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.

ANDRÉ LEE COLEMAN, PETITIONER

*v.*

BERTINA BOWERMAN, ET AL.

ANDRÉ LEE COLEMAN, PETITIONER

*v.*

STEVEN DYKEHOUSE, ET AL.

ANDRÉ LEE COLEMAN, PETITIONER

*v.*

AARON J. VROMAN, ET AL.

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

## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Whether, under the "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. 1915(g), a district court's dismissal of a lawsuit counts as a strike while it is still pending on appeal or before the time for seeking appellate review has passed.

## PARTIES TO THE PROCEEDING

Pursuant to Rule 12.4, this Court granted a single petition for a writ of certiorari to review the judgments in four underlying cases. Petitioner in each of the four cases is André Lee Coleman, also known as André Lee Coleman-Bey.

Respondents in *Coleman* v. *Tollefson* are Todd Tollefson, Mary Aho, James G. Armstrong, Joseph Bouchard, William Luetzow, and Kimberly Mieni.

Respondents in *Coleman* v. *Bowerman* are Bertina Bowerman, Mary Boneville, and Kimberly Hill.

Respondents in *Coleman* v. *Dykehouse* are Steven Dykehouse, Ronald T. Embry, Sam Norman, and Debra Olger.

Respondents in *Coleman* v. *Vroman* are Aaron J. Vroman and Mary E. Fate.

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## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the court of appeals in *Coleman* v. *Tollefson* (Pet. App. 1a-14a) is reported at 733 F.3d 175. The relevant orders of the court of appeals in *Coleman* v. *Bowerman* (Pet. App. 26a-29a), *Coleman* v. *Dykehouse* (Pet. App. 36a-39a), and *Coleman* v. *Vroman* (Pet. App. 46a-49a) are unreported. The opinions of the district courts in all four cases (Pet. App. 17a-25a, 32a-35a, 42a-45a, 52a-54a) are unreported.

## JURISDICTION

The judgment of the court of appeals in *Tollefson* was entered on October 23, 2013. A petition for rehearing was denied on January 17, 2014 (Pet. App. 15a-16a). The relevant orders of the court of appeals in *Bowerman*, *Dykehouse*, and *Vroman* were entered on January 10, 2014. On March 27, 2014, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 12, 2014. The petition for a writ of certiorari was filed on May 5, 2014, and was granted on October 2, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 1915(g) of Title 28 of the United States Code provides as follows:

> 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.

The federal *in forma pauperis* statute, 28 U.S.C. 1915, is reprinted in full in an appendix to this brief. App., *infra*, 1a-4a.

## STATEMENT

The "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. 1915(g), generally prohibits a prisoner from proceeding *in forma pauperis* in federal court if "the prisoner has, on 3 or more prior occasions, while incarcerated * * * , 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." This case presents the question whether a district court's dismissal of a lawsuit on one of the enumerated grounds counts as a strike for purposes of Section 1915(g) while it is still pending on appeal and therefore subject to reversal or modification.

In each of the four underlying cases that were the subject of the petition for certiorari, petitioner, a Michigan state prisoner, filed a civil-rights action in federal court and moved for leave to proceed *in forma pauperis* while a dismissal that would otherwise have qualified as his third strike was still on appeal. In each case, the district court denied petitioner's motion. Pet. App. 17a-25a, 32a-35a, 42a-45a, 52a-54a.

In the first of the underlying cases, *Tollefson*, the Sixth Circuit affirmed. Pet. App. 1a-14a. In a divided opinion, the Sixth Circuit held, contrary to the holdings of seven other courts of appeals (and dicta from three others), that a district court's dismissal immediately counts as a strike for purposes of the PLRA's "three strikes" provision, even if the dismissal was on appeal when the instant action was commenced. Relying on its decision in *Tollefson*, the Sixth Circuit subsequently denied petitioner *in forma pauperis* status in the other cases. Pet. App. 26a-29a, 36a-39a, 46a-49a. The Sixth Circuit's interpretation of the "three strikes" provision was incorrect, and its judgments should therefore be reversed.

**A. Background**

1. Originally enacted in 1892, the federal *in forma pauperis* statute is "designed to ensure that indigent litigants have meaningful access to the federal courts."

*Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989) (citation omitted). In its original form, the statute provided that any citizen "may commence and prosecute to conclusion" a lawsuit in federal court "without being required to prepay fees or costs, or give security therefor before or after bringing suit," upon filing an affidavit stating that he was unable to do so. Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252. In enacting the statute, Congress "intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, * * * solely because his poverty makes it impossible for him to pay or secure the costs." *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948).

2. Congress most recently amended the *in forma pauperis* statute in 1996 as part of the Prison Litigation Reform Act (PLRA). See Pub. L. No. 104-134, § 804, 110 Stat. 1321-73 to 1321-75. Lawsuits by prisoners accounted for a disproportionate share of civil filings in federal court. *Jones* v. *Bock*, 549 U.S. 199, 203 (2007). In the PLRA, Congress sought to "address[] th[e] challenge" of "ensuring that the flood of nonmeritorious claims [by prisoners] does not submerge and effectively preclude consideration of the allegations with merit." *Ibid.* Congress therefore enacted a variety of reforms designed to "filter out" nonmeritorious prisoner claims while "facilitat[ing] consideration" of meritorious ones, consistent with our legal system's "guarantee[] that prisoner claims of illegal conduct by their custodians are fairly handled according to law." *Id.* at 203-204.

To that end, the PLRA made numerous changes to the way in which federal courts process lawsuits by prisoners. For example, the PLRA requires a district court faced with a lawsuit by a prisoner to review the complaint as soon as practicable—even before docketing, if feasible—to determine whether the complaint should be

dismissed. See 28 U.S.C. 1915A. The PLRA also requires a prisoner to exhaust any available administrative remedies before bringing suit in federal court. See 42 U.S.C. 1997e.

The PLRA amended the federal *in forma pauperis* statute, 28 U.S.C. 1915, in at least two important ways. First, the PLRA imposed specific obligations to pay filing fees on prisoners who qualify for *in forma pauperis* status. Under new subsection (b), unlike other individuals who qualify for *in forma pauperis* status, a prisoner who has any assets is required to pay an initial installment of 20% of his average monthly income (or the average balance in his account, if greater), followed by similar monthly installments until the entire fee is paid. 28 U.S.C. 1915(b).

