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No. 13-1333

IN THE
Supreme Court of the United States

ANDRÉ LEE COLEMAN,
A/K/A ANDRÉ LEE COLEMAN-BEY, *Petitioner*,
v.
TODD TOLLEFSON, *et al.*, *Respondents.*

ANDRÉ LEE COLEMAN, *Petitioner*,
v.
BERTINA BOWERMAN, *et al.*, *Respondents.*

ANDRÉ LEE COLEMAN, *Petitioner*,
v.
STEVEN DYKEHOUSE, *et al.*, *Respondents.*

ANDRÉ LEE COLEMAN, *Petitioner*,
v.
AARON J. VROMAN, *et al.*, *Respondents.*

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers, a nonprofit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, NACDL frequently appears as amicus in cases involving prisoners' access to the courts.

SUMMARY OF ARGUMENT

The majority interpretation of the three-strikes provision of the Prison Litigation Reform Act of 1995 ("PLRA"), 28 U.S.C. § 1915(g), provides a clear, easily administrable rule that avoids anomalous results, introduces no further complexity, and best serves the

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[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

statute's purposes. Under that interpretation, a district court's dismissal of a prior action on one of the grounds enumerated in the statute does not qualify as a "strike" for purposes of § 1915(g) so long as that dismissal remains open on appeal. *See Henslee* v. *Keller*, 681 F.3d 538, 541 (4th Cir. 2012) (discussing circuit decisions). That rule is simple to apply and calls for a familiar analysis of finality that courts routinely conduct in other contexts. Courts have accordingly implemented that interpretation without difficulty since early after the PLRA's enactment. Moreover, that interpretation bars prisoners who repeatedly pursue frivolous litigation from proceeding under the *in forma pauperis* statute without unfairly penalizing those litigants to whom the three-strikes provision would otherwise apply only because of a prior dismissal that might turn out to be erroneous in some respect.

In contrast, the Sixth Circuit's interpretation creates needless uncertainty and raises as many questions as it answers. That interpretation, which the Seventh Circuit has also adopted, "requires district courts to count as strikes cases that are dismissed on the grounds enumerated in the provision even when pending on appeal." Pet. App. 4a; *see also Robinson* v. *Powell*, 297 F.3d 540, 541 (7th Cir. 2002). The Sixth Circuit's interpretation thus permits strikes to arise and vanish intermittently as dismissals are entered and then reversed, potentially barring meritorious claims in the interim. The Sixth Circuit's decision also creates further complications in the statute, including the question whether a prisoner may be granted *in forma pauperis* status to appeal from a dismissal that would otherwise count as a third strike.

Injecting these complexities into the administration of the PLRA serves no evident useful purpose.

The PLRA "contains a variety of provisions designed to bring [prisoner] litigation under control." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006). Among other things, the PLRA "mandates early judicial screening of prisoner complaints and requires prisoners to exhaust prison grievance procedures before filing suit." *Jones* v. *Bock*, 549 U.S. 199, 202 (2007). The Sixth Circuit's interpretation of the three-strikes provision does not add to the effectiveness of those mechanisms, but instead threatens to extinguish meritorious claims brought by prisoners whose prior strikes could disappear on appeal. This Court should reject that interpretation and construe any ambiguity in § 1915(g) in the manner most consistent with its purpose, ease of administration, and common sense.

ARGUMENT

THE INTEREST IN EASE OF ADMINISTRATION AND THE PURPOSES OF THE PLRA FAVOR TREATING A PRIOR DISMISSAL AS A "STRIKE" ONLY AFTER IT BECOMES FINAL ON APPEAL

A. The Majority Interpretation Is A Simple Rule That Courts Have Applied Since 1996 Without Difficulty

Treating a prior dismissal as a "strike" under § 1915(g) only after it has become final on appeal provides a simple rule that courts can easily apply. Under this view, "a dismissal ripens into a 'strike' for § 1915(g) purposes on 'the date of the Supreme Court's denial or dismissal of a petition for writ of certiorari, if the prisoner filed one, or from the date when the time to file a petition for writ of certiorari expired, if he did not.'" *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1100 (9th Cir. 2011) (quoting *Hafed* v. *Federal Bureau of Prisons*, 635 F.3d 1172, 1176 (10th Cir. 2011)). If a prisoner does not ap-

peal a dismissal from the district court in the first place, "the dismissal counts as a 'strike' from the date when his time to file a direct appeal expired." *Id.* at 1100 n.6. Thus, under that majority interpretation, a court applying § 1915(g) need only determine whether any appeal from a previous dismissal is pending or whether the deadline for seeking further review has passed. If an appeal is pending, or if the period for seeking further review has not yet elapsed, then the dismissal does not count as a strike for purposes of § 1915(g).

