No. 98-715

In the Supreme Court of the United States

OCTOBER TERM, 1998

KENNETH JAY WILSON, PETITIONER

v.

LEWIS YAKLICH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Section 804(d) of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, Title VIII, 110 Stat. 1321-74, amended 28 U.S.C. 1915(g) (Supp. II 1996) to provide:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding [*in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed 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.

The questions presented are:

1. Whether the limitation on *in forma pauperis* filings imposed by Section 1915(g) violates petitioner's rights to due process and equal protection.

2. Whether counting dismissals entered before the enactment of the PLRA toward Section 1915(g)'s three-dismissal limit deprives petitioner of due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-29) is reported at 148 F.3d 596. The orders of the district court (Pet. App. 1-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1998. A petition for rehearing was denied on July 27, 1998 (Pet. App. 30-31). The petition for a writ of certiorari was filed on October 26, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has long made special provision for access to the federal courts by individuals who cannot afford to prepay or give security for fees and costs, as other litigants are or may be required to do. See, *e.g.*, 28 U.S.C. 1914 (district court fees); Fed. R. App. P. 7 (appeal bonds). Since 1892, what is now 28 U.S.C. 1915 has permitted any 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." *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989); see 28 U.S.C. 1915(a)(1) (Supp. II 1996).[1] A party who is granted leave to proceed *in forma pauperis* (IFP) is not required to prepay ordinary filing or other fees. The United States also pays certain costs in the first instance (whether or not it is a party to the litigation); and the opposing party must accept the likelihood that any judgment for costs against the IFP litigant at the end of the litigation will be uncollectible. See, *e.g.*, 28 U.S.C. 1911-1913, 1920 (taxation of costs).

On April 26, 1996, the President signed the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, § 101(a), Title VIII, 110 Stat. 1321-66. The PLRA made various changes in the nature and availability of IFP status in civil actions and appeals brought by federal or state prisoners. As directly relevant here,

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[1] Unless otherwise noted, all references to Section 1915 in this brief are to the amended version set out in the 1996 Supplement to the United States Code.

Section 804(d) of the Act, 110 Stat. 1321-74, adds to 28 U.S.C. 1915 a new subsection (g):

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed 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.

Thus, under most circumstances, a prisoner who meets the three-prior-dismissal threshold of Section 1915(g) must now pay the filing fees required of ordinary litigants before he or she may bring a civil action, or appeal a civil judgment, in federal court.

2. *Yaklich*. On November 16, 1995, petitioner, who was then imprisoned at Ohio's Mansfield Correctional Institution, filed a pro se complaint in the United States District Court for the Northern District of Ohio, alleging that respondent Lewis Yaklich and other employees of the Ohio Department of Rehabilitation and Correction had violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. Pet. App. 32-35. The complaint alleged that members of the "Aryan Brotherhood" had, on two occasions, "forced [him] into refusing to lock in the general population area"; and that the defendants, although aware of that situation, did not investigate it, refused to place petitioner in protective custody, and

instead disciplined petitioner.[2] *Id.* at 33-34. The complaint did not allege that petitioner had suffered physical harm, or that he was subject to any continuing threat. *Ibid.*; see *id.* at 13. The complaint sought compensatory and punitive damages. *Id.* at 34-35.

Petitioner sought to file his complaint *in forma pauperis* under 28 U.S.C. 1915 (1994) (before amendment by the PLRA). On December 22, 1995, the district court dismissed the complaint as frivolous, pursuant to 28 U.S.C. 1915(d) (1994) (now Section 1915(e)). Pet. App. 4-6. The court held that petitioner had failed to allege either the imposition of an "atypical and significant hardship" or that "the conditions of his confinement deprived him of 'the minimal civilized measure of life's necessities.'" *Id.* at 5 (citing *Sandin* v. *Conner*, 515 U.S. 472 (1995), and quoting *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981)). The court further certified that no appeal from its decision could be taken in good faith, thus precluding petitioner from proceeding *in forma pauperis* on appeal. *Id.* at 6-7; see 28 U.S.C. 1915(a) (1994). On February 13, 1996, the court denied petitioner's motion to reconsider. Pet. App. 8-9.

Petitioner filed a notice of appeal and asked the court of appeals for leave to proceed *in forma pauperis* despite the district court's certification. The court subsequently appointed counsel for petitioner and directed the parties to address the relevance of the intervening enactment of the PLRA. In response, petitioner contended that the PLRA's amendments to Section 1915 did not apply to his case, and that if they did apply they violated his constitutional rights to due process and equal protection and impermissibly increased his

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[2] Neither the record below nor the petition elucidates the meaning of the phrase "refusing to lock." See Pet. 3 & n.1.

punishment for previous crimes. The United States thereafter intervened, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the Act.

