris v. Mangum*, 863 F.3d 1133, 1140 (9th Cir. 2017) (plaintiff "could not accrue a strike" for dismissal of removed case because such action was not brought "in a court of the United States"). Likewise, "[w]here [*in forma pauperis*] status is denied solely on the ground that the plaintiff has accumulated too many strikes, the denial of [*in forma pauperis*] status and

subsequent dismissal of the case do not count as a strike." *El-Shaddai v. Zamora*, 833 F.3d 1036, 1042 (9th Cir. 2016).

In short, section 1915(g)'s "language is clear." *Harris*, 935 F.3d at 673. And because "Congress said what it meant," *id.* at 676, courts "must not read in by way of creation, but instead abide by the duty of restraint," *Jones v. Bock*, 549 U.S. 199, 216 (2007) (internal quotation marks omitted).

2. Section 1915(g)'s plain text does not encompass Rule 41(a)(1) voluntary dismissals.

Here, as in other contexts, the text is both straightforward and dispositive. Section 1915(g) deems as "strikes" only those actions "dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim." 28 U.S.C. § 1915(g). As this Court has explained, "dismiss" means to "terminat[e]" or "dispose[] of" a case. *O'Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008). "[G]rounds" are the "legal basis" for an action. *Campbell v. Blodgett*, 997 F.2d 512, 516 (9th Cir. 1992) (quoting *Sanders v. United States*, 373 U.S. 1, 16, (1963)); *see also* OXFORD ENGLISH DICTIONARY 876 (2d ed. 1989) ("on the ground of" means "by reason of (some circumstance alleged in justification of a procedure)"). Together, dismissal is the act of case termination; grounds are what justify it.

At the most basic level, an action voluntarily dismissed under Rule 41(a)(1) is not "terminated" based on any of section 1915(g)'s enumerated grounds; the action is terminated because the plaintiff voluntarily elected to withdraw it. Such a

dismissal is therefore not justified by frivolousness, maliciousness, or a failure to state a claim. That is precisely why several courts of appeals have held (contrary to the district court here) that a Rule 41(a)(1) dismissal does not and cannot count as a strike under the PLRA. *See Smith v. Williams*, 67 F.4th 1139, 1141 (11th Cir. 2023) (holding, based on plain language of section 1915(g), that "voluntary dismissal of an action pursuant to Rule 41(a)" does not "count as a PLRA 'strike'"); *Tolbert v. Stevenson*, 635 F.3d 646, 654 (4th Cir. 2011) ("Because a voluntary dismissal is not one of the grounds listed in § 1915(g), these actions do not count as strikes."); *Carbajal v. McCann*, 808 F. App'x 620, 630 (10th Cir. 2020) ("A voluntary dismissal does not count as a PLRA strike.").

What's more, the particular grounds enumerated in section 1915(g) necessarily limit strikes to dismissals based on findings entered by a court. After all, only a court can determine whether an action must be terminated because it is "frivolous, malicious, or fails to state a [cognizable] claim." 28 U.S.C. § 1915A(b)(1). Parties can make arguments, but the decision that such a dismissal is warranted ultimately requires a legal "finding" only the court can make. *El-Shaddai*, 833 F.3d at 1042; *see, e.g.*, *Yamaguchi v. U.S. Dep't of the Air Force*, 109 F.3d 1475, 1480 (9th Cir. 1997) ("A dismissal for failure to state a claim is a ruling on a question of law[.]"); *see also Avery v. Stainer*, No. 2:18-cv-1302-JAM-AC-P, 2021 WL 1153773, at *4 (E.D. Cal. Mar. 26, 2021), *report and recommendation*

adopted, 2021 WL 2652117 (E.D. Cal. June 28, 2021) ("In evaluating whether a case constitutes a strike, the court looks to *the court's* reasons for dismissal, not plaintiff's motivations.") (emphasis added).

Statutory context confirms that reading of section 1915(g). "Related provisions reflect a congressional focus upon *trial court* dismissal." *Coleman*, 575 U.S. at 538 (emphasis added). Indeed, section 1915A(b) outlines the "[g]rounds" upon which a "court" may justify *sua sponte* "dismiss[ing]" a prisoner's suit on PLRA screening. 28 U.S.C. § 1915A(b)(1) ("Grounds for dismissal.—On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted[.]"). Those are the same findings that section 1915(g) contemplates.