The Fifth Circuit adopted this approach shortly after the PLRA's enactment, and experience within that circuit confirms the ease of its application. In *Adepegba* v. *Hammons*, 103 F.3d 383 (5th Cir. 1996), the Fifth Circuit held that "[a] dismissal should not count against a petitioner until he has exhausted or waived his appeals." *Id.* at 387. The court reasoned that reversal of an otherwise qualifying dismissal "nullifies the 'strike.'" *Id.* From that premise—which is not contested here—the court concluded that a dismissal should not be treated as a strike so long as it might yet be "nullifie[d]" on appeal. Thus, the court held, only those dismissals for which appeal has been exhausted or waived count as strikes. *Id.* at 387-388. "Any other reading," the court explained, would "pose[] a risk of inadvertently punishing nonculpable conduct," contrary to Congress's intention "only to penalize litigation that is truly frivolous, not to freeze out meritorious claims or ossify district court errors." *Id.*

Applying the statute to the facts before it, the Fifth Circuit held that the district court's dismissal of the case at hand did not constitute a strike because Adepegba's appeal was not yet exhausted. 103 F.3d at 387. In contrast, the court had no trouble concluding that prior decisions Adepegba had failed to appeal within

the time allowed counted as strikes. *Id.* at 388 (citing 90-day deadline under S. Ct. R. 13). Based on those prior strikes, the court was able to determine, once and for all, that Adepegba was barred from pursuing any other action in federal court under the *in forma pauperis* statute unless he faced "'imminent danger of serious physical injury.'" *Id.*

District courts within the Fifth Circuit have likewise had little difficulty applying *Adepegba*'s holding. In *White* v. *City of Dallas*, 2007 WL 1793561 (N.D. Tex. June 21, 2007), the plaintiff sought to proceed *in forma pauperis* in a § 1983 suit against the Dallas Police Department. Adopting the magistrate judge's findings and conclusions, the district court identified six prior qualifying dismissals—five dismissals in the district court, plus one dismissal of a frivolous appeal. *Id.* at *2-3. For each dismissal, the court simply noted whether the plaintiff had appealed or waived his appellate rights and counted the strikes accordingly. *See id.* (precluding *in forma pauperis* status); *see also, e.g.*, *Grandinetti* v. *White*, 2007 WL 1428809, at *2 (E.D. Tex. May 10, 2007) (adopting magistrate judge's application of *Adepegba* to find at least three prior dismissals in which appeal had been exhausted or waived). Similarly, in *Few* v. *Rivera*, 2006 WL 4659838, at *1-2 (W.D. Tex. Dec. 8, 2006), a magistrate judge identified three prior qualifying dismissals, but the district court noted that the plaintiff's appeal from one of those dismissals remained pending in the Fifth Circuit and thus did not constitute a strike. As to a fourth prior dismissal, the district court simply noted that the plaintiff's deadline to appeal had not yet expired. *Id.* at *1.

Decisions in the other courts of appeals that have adopted the Fifth Circuit's interpretation of § 1915(g) similarly confirm the rule's clarity and ease of applica-

tion. In *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775 (10th Cir. 1999), the Tenth Circuit summarized a set of clear rules "to provide guidance for future cases," *id.* at 780, including a rule that a dismissal should not count as a strike before the prisoner has exhausted or waived his opportunity to appeal. The court straightforwardly applied that rule, granting *in forma pauperis* status where the plaintiff's appeal from one prior dismissal remained pending and the plaintiff had not yet exhausted or waived his right to appeal a second prior dismissal. *Id.*; *see also Nicholas* v. *Corbett*, 254 F. App'x 117, 118 (3d Cir. 2007) (per curiam) (prior dismissals did not count as strikes because the plaintiff's "appeals were not completed at the time [he] filed" the complaint at issue); *Silva*, 658 F.3d at 1100-1101 (one prior dismissal did not count because appeal was still pending; another prior dismissal did not count because time for seeking certiorari had not yet expired).

B. The Majority Interpretation Calls For The Same Familiar Finality Determination Courts Routinely Make In Other Contexts

In several contexts, courts must determine whether a litigant has exhausted or waived his appellate rights for purposes of assigning some particular significance to a prior judicial decision. The finality determination a court must make under the majority interpretation of § 1915(g) is no different, and there is no reason to expect that making that assessment would be any more problematic in the PLRA's *in forma pauperis* context than in any other.