Second, and of particular relevance here, the PLRA added what has come to be known as the "three strikes" provision. That provision, codified in new subsection (g), prohibits a prisoner from proceeding *in forma pauperis* in federal court if "the prisoner has, on 3 or more prior occasions, while incarcerated * * *, 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 in imminent physical danger. 28 U.S.C. 1915(g).[1] In most instances, therefore, a prisoner who has accumulated three so-called "strikes" (*i.e.*, qualifying "dismiss[als]" on "prior occasions") is barred from proceeding with any civil action or appeal in federal court unless he first pays the full amount of the filing fee,

[1] After the enactment of the PLRA, a number of States adopted similar "three strikes" provisions. See, *e.g.*, Okla. Stat. tit. 57, § 566.2(A); 42 Pa. Cons. Stat. § 6602(f).

currently set at $400 for a complaint (including a $50 administrative fee) and $505 for a notice of appeal (including a $5 docketing fee). See 28 U.S.C. 1914(a), 1917; United States Courts, District Court Miscellaneous Fee Schedule ¶ 14 (Dec. 1, 2013) <tinyurl.com/dctfees>; United States Courts, Court of Appeals Miscellaneous Fee Schedule ¶ 1 (Dec. 1, 2013) <tinyurl.com/uscafees>.[2]

**B. Facts And Procedural History**

1. Petitioner is an inmate in a Michigan state prison. He has been incarcerated since 1983, when he was convicted of armed robbery and related offenses. On December 3, 2010, petitioner filed a civil-rights action in the United States District Court for the Western District of Michigan under 42 U.S.C. 1983 against Todd Tollefson and five other Baraga employees, asserting, *inter alia*, that they had violated his constitutional rights by interfering with his access to the courts. J.A. 119-136. He moved for leave to proceed *in forma pauperis*. Pet. App. 2a, 17a.

Citing the "three strikes" provision, the district court denied petitioner's motion. Pet. App. 17a-20a. The district court identified three lawsuits that had been filed by petitioner and dismissed by federal district courts. *Id.* at 19a. As to the first of those lawsuits, *Coleman* v. *Lentin*, petitioner filed the complaint, and the district court ordered dismissal, in 1992. J.A. 45. As to the second of those lawsuits, *Coleman* v. *Kinnunen*, petitioner filed the complaint in 2005. The district court initially dis-

[2] The foregoing provisions of Section 1915 do not apply to proceedings in this Court; *in forma pauperis* status in this Court is generally governed by Rule 39. See, *e.g.*, *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1, 2-3 (1992) (per curiam).

missed for failure to state a claim, but the court of appeals vacated in part and remanded for further proceedings. The district court granted a renewed motion to dismiss on remand in 2008. J.A. 46-49. And of particular note for present purposes, as to the third of those lawsuits, *Coleman* v. *Sweeney*, petitioner filed the complaint in 2009. The district court dismissed for failure to state a claim in October 2009, but petitioner appealed. J.A. 53-65, 160-164. Based on its determination that the dismissals in *Lentin*, *Kinnunen*, and *Sweeney* counted as strikes, the district court denied petitioner *in forma pauperis* status. Pet. App. 19a.[3]

Petitioner moved for reconsideration in the district court, arguing, as is relevant here, that the dismissal in *Sweeney* could not count as a strike because it was still pending on appeal when petitioner filed the instant complaint (and, for that matter, when the district court denied him leave to proceed *in forma pauperis*).[4] The district court denied the motion. Pet. App. 21a-25a. The court concluded that "a dismissal counts as a strike even if it is pending on appeal at the time that the plaintiff files his new action." *Id.* at 24a. In the court's view, "a judgment of dismissal by a district court is final and

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[3] The district court noted that petitioner did not qualify for the exception to the "three strikes" rule because he did not allege that he was in imminent physical danger. Pet. App. 19a-20a.

[4] The court of appeals affirmed the dismissal in *Sweeney* on March 29, 2011—not only after petitioner filed the complaint in *Tollefson*, but also (contrary to the court of appeals' opinion in *Tollefson*, see Pet. App. 7a) after the district court denied petitioner's motion for leave to proceed *in forma pauperis* in *Tollefson* on February 15, 2011. Petitioner did not petition this Court for review of the court of appeals' decision affirming the dismissal in *Sweeney*, and his time to do so expired on June 27, 2011.

should be given full effect, unless stayed upon appeal." *Id.* at 23a.

Because of the denial of *in forma pauperis* status, petitioner was unable to pursue his claims, and the district court dismissed for want of prosecution. The court, however, did grant petitioner leave to proceed *in forma pauperis* for purposes of appeal. Pet. App. 2a.

2. A divided court of appeals affirmed, holding that a district court's dismissal of a lawsuit counts as a strike for purposes of Section 1915(g) even if it was still on appeal at the time the instant action was commenced. Pet. App. 1a-14a.

a. The court of appeals reasoned that, because Section 1915(g) "does not say that the dismissal must be final in all of the courts of the United States," a district court's dismissal immediately counts as a strike even if it is still pending on appeal. Pet. App. 4a (citation omitted). The court explained that such an approach was "consistent with how judgments are treated for purposes of res judicata," because "cases on appeal have preclusive effect until they are reversed or vacated." *Id.* at 5a.

The court of appeals acknowledged that the vast majority of circuits to have considered the issue had held that a "dismissal does not count as a strike until the litigant has exhausted or waived his appellate rights." Pet. App. 5a (citing *Henslee* v. *Keller*, 681 F.3d 538 (4th Cir. 2012); *Silva* v. *Di Vittorio*, 658 F.3d 1090 (9th Cir. 2011); *Smith* v. *Veterans Administration*, 636 F.3d 1306 (10th Cir.), cert. denied, 132 S. Ct. 381 (2011); *Chavis* v. *Chappius*, 618 F.3d 162 (2d Cir. 2010); *Nicholas* v. *American Detective Agency*, 254 Fed. Appx. 116 (3d Cir. 2007) (per curiam); *Thompson* v. *DEA*, 492 F.3d 428 (D.C. Cir. 2007); *Campbell* v. *Davenport Police Department*, 471 F.3d 952 (8th Cir. 2006) (per curiam); and *Adepegba* v. *Hammons*, 103 F.3d 383 (5th Cir. 1996)). The court of

appeals, however, rejected the analysis of those courts. *Id.* at 5a-6a.

In particular, the court of appeals rejected as "unfounded" the concern expressed by some courts that immediately counting a district court's dismissal as a strike "would preclude the prisoner from pursuing the appeal of [a third] dismissal in forma pauperis." Pet. App. 5a-6a. The court of appeals reasoned that such an "anomalous result" would not occur because a dismissal that is pending on appeal "is not a *prior* occasion for purposes of that appeal" within the meaning of the statute. *Id.* at 6a. The court of appeals explained that, although a district court's dismissal immediately counts as a strike, the appeal of that dismissal "is the *same* occasion" and thus would not be subject to the "three strikes" provision. *Ibid.*

Based on that reasoning, the court of appeals determined that the dismissal at issue in petitioner's case "counted as a strike continually from when it was entered," despite petitioner's pending appeal. Pet. App. 7a. Because the dismissal occurred before petitioner filed the instant complaint, the court of appeals upheld the district court's denial of *in forma pauperis* status. *Ibid.*

b. Judge Daughtrey dissented. Pet. App. 7a-14a. She described as "both more compelling and more fair" "the reasoning that has led the great majority of circuits to conclude that dismissals count as strikes under the PLRA only when those dismissals have become final—*i.e.*, when the plaintiff has exhausted or waived his appellate rights." *Id.* at 9a. She rejected the panel majority's contention that "the majority rule distorts the plain meaning of the PLRA." *Ibid.* As she noted, "[S]ection 1915(g) does not expressly state whether a prior dismissal of 'an action or appeal' must be final before it can be considered a 'strike.'" *Ibid.* (citation omitted). Instead,

"the statute is ambiguous, not only with respect to when dismissals should count as strikes but also with respect to what counts as a 'prior occasion.'" *Ibid.*

Construing Section 1915(g) "in light of its history and purpose," Judge Daughtrey reasoned that "Congress could not have intended that dismissals would count as strikes immediately, given Congress's concern with fostering meritorious prisoner suits and preventing frivolous ones." Pet. App. 10a. She explained that the panel majority's interpretation "could potentially bar the filing of meritorious claims * * * by preventing prisoners from bringing claims in federal court while one or more of their first three dismissals were being reversed on appeal." *Id.* at 10a-11a.