Unsurprisingly, given the text of section 1915(g) and its place in the broader statutory scheme, this Court has consistently referred to a strike-qualifying "dismissal" as an action by a court. *See, e.g.*, *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) ("[I]n determining a § 1915(g) 'strike,' the reviewing court looks to the dismissing *court's* action and the reasons underlying it.") (emphasis added); *Moore*, 657 F.3d at 893-894 ("The three-strikes rule counts a dismissal as a strike if *the court held* that the action 'fails to state a claim upon which relief may be granted.'") (emphasis added); *accord Coleman*, 575 U.S. at 537 (stressing that

"§ 1915 itself describes dismissal as an action taken *by a single court*") (emphasis added). As has the federal government. *See, e.g.*, Br. for the United States as Amicus Curiae at 14, *Lomax v. Ortiz-Marquez*, No. 18-8369 (U.S. Jan. 22, 2020) (defining "grounds" in section 1915(g) as "*the court's* basis or reason *** for the dismissal") (emphasis added).

Rule 41(a)(1) voluntary dismissals are fundamentally different. They involve no legal finding or court action. Quite the opposite, "Rule 41 *** does not consider the plaintiff's reasons for seeking a voluntary dismissal." *Lake at Las Vegas Invs. Grp., Inc. v. Pacific Malibu Dev. Corp.*, 933 F.2d 724, 727 (9th Cir. 1991); *see also Avery* 2021 WL 1153773, at *4 ("plaintiff's reasons for moving to voluntarily dismiss are immaterial"). And Rule 41(a)(1)(A)(i) expressly provides that "the plaintiff may dismiss an action *without a court order* by filing *** a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." FED. R. CIV. P. 41(a)(1)(A)(i) (emphasis added); *see Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir. 1997) ("The dismissal is effective on filing and no court order is required."). "There is not even a perfunctory order of court closing the file. Its alpha and omega [i]s the doing of the plaintiff alone." *Pedrina v. Chun*, 987 F.2d 608, 610 (9th Cir. 1993). As such, Rule 41(a)(1) "confers on the plaintiff an absolute right to voluntarily dismiss his action" before service of an

answer. *American Soccer Co. v. Score First Enters.*, 187 F.3d 1108, 1110 (9th Cir. 1999).

Because Rule 41(a)(1) by its terms and operation eschews any legal determination, let alone one by a court, it follows that such a dismissal cannot be based on finding of any of section 1915(g)'s grounds. In fact, the process does not require, and does not signal, any finding at all. A plaintiff could decide to voluntarily dismiss his action for any number of reasons. Perhaps the prison gave the plaintiff the sought-after accommodations. Perhaps the staff member named as a defendant transferred to a new facility. Or perhaps the plaintiff faced retaliation from prison staff for filing the lawsuit, or found the litigation process too overwhelming to continue. None of these motivations would suggest a finding of frivolousness, maliciousness, or a lack of merit. Thus, a Rule 41(a)(1) voluntary dismissal cannot constitute a strike under section 1915(g).

B. The District Court Erred In Concluding That Mr. Spencer's Rule 41(a)(1) Dismissals Satisfy Section 1915(g)

1. Mr. Spencer's voluntary dismissals are not the legal or factual equivalent of dismissal on section 1915(g)'s enumerated grounds.

Despite the fact that statutory interpretation must begin with the text, *see Lomax*, 140 S. Ct. at 1724, the district court made no effort to grapple with the words of section 1915(g), much less explain how a Rule 41(a)(1) voluntary dismissal fits within the provision's enumerated grounds. Instead, the district court concluded

that, because magistrate judges conducting PLRA screening had determined that Mr. Spencer's complaints in *Beeler* and *Kokor* failed to state a claim, Mr. Spencer's subsequent voluntary dismissals of those actions were tantamount to dismissals "on the grounds that" the actions "fail[ed] to state a claim." 28 U.S.C. § 1915(g). That reasoning is wrong on both the law and the facts.