1. Federal habeas statute of limitations

Under the federal habeas statute, a prisoner in custody pursuant to a state-court judgment must file any habeas petition within a one-year limitations period. 28 U.S.C. § 2244(d)(1). That limitations period runs from the latest of several enumerated dates, one of which is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). Similarly, a prisoner in custody pursuant to a federal conviction must file any motion for postconviction relief within one year after the latest of several dates, including "the date on which the judgment of conviction becomes final." *Id.* § 2255(f)(1); *see also Clay* v. *United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). To apply those provisions, courts must accordingly determine the date on which a prisoner exhausted or waived his appellate rights with respect to the underlying conviction.

Doing so poses no difficulty. Courts can readily identify the date on which this Court denies certiorari as the date on which a conviction has become final, triggering the one-year limitations period. *See, e.g.*, *Smoak* v. *United States*, 12 F. Supp. 3d 254, 262 (D. Mass. 2014) (conviction became final on date certiorari was denied; limitations period expired one year after that date); *Short* v. *Warden*, 2013 WL 5516440, at *1 (W.D. La. Oct. 2, 2013) (same); *Borst* v. *Glebe*, 2013 WL 2403261, at *4 (W.D. Wash. May 31, 2013) (same). Where no petition for certiorari has been filed, courts can easily determine the date on which a conviction became final by virtue of the prisoner's failure to seek

certiorari within the time allowed. *See, e.g.*, *Anderson* v. *Litscher*, 281 F.3d 672, 675 (7th Cir. 2002) (where state-court prisoner filed no petition for certiorari, one-year limitations period began to run 90 days after the conclusion of state-court review); *James* v. *Beard*, 2014 WL 4961768, at *3 (N.D. Cal. Sept. 29, 2014) (same); *Korn* v. *United States*, 937 F. Supp. 2d 1182, 1186-1187 (C.D. Cal. 2013) (where federal prisoner filed no petition for certiorari, one-year limitations period began to run 90 days after court of appeals affirmed conviction).

2. Retroactive application of new decisions to pending cases

As this Court first held in *United States* v. *Johnson*, 457 U.S. 537 (1982), rules announced in decisions of this Court apply to pending criminal cases differently depending on whether the case involves a conviction that is still pending on direct review or whether the case raises a collateral attack to a conviction that has become final. *See Griffith* v. *Kentucky*, 479 U.S. 314, 321-323 (1987) (discussing *Johnson*). In general, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328. But a rule applies retroactively to judgments that are already final on direct review only in the exceptional circumstances identified in *Teague* v. *Lane* and its progeny. *See Whorton* v. *Bockting*, 549 U.S. 406, 416 (2007) (discussing *Teague*, 489 U.S. 288 (1989)). Outside those circumstances, a prisoner's collateral attack on a final judgment of conviction is governed by the "law prevailing at the time [his] conviction became final." *Teague*, 489 U.S. at 306.

To assess an intervening decision's applicability under this framework, a court must therefore first de-

termine whether the case before it involves a conviction that had already become final on direct review before the intervening decision was issued. *See Beard* v. *Banks*, 542 U.S. 406, 411 (2004) ("First, the court must determine when the defendant's conviction became final."). Doing so, this Court has explained, ordinarily "poses no difficulties." *Id.* "State convictions are final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Id.* at 412 (internal quotation marks omitted). Thus, in applying the *Teague* analysis, courts routinely make the same finality determination called for under the majority interpretation of § 1915(g).

As in the habeas context, courts have no trouble doing so. In *DeCastro* v. *Branker*, 642 F.3d 442, 458 (4th Cir. 2011), for example, a habeas petitioner sought to challenge his conviction under this Court's decision in *Bradshaw* v. *Stumpf*, 545 U.S. 175 (2005), on the ground that the prosecutor's pursuit of inconsistent theories at his criminal trial and the trials of his two confederates violated due process. The Fourth Circuit held *Bradshaw* to be inapplicable, however, because it postdated the finality of the petitioner's conviction, and none of the *Teague* exceptions applied. 642 F.3d at 458. To make the finality determination, the court simply looked to the date on which this Court denied certiorari on direct review from the petitioner's conviction. *Id.* Other courts have similarly looked to the date on which this Court denied certiorari—a "straightforward" step—to determine a conviction's finality for *Teague* purposes. *Jones* v. *Page*, 76 F.3d 831, 851 (7th Cir. 1996); *see also, e.g.*, *Bronshtein* v. *Horn*, 404 F.3d 700, 715 (3d Cir. 2005); *Guzman* v. *United States*, 404 F.3d

139, 140 (2d Cir. 2005); *Earnest* v. *Dorsey*, 87 F.3d 1123, 1132 (10th Cir. 1996).

