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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INTRODUCTION

By its terms, the Prison Litigation Reform Act (PLRA) limits "strikes" to dismissals that are "on the grounds" of frivolousness, maliciousness, or failure to state a claim. 28 U.S.C. § 1915(g). Voluntary dismissals pursuant to Rule 41(a)(1) do not manifest any such determination by a plaintiff (much less by a court). The legal basis for a voluntary dismissal is just that: voluntariness.

Defendants nonetheless claim that because section 1915(g) does not specify who is effectuating the dismissal, the term "dismissed" must be read to encompass voluntary dismissals by plaintiffs. That gives short shrift to the fact that "dismissed" is tethered to "on the [enumerated] grounds"—statutory text that defendants cannot square with the inherent attributes of Rule 41(a)(1) dismissals, which require nothing more than filing a simple notice that takes effect without court approval.

Although the exact contours of defendants' preferred approach are unclear, they seem to take the position that when a screening decision has found a complaint lacking, the plaintiff's subsequent voluntary dismissal of the action suggests the "motive" for dismissal was (at least in part) a failure to state a claim. But nothing in section 1915(g) so much as hints at an analysis of the motives for dismissal. Indeed, such an inquiry would be especially inapposite to voluntary dismissals, given that Rule 41(a)(1) does not contemplate, let alone require, that a plaintiff provide any explanation. Nor can defendants' proposed rule be derived from cases in which this

Court found the dismissal of an action *necessarily* to encompass a failure-to-state-a-claim determination. Here, all agree that a plaintiff's reasons for voluntarily dismissing an action can have nothing to do with the merits, and there is no reason to find otherwise solely because the dismissal is preceded by a screening determination.

In any event, neither of Mr. Spencer's voluntary dismissals in *Beeler* and *Kokor I* would constitute a "strike" even under the novel motivation-based inquiry defendants propose. There is simply no basis to conclude that Mr. Spencer voluntarily dismissed his actions because he *agreed with* the screening court's determination that his actions failed to state a claim. In fact, in *Kokor I*, Mr. Spencer expressly *objected* to the screening determination.

Defendants' policy arguments also ring hollow. Despite defendants' efforts to make Mr. Spencer out to be a litigious boogeyman, his dismissal rate is far below the average for federal district court civil actions. The PLRA was not intended to close the courthouse doors to prisoner litigants, much less those like Mr. Spencer who have a track record of bringing legitimate claims. Nor is there any evidence that excluding voluntary dismissals from section 1915(g) has led to abuse in the circuits that have done so. Even if there were, it is Congress's job to address such concerns—not this Court's.

Alternatively, this Court should hold that collateral estoppel bars relitigating the strike-worthiness of Mr. Spencer's voluntary dismissals. A district court already determined, in a case between Mr. Spencer and defendants' privies, that Rule 41(a)(1) voluntary dismissals cannot constitute a strike. That holding should be given preclusive effect. Defendants' arguments to the contrary are either contradicted by precedent, unsupported, or both.

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

ARGUMENT

I. MR. SPENCER'S VOLUNTARY DISMISSALS DO NOT CONSTITUTE STRIKES

A. Rule 41(a)(1) Voluntary Dismissals Do Not Fall Within The Plain Text Of Section 1915(g)

The text of section 1915(g) "is plain and unambiguous." *Harris v. Harris*, 935 F.3d 670, 674 (9th Cir. 2019). A "strike" is an action "that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). As this Court has explained, the word "grounds" refers to the "legal basis" for an action. *Campbell v. Blodgett*, 997 F.2d 512, 516 (9th Cir. 1992). Thus, "dismissed on the grounds" means that the "legal basis" for terminating the action was one listed in section 1915(g).

As explained in Mr. Spencer's opening brief (at 13-17), actions voluntarily dismissed under Rule 41(a)(1) are not terminated as frivolous, malicious, or failing

to state a claim. By operation, a Rule 41(a)(1) "voluntary dismissal," accomplished by filing a "notice" and "without a court order," is simply an election to withdraw an action. FED. R. CIV. P. 41(a)(1)(A). No matter the plaintiff's "motive[s]" (Defs.' Br. 23, 28 n.6), there is no other "legal basis" for the termination. Moreover, the determination that an action is frivolous, malicious, or fails to state a claim is a legal "finding" only a court can make—yet never does under Rule 41(a)(1). *El-Shaddai v. Zamora*, 833 F.3d 1036, 1042 (9th Cir. 2016); *see* 28 U.S.C. § 1915(e) ("[T]he *court* shall dismiss the case at any time if the *court* determines that *** the action or appeal *** is frivolous or malicious [or] fails to state a claim[.]") (emphases added); *Pedrina v. Chun*, 987 F.2d 608, 610 (9th Cir. 1993) (Rule 41(a)(1) dismissal leaves "no role" for court because dismissal's "alpha and omega [i]s the doing of the plaintiff alone").