As a legal matter, Rule 41(a)(1) voluntary dismissals cannot constitute dismissals on any of section 1915(g)'s enumerated grounds. As explained above, an action voluntarily dismissed under Rule 41(a)(1) ends only because the plaintiff voluntarily chose to end it. *See supra*, pp. 13-17. There are no other "grounds" for such a dismissal. Moreover, only a court can make the legal determination required to dismiss an action because it is "frivolous, malicious, or fails to state a claim"; a court plays no role in Rule 41(a)(1) voluntary dismissals. *See supra*, pp. 14-17. Thus, none of Mr. Spencer's Rule 41(a)(1) voluntary dismissals can count as a strike, regardless of their particulars.

Even if a plaintiff's *motives* for voluntarily dismissing his action could somehow constitute the legal "grounds" for dismissal within the meaning of section 1915(g), there is no basis to conclude that Mr. Spencer voluntarily withdrew the two actions at issue (*Beeler* and *Kokor*) as frivolous, malicious, or without merit. In *Beeler*, the magistrate judge found that Mr. Spencer's complaint failed to state a claim but that the defects were curable, and thus dismissed the complaint (but not

the action) with leave to amend. Order 7, No. 13-cv-1624 (E.D. Cal. Aug. 20, 2014), ECF No. 11; *see McKeever v. Block*, 932 F.2d 795, 797 (9th Cir. 1991) ("While the magistrate can dismiss complaints with leave to amend, the district court necessarily must review that decision before dismissing the entire action.").[2] Rather than amend, Mr. Spencer exercised his right to voluntarily dismiss his action under Rule 41(a)(1). Notice, No. 13-cv-1624 (E.D. Cal. Sept. 8, 2014), ECF No. 12 ("Beeler Notice").

Critically, in doing so, Mr. Spencer in no way embraced or acquiesced to the magistrate judge's finding. All he did was effectuate a dismissal pursuant to Rule 41(a)(1). Beeler Notice 1. Accordingly, to the extent there were any "grounds" for that dismissal, they are indecipherable. It would thus be entirely speculative to conclude that they were grounds enumerated in section 1915(g). *See Byrd v. Shannon*, 715 F.3d 117, 127 (3d Cir. 2013) (declining to assess strike where court "[could]not determine with certainty that [plaintiff's] appeal was dismissed for reasons warranting a strike under § 1915(g)"); *Thompson v. DEA*, 492 F.3d 428, 436 (D.C. Cir. 2007) (refusing to assess strike where "the only evidence of what happened in the district court is a single PACER docket report showing the case was

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[2] Dismissing a complaint with leave to amend does not terminate the entire "action" and is therefore not covered by section 1915(g). 28 U.S.C. § 1915(g); *see Lomax*, 140 S. Ct. at 1724 n.4 ("[T]he [three-strikes] provision does not apply when a court gives a plaintiff leave to amend his complaint *** because the suit continues[.]").

dismissed, without a word on the grounds for dismissal"); *Avery* 2021 WL 1153773, at *4 ("plaintiff's motivation in dismissing the appeal is nothing but speculation, since plaintiff's motion to voluntarily dismiss the appeal made no comment on the appeal's merits").

In *Kokor*, the magistrate judge assigned to the case issued an order recommending that Mr. Spencer's case be dismissed for failure to state a claim. Findings & Recommendation, No. 17-cv-597 (E.D. Cal. Mar. 13, 2018), ECF No. 15. But the district court never ruled on the recommendation. Instead, Mr. Spencer voluntarily dismissed the action under Rule 41(a)(1). *See* Objections, No. 17-cv-597 (E.D. Cal. Apr. 5, 2018), ECF No. 18 ("Kokor Objections"). In doing so, Mr. Spencer never "found" that his complaint in fact failed to state a claim. Nor did he "adopt" or rely on the magistrate judge's determination. *Cf. El-Shaddai*, 833 F.3d at 1046 (considering whether appellate affirmance adopted or otherwise relied on any district court findings of frivolousness). To the contrary, Mr. Spencer reiterated his objections to the magistrate judge's order and his desire "to proceed" on his claims. Kokor Objections 1.

To be sure, Mr. Spencer stated that the magistrate judge's order could result in "a strike against him" if ultimately adopted by the district court. Kokor Objections 1-2. But acknowledging that risk does not suggest Mr. Spencer thought his claims failed as matter of law, much less that such conclusion was the legal justification for

his voluntary dismissal. Even "attorneys can never be 100% certain they will win even the best case." *Hensley v. Eckerhart*, 461 U.S. 424, 449 (1983) (Brennan, J., concurring in part). Thus, Mr. Spencer's statements are hardly the "equivalent" of finding that one of section 1915(g)'s enumerated grounds is present. *Knapp*, 738 F.3d at 1110.