Alternatively, in cases where a petitioner did not seek review in this Court of the underlying judgment of conviction, courts determine finality for *Teague* purposes by identifying the last date on which the petitioner could have filed a petition for certiorari—another "very straightforward" inquiry. *Winsett* v. *Washington*, 130 F.3d 269, 275 (7th Cir. 1997); *see also, e.g.*, *Jones* v. *Smith*, 231 F.3d 1227, 1237 (9th Cir. 2000); *Glock* v. *Singletary*, 65 F.3d 878, 883-884 (11th Cir. 1995).

3. Res judicata

Finally, the question whether a judgment has become final on appeal is one that courts are familiar with in the context of res judicata. The Sixth Circuit sought to justify its holding below in part on the ground that prior judgments are accorded preclusive effect even while appeal is pending until they are reversed or vacated. Pet. App. 5a. But that is not a uniform rule. And in those jurisdictions that apply res judicata only after a prior judgment has become final on appeal, courts must make the same finality determination called for under § 1915(g), and they have no difficulty doing so.

Under California law, "[u]nlike the federal rule and that of several states," prior judgments are not final for res judicata purposes "until an appeal from the trial court judgment has been exhausted or the time to appeal has expired." *Kay* v. *City of Rancho Palos Verdes*, 504 F.3d 803, 808 (9th Cir. 2007) (internal quotation marks omitted). In *Kay*, the Ninth Circuit easily concluded that the prior judgment at issue was indeed final

because the appellate process in the California courts had been exhausted, as indicated by the issuance of the remittitur. *Id.* at 808-809. Similarly, in *Hill* v. *Clovis Police Department*, 2012 WL 1833880 (E.D. Cal. May 18, 2012), the court, applying California law, held that a prior judgment had no preclusive effect where an appeal remained pending. *Id.* at *3; *see also Harper* v. *City of Monterey*, 2012 WL 195040, at *6 (N.D. Cal. Jan. 23, 2012) (prior judgment was final for res judicata purposes under California law where litigant did not appeal within the allotted time period).

Courts thus have ample experience in a range of contexts identifying the date on which a judgment has become final due to a litigant's exhaustion or waiver of appellate rights. By calling for the same straightforward inquiry, the majority interpretation of § 1915(g) shares the virtues of clarity and ease of administration that characterize the rules that apply in these other familiar contexts.

C. The Sixth Circuit's Interpretation Produces Bizarre Results And Uncertainty, With No Attendant Benefit

In contrast to the clear, familiar, and easily administrable interpretation of § 1915(g) adopted by the majority of lower courts, the Sixth Circuit's reading of the statute creates bizarre results and introduces uncertainty into the application of a statute that Congress designed to reduce and streamline litigation, not increase it. These consequences do not serve the policies animating the PLRA, and common sense alone dictates that they be rejected.

1. The decision below produces anomalous and potentially unjust results

Most obvious among its practical defects, the Sixth Circuit's interpretation permits strikes to arise temporarily and then disappear in the event of reversal or modification on appeal. There is no indication in the PLRA that Congress intended such an anomalous result, under which a court cannot resolve with certainty whether a prisoner shall be barred from proceeding *in forma pauperis*, but can only decide, as petitioner notes, whether the prisoner is barred "for now." Pet. Br. 22. If the prisoner later seeks *in forma pauperis* status again for another suit, the court in the later proceeding must review again whether the three-strikes bar remains, or whether instead one of the strikes relied on by the court in the earlier action has disappeared.

In the interim, the Sixth Circuit's approach to strike-counting can penalize a prisoner for litigation conduct the PLRA is not supposed to penalize. The purpose of the PLRA is to penalize and deter litigation that is truly frivolous, "not to freeze out meritorious claims or ossify district court errors." *Adepegba*, 103 F.3d at 388. Counting prior dismissals as strikes before a prisoner has had the opportunity to correct any error "risk[s] inadvertently punishing nonculpable conduct." *Jennings*, 175 F.3d at 780 (internal quotation marks omitted).