Defendants respond by proffering a reading of section 1915(g) keyed to the word "dismissed." As they put it, "[a] dismissal is a dismissal"—whether "court-imposed" or "voluntary." Defs.' Br. 18-19 (alteration in original); *see also id.* at 25 ("[T]he term 'dismiss' refers to any dismissal, not just a dismissal by a court."). Thus, in their view, how Rule 41(a)(1) voluntary dismissals actually work "is of no import." *Id.* at 26.

That reasoning, which fails to engage with the statute's requirement that dismissal be "on [certain] grounds," violates the most basic of statutory construction

principles: "[A] court should not interpret each word in a statute with blinders on, refusing to look at the word's function within the broader statutory context." *Abramski v. United States*, 573 U.S. 169, 179 n.6 (2014). Indeed, "it is perilous to pluck words from a statute and define them in isolation" because "[a] word's setting often offers the most promising insights about its meaning." *Jones Bros., Inc. v. Secretary of Lab.*, 898 F.3d 669, 673 (6th Cir. 2018).

Here, the "setting" is key. By defining "strike" as an action that was "dismissed on the grounds that it is frivolous, malicious, or fails to state a claim," Congress necessarily limited strikes to dismissals that can have those "grounds." 28 U.S.C. § 1915(g). For the reasons just explained, Rule 41(a)(1) voluntary dismissals cannot.

Contrary to defendants' contention, that conclusion does not "conflate[] the substantive grounds for dismissal *** with the procedure used to [e]ffect the dismissal." Defs.' Br. 20. It simply recognizes the unremarkable fact that the procedure used for dismissal can limit the substantive grounds available. Take Rule 12(b)(1) as an example. Under this Court's precedent, dismissals under Rule 12(b)(1) for lack of subject matter jurisdiction can *never* constitute strikes because "it is not possible" for a court to dismiss for lack of jurisdiction *and* on one of section 1915(g)'s enumerated grounds; "[a] federal court cannot assume subject-matter jurisdiction to reach the merits of a case." *Moore v. Maricopa Cnty. Sheriff's Off.*,

657 F.3d 890, 895 (9th Cir. 2011). Similar logic applies here. Dismissals under Rule 41(a)(1) can never constitute strikes because they leave "no role" for the court to ascribe *any* substantive grounds to the dismissal, much less the grounds enumerated in section 1915(g). *Pedrina*, 987 F.2d at 610.

Defendants also emphasize this Court's holding that a dismissal without prejudice can be a strike because section 1915(g) "does not distinguish between dismissals with and without prejudice." *O'Neal v. Price*, 531 F.3d 1146, 1154 (9th Cir. 2008). But those dismissals are still on statutorily enumerated grounds. More pertinent is the fact that there are numerous categories of dismissals that fall *outside* of section 1915(g)'s scope. *See, e.g.*, *Moore*, 657 F.3d at 895 (no strikes for Rule 12(b)(1) dismissals); *Harris v. Mangum*, 863 F.3d 1133, 1141 (9th Cir. 2017) (no strikes for dismissals of removed cases); *Harris*, 935 F.3d at 674 (no strikes for dismissals due to "district court's decision not to exercise supplemental jurisdiction over state-law claims"); *id.* at 674-675 (no strikes for dismissals "due to a failure to serve"); *Andrews v. King*, 398 F.3d 1113, 1122 (9th Cir. 2005) (no strikes for dismissals of civil detainee's claims); *id.* at 1122-1123 (no strikes for dismissals of habeas petitions).

At bottom, a "dismissal is a dismissal," but (as even defendants concede) "in section 1915(g) it counts as a strike" only "provided that it is on one of the grounds specified." Defs.' Br. 19 (quoting *Paul v. Marberry*, 658 F.3d 702, 704 (7th Cir.