3. *Sanford.* While the *Yaklich* case was pending on appeal, petitioner, who had been transferred to the Southern Ohio Correctional Facility, filed seven new complaints in the United States District Court for the Southern District of Ohio, alleging violations of 42 U.S.C. 1983 by respondent Mary Sanford and others. See Pet. App. 1. In each case, petitioner sought to proceed *in forma pauperis*. *Ibid.* On November 4, 1996, the district court denied petitioner's IFP applications. *Id.* at 1-3. Noting that it had previously held (in connection with another group of seven IFP complaints) that petitioner had filed "at least three frivolous actions in this Court in the past," and that the present complaints included no claim of imminent physical danger, the court held that, in accordance with Section 1915(g), it would no longer accept petitioner's civil complaints for filing unless they were accompanied by the ordinary filing fee. *Id.* at 2.[3]

The court of appeals consolidated petitioner's appeal from the denial of his IFP applications in *Sanford* with his previous appeal on the merits in *Yaklich*.

4. The court of appeals affirmed the dismissal of the complaint in *Yaklich* because it concurred in the district court's conclusion, under pre-PLRA Section 1915(d), that the action was frivolous. Pet. App. 13, 17. The court accordingly did not address petitioner's chal-

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[3] The complaints were not ultimately accepted for filing, and the district court's order indicates only that they invoked 42 U.S.C. 1983 and did not allege imminent physical danger. Pet. App. 1-2. The record offers no further indication of the substance of the underlying claims in the *Sanford* litigation.

lenges to the applicability or constitutionality of the PLRA in connection with that case. *Id.* at 17.[4] The court did, however, reach and resolve those claims in affirming the district court's rejection of petitioner's applications to proceed *in forma pauperis* in connection with the seven new complaints at issue in *Sanford*. *Id.* at 17-29.

a. The court first rejected (Pet. App. 19-22) petitioner's argument that the "three strikes" provision of Section 1915(g) should not be applied "retroactively" to his case "because any 'strikes' occurring prior to the effective date of the PLRA cannot be counted against him in his effort to prosecute his § 1983 causes of action" (*id.* at 19). Applying the analytical framework of *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the court first determined that the PLRA contains no "unambiguous directive" that pre-Act dismissals should be counted for purposes of Section 1915(g). Pet. App. 21. The court further concluded, however, that counting such dismissals would not produce any genuinely "retroactive" effect. *Id.* at 21-22. Rather, the court joined "[a]ll other circuits that have addressed this

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[4] Because the United States intervened in *Yaklich* only for the purpose of defending the constitutionality of the PLRA, we do not address in any detail the court of appeals' non-constitutional grounds for affirming dismissal of the complaint in that case. Briefly, the court held that the complaint failed to allege that petitioner "has suffered or is threatened with suffering actual harm as a result of the defendants' acts or omissions" (Pet. App. 15), and that no injunctive relief could be proper because petitioner had already been transferred from the facility where the actions complained of allegedly occurred (*id.* at 16). To the extent the complaint raised a due process claim, the court held that petitioner had not alleged that prison regulations imposed an "'atypical and significant hardship on [him] in relation to the ordinary incidents of prison life.'" *Id.* at 17 (quoting *Sandin*, 515 U.S. at 484).

issue" in holding that Section 1915(g) is not improperly "retroactive" because it is a "procedural rule," "does not alter the merits of the underlying actions," does not impose new liability for court costs (for which prisoners were always ultimately liable), and merely "codifies an existing practice in the courts designed to prevent prisoners from abusing the [IFP] privilege." *Ibid.*

b. The court next rejected (Pet. App. 22-25) petitioner's argument that 28 U.S.C. 1915(g) violates equal protection principles by treating indigent prisoners differently from either non-indigent prisoners or indigent non-prisoners. Noting that "neither indigents nor prisoners are a suspect class," the court inquired only whether there is a "rational basis" for the distinctions drawn by the statute. Pet. App. 23. The distinction between indigent and non-indigent prisoners, the court observed, is rationally related to the legitimate goal of deterring frivolous lawsuits by declining to subsidize them at taxpayer expense. *Id.* at 23-24. The distinction between prisoners and non-prisoners, the court held, is rationally related to the greater free time of prisoners, the attraction of civil litigation as a "recreational activity" for prisoners, and the empirical observation that "prisoners have abused the judicial system in a manner that non-prisoners simply have not." *Id.* at 24.