Such errors do occur. Even where a district court dismisses a complaint as wholly frivolous, the appellate process remains meaningful and can result in reversal or modification. In the time it takes to secure relief on appeal, however, the prisoner may be unjustly barred from pursuing a valid claim on account of a previous er-

roneous dismissal. For example, in *Rognirhar* v. *Grannis*, 463 F. App'x 612, 613 (9th Cir. 2011), the district court dismissed as frivolous the plaintiff's challenge under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") to a prison grooming regulation that prohibited inmates from maintaining facial hair extending more than half an inch from the face. Citing circuit precedent sustaining a similar challenge under RLUIPA, the Ninth Circuit held that the RLUIPA claim was not frivolous and accordingly remanded for further proceedings. *Id.* at 614; *see also Holt* v. *Hobbs*, 134 S. Ct. 1490 (2014) (mem.) (granting certiorari to consider similar RLUIPA claim). The reversal, however, took over two and a half years. Under the Sixth Circuit's interpretation of § 1915(g), that erroneous dismissal would have counted improperly as a strike for that entire time.

In *Alfred* v. *Corrections Corp. of America*, 437 F. App'x 281, 285 (5th Cir. 2011), the Fifth Circuit held that the district court abused its discretion in dismissing Alfred's complaint as frivolous. While the district court had thought the complaint "entirely conclusory," the court of appeals held that Alfred "ha[d] pleaded a non-frivolous contention that the defendants committed a constitutional violation," either by "intentionally disclosing" his confidential medical information or by "fostering an atmosphere of disclosure with deliberate indifference to constitutional rights." *Id.* Indeed, on remand, Alfred was able to obtain an amicable settlement. *See* Stipulation of Dismissal, *Alfred* v. *Corrections Corp. of Am.*, No. 09-300 (W.D. La. Dec. 20, 2011) (ECF No. 29). Nearly two years elapsed, however, between the district court's initial dismissal of Alfred's complaint as frivolous and the court of appeals' order reversing the dismissal. *See also, e.g.*, *Fussell* v. *Van-*

noy, __ F. App'x __, 2014 WL 6661143, at *1-2 (5th Cir. Nov. 25, 2014) (reversing district court's dismissal as frivolous of Eighth Amendment claim challenging plaintiff's 25-year confinement to extended lockdown in Angola prison; nearly one year elapsed before dismissal was reversed); *Ford* v. *Hunter*, 534 F. App'x 821, 824 (11th Cir. 2013) (district court "clearly abused its discretion" in dismissing plaintiff's First Amendment claim as frivolous; over a year and a half elapsed before dismissal was reversed).

The meaningfulness of appeal in these and similar cases exposes another problem in the Sixth Circuit's view that any dismissal counts as a strike even before the prisoner has exhausted or waived appeal. Under that interpretation, a prisoner arguably cannot proceed *in forma pauperis* to appeal the very dismissal that would otherwise count as his third strike. *See Adepegba*, 103 F.3d at 388. Even the Sixth Circuit recognized this as an "anomalous result" of its holding. Pet. App. 6a. To avoid the problem, the Sixth Circuit had to address a separate question of statutory interpretation, concluding that "[a] third strike that is on appeal" would not bar the appeal because it "is not a *prior* occasion for the purposes of that appeal." *Id.* The court's only basis for this conclusion was its reasoning that the prior dismissal and the subsequent appeal form "the *same* occasion." *Id.*

By comparison, the Seventh Circuit—which also counts dismissals as strikes before they are final on appeal—similarly recognized the "legitimate" concern raised by that interpretation, but resorted to a different device to solve it. *Robinson* v. *Powell*, 297 F.3d 540, 541 (7th Cir. 2002). According to the Seventh Circuit, the prisoner could simply ask the court of appeals to grant *in forma pauperis* status under Federal Rule

of Appellate Procedure 24(a)(5), and the court could review the correctness of the district court's third dismissal in considering that request. At least one other court has questioned the viability of this approach. *See Henslee* v. *Keller*, 681 F.3d 538, 542 n.8 (4th Cir. 2012) ("The availability of this procedure may be limited by the 2002 amendment to Federal Rule of Appellate Procedure 24, which added language that makes the rule consistent with, and subject to, the requirements of the PLRA." (citing Fed. R. App. P. 24(a)(3)(B) (2002))).