Because Judge Daughtrey would have held that "dismissals of causes of action do not count as strikes under the PLRA until the prisoner-plaintiffs have exhausted or waived their appeals," she proceeded to consider "at precisely what point in the litigation process the finality of any prior dismissals should be assessed." Pet. App. 12a. In light of the relevant statutory language and the approach taken by other courts, Judge Daughtrey would have assessed the finality of potential strikes as of the date of the filing of the complaint. *Id.* at 13a. Because the dismissal at issue was still pending on appeal when petitioner filed the instant complaint, Judge Daughtrey concluded that petitioner was entitled to *in forma pauperis* status. *Id.* at 13a-14a.

c. The court of appeals subsequently denied rehearing en banc. Pet. App. 15a-16a. Judge Daughtrey would have granted panel rehearing. *Id.* at 16a.

3. Like *Tollefson*, the other cases that are before this Court—*Bowerman*, *Dykehouse*, and *Vroman*—were civil-rights actions filed by petitioner in the Western District of Michigan under Section 1983. In each case, as in

*Tollefson*, the dismissal that would have qualified as the third strike was still on appeal when the instant complaint was filed. Pet. App. 34a, 44a, 53a. And the district court denied petitioner *in forma pauperis* status on materially identical reasoning to that in *Tollefson*. *Id.* at 33a-35a, 43a-45a, 52a-53a.

In each case, as in *Tollefson*, petitioner was unable to pursue his claims because of the district court's denial of *in forma pauperis* status, and the district court dismissed for want of prosecution. Unlike in *Tollefson*, however, the district court also denied petitioner leave to proceed *in forma pauperis* for purposes of appeal. Pet. App. 27a, 37a, 47a.

As a result, in each case, petitioner had to apply to the court of appeals for leave to proceed *in forma pauperis* on appeal. Relying on its decision in *Tollefson*, the court of appeals issued materially identical orders in each case denying petitioner's motion for leave to proceed *in forma pauperis* on appeal. Pet. App. 26a-29a, 36a-39a, 46a-49a. The court cited *Tollefson* for the proposition that "a dismissal of a case for failure to state a claim qualifies as a 'strike' even if the appeal from the dismissal is pending at the time a prisoner files a new complaint." *Id.* at 28a, 38a, 48a (citing *id.* at 4a). The court of appeals then dismissed each appeal for want of prosecution. *Id.* at 30a-31a, 40a-41a, 50a-51a.

## SUMMARY OF ARGUMENT

This is a case where statutory ambiguity can be resolved with a modicum of common sense. The PLRA's "three strikes" provision, 28 U.S.C. 1915(g), bars a prisoner from bringing any civil action without prepaying the full amount of the filing fee if the prisoner has accumulated three qualifying dismissals under the statute. Section 1915(g), however, does not specifically address

the question of *when* a dismissal counts: specifically, whether a dismissal immediately counts as a strike, or whether it counts only once it has become final on appeal. The text and underlying purposes of the PLRA, as well as considerations of workability and administrability, support the latter interpretation. Accordingly, that interpretation has been adopted by the vast majority of the courts of appeals to have considered the issue. The Sixth Circuit, however, adopted the contrary interpretation, based on faulty reasoning and a false assurance that it could avoid some of the anomalies that such an interpretation inevitably creates. The Sixth Circuit's outlying interpretation should be rejected.

A. The better reading of the text of Section 1915(g) is that a dismissal does not count as a strike until it becomes final on appeal. While the text is not free of ambiguity on the specific timing question presented here, it is more consistent with an interpretation that counts as strikes only dismissals that have become final on appeal. A strike accumulates when a qualifying "dismiss[al]" occurs on a "prior occasion[]." As the Sixth Circuit itself recognized, a district court's dismissal and the ensuing appeal from that dismissal constitute a single "occasion" for purposes of the statute. A strike flowing from that "occasion" thus cannot accumulate until the appeal has run its course.

That interpretation is also entirely consistent with the PLRA's underlying purposes. It is plain from the text itself that Congress intended to penalize only prisoner litigation that is "frivolous, malicious, or fails to state a claim upon which relief may be granted." Enforcing the "three strikes" bar against a prisoner on account of a dismissal that is still pending on appeal, however, poses a risk of punishing litigation that turns out to be meritorious. The PLRA was intended to strike a balance

between filtering out frivolous claims by prisoners and facilitating judicial consideration of meritorious claims. Those purposes are better served by an interpretation that allows for meaningful appellate review of potential strikes before cutting off a prisoner's access to *in forma pauperis* status.

B. In light of the PLRA's concern with promoting judicial efficiency, considerations of workability and administrability strongly support the majority interpretation. If a strike were assessed immediately upon a district court's dismissal, a later reversal could cause a prisoner to *lose* a strike. The resulting fluid approach to strike counting would introduce needless uncertainty and complexity into the *in forma pauperis* determination. Nothing in the statute suggests that Congress intended that approach. Aside from making little sense, that approach would be difficult to administer and would confuse litigants. Waiting until a dismissal is final on appeal before assessing a strike—the rule followed by a majority of the courts of appeals—avoids those complexities: under that approach, once a prisoner has accumulated three strikes, he is barred for good. The majority interpretation also avoids the serious and widely recognized problem that the immediate counting of a dismissal as a strike would effectively preclude appellate review of a third dismissal by denying the prisoner *in forma pauperis* status on appeal. If Congress had intended such a harsh and unusual result, it surely would have said so clearly.

C. In the decision below, the Sixth Circuit attempted to mitigate the harshness of its interpretation by holding that a district court's dismissal could be counted as a strike against a successive suit, but not against an appeal from the dismissal itself. The court's internally inconsistent reasoning, however, reveals the error of that ap-

proach. The Sixth Circuit correctly recognized that a district court's dismissal and the ensuing appeal are the same "occasion" for purposes of Section 1915(g). Yet it failed to realize that, for that very reason, the dismissal cannot count as a strike against a successive suit filed while it is pending on appeal, because the statutory "occasion" is still in progress. The Sixth Circuit's attempt to mitigate the harsh consequences of its interpretation thus fails. And the Sixth Circuit offered little actual support for its interpretation, other than the anodyne observations that the statute does not specifically address the timing question presented here and that the doctrine of res judicata attaches immediate consequences to district court judgments. Those observations merely highlight the ambiguity of the statute; they do not aid in resolving it.