2011)). A voluntary dismissal under Rule 41(a)(1) is, by its very definition, not on one of those grounds.

B. Defendants' Novel Motives-Based Approach Is Legally And Factually Flawed

Brushing aside section 1915(g)'s text and Rule 41(a)(1)'s operation, defendants argue that courts can nevertheless deem voluntary dismissals that follow a screening determination a "strike" because the timing suggests the dismissal was "motiv[ated]" by or "resulted from" an "appraisal of the merits." Defs.' Br. 20-23. Specifically, because Mr. Spencer's voluntary dismissals in *Beeler* and *Kokor I* came after screening decisions that the complaints failed to state a claim, defendants argue that those appraisals effectively merged with Mr. Spencer's decision to voluntarily dismiss his actions—making the screening determinations the effective "grounds" for his decision and, therefore, the dismissals "strikes." Defendants are wrong both generally and in Mr. Spencer's case.

1. Neither the PLRA's text nor this Court's precedents supports defendants' proposed inquiry into a plaintiff's "motives" for noticing a voluntary dismissal.

As an initial matter, there is no statutory support for defendants' proposed approach. Beyond the fact that Rule 41(a)(1) voluntary dismissals are not—and cannot be—"on the grounds" enumerated in section 1915(g), pp. 3-7, *supra*, nothing in section 1915(g)'s text contemplates that the assessment of a "strike" depends on a plaintiff's "motive[s]." *Contra* Defs.' Br. 23-24, 28 & n.6. Instead, section

1915(g) requires strike-assessing courts to look at a dismissal's "grounds"—meaning its "legal basis," p. 3, *supra*, not "factual incentive," *Motive*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724-1725 (2020) ("A strike-call under Section 1915(g) thus hinges exclusively on the *basis* for the dismissal.") (emphasis added). For good reason: Deducing someone's "motives" is not easy. Motives can be hidden and "difficult to pin down." *Gafoor v. INS*, 231 F.3d 645, 650 (9th Cir. 2000). Even defendants acknowledge (Br. 28 n.6) that "[c]onduct may have more than one motive," meaning a court could infer a dual motive—one on the record and one not. A court could even infer a motive that *conflicts* with the record.

Imputing "motives" to a Rule 41(a)(1) voluntary dismissal is especially illogical. This Court has made clear that "Rule 41 *** does not consider the plaintiff's reasons for seeking a voluntary dismissal." *Lake at Las Vegas Invs. Grp. v. Pacific Malibu Dev. Corp.*, 933 F.2d 724, 727 (9th Cir. 1991). Such reasons, which need not even be provided in the dismissal notice, are "immaterial." *Avery v. Stainer*, No. 2:18-cv-1302-JAM-AC-P, 2021 WL 1153773, at *4 (E.D. Cal. Mar. 26, 2021). Yet under defendants' approach, courts would be required to consider—and prisoner-plaintiffs incentivized to provide—just that. Neither section 1915(g) nor common sense countenances that result.

Lacking any textual support for their motives-based inquiry, defendants invoke *El-Shaddai*, 833 F.3d 1036, *Knapp v. Hogan*, 738 F.3d 1106 (9th Cir. 2013), and *Mangum*, 863 F.3d 1133. As Mr. Spencer explained in his opening brief (at 21-25), however, none of those cases concern Rule 41(a)(1) voluntary dismissals. Regardless, defendants misunderstand the cases' import.

Start with *El-Shaddai*. Defendants repeatedly quote the line that says "the central question [under section 1915(g)] is whether the dismissal 'rang the PLRA bells of frivolous, malicious, or failure to state a claim.'" 833 F.3d at 1042; *see* Defs.' Br. 2, 16, 19. But *El-Shaddai* was not focusing the section 1915(g) analysis on the motives underlying a dismissal. The cases *El-Shaddai* cites explain that a dismissal rings "PLRA bells" only when it (i) "explicitly deemed the action frivolous, malicious, or failing to state a claim," or (ii) was necessarily (though not expressly) on those grounds. *Blakely v. Wards*, 738 F.3d 607, 615 (4th Cir. 2013); *see also Byrd v. Shannon*, 715 F.3d 117, 126-127 (3d Cir. 2013). That is why the Court in *El-Shaddai* concluded that "[a]ppellate affirmances do not count as strikes unless the court expressly states that the appeal itself was frivolous, malicious or failed to state a claim." 833 F.3d at 1046 (alteration in original); *accord id.* at 1044 n.4 (same for summary judgment decisions). An appellate affirmance standing alone does not *necessarily* suggest such a finding.