The court of appeals also held (Pet. App. 24-25) that the PLRA does not unduly interfere with petitioner's "fundamental constitutional right of access to the courts" (*id.* at 24). Noting that access to the courts must be "adequate, effective, and meaningful," the court pointed out that petitioner "still had available to him at the time of the initial filing the opportunity to litigate his federal constitutional causes of action *in forma pauperis* in state court." *Id.* at 25. Thus, the

court concluded, "it cannot be said that the right of access to the courts has been denied." *Ibid.*[5]

ARGUMENT

The court of appeals' conclusions with respect to 28 U.S.C. 1915(g)'s application and constitutionality are correct, and comport with those of all the other courts of appeals that have considered the relevant questions.[6] Those conclusions do not warrant further review by this Court.[7]

1. Petitioner contends (Pet. 15-18) that under the analysis prescribed in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), Section 1915(g) should not be applied "retroactively" by counting pre-PLRA dismissals toward the three-dismissal limit imposed by that Section.[8] The court below correctly joined six

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[5] For the same reasons that it rejected petitioner's equal protection arguments, the court also rejected his argument that enforcement of Section 1915(g) would violate "substantive due process principles." Pet. App. 25-26. Finally, the court rejected arguments based on the Bill of Attainder and Ex Post Facto provisions of the Constitution. *Id.* at 26-28. Petitioner does not renew the latter two contentions in this Court (see Pet. i), and we do not address them.

[6] We have also opposed review in a pending case that raises similar constitutional and "retroactivity" challenges to Section 1915(g). Br. in Opp., *Rivera* v. *United States*, No. 98-6127 (filed Nov. 23, 1998).

[7] As noted above, the United States intervened in the *Yaklich* case only to defend the constitutionality of Section 1915(g)—an issue that the court of appeals ultimately addressed only in connection with the consolidated appeal in *Sanford*. This brief does not address the merits of the court of appeals' determination that the complaint in *Yaklich* was frivolous under pre-PLRA standards.

[8] Although petitioner frames this question in constitutional terms (see Pet. i (Question 3), 15), *Landgraf* is concerned primarily with principles of statutory construction. See 511 U.S. at 266-268,

other courts of appeals in rejecting that argument. Pet. App. 19-22; see *Rivera* v. *Allin*, 144 F.3d 719, 728-730 (11th Cir. 1998), petition for cert. pending, No. 98-6127; *Tierney* v. *Kupers*, 128 F.3d 1310, 1311-1312 (9th Cir. 1997); *Keener* v. *Pennsylvania Bd. of Probation & Parole*, 128 F.3d 143, 144-145 (3d Cir. 1997) (per curiam); *Adepegba* v. *Hammons*, 103 F.3d 383, 385-387 (5th Cir. 1996); *Abdul-Wadood* v. *Nathan*, 91 F.3d 1023, 1025 (7th Cir. 1996); *Green* v. *Nottingham*, 90 F.3d 415, 418-420 (10th Cir. 1996).

Following *Landgraf*, the court of appeals first properly noted that the language and purposes of the PLRA suggest a congressional intention to count pre-Act dismissals for purposes of Section 1915(g). Pet. App. 20-21; see *Landgraf*, 511 U.S. at 280 ("the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach"); *Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997) ("normal rules of construction" apply in determining the threshold question of a statute's facial "temporal reach"). Finding in the Act, however, no "unambiguous directive" in this regard, the court proceeded to address other factors discussed in *Landgraf*, and correctly concluded that counting pre-Act dismissals does not result in a disfavored "retroactive" effect. Pet. App. 21-22.

First, the three-dismissal rule does not impair rights petitioner possessed when he filed previous lawsuits that were ultimately dismissed as frivolous. The statu-

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272. Petitioner's remaining "retroactivity" claim (unlike the Bill of Attainder and Ex Post Facto Clause claims he raised in the court of appeals, see note 5, *supra*) is therefore essentially a statutory one. Because a conclusion that petitioner is not subject in this case to the limitations imposed by Section 1915(g) would obviate any need to consider the constitutionality of those limitations, we address that question first.

tory authorization to allow a litigant to proceed *in forma pauperis* was always addressed to the discretion of the courts. See 28 U.S.C. 1915(a) (1994) (court "may" authorize litigant to proceed IFP); *Rivera*, 144 F.3d at 729-730. Certainly petitioner never had any "right" to *abuse* that authorization by using it to file lawsuits that were later determined to be utterly without merit; and the PLRA merely codified the judicial practice of "revok[ing] a prisoner's ability to proceed *in forma pauperis* upon determining that the litigant was taking unfair advantage of IFP procedures." Pet. App. 22; see, *e.g.*, *Adepegba*, 103 F.3d at 387.