2. This Court's precedent does not support treating Mr. Spencer's voluntary dismissals as dismissals on section 1915(g)'s enumerated grounds.

The district court based its contrary conclusion on three decisions of this Court—*Knapp*, *El-Shaddai*, and *Mangum*—none of which supports treating Rule 41(a)(1) voluntary dismissals as strikes. As even the district court admitted, those decisions do not address the unique nature of Rule 41(a)(1) dismissals. *See* 2-ER-47. To the extent the cases shed light here, they reinforce that the assessment of a strike should focus on a *court*'s basis for ultimately ordering dismissal, which is absent here.

Take *Knapp* first. There, the plaintiff had "filed complaints that violated Rule 8(a)'s 'short and plain statement' requirement, was given leave to amend, but nevertheless failed to correct the violation after repeated warnings by the district court." 738 F.3d at 1110. The question was whether the district court's later dismissals of those actions under Rule 8(a) counted as "dismissals for failure to state a claim under § 1915(g)." *Id.* This Court said "yes," because no matter how the

dismissal was styled, the district court's finding that the plaintiff's complaint was "irremediably unintelligible" was the equivalent of finding that the plaintiff had failed to state a claim. *Id.*; *see also id.* at 1111 ("These cases were dismissed because [the plaintiff], after having been given numerous chances to perfect his pleadings, 'fail[ed] to state a claim.'") (alteration in original).

El-Shaddai applied the same court-focused rule. The plaintiff there had 11 prior proceedings "disposed of" by courts "on several different procedural postures." 833 F.3d at 1042. As in *Knapp*, the "style[]" of the courts' disposal did not matter; what did was the judicial "finding" on which that disposal was "based." *Id.* In the end, ten of the proceedings—dismissals for denial of *in forma pauperis* status or failure to exhaust administrative remedies, disposition on summary judgment, adverse affirmance on appeal, dismissal of habeas petitions—were deemed not to be strikes because the courts never found an action to be frivolous, malicious, or without merit. *Id.* at 1042-1048.

Mangum is no different. In that case, the plaintiff "filed a complaint that was dismissed for failure to state a claim with leave to amend," and thereafter "failed to file amended complaints within the time designated in the dismissal orders." 863 F.3d at 1141. The district court "entered judgment against him," which this Court deemed a dismissal "for failure to comply with a court order based on Federal Rule of Civil Procedure 41(b)." *Id.* at 1141-1142; *see* FED. R. CIV. P. 41(b) ("If the

plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it."). Once again, this Court's assessment focused not on the "procedural posture," but on the district court's "underlying reason for the dismissal." 863 F.3d at 1142.

Unlike in those three cases, there is no way to identify here the findings on which "the dismissing court's action" was based. *Knapp*, 738 F.3d at 1109; *see also Daker v. Head*, 730 F. App'x 765, 767 (11th Cir. 2018) ("the dispositive question is why the filing was *dismissed*"). A Rule 41(a)(1) voluntary dismissal involves no finding or "court[] action." *Knapp*, 738 F.3d at 1109.

Indeed, that is exactly why Rule 41(a)(1) voluntary dismissals *must* be "categorically *** excluded from counting as a strike," even if the Rule 8(a) dismissal in *Knapp* cannot. *Contra* 2-ER-44. Unlike a Rule 8(a) dismissal—which *could* rest on a court finding of frivolousness, maliciousness, or a failure to state a claim—a Rule 41(a)(1) voluntary dismissal never rests on any court finding. The dismissal takes effect on the plaintiff's action alone. *See Commercial Space Mgmt. Co. v. Boeing Co.*, 193 F.3d 1074, 1076 (9th Cir. 1999) ("once a notice of voluntary dismissal is filed, the district court in which the action is pending loses jurisdiction and cannot exercise discretion with respect to the terms and conditions of the dismissal").