D. The approach adopted by the Seventh Circuit—the only other court of appeals to have held that a district court's dismissal immediately counts as a strike—fares no better. In its own effort to mitigate the harshness of its interpretation, the Seventh Circuit created a procedure whereby a prisoner could ask the court of appeals for leave to proceed *in forma pauperis* on appeal from a third-strike dismissal under Federal Rule of Appellate Procedure 24(a)(5), and the court, in considering that request, could review the merits of the underlying dismissal. Not only is that approach at odds with the rule, but it also cannot be reconciled with the Seventh Circuit's own interpretation of Section 1915(g), under which a prisoner in that situation would already have three strikes, thus barring the court of appeals from granting him *in forma pauperis* status and reviewing the dismissal. The Seventh Circuit's proposed workaround would also unnecessarily multiply the complexity

and effort associated with determining whether a prisoner is entitled to proceed *in forma pauperis*.

E. The Sixth Circuit's erroneous interpretation of Section 1915(g) should be corrected and its judgments reversed. Because the dismissal that would have counted as petitioner's third strike was still pending on appeal when he submitted each of the underlying complaints in the district court, the Sixth Circuit erred in holding that he was not entitled to *in forma pauperis* status in those cases. The Sixth Circuit's judgments should therefore be reversed, thereby enabling petitioner to proceed *in forma pauperis* on remand in the district court.

## ARGUMENT

### UNDER THE PLRA'S 'THREE STRIKES' PROVISION, A DISTRICT COURT'S DISMISSAL OF A LAWSUIT DOES NOT COUNT AS A STRIKE UNTIL IT BECOMES FINAL ON APPEAL

This case presents a straightforward question of statutory interpretation. The PLRA's "three strikes" provision, 28 U.S.C. 1915(g), bars a prisoner from bringing any civil action without prepaying the full amount of the filing fee if the prisoner has accumulated three qualifying dismissals under the statute. The question presented by this case is *when* a district court's dismissal of a lawsuit counts as a strike for purposes of Section 1915(g). The vast majority of the courts of appeals have held that a district court's dismissal counts as a strike only once it becomes final on appeal—not while it is still pending on appeal or before the time for seeking appellate review has passed. The Sixth Circuit in this case erred by holding that a district court's dismissal immediately counts as a strike, even if that dismissal could still be reversed or modified on appeal. This Court should

adopt the majority interpretation and reverse the Sixth Circuit's judgments.

### A. The Text And Underlying Purposes Of The PLRA Indicate That A Dismissal Counts As A Strike Only Once It Becomes Final On Appeal

The text of Section 1915(g) does not expressly address the question of when a dismissal should count as a strike. The better reading of the text, however, is that a dismissal does not count as a strike until it becomes final on appeal. That interpretation fully accords with the underlying purposes of the PLRA, which was intended to strike a balance between penalizing truly meritless lawsuits and fostering meritorious ones. The Sixth Circuit erred when it adopted a contrary interpretation, based only on the most cursory analysis of the statutory text.

1. As this Court has repeatedly noted, the "first step" in interpreting a statute is to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). In determining whether statutory language is unambiguous, this Court looks to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

Although Section 1915(g) plainly applies once a prisoner has accumulated three qualifying dismissals under the statute, it does not address the implications of appellate review on such a dismissal. As is relevant here, Section 1915(g) does not specifically address the timing question of *when* a dismissal counts: in particular, whether a dismissal counts as a strike while it is still pending on appeal. Instead, the statute simply states that a prisoner who, "on 3 or more prior occasions, * * * brought an action or appeal * * * that was dismissed on the grounds that it is frivolous, malicious,

or fails to state a claim upon which relief may be granted," cannot be afforded *in forma pauperis* status absent "imminent danger of serious physical injury." Where a statute "says nothing explicitly" about the issue in question, "such silence * * * normally creates ambiguity[;] [i]t does not resolve it." *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002); see also *Regions Hospital* v. *Shalala*, 522 U.S. 448, 458 (1998) (concluding that the statute at issue was "silent on the matter of time, and therefore * * * ambiguous").[5]

What is more, Section 1915(g) does not define either of the phrases that potentially bear on the timing question presented here, "prior occasion[]" or "dismiss[al]." As to "prior occasion[]," that phrase is open to multiple interpretations. It "may refer to a single moment or to a continuing event: to an appeal, independent of the underlying action, or to the continuing claim, inclusive of both the action and its appeal." *Henslee* v. *Keller*, 681 F.3d 538, 542 (4th Cir. 2012). Similarly, as to "dismiss[al]," Section 1915(g) is silent about the impact of subsequent proceedings on an otherwise qualifying dismissal. Where, for example, a district court's dismissal of an action is reversed on appeal, the action is thereby

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[5] In 2000, Congress enacted a similar "three strikes" provision relating to civil forfeiture. See Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 2, 114 Stat. 210. That provision bars a prisoner from filing a claim under a civil-forfeiture statute, or appealing a judgment in an action based on a civil-forfeiture statute, if the prisoner has, on three or more prior occasions, brought an action or appeal that was dismissed as frivolous or malicious, except in "extraordinary and exceptional circumstances." 18 U.S.C. 983(h)(3). Although the relevant language in that "three strikes" provision is materially identical to that of Section 1915(g), there appears to be no case law addressing the question of when a dismissal counts as a strike under that statute.

reinstated—with the result that the action arguably can no longer be described as "dismissed." See *Adepegba* v. *Hammons*, 103 F.3d 383, 387 (5th Cir. 1996). Thus, Section 1915(g) is ambiguous with regard to when an otherwise qualifying dismissal counts as a strike—and, specifically, whether a dismissal counts while it is still pending on appeal and therefore subject to reversal or modification. See, *e.g.*, *Ball* v. *Famiglio*, 726 F.3d 448, 464-465 (3d Cir. 2013), cert. denied, 134 S. Ct. 1547 (2014); *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1098 (9th Cir. 2011); Pet. App. 9a (Daughtrey, J., dissenting).

2. Although the text is not free of ambiguity, the better reading of Section 1915(g) is that a dismissal does not count as a strike until it becomes final on appeal.

The term "strike" does not appear in Section 1915(g). Instead, Section 1915(g) refers to "3 or more prior occasions" on which "an action or appeal * * * was dismissed" for failure to state a claim (or on one of the other enumerated grounds).[6] Under the plain language of the statute, and as lower courts have consistently recognized, where a district court issues an otherwise qualifying dismissal, a court of appeals' *affirmance* of that dismissal does not count as a distinct strike; only a qualifying *dismissal* of the appeal would do so. See, *e.g.*, *Ball*, 726 F.3d at 464; *Taylor* v. *First Medical Management*, 508 Fed. Appx. 488, 494-495 (6th Cir. 2012); *Thompson* v. *DEA*, 492 F.3d 428, 436-437 (D.C. Cir. 2007); *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775, 780 (10th Cir. 1999); *Adepegba*, 103 F.3d at 387. It therefore naturally follows that a district court's dis-

[6] As lower courts have explained, "strike" is simply the vernacular term for a qualifying "dismiss[al]" on a "prior occasion[]." See, *e.g.*, *Patton* v. *Jefferson Correctional Center*, 136 F.3d 458, 463 n.8 (5th Cir. 1998); *Jennings*, 175 F.3d at 778-779.

missal and the ensuing appeal from that dismissal constitute a single unit—or, in the language of Section 1915(g), a single "occasion." See *Henslee*, 681 F.3d at 543.[7]

If a district court's dismissal and the ensuing appeal constitute a single "occasion," moreover, the strike flowing from that "occasion" cannot occur until the appeal has completed. The Sixth Circuit's interpretation would incongruously count a dismissal as a strike while the "occasion" is still in progress. It is far more logical, and consistent with the statutory text, to count a dismissal as a strike only after the "occasion" is complete: *i.e.*, when the appeal from the dismissal has run its course.