Second, Section 1915(g) does not increase petitioner's liability for past conduct, because "even prior to enactment of the PLRA, prisoners were liable for the costs of suits filed, although the collection of those costs was deferred." Pet. App. 21-22; accord *Rivera*, 144 F.3d at 730 ("[l]itigants have always been liable for filing fees"); *Adepegba*, 103 F.3d at 386 ("[Section 1915(g)] requires collection of a fee that was always due."); *Abdul-Wadood*, 91 F.3d at 1025 ("All § 1915 has ever done is excuse *pre*-payment of the docket fees; a litigant remains liable for them.").

Third, to the extent that Section 1915(g) does impose new consequences with respect to past conduct, "those consequences are not matters of substance, but only of the procedure required to pursue future claims." Pet. App. 21; see *Rivera*, 144 F.3d at 730; *Adepegba*, 103 F.3d at 386; *Green*, 90 F.3d at 420. As *Landgraf* made clear, however, "the fact that a new procedural rule was instituted after the conduct giving rise to [a] suit does not make application of the rule at trial retroactive." 511 U.S. at 275. The court of appeals in this case joined its sister circuits in applying the same principle to the new procedural limitation imposed by Section 1915(g),

which is not "retroactive" even though its (prospective) application in the present case depends on conduct (previous frivolous filings) that occurred before its enactment. Pet. App. 21 (citing cases); see also *Landgraf*, 511 U.S. at 270 n.24 ("[A] statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'"). That conclusion, which is of essentially transitional significance, is correct and requires no further review.

2. The court of appeals also correctly rejected petitioner's constitutional argument (Pet. 9-15) that the application of 28 U.S.C. 1915(g) to his case violates his right to equal protection. Pet. App. 22-25. Every other court of appeals that has considered a similar challenge has likewise upheld the constitutionality of the limits that Section 1915(g) imposes on the continued use of *in forma pauperis* status by prisoners with a demonstrated history of meritless civil litigation. See *Rodriguez* v. *Cook*, No. 97-35095 (9th Cir. Dec. 16, 1998); *White* v. *Colorado*, 157 F.3d 1226, 1234-1235 (10th Cir. 1998); *Rivera*, 144 F.3d at 727-728; *Carson* v. *Johnson*, 112 F.3d 818, 821-822 (5th Cir. 1997).

The court of appeals properly determined that Section 1915(g), as applied to petitioner, is subject only to rational basis review. See Pet. App. 23-25. Petitioner claims (Pet. 9-11) that the statute is subject to strict scrutiny because it burdens his fundamental right of access to the courts. That argument, however, confuses a fundamental constitutional right of fair and reasonable access to a judicial forum with the different (although sometimes overlapping) *statutory* privilege that Congress has granted most indigent litigants to seek leave to be excused from assuming, in advance, the ordinary processing costs of federal civil litigation.

As this Court recently observed, in "the generality of civil cases, * * * indigent persons have no constitutional right to proceed *in forma pauperis*." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 119 (1996). The Court has recognized only "a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees." *Id.* at 113; see also *id.* at 114 ("[A] constitutional requirement to waive court fees in civil cases is the exception, not the general rule."). In particular, the Court has "set apart from the mine run of cases" those that implicate "fundamental interest[s] or classification[s] attracting heightened scrutiny"—specifically "those involving state controls or intrusions on family relationships," *id.* at 115-116, such as the parental termination proceedings at issue in *M.L.B.*, or the divorce proceedings at issue in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Compare *Ortwein* v. *Schwab*, 410 U.S. 656 (1973) (per curiam) (no constitutional right to proceed IFP in court challenge to administrative reduction of welfare benefits); *United States* v. *Kras*, 409 U.S. 434 (1973) (no right to waiver of fees for discharge in bankruptcy).