In resisting that conclusion, the district court seized on the statement from *Knapp* that "the procedural mechanism or Rule by which the dismissal is accomplished, while informative, is not dispositive." 738 F.3d at 1109. But as this Court further explained, that was only because "there are multiple ways that [Rule 8] dismissals can be violated"—some, but not all, of which align with the grounds enumerated in section 1915(g). *Id.* That fact-specific ruling is not a broad pronouncement about all types of dismissals. At any rate, it hardly "logically follows" that if "a Rule 8(a) dismissal cannot be categorically included or excluded from counting as a strike *** that a Rule 41(a) voluntary dismissal cannot be categorically included or excluded from counting as a strike, either." 2-ER-44. Rule 8(a) dismissals and Rule 41(a)(1) dismissals are fundamentally different.

The district court next claimed that *Mangum* justifies treating the pre-dismissal failure-to-state-a-claim determinations in *Beeler* and *Kokor* as dispositive. 2-ER-45, 2-ER-47. In *Mangum*, however, the district court's initial failure-to-state-a-claim determination was relevant only because it supplied the substance for the final termination decision. That was the specific procedural posture that "rang the PLRA bells of failure to state a claim": "the entry of judgment *** was delayed until it became clear that [the plaintiff] would not file an amended complaint that did state a claim," making the initial determination and the final judgment effectively one in the same. 863 F.3d at 1142 (ellipsis omitted); *see also*

Lira v. Herrera, 427 F.3d 1164, 1169 (9th Cir. 2005) ("If a plaintiff does not take advantage of the opportunity to fix his complaint, a district court may convert the dismissal of the complaint into dismissal of the entire action."). No such conversion of a court's initial dismissal determination into a dismissal for failure to state of claim occurs when a plaintiff elects a voluntary dismissal under Rule 41(a)(1).

The district court below insisted that if Mr. Spencer had not "voluntarily dismissed these two cases and instead just let them sit as the plaintiff in [*Mangum*] did, eventually both matters would likely have been dismissed for failure to obey a court order and/or for failure to amend," and thus constituted strikes. 2-ER-45. But the text of section 1915(g) does not concern the grounds on which a plaintiff's suit *could have* eventually been dismissed, only the grounds on which it was *actually* dismissed. *See Paul v. Marberry*, 658 F.3d 702, 706 (7th Cir. 2011) (Posner, J.) ("[S]ince most prisoners litigate their civil *claims* pro se, they should not be required to speculate on the grounds the judge could or even should have based the dismissal on.") (emphasis added); *Daker v. Commissioner, Ga. Dep't of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016) (W. Pryor, J.) ("We cannot conclude that an action or appeal 'was dismissed on the grounds that it is frivolous' based on our *present-day* determination that the action or appeal was frivolous or based on our conclusion that the dismissing court *could* have dismissed it as frivolous.").

3. The district court's intuitions about the "purpose" of the PLRA cannot expand section 1915(g) to reach Mr. Spencer's voluntary dismissals.

Finally, the district court claimed that ruling for Mr. Spencer would "thwart[]" the "underlying intent and purpose" of the PLRA by allowing Rule 41(a)(1) voluntary dismissals to "be strategically used as a backstop to avoid a strike application." 2-ER-46. But such policy concerns must be resolved by Congress, not the courts. *See Mangum*, 863 F.3d at 1140. As explained above, the plain text of section 1915(g) makes clear that Rule 41(a)(1) voluntary dismissals do not constitute strikes—especially as applied to Mr. Spencer's circumstances. *See supra*, pp. 13-17. A court "must apply" that text "as written." *Harris*, 935 F.3d at 674. "It is not a judge's job to add to or otherwise re-mold [that] text to try to meet a statute's perceived policy objectives." *Id.*; *see also Smith*, 67 F.4th at 1141 (court "cannot rewrite the text" of § 1915(g) "to match [its] intuitions about unstated congressional purposes") (internal quotation marks omitted).

In any event, reading section 1915(g) to exclude Rule 41(a)(1) voluntary dismissals would not cause the drain on court resources the district court surmised. If an action "lacks merit entirely," a court is well within its discretion to dismiss it without leave at the screening stage. *Lopez*, 203 F.3d at 1129. Moreover, penalizing plaintiffs for exercising their Rule 41(a)(1) rights could actually "undermine the goal

of judicial economy" by encouraging them to keep their case alive, rather than voluntarily dismissing them. *Id.* at 1130.