3. The PLRA's underlying purposes, as expressed in the text and legislative history, support the conclusion that Congress did not intend for a dismissal to count as a strike against a prisoner until it becomes final on appeal. To begin with, it is plain from the text itself that Congress intended the "three strikes" provision to penalize only prisoner litigation that is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. 1915(g). And the penalty imposed for filing such litigation is severe: the denial in future actions, absent "imminent danger," of even the modified *in forma pauperis* status available to prisoners—which, for most prisoners, serves as an effective bar to the filing of future actions, however meritorious. *Ibid.*

Like the text, the legislative history of the PLRA reflects Congress' intention to "filter out the bad claims and facilitate consideration of the good": that is, to limit truly meritless claims by prisoners without preventing

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[7] By contrast, where the court of appeals issues a qualifying dismissal of the appeal, that dismissal (and any subsequent review proceedings) would constitute a distinct "occasion."

meritorious claims from being heard. *Jones* v. *Bock*, 549 U.S. 199, 203-204 (2007). As one of the PLRA's sponsors explained, "I do not want to prevent inmates from raising legitimate claims," and "this legislation will not prevent those claims from being raised." 141 Cong. Rec. 35,797 (1995) (Sen. Hatch); see also 141 Cong. Rec. 38,276 (1995) (Sen. Kyl) (stating that the PLRA "will free up judicial resources for claims with merit by both prisoners and nonprisoners").

Counting a dismissal as a strike while it is still pending on appeal poses "a risk of inadvertently punishing nonculpable conduct," contrary to Congress's purposes in enacting the PLRA. *Adepegba*, 103 F.3d at 387. As long as a prisoner is appealing from a dismissal on one of the enumerated grounds in Section 1915(g), the possibility remains that the court of appeals will conclude the district court erred in dismissing the prisoner's suit on that ground. But if a strike were assessed against the prisoner immediately upon the district court's dismissal and were then used to prevent him from proceeding *in forma pauperis*, the prisoner would be penalized for conduct that Congress never intended to reach.

Instead, the interpretation of the "three strikes" provision that most faithfully hews to Congress's purposes is the one that waits until appellate review is complete before counting a dismissal as a strike. Consistent with Congress's purpose of limiting truly meritless prisoner litigation, that interpretation counts as strikes all final dismissals on the grounds enumerated in Section 1915(g). And consistent with Congress's purpose of facilitating meritorious litigation, that interpretation allows for plenary appellate review of erroneous district court dismissals. Especially in light of the numerous other restrictions imposed by the PLRA, withholding a strike for the period of time necessary for appellate review poses

little threat of unleashing the flood of frivolous complaints that inspired the PLRA, while it ensures that meritorious complaints are not erroneously swept away.

In the decision below, the Sixth Circuit made no effort to reconcile its interpretation with the PLRA's underlying purposes—and little effort to reconcile it with the statutory text. See pp. 27-31, *infra*. This Court should instead adopt the interpretation of the vast majority of circuits to have considered the issue, and reject the Sixth Circuit's cramped approach.

### B. Counting A Dismissal As A Strike Only Once It Becomes Final On Appeal Is An Administrable Rule That Accords With Common Sense And Avoids Anomalous Results

In interpreting a statute that governs the processing of lawsuits by federal courts, this Court should attach particular weight to considerations of workability and administrability. Cf. *Hertz Corp.* v. *Friend*, 559 U.S. 77, 80 (2010) (noting that, in interpreting a jurisdictional statute, the Court has "place[d] primary weight upon the need for judicial administration * * * to remain as simple as possible"). Here, those considerations strongly counsel in favor of counting a dismissal as a strike only once it becomes final on appeal. An analysis of those considerations also exposes some of the unavoidable problems with a contrary interpretation.

1. To state the obvious, under the PLRA's "three strikes" provision, strikes accumulate against a prisoner over time. Like a batter in baseball, once a prisoner reaches three strikes, he's out. The whole point of the statute is to cut off access to *in forma pauperis* status once the prisoner reaches a certain point—*i.e.*, three strikes. From that point forward, a prisoner is barred from proceeding *in forma pauperis*, subject only to the "imminent danger" exception, for as long as he is de-

tained. See 28 U.S.C. 1915(h). Counting a dismissal as a strike only once it becomes final on appeal accords with that understanding: once a dismissal becomes final on appeal, it is permanently a strike and counts toward the three strikes that trigger application of the provision.

By contrast, if a district court's dismissal immediately counted as a strike against a prisoner, a later reversal on appeal could cause a prisoner to *lose* a strike: that is, to go from three strikes to two (or even fewer). The Sixth Circuit did not dispute, and respondents have conceded, that the reversal of a dismissal would remove the erroneous strike. See Br. in Opp. 7-8. Under the Sixth Circuit's approach, therefore, it appears that the rule would be three strikes and you're out—for now.[8] Nothing in the statute suggests that Congress contemplated such a fluid approach to strike counting. Nor can such an approach be reconciled with the underlying premise of the "three strikes" provision discussed above: namely, that, once a prisoner reaches three strikes, he is barred from claiming *in forma pauperis* status for the rest of his incarceration.

The Sixth Circuit's dynamic approach to strike counting would have pernicious consequences, because it could bar a prisoner from proceeding *in forma pauperis* in a fourth, potentially meritorious, lawsuit where a district court's dismissal that counts as a third strike is later reversed or modified on appeal. In the time that it takes the court of appeals to act, the limitations period could

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[8] In the modern era, a more accurate rendition might be: three strikes, you're out, and the game goes on while the instant replay is being reviewed. But see Major League Baseball, *Replay Review Regulations* (June 30, 2014) <tinyurl.com/replayrules> (providing that balls-and-strikes calls are not reviewable, at least for now, by instant replay).

run on any claims in the fourth suit and thus bar the prisoner from pursuing the claims in that suit altogether.

To take this case as an example, the dismissal that constituted the third strike was pending on appeal for some seventeen months. See J.A. 53-65, 160-164. In that amount of time, the limitations period for prisoner civil-rights claims would have run in some jurisdictions, see, *e.g.*, Ky. Rev. Stat. Ann. § 413.140(1) (one year); Tenn. Code Ann. § 28-3-104 (same), and would nearly have run in others, see, *e.g.*, Ohio Rev. Code Ann. § 2305.10(A) (two years); Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (same); Va. Code Ann. § 8.01-243(A) (same).[9] Because there is no mechanism for deferring consideration of *in forma pauperis* status until a subsequent reversal can be taken into account when counting strikes, see pp. 34-35, *infra* (explaining that the relevant time at which the number of strikes should be assessed is when the prisoner submits the instant complaint), a prisoner would have to refile his suit—by which time he could be time-barred. The Sixth Circuit's approach would therefore bar at least some prisoners from proceeding *in forma pauperis* in a fourth, potentially meritorious, suit.