Knapp and *Mangum* embrace the same reasoning. In *Knapp*, this Court held that "dismissals following the repeated violation of Rule 8(a)'s 'short and plain statement' requirement, following leave to amend, are dismissals for failure to state a claim under [section] 1915(g)." 738 F.3d at 1110 (emphasis omitted). The Court explained that "after an incomprehensible complaint is dismissed under Rule 8 and the plaintiff is given, but fails, to take advantage of the leave to amend, 'the judge [is] left with [] a complaint that [is] irremediably unintelligible.'" *Id.* (alterations except last in original). Thus, the "reasonable"—indeed, only—conclusion is that the plaintiff "fail[ed] to state a claim," meaning any dismissal is necessarily on those grounds. *Id.* at 1110-1111; *see Paul*, 658 F.3d at 705 ("[When] the plaintiff is told to amend his unintelligible complaint and fails to do so, the proper ground of dismissal is *** failure to state a claim.").

Similarly, in *Mangum*, this Court held that "when (1) a district court dismisses a complaint on the ground that it fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff then fails to file an amended complaint, the [court's later] dismissal counts as a strike under [section] 1915(g)." 863 F.3d at 1143. In that instance, the final dismissal is effectively a "delayed" entry of the initial failure-to-state-a-claim determination—meaning the dismissal must rest on those same grounds. *Id.* at 1142; *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.") (emphasis added).

The rule applied in those cases does not help defendants because Rule 41(a)(1) voluntary dismissals are fundamentally different. For one thing, voluntary dismissals can never rest on failure-to-state-a-claim grounds. *See* pp. 3-7, *supra*. Even if they could, there would need to be some explicit statement or an unavoidable inference to that effect. *See El-Shaddai*, 833 F.3d at 1046. Defendants do not claim that Rule 41(a)(1) dismissal notices contain such statements, and they acknowledge that "a plaintiff can dismiss [an action] for any number of reasons." Defs.' Br. 27 (internal quotation marks omitted). As such, a Rule 41(a)(1) voluntary dismissal is not expressly or necessarily on the ground of failure to state a claim.

For essentially the same reasons, the "timing" of a Rule 41(a)(1) voluntary dismissal does not change the equation. *Contra* Defs.' Br. 23 ("the timing of the voluntary dismissals alone is indicative of Spencer's motive"). Even if a voluntary dismissal follows a magistrate judge's finding or recommendation that the complaint be dismissed (often with leave to amend), the voluntary dismissal does not necessarily rest on the same appraisal of the merits. Nor is that a "reasonable" inference to make. *Knapp*, 738 F.3d at 1110. The plaintiff could have voluntarily dismissed the case because he was transferred to a new unit, or because the staff member named as a defendant left the facility. Or perhaps the plaintiff did not wish

to continue in the face of retaliation from prison staff for filing the suit in the first place. None of those reasons for dismissal would have anything to do with the merits of the case. And any one of those scenarios is more likely than a plaintiff dismissing his action because he *agrees* it is frivolous, malicious, or fails to state a claim.

In sum, neither section 1915(g) nor this Court's precedents supports defendants' motives-based inquiry, particularly as applied to Rule 41(a)(1) voluntary dismissals. This Court should reject that novel—and unworkable—approach.

2. Nothing in the record supports ascribing the PLRA screening courts' rationales to Mr. Spencer.

In any event, even under defendants' (flawed) approach, the record here does not support the conclusion defendants draw about Mr. Spencer's motives. There is no basis to impute the screening decisions' rationales to Mr. Spencer's voluntary dismissals.

In *Beeler*, Mr. Spencer voluntarily dismissed his case after a magistrate judge dismissed the complaint (but not the action) for failure to state a claim, but granted leave to amend to cure the complaints defects. In doing so, Mr. Spencer never said anything to suggest he agreed with or adopted the magistrate judge's conclusion. In fact, he made no substantive statement at all; he merely filed the requisite notice. *See* Notice, No. 13-cv-1624 (E.D. Cal. Sept. 8, 2014), ECF No. 12.