In this case, the court of appeals properly applied "the general rule * * * that fee requirements ordinarily are examined only for rationality." *M.L.B.*, 519 U.S. at 123. Although neither the record nor the petition discloses the precise nature of the claims petitioner sought to make in the seven new lawsuits at issue in the *Sanford* proceeding, petitioner's history of frivolous litigation (see Pet. App. 2, 4-6, 19-20) plainly differentiates this case from *M.L.B.*, which involved one parent's effort to *defend* against the other's effort to terminate parental rights (see 519 U.S. at 107, 125), or *Boddie*, which involved access to state courts to invoke their

exclusive jurisdiction to terminate a marriage. Section 1915(g)'s limitation on the general statutory right to proceed *in forma pauperis*—which indigent prisoners normally enjoy in common with all other indigent litigants—applies only to prisoners who have, over time, demonstrated a propensity for abuse of that right, to the detriment of the courts, defendants, federal taxpayers, and other litigants. That statutory limit is merely a regularized, legislative version of a prerogative that this Court, among others, has periodically exercised in the face of demonstrated abuse of its processes. See, *e.g.*, *Shieh* v. *Kakita*, 517 U.S. 343 (1996); *Rodriguez*, slip op. 13846; *Adepegba*, 103 F.3d at 387; Pet. App. 22.

In situations that do involve the most fundamental of interests—where a prisoner faces "imminent danger of serious physical injury"—Section 1915(g) itself provides for the continued availability of IFP status. And, as the court of appeals pointed out (Pet. App. 25-26), so far as appears in this case, Section 1915(g) does not under any circumstances deprive petitioner of all access to a judicial forum, because he remains free to litigate his claims (which appear to be against state officials) under 42 U.S.C. 1983 *in forma pauperis* in state court. See *Howlett* v. *Rose*, 496 U.S. 356, 358 (1990) ("State courts as well as federal courts have jurisdiction over § 1983 cases."); compare *Boddie*, 401 U.S. at 376, 380 (state-court filing fee deprived petitioner of her "only avenue" and "sole means" to obtain divorce); *M.L.B.*, 519 U.S. at 125 (effort to "defend against the State's destruction of her family bonds" in state court proceeding was comparable to "a defendant resisting criminal conviction"); *id.* at 116 n.8, 127-128; *Kras*, 409 U.S. at 445 ("In contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal

relationship with his creditors."); cf. *Ortwein*, 410 U.S. at 659-660 (administrative hearing was available to welfare recipients at no cost before they could be denied benefits); *Kadrmas* v. *Dickinson Pub. Sch.*, 487 U.S. 450, 460-461 (1988) (upholding fee for transport to public schools, and distinguishing court-access cases on the ground that the court remedies were exclusive).[9] Under these circumstances, the modest limitations imposed by Section 1915(g) impose no undue burden on the fundamental right of reasonable access to the courts, and the court of appeals correctly held that those limitations do not deprive petitioner of equal protection or due process so long as they are rationally related to any legitimate state purpose.

Section 1915(g) easily passes muster under that standard. The court of appeals properly recognized—as have other courts—that the goals of curtailing abusive prisoner litigation and conserving governmental (including judicial) resources are legitimate government purposes. Pet. App. 23-24; see *Rodriguez*, slip op. 13847-13848; *White*, 157 F.3d at 1234; *Rivera*, 144 F.3d at 727; *Carson*, 112 F.3d at 822. Denying the benefit of IFP status in all but the most serious cases to prisoners who have in the past repeatedly filed lawsuits that proved, on examination, to be meritless is a rational

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[9] Ohio law permits indigent prisoners to pursue non-frivolous suits in state court without pre-payment of court fees and costs. See Ohio Rev. Code Ann. § 2969.22 (Anderson 1996 & Supp. 1998). Ohio recently adopted a screening process in order to reduce the number of frivolous prisoner filings. See *id.* §§ 2969.24 (court may dismiss frivolous inmate suits against government entities or employees), 2969.25 (court may appoint attorney to review claim and make recommendation as to frivolousness). Petitioner acknowledges the propriety of such case-by-case determinations. See Pet. 13, 17-18.

means to advance those legitimate ends. Any differentiation that results between indigent and non-indigent prisoners simply reflects Congress's measured decision not to bar further filings by abusive inmates, but simply to cease subsidizing them; and any distinction made between prisoners and non-prisoners reflects a reasonable legislative determination that prisoners are more prone to abuse the availability of IFP status, in part because they often have substantially more free time than non-prisoners to devote to litigation, and because for some pro se litigation "has become a recreational activity." Pet. App. 23-24; see, *e.g.*, *Rodriguez*, slip op. 13847; *Rivera*, 144 F.3d at 728 ("Congress did not enact the PLRA in a vacuum. It held hearings and rendered findings, concluding that prisoners file more frivolous lawsuits than any other class of persons."); see also *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of [a] problem which seems most acute to the legislative mind.").

The court of appeals thus correctly rejected petitioner's constitutional challenges to the application of Section 1915(g) in his case. In the absence of any conflict in the courts of appeals, that decision does not warrant review by this Court.

CONCLUSION

With respect to the first three questions presented by the petition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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