2. The Sixth Circuit's approach also introduces needless complexity and uncertainty into a statute that was intended to reduce, not increase, the courts' work in processing prisoner litigation. Under that approach, the

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[9] The limitations period for an action against state officials under 42 U.S.C. 1983 is determined by the limitations period for personal-injury claims under the law of the State where the cause of action arose. See, *e.g.*, *Wallace* v. *Kato*, 549 U.S. 384, 387 (2007). The same rule applies to actions against federal officials under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). See 14 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3655, at 302 (3d ed. Supp. 2014).

same prisoner could have three strikes one day but, because of an intervening decision on appeal, only two strikes the next.

Where a court determines that a prisoner is barred from proceeding *in forma pauperis* in a fourth suit even though a dismissal that counts as a third strike is pending on appeal, moreover, that will not necessarily be the end of the matter. Assuming that the fourth suit was dismissed without prejudice for want of prosecution, the prisoner will retain the ability to refile the suit at a later date. If he does so, and the limitations period has not yet run on his claims, the court would be required to reassess whether the prisoner has three strikes at that time—and, in the event a dismissal that previously barred the prisoner from *in forma pauperis* status was reversed or modified on appeal in the intervening period, to proceed to the merits of the prisoner's claims. To say the least, that sequence of events hardly serves the interest in judicial efficiency—one of the primary interests underlying the PLRA.

By contrast, under the majority interpretation, such problems are avoided entirely. If courts must wait until a dismissal becomes final on appeal before counting it as a strike, a prisoner who has three strikes will permanently have three strikes. Critically, a court will therefore be able to rely on a determination from a previous case that a given prisoner has three strikes when assessing the prisoner's eligibility for *in forma pauperis* status in a later case. And where a prisoner has not previously been barred from *in forma pauperis* status, a court will have to assess whether the prisoner has three strikes only once, because the court will not be confronted with the refiling of a suit in the circumstance where a prisoner goes from having three strikes to having only two.

Not only does the majority interpretation avoid the pitfalls of the Sixth Circuit's dynamic approach to strike counting, but it provides a rule that is familiar and readily administrable. Under the majority interpretation, a dismissal counts as a strike for purposes of Section 1915(g) when the prisoner has exhausted his appeals of that dismissal or when the time for seeking appellate review (including review from this Court) has run. Courts that have adopted the majority interpretation have applied that rule with no apparent difficulty; indeed, it has been the rule in the Fifth Circuit since shortly after the PLRA's enactment almost two decades ago. See, *e.g.*, *Silva*, 658 F.3d at 1100 & n.6; *Hafed* v. *Federal Bureau of Prisons*, 635 F.3d 1172, 1176-1177 (10th Cir. 2011); *Adepegba*, 103 F.3d at 388.

In a variety of other contexts, moreover, courts are required to assess whether a district court's judgment has become final on appeal—and, again, they have done so with no apparent difficulty. See, *e.g.*, *Clay* v. *United States*, 537 U.S. 522, 525 (2003) (holding that the limitations period for motions for postconviction relief under 28 U.S.C. 2255 begins to run when the conviction becomes final: that is, when "the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction"); *Griffith* v. *Kentucky*, 479 U.S. 314, 321 & n.6 (1987) (holding that the retroactivity of new constitutional rules of criminal procedure depends on whether the conviction is final: that is, whether "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). Given the ease of applying the majority interpretation, there is simply no valid reason to burden lower courts with the complications presented by a contrary interpretation.

3. Perhaps the most troubling feature of an interpretation that requires immediately counting a district court's dismissal as a strike is that it would effectively preclude a prisoner from appealing a dismissal that would count as a third strike. That is because, if such a dismissal is immediately deemed to be a strike, a court could not grant a prisoner *in forma pauperis* status to appeal from that very dismissal, because Section 1915(g) prohibits "bring[ing] a civil action *or appeal[ing] a judgment in a civil action*" after three prior qualifying dismissals. 28 U.S.C. 1915(g) (emphasis added).

As numerous courts of appeals have recognized, by effectively depriving prisoners of the right to appeal, such an approach would "ossify district court errors"—errors that not only prevent prisoners from obtaining relief on their instant claims, but preclude them from pursuing potentially meritorious claims in other suits. *Adepegba*, 103 F.3d at 388. That outcome would be "unreasonably severe in light of congressional intent to foster meritorious prisoner lawsuits." *Henslee*, 681 F.3d at 542 n.9.

An approach that effectively eliminates the appellate function in a category of cases would also constitute a dramatic departure from ordinary practice, as the lower courts have recognized. See *Silva*, 658 F.3d at 1098; *Henslee*, 681 F.3d at 543. By statute, litigants have an appeal as of right "from all final decisions of the district courts of the United States." 28 U.S.C. 1291. If Congress had intended effectively to abrogate that right in a category of cases, "it would have clearly said so." *Thompson*, 492 F.3d at 432; see *Chavis* v. *Chappius*, 618 F.3d 162, 169 (2d Cir. 2010); see generally *Jones*, 549 U.S. at 216 (explaining, in the course of interpreting another provision of the PLRA, that, when Congress meant

to depart from the usual practice under the Federal Rules of Civil Procedure, "it did so expressly").

The fact that Congress extensively altered the preexisting rules for proceeding *in forma pauperis* as applied to prisoners, but did not state an unambiguous intention to limit appeals from all third qualifying dismissals, constitutes "strong evidence that the usual practice should be followed." *Jones*, 549 U.S. at 212. In this case, the interpretation that is consistent with the "usual practice," as well as the statutory text and purposes, is one that generally allows prisoners to take appeals of dismissals that would count as strikes—not one that effectively forecloses prisoners from doing so.

In that respect, as in others, an interpretation that requires the immediate counting of a district court's dismissal as a strike would require this Court to "leave [its] common sense at the doorstep." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989). By contrast, the majority interpretation respects finality, has proven to be workable, and avoids the complexities and anomalies of the contrary interpretation. It is also the preferable reading of the statutory text. This Court should adopt the majority interpretation and reverse the Sixth Circuit's judgments.

### C. The Sixth Circuit's Interpretation Of The 'Three Strikes' Provision Is Deeply Flawed

In the decision below, the Sixth Circuit acknowledged that the vast majority of the courts of appeals have held that "dismissal does not count as a strike until the litigant has exhausted or waived his appellate rights." Pet. App. 5a. In holding that a district court's dismissal immediately counts as a strike, the Sixth Circuit attempted to ameliorate perhaps the most troubling feature of such an interpretation, as discussed above: namely, that

"[the] counting of a third dismissal still on appeal as a strike [would] lead to the anomalous conclusion that the third dismissal was itself precluded from being appealed." *Id.* at 2a.