Defendants contend that by "forfeit[ing] his opportunity to object or amend the complaint," Mr. Spencer "implicitly conceded he had no further facts to allege."

Defs.' Br. 22-23. Not so. Mr. Spencer could have chosen not to amend or object for any number of reasons. *See* pp. 11-12, *supra*. And even if Mr. Spencer thought he had no more facts to allege, that does not mean Mr. Spencer *agreed* with the district court that further facts were warranted, *i.e.*, that his complaint failed to state a claim as originally written. In short, there is no way to "determine with certainty" Mr. Spencer's reasons for dismissing *Beeler*. *Byrd*, 715 F.3d at 127.

The same holds true for *Kokor I*. Mr. Spencer voluntarily dismissed *Kokor I* after a magistrate judge issued a recommendation to dismiss the action for failure to state a claim. Again, Mr. Spencer in no way suggested that he agreed with or adopted the magistrate judge's conclusion. Just the opposite: in his notice of dismissal, Mr. Spencer outlined his objections to the magistrate judge's order and his desire to "proceed" with his claims. Objs. 1, No. 17-cv-597 (E.D. Cal. Apr. 5, 2018), ECF No. 18 ("Kokor Objs.").[1]

To be sure, Mr. Spencer went on to say he was dismissing the suit so "he would not have a strike against him." Kokor Objs. 1. But as Mr. Spencer explained in his opening brief (at 20-21), voluntarily dismissing an action because there is a

[1] Defendants briefly suggest (Defs.' Br. 24) that, by recounting his objections, Mr. Spencer is trying to "collaterally attack the screening decision." Suffice to say, relying on contemporaneously made objections to show Mr. Spencer's mindset is not a collateral attack.

risk a court finds it meritless is different from dismissing an action because one *agrees* it is meritless—a distinction defendants never address.

C. Defendants' Policy Arguments Are Misplaced

Perhaps recognizing the weakness of their legal and factual arguments, defendants resort to supposed policy concerns. According to defendants, "carving out an exception for voluntary dismissals would produce a 'leaky filter,'" allowing incarcerated plaintiffs to "repeatedly use voluntary dismissals as a strategic litigation tactic to avoid a third strike and thus continue abusing the [*in forma pauperis*] privilege in future actions." Defs.' Br. 34.

Defendants, however, do not cite any evidence to suggest that this fear comports with reality. Although several circuits have held that voluntary dismissals do not constitute strikes—*see Smith v. Williams,* 67 F.4th 1139, 1141 (11th Cir. 2023); *Tolbert v. Stevenson*, 635 F.3d 646, 654 (4th Cir. 2011); *Carbajal v. McCann*, 808 F. App'x 620, 630 (10th Cir. 2020)—defendants do not point to any indications that incarcerated plaintiffs in those jurisdictions are abusing the system.[2]

Defendants contend that Mr. Spencer himself exemplifies their concerns. But Mr. Spencer is not the type of incarcerated plaintiff Congress was concerned with in

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[2] All defendants can point to (Br. 36) are two isolated incidents, 17 years apart, within the 30 years of the PLRA's existence. Such one-offs hardly forecast the floodgates problem defendants hypothesize.

enacting the PLRA. Defendants themselves recognize (Br. 14) that the *Beard* litigation, which was allowed to proceed after a district court held voluntary dismissals *not* to be strikes, resulted in a settlement. And in the end, of the nearly 30 lawsuits and appeals Mr. Spencer has brought over the last 14 years, courts have dismissed *only two* for failure to state a claim. *Id.* at 1. Even including the now-five cases Mr. Spencer has voluntarily dismissed, that dismissal rate—24.1%—is considerably lower than the general civil dismissal rate. *See* Scott Dodson, *A New Look at Dismissal Rates in Federal Civil Cases*, 96 JUDICATURE 127, 132 (2012) (finding 77.2% dismissal rate for civil cases in federal courts).[3]

The PLRA was not aimed at "prevent[ing] inmates from raising [such] legitimate claims." 141 Cong. Rec. 27,042 (1995) (statement of Sen. Orrin Hatch). Nor is its purpose to keep prisoners out of the federal courts, as defendants insinuate. Rather, as the Supreme Court has recognized, "[o]ur legal system *** remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law." *Jones v. Bock*, 549 U.S. 199, 203 (2007).