The majority interpretation of § 1915(g) avoids these incongruities. Once a prisoner reaches three strikes, based on three prior qualifying dismissals that are final on direct review, those strikes cannot disappear. The determination need not be revisited for the duration of the prisoner's incarceration. *See, e.g.*, *Adepegba*, 103 F.3d at 388 ("Adepegba is out, and not just in this appeal. Under the terms of the statute, he may pursue another action in federal court i.f.p. only if he is in 'imminent danger of serious physical injury.'"). But there is no risk that an erroneous dismissal will count as a strike against a future *in forma pauperis* claim during the several-month-long—or even years-long—period it takes for a court of appeals to correct the error. And there is no need for the additional interpretive gymnastics the Sixth and Seventh Circuits felt compelled to perform to find a solution to the anomaly that a prisoner might be barred from appealing the third strike.

2. The Sixth Circuit's approach does not promote any PLRA policy

The district court in this case reasoned that the majority interpretation of § 1915(g) "could eviscerate the purpose" of that provision "to deter abusive litigants."

Pet. App. 24a. According to the district court, "a plaintiff could avoid the effect of § 1915(g) by filing three frivolous lawsuits simultaneously and appealing each dismissal," resulting in "a multitude of frivolous lawsuits, with no possibility of applying § 1915(g) to deter the frivolous litigation." *Id.*

These predictions are unfounded and lend no support to the Sixth Circuit's interpretation of the three-strikes provision. The PLRA aims to "filter out the bad claims" while "facilitat[ing] consideration of the good." *Jones* v. *Bock*, 549 U.S. 199, 204 (2007). The majority interpretation readily fulfills that purpose. Under that view, except in cases of imminent danger, a prisoner who repeatedly files frivolous claims will be barred from proceeding *in forma pauperis*—once and for all, for the duration of his incarceration—as soon as three of his actions or appeals have been dismissed on a ground enumerated in the statute and all appeals from those dismissals have been exhausted or waived. Those strikes can never disappear. The three-strikes provision serves its function robustly.

The only difference between that majority interpretation and the Sixth Circuit's unworkable rule arises in the period of time when one or more of a prisoner's prior dismissals remains open to reversal or modification on appeal. Permitting prisoners to proceed *in forma pauperis* during that time frame poses no threat to the purposes of the PLRA. As an initial matter, as respondents have conceded, this particular circumstance "does not arise frequently" and does so "only [in] a narrow and highly specific category of cases." Opp. 6. While the stakes are significant for the individual prisoners involved—who can be barred for months or even years from pursuing potentially valid constitutional claims due to an erroneously entered third strike—the

consequences for the judicial system as a whole of allowing such claims to go forward are marginal at best.

Moreover, the PLRA contains numerous other mechanisms "to prevent sportive filings in federal court." *Skinner* v. *Switzer*, 131 S. Ct. 1289, 1299 (2011). In 1998, this Court recognized the evident success of those mechanisms in reducing frivolous claims. *See Crawford-El* v. *Britton*, 523 U.S. 574, 597 (1998) ("Recent statistics suggest that the Act is already having its intended effect."). More recent statistics confirm that the PLRA's other screening mechanisms and requirements have continued to be effective. *See* Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, U.C. Irvine L. Rev. (forthcoming 2015) (available as Public Law & Theory Research Paper Series Paper No. 427 and Law & Economics Research Paper Series Paper No. 14-020, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506378). Data compiled by the Administrative Office of the U.S. Courts confirm that "[a]fter a very steep decline in both filings and filing rates in 1996 and 1997, rates continued to shrink for another decade," eventually reaching a plateau far lower than pre-PLRA rates. *Id.* at 5-6.

The magnitude of that reduction varies by State. Notably, Mississippi (located in the Fifth Circuit, which follows the majority interpretation) is among the States that has experienced the largest percentage decline in prisoner filing rates, while Illinois (located within the Seventh Circuit, which does not apply the majority interpretation) is among the States with the smallest percentage decline. *Id.* at 9; *see also id.* at 7 table 2 (showing change in filing rates by State). These data obviously reflect numerous considerations and do not permit any inferences about causation. But they none-

theless belie the district court's prediction (Pet. App. 24a) that adopting the majority interpretation of § 1915(g) would cause a proliferation of frivolous lawsuits.

The decision below thus injects unworkability and incongruity into the administration of the PLRA with no apparent benefit in return. The Sixth Circuit's decision is not necessary to promote any purpose of the PLRA, but only undermines the statute's goals by complicating the administration of the three-strikes provision and threatening to penalize nonculpable litigation conduct.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

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