The Sixth Circuit contended that, under its interpretation, a dismissal that counts as a third strike would not constitute a "prior occasion" in an appeal from that dismissal. Pet. App. 5a, 6a. But the Sixth Circuit's reasoning on that point actually demonstrates why a district court's dismissal cannot count as a strike until it becomes final on appeal. And when that point is put to one side, the Sixth Circuit offered virtually no affirmative reasoning to support its interpretation of the statute. The Sixth Circuit's interpretation should therefore be rejected.

1. Acknowledging that it would be "anomalous" to construe Section 1915(g) effectively to deprive a prisoner of the right to appeal from a third-strike dismissal, the Sixth Circuit devoted much of its opinion to devising a workaround for that problem. As a preliminary matter, that factual scenario is not presented by any of petitioner's underlying cases, and the Sixth Circuit said nothing about the other problems that the immediate counting of a district court's dismissal would entail. See pp. 21-25, *supra*.

In any event, the Sixth Circuit's explanation for how a prisoner could still appeal a dismissal that counts as a third strike is baffling. The Sixth Circuit reasoned that, even though such a dismissal would still count immediately as a strike against a fourth or successive suit, it would not count against an appeal from the dismissal. Pet. App. 6a. In the Sixth Circuit's view, a district court's dismissal and the ensuing appeal are "the *same* occasion" within the meaning of the statute. *Ibid.* Thus, because Section 1915(g) prohibits *in forma pauperis* status only when a prisoner's cases have been dismissed on

"3 or more prior occasions," the dismissal would not qualify as a "prior occasion[]" with regard to the appeal from the dismissal. *Ibid.*

Put simply, the Sixth Circuit's reasoning is at war with itself. That is because the Sixth Circuit's conclusion that a district's court dismissal immediately counts as a strike with regard to a fourth or successive suit cannot be reconciled with its conclusion that such a dismissal does not count with regard to an appeal from the dismissal. As discussed above, see p. 18, Section 1915(g) does not use the term "strike"; instead, it refers to qualifying "dismiss[als]" on "prior occasions." The Sixth Circuit correctly reasoned that a district court's dismissal and the ensuing appeal are "the *same* occasion." Pet. App. 6a.

It necessarily follows from that proposition that the "occasion" is not complete, and a strike should not be assessed, until the appeal has concluded—regardless of the proceeding in which *in forma pauperis* status is being sought. Under the Sixth Circuit's interpretation, a potential "occasion" is counted against a prisoner *while it is still in progress*: *i.e.*, where, as here, a fourth or successive suit is filed when an appeal from the third-strike dismissal is still ongoing. The Sixth Circuit made no effort to explain how the dismissal from an in-progress "occasion" could be counted as a strike in an unrelated suit, but not in the in-progress suit itself.

In the end, the Sixth Circuit fails to mitigate the harsh consequences of its interpretation. It is impossible to avoid the concededly "anomalous" result of an interpretation that requires the immediate counting of a district court's dismissal as a strike: *viz.*, that a prisoner is effectively precluded from appealing from a dismissal that counts as a third strike. And the Sixth Circuit's own explanation of the meaning of the phrase "prior occa-

sion[]" in Section 1915(g) amply illustrates why the majority interpretation, not the Sixth Circuit's, is the better reading of the statute.

2. The Sixth Circuit offered two affirmative arguments in passing to support its interpretation. Both of those arguments are patently flawed.

a. The Sixth Circuit contended that a "literal" reading of Section 1915(g) compelled adoption of its interpretation, on the ground that the statute "does not say that the dismissal must be final in all of the courts of the United States." Pet. App. 4a. That observation is true, but the conclusion the court drew from it does not follow. Section 1915(g) also does not expressly state that the reversal of a dismissal would prevent the dismissal from being counted as a strike. But an informed reader would surely conclude that it is implicit in the statute, in light of the PLRA's purposes, the usual practice in federal courts, and basic principles of fairness. Compare Br. in Opp. 16 (contending that "the plain language of § 1915(g) imposes no * * * finality requirement") with *id.* at 7-8 (conceding that the reversal of a dismissal would prevent the dismissal from being counted as a strike).

So too, the fact that Section 1915(g) does not expressly address the question of when a dismissal should count as a strike hardly establishes a "plain meaning" that a dismissal counts immediately. Pet. App. 5a. Instead, it simply demonstrates that the text is inconclusive and the court must resort to other tools of statutory construction. See pp. 18-21, *supra*. One need look no further than to the opinions of the seven courts of appeals that have held that a dismissal counts as a strike only after it becomes final on appeal to conclude that the statute is susceptible to more than one interpretation.

b. The Sixth Circuit also contended that its interpretation of Section 1915(g) is "consistent with how judg-

ments are treated for purposes of res judicata," under which "cases on appeal have preclusive effect until they are reversed or vacated." Pet. App. 5a. But the doctrine of res judicata, or claim preclusion, serves a distinct purpose and thus is of limited guidance here.

Claim preclusion prevents a party, after a final judgment on the merits, from "relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). Such a rule makes eminent sense given the policy considerations animating the doctrine of claim preclusion: once judgment is entered, a party no longer has the ability to raise issues in the initial lawsuit, and allowing a second lawsuit to go forward would simply give the losing party in the initial lawsuit another bite at the apple. Section 1915(g), by contrast, prevents a prisoner from pursuing *any* additional lawsuits *in forma pauperis*—however unrelated the claims in those lawsuits might be. Regardless of which interpretation of Section 1915(g) this Court adopts, the doctrine of claim preclusion would continue to bar a prisoner from seeking to litigate the same or related claims in a separate lawsuit, whether *in forma pauperis* or otherwise.

The question of how to interpret Section 1915(g) should be answered not by analogy to the distinct doctrine of claim preclusion, but rather by reference to the text and purposes of the statute, which strongly point to the conclusion that a qualifying dismissal must become final on appeal before it can count as a strike. The mere fact that the law, in some circumstances but not in others, attaches immediate consequences to district court judgments hardly constitutes compelling evidence that Section 1915(g) should be interpreted that way as well—especially in light of the complexities and anomalies that such an interpretation would present.

### D. The Seventh Circuit's Interpretation Of The 'Three Strikes' Provision Is Also Deeply Flawed

The Seventh Circuit is the only other court of appeals to have adopted an interpretation that requires the immediate counting of a district court's dismissal as a strike—and it did so in a brief opinion with little reasoning. See *Robinson* v. *Powell*, 297 F.3d 540, 541 (7th Cir. 2002). Relying (like the Sixth Circuit) on a "literal[]" reading of Section 1915(g), the Seventh Circuit held that the district court in that case had erred when it granted a prisoner leave to proceed *in forma pauperis* on appeal from a dismissal that, according to the Seventh Circuit, counted as the prisoner's third strike. *Ibid.*; see Pet. App. 4a.