At any rate, "abstract policy concerns cannot trump statutory text." *United States v. Rich*, 603 F.3d 722, 731 (9th Cir. 2010). Even if defendants' "policy concerns are warranted, [this Court] must still strictly construe the plain language of

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[3] https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2395&context=faculty_scholarship.

the statute." *Harris*, 935 F.3d at 674. "[T]he judge's job is to construe the statute—not to make it better." *Jones*, 549 U.S. at 216. And the statute here is clear: voluntary dismissals cannot constitute "strikes."

II. COLLATERAL ESTOPPEL SHOULD BE APPLIED HERE

In the alternative, this Court should apply collateral estoppel to bar the relitigation of the strike-worthiness of Mr. Spencer's voluntary dismissals. As Mr. Spencer explained in his opening brief (at 27-30), a district court in this circuit already rejected defendants' exact argument in *Beard*—a case between Mr. Spencer and staff from the same prison facility at issue in these consolidated cases. Defendants' responses are unpersuasive.

First, defendants argue that the *Beard* decision "has no preclusive effect because it was an interlocutory ruling." Defs.' Br. 39. But this Court has made clear that "[t]o be 'final' for collateral estoppel purposes, a decision need not possess 'finality' in the sense of 28 U.S.C. § 1291." *Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983). A decision constitutes a "final judgment" for purposes of collateral estoppel so long as it is "'sufficiently firm' to be accorded conclusive effect." *Id.* A threshold determination that Mr. Spencer's voluntary dismissal are not strikes, which the district court did not revisit in allowing the litigation to proceed, is plainly "firm."

Second, defendants contend that "*Beard* *** cannot be afforded preclusive effect" because it "was never subject to challenge on appeal." Defs.' Br. 40. "The fact that a judgment is unappealed," however, "ordinarily does not deprive it of preclusive effect." *In re Jenson*, 980 F.2d 1254, 1257 n.2 (9th Cir. 1992). And defendants cite nothing to support the proposition that *Beard* was unappealable, even as a collateral order.

Third, defendants claim they are not in privity with the defendants in *Beard*. Specifically, they stress (Br. 44-46) that there is no "doctrine of preclusion by 'virtual representation,'" and that the defendants in *Beard* were sued in their individual, not official, capacities. But as even defendants admit (Br. 44), there is privity when a non-party "assume[s] control over the litigation in which the judgment was rendered." *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008) (internal quotation marks omitted) (quoting *Montana v. United States*, 440 U.S. 147, 154 (1979)). The question is "whether the 'relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings.'" *United States v. Bhatia*, 545 F.3d 757, 759-760 (9th Cir. 2008). The State of California, a party in these consolidated cases and counsel to all defendants here, undoubtedly had such a "laboring oar" in *Beard*. *Id.* at 760. Its own Attorney General's Office appeared as counsel for the *Beard* defendants,

allowing it to "direct" and "review" filings and "present proofs and argument." *Id.* Defendants offer no explanation for why this form of privity does not exist here.

Finally, defendants argue (Br. 47) that "equitable concerns" counsel against applying preclusion because doing so would "perpetuat[e] an erroneous result" and "prevent this Court from developing the law." *Beard*, however, was correct. And giving one decision preclusive effect for one plaintiff does not "perpetuat[e]" anything, much less prevent this Court from developing the law in a future case.

If anything, this is precisely the kind of case in which principles of "fairness" and "equity" counsel *in favor* of preclusion. Mr. Spencer, an incarcerated *pro se* litigant, having won an important issue, should not have to worry about relitigating the exact same question in each and every case he files. *See Montana*, 440 U.S. at 153-154 (preclusion is meant to protect parties "from the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions."). Indeed, under defendants' view, Mr. Spencer could be forced to relitigate this same question nine times over, lose on the tenth, and then have California defendants turn around and say that the one and only loss has preclusive effect. *See* Defs.' Br. 41 ("[A]n [*in forma pauperis*] denial or revocation would have issue-preclusive effect while the grant of [*in forma pauperis*] status would not."). That is the antithesis of equity.

CONCLUSION

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

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Respectfully submitted,

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December 20, 2024

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I hereby certify that on December 20, 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.

December 20, 2024

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