Nor, for that matter, is there any reason to think *every* action voluntarily dismissed after a failure-to-state-a-claim determination is incurable such that the PLRA's supposed "purposes" are implicated. As noted above, there are any number of reasons a plaintiff might decide to voluntarily dismiss his action that are unrelated to the merits of the case. *See supra*, p. 17. No part of the PLRA's text or purpose suggests plaintiffs should be penalized with strikes in those instances.

II. COLLATERAL ESTOPPEL BARS RELITIGATION OVER WHETHER MR. SPENCER'S VOLUNTARY DISMISSALS CONSTITUTE STRIKES

Alternatively, collateral estoppel bars the litigation of the issue against Mr. Spencer because the district court in *Beard* already resolved that question in his favor.

"Collateral estoppel, also termed issue preclusion, generally applies when an issue finally decided in an earlier action is involved in a second action, and the parties involved in the second action are bound by the first decision." *Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1039 (9th Cir. 1983). Under federal law, collateral estoppel applies when: (1) "the issue necessarily decided at the previous proceeding is identical to the one *** sought to be relitigated"; (2) "the first proceeding ended with a final judgment on the merits"; and (3) "the party against

whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding." *Hydranautics*, 204 F.3d at 885.

This Court has previously said that the doctrine applies to "prevent a prisoner from avoiding the [PLRA's] three-strike rule based on allegations rejected in an earlier case." *Andrews v. Cervantes*, 493 F.3d 1047, 1057 n.11 (9th Cir. 2007). And district courts have held that collateral estoppel "prevent[s]" plaintiffs "from re-litigating whether [they are] a three-strikes litigant under [section] 1915(g)." *Thomas v. Sepulveda*, No. 14-cv-01157-CW, 2014 WL 5409064, at *3 (N.D. Cal. Oct. 23, 2014); *see also Shepherd v. Keyser*, No. 21-cv-2363-LTS, 2021 WL 1842159, at *3 (S.D.N.Y. May 7, 2021) (holding that collateral estoppel "applies and bars Plaintiff from relitigating the issue of whether he has three strikes").

The doctrine applies no differently here. *First*, the issue decided in *Beard* is the same one presented in this case: "whether a voluntary dismissal following a finding of failure to state a claim counts as a strike." 2021 WL 3418677, at *1. In fact, the district court in *Beard* considered that question in the context of analyzing one of the voluntary dismissals at issue here—*Beeler*. Rejecting the SATF defendants' arguments to the contrary, the *Beard* court ultimately concluded that a voluntary dismissal, such as *Beeler*, does not constitute a strike. *Id.* (finding "no reason to penalize a *pro se* prisoner litigant who exercises his procedural right to

elect a voluntary dismissal by holding that the voluntary dismissal constitutes a strike") (internal quotation marks omitted).

Second, the *Beard* decision was a "final judgment" for purposes of collateral estoppel because it was "'sufficiently firm' to be accorded conclusive effect." *Luben Indus.*, 707 F.2d at 1040. Indeed, both parties were "fully heard" on the question, and "the court supported its decision with a reasoned opinion." *Id.* Thus, the decision was in no way "tentative." *Id.*

Third, defendants here are in privity with the defendants in *Beard*. Privity requires "an identity or community of interest with, and adequate representation by, the losing party in the first action and that, under the circumstances, the [losing party] should reasonably have expected to be bound by the prior adjudication." *Cunningham v. Gates*, 312 F.3d 1148, 1156 (9th Cir. 2002) (internal quotation marks omitted), *as amended on denial of reh'g* (Jan. 14, 2003). Here, the SATF staff sued in *Beard* and in the consolidated cases on appeal all are California government employees working in SATF, represented by the California Attorney General's Office. *See, e.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-403 (1940) ("There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government."); *Church of New Song v. Establishment of Religion on Taxpayers'*

Money in Fed. Bureau of Prisons, 620 F.2d 648, 654 (7th Cir. 1980) ("since both suits were brought against employees of the Federal Bureau of Prisons, the defendants in both cases are in privity").

For all these reasons, the court's decision in *Beard* controls whether Mr. Spencer's voluntary dismissals constitute strikes.

CONCLUSION

This Court should reverse the district court's judgments and remand for further proceedings.

Dated: August 16, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 6,860 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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August 16, 2024

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellant states that there are no known related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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