The Seventh Circuit, however, took an alternative approach to the Sixth Circuit's. Like the Sixth Circuit, the Seventh Circuit acknowledged that its interpretation raised a "legitimate" concern that indigent prisoners would be prevented from "obtaining appellate review of the correctness of the ruling by the district court that resulted in * * * [the] third strike." *Robinson*, 297 F.3d at 541. But the Seventh Circuit devised a different workaround for that problem. Rather than construing "prior occasion[]" to permit an appeal from a dismissal that would count as the third strike, the Seventh Circuit reasoned that a prisoner seeking to appeal from such a dismissal could file a motion under Federal Rule of Appellate Procedure 24(a)(5) asking the court of appeals for leave to proceed *in forma pauperis*. *Ibid.* In the course of deciding "whether indeed [the prisoner] had three strikes" and therefore was disqualified from *in forma pauperis* status, the Seventh Circuit explained, the court of appeals could determine whether "the district court might have erred in dismissing [the prisoner's] complaint for failure to state a claim." *Ibid.* If so, the court of ap-

peals could grant the prisoner's motion to proceed *in forma pauperis* on appeal. *Ibid.*

The Seventh Circuit's effort to mitigate the harsh effects of the purportedly "literal" interpretation is just as flawed as the Sixth Circuit's. To be sure, Rule 24(a)(5) allows a plaintiff to file a motion in the court of appeals seeking leave to proceed *in forma pauperis*, once the district court has denied the plaintiff leave to proceed *in forma pauperis* on appeal. A court of appeals' consideration of a Rule 24(a)(5) motion, however, "is not a review of the district court's denial, but an original consideration" of whether the plaintiff is entitled to proceed *in forma pauperis* on appeal. *Boling-Bey* v. *United States Parole Commission*, 559 F.3d 1149, 1154 (10th Cir. 2009); accord Fed. R. App. P. 24 advisory committee's note (1967). If it is really "contrary to the language of the statute" for a district court to grant a prisoner leave to proceed *in forma pauperis* on appeal after a dismissal that would count as the prisoner's third strike, *Robinson*, 297 F.3d at 541, it is hard to see why the analysis should be any different for a court of appeals in making the identical determination itself under Rule 24(a)(5).

And the Seventh Circuit's approach would go further than merely permitting a court of appeals to review the district court's decision on whether to grant leave to proceed *in forma pauperis* status on appeal; it would permit the court of appeals, in considering a Rule 24(a)(5) motion, to review the *merits* of a district court's underlying dismissal. But the Seventh Circuit cited no support for the extraordinary proposition that a court of appeals' task in determining *in forma pauperis* status goes beyond counting up the existing strikes and includes evaluating their underlying merits. There is certainly no support for that proposition in the PLRA's "three strikes" provision. And a court cannot use a procedural rule to

circumvent the requirements imposed by a later-enacted statute. See, *e.g.*, *Jackson* v. *Stinnett*, 102 F.3d 132, 135 (5th Cir. 1996).

In addition, as the federal government has recognized in urging the adoption of the majority interpretation, the Seventh Circuit's approach "create[s] more work than is appropriate for either the courts or the litigants to resolve a request for [*in forma pauperis*] privileges." *Thompson*, 492 F.3d at 433 (quoting U.S. Br. at 24); see Pet. App. 12 (Daughtrey, J., dissenting) (noting that the Seventh Circuit's approach "threatens to make the resolution of a Rule 24(a)(5) motion more complex and involved than it is at present"). As one commentator has observed, such an approach "create[s] a technical trap for uncounselled and unsophisticated litigants while serving no actual useful purpose for the judicial system." John Boston, *The Prison Litigation Reform Act* 164 (Feb. 27, 2006) <tinyurl.com/plratreatise>.

By transforming proceedings on *in forma pauperis* motions into quick-look merits appeals, the Seventh Circuit's approach is not only impermissible but also ill-advised. Because there is no principled way of mitigating its troubling consequences, this Court should reject any interpretation of Section 1915(g) that requires the immediate counting of a district court's dismissal as a strike.

### E. The Sixth Circuit Erred By Counting Petitioner's Non-Final Dismissal As A Strike

The Sixth Circuit's error in holding that a district court's dismissal immediately counts as a strike for purposes of the PLRA's "three strikes" provision requires reversal of the judgments below.

1. When a prisoner seeks to proceed *in forma pauperis* in a district court, the court should determine

how many strikes the prisoner had as of the time that he submitted his complaint to the court and requested *in forma pauperis* status. Section 1915(g) precludes a prisoner with three strikes from "bring[ing] a civil action" *in forma pauperis*. Consistent with the statutory text, numerous courts of appeals have held that the relevant time at which the number of strikes should be assessed is the date on which a prisoner files his complaint—or, more precisely, the date on which the prisoner submits his complaint to the court. See, *e.g.*, *Dollar* v. *Coweta County Sheriff Office*, 510 Fed. Appx. 897, 900 (11th Cir. 2013) (per curiam); *O'Neal* v. *Price*, 531 F.3d 1146, 1152 (9th Cir. 2008); *Campbell* v. *Davenport Police Department*, 471 F.3d 952, 952 (8th Cir. 2006) (per curiam); *Nicholas* v. *American Detective Agency*, 254 Fed. Appx. 116, 117 (3d Cir. 2007) (per curiam); Pet. App. 13a (Daughtrey, J., dissenting).

2. Should this Court agree with the vast majority of courts of appeals that a district court's dismissal does not count as a strike for purposes of the "three strikes" provision until it becomes final on appeal, it should reverse the judgments below. At the time petitioner submitted his complaint and *in forma pauperis* request in each of the four underlying cases, the dismissal in *Sweeney*, which would have counted as his third strike, was still pending on appeal. J.A. 6, 13, 20, 27; Pet. App. 4a, 27a-28a, 37a-38a, 47a-48a. Under the correct interpretation of Section 1915(g), that dismissal should not have counted against petitioner, because it was not final as of the date on which petitioner submitted his complaints.

In each of the four underlying cases, however, the Sixth Circuit held that "a dismissal of a case for failure to state a claim qualifies as a 'strike' even if the appeal from the dismissal is pending at the time a prisoner files a new complaint"—and, on that basis, applied the PLRA's

"three strikes" provision to petitioner. Pet. App. 28a, 38a, 48a; see *id.* at 4a. For the reasons stated herein, that outlying holding constituted an erroneous interpretation of the "three strikes" provision. The Sixth Circuit's judgments should therefore be reversed, thereby enabling petitioner to proceed *in forma pauperis* on remand in the district court.

**CONCLUSION**

The judgments of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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## APPENDIX

28 U.S.C. 1915 provides:

### Proceedings in forma pauperis

**(a)(1)** Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

**(2)** A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

**(3)** An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

**(b)(1)** Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

**(A)** the average monthly deposits to the prisoner's account; or

**(B)** the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

**(2)** After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

**(3)** In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

**(4)** In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

**(c)** Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court,

in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

**(d)** The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

**(e)(1)** The court may request an attorney to represent any person unable to afford counsel.

**(2)** Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

**(A)** the allegation of poverty is untrue; or

**(B)** the action or appeal—

**(i)** is frivolous or malicious;

**(ii)** fails to state a claim on which relief may be granted; or

**(iii)** seeks monetary relief against a defendant who is immune from such relief.

**(f)(1)** Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

**(2)(A)** If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

**(B)** The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

**(C)** In no event shall the costs collected exceed the amount of the costs ordered by the court.

**(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.

**(h)** As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.