No. 13-1333

In the Supreme Court of the United States

ANDRE LEE COLEMAN,
AKA ANDRE LEE COLEMAN-BEY, PETITIONER
V.
TODD TOLLEFSON, ET AL.

ANDRE LEE COLEMAN, PETITIONER
V.
BERTINA BOWERMAN, ET AL.

ANDRE LEE COLEMAN, PETITIONER
V.
STEVEN DYKEHOUSE, ET AL.

ANDRE 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 RESPONDENTS

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QUESTION PRESENTED

Whether the "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. § 1915(g), bars a prisoner from bringing a civil action or appealing a judgment in a civil action after three actions have been dismissed, even if the third dismissal is a district-court dismissal that is not yet final on appeal.

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STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1915(g) states:

> 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 full text of 28 U.S.C. § 1915 is reprinted in full in the appendix to this brief. App. 1a–5a.

INTRODUCTION

In forma pauperis status is a privilege that allows a litigant to pay filing fees late, after filing an action or an appeal, instead of paying up front. By passing the Prison Litigation Reform Act, Congress cut off that privilege for prisoners who have abused it by filing three or more meritless, frivolous, or malicious actions or appeals. When Congress set out this three-strikes rule in 28 U.S.C. § 1915(g), it used plain text that specifies the point in time when the dismissal of an action on one of these qualifying grounds qualifies as a strike: it qualifies when the "action . . . was dismissed."

There is nothing obscure about what that phrase means. Litigants, lawyers, judges, and justices routinely use that phrase to refer to the point in time when a district court enters the order dismissing the action. Despite this common usage, Coleman argues that the dismissal should not count until it is final on appeal. But Congress did not include any final-on-appeal limitation in § 1915(g).

Quite the opposite, § 1915(g)'s plain language confirms that Congress intended to count district-court dismissals as strikes regardless of whether they are pending on appeal: the phrase "action *or* appeal" expressly distinguishes between the district-court and appellate-court components of a case, confirming that Congress intended strikes to count at each of those litigation stages—when "an action . . . was dismissed" or when "an . . . appeal . . . was dismissed." And this makes sense, given that the statute addresses filing fees, which are imposed separately at the district-court and appellate stages.

Further, the statute provides only one exception to the three-strikes rule: where "the prisoner is under imminent danger of serious physical injury." § 1915(g). It includes no exception for finality on appeal, even though Congress knew how to address that precise issue, as evidenced by other statutes—including, for example, 28 U.S.C. § 2244(d)(1)(A) ("the date on which the judgment became *final by the conclusion of direct review or the expiration of the time for seeking such review*") (emphasis added), a provision enacted just *two days* before § 1915(g).

Although this is a statutory-interpretation case, Coleman does not address the ordinary meaning of the phrase "an action . . . was dismissed" or the fact that § 1915(g) uses the disjunctive phrase "action or appeal" to separate those litigation stages. Instead, he asserts that "prior occasions" is ambiguous, so the Court should look beyond the text to determine Congress's purposes and adopt a rule that would be more lenient and administrable. But his premise is wrong: the statute unambiguously identifies the "prior occasions" that count as strikes: (1) when an "action . . . was dismissed" and (2) when an "appeal . . . was dismissed." Congress intended that once a prisoner has incurred three strikes, he will be treated like an ordinary citizen, who must decide if filing a complaint or an appeal is worth the cost.

Counting a strike when the district court dismisses is consistent with the ordinary rule that such dismissals have legal effect even when pending on appeal—a party wishing to delay that effect must seek a stay pending appeal, and judgments have res judicata effect even when pending on appeal.

The clear text states Congress's intent and must be enforced as written. This Court should affirm.

STATEMENT OF THE CASE

A. The history of *in forma pauperis* status

To proceed *in forma pauperis* is to proceed "[i]n the manner of an indigent who is permitted to disregard filing fees and court costs." BLACK'S LAW DICTIONARY 794 (9th ed. 2009). For the first century of our Nation's history, no right to proceed *in forma pauperis* existed. The First Congress imposed filing fees on all plaintiffs, and Congress did not enact a statute creating the possibility that a federal litigant might proceed as a pauper until 1892. *Lewis* v. *Sullivan*, 279 F.3d 526, 528 (7th Cir. 2002).

While the *in forma pauperis* statute was "designed to ensure that indigent litigants have meaningful access to the federal courts," Congress also "recognized that 'a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.' " *Denton* v. *Hernandez*, 504 U.S. 25, 31 (1992) (quoting *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989)). Accordingly, from the outset the statute allowed courts "to dismiss an *in forma pauperis* complaint 'if satisfied that the action is frivolous or malicious.' " *Id.*; see also *Brinkley* v. *Louisville & N.R. Co.*, 95 F. 345 (C.C.W.D. Tenn. 1899).

In 1991, this Court amended its own rules to address a problem that the rules were "not effective" in handling: the problem of "abusive" *in forma*

pauperis filings. *In re Amendment to Rule 39*, 500 U.S. 13, 14 (1991). The Court explained that "to preserve meaningful access to this Court's resources, and to ensure the integrity of our processes, we find it necessary and advisable to promulgate this amendment to Rule 39, to provide us some control over frivolous or malicious *in forma pauperis* filings." *Id.* at 13–14. The amendment made clear that this Court may deny pauper status for frivolous filings and thus "may enter orders similar to those entered by the lower federal courts for almost 100 years pursuant to 28 U.S.C. §§ 1915(a) and (d), and their predecessors." *Id.* at 14.

Five years after this Court adopted its rule designed to deny pauper status to those who abused it, Congress took up the same issue by introducing the Prison Litigation Reform Act. Senator Kyl, one of the PLRA's sponsors, recognized that "prisoners have very little incentive not to file nonmeritorious lawsuits." 141 Cong. Rec. S7526 (May 25, 1995). "Unlike other prospective litigants who seek poor person status, prisoners have all the necessities of life supplied, including the materials required to bring their lawsuits," and thus "no incentive to limit suits to cases that have some chance of success." *Id.*

Senator Kyl recounted frivolous suits actually filed by inmates around the country. One inmate "claimed $1 million in damages for civil rights violation because his ice cream had melted." 141 Cong. Rec. S14629 (Sept. 29, 1995). Another "alleged that being forced to listen to his unit manager's country and western music constituted cruel and unusual punishment." *Id.* Yet another "sued because

he was served chunky instead of smooth peanut butter." *Id.* And still another brought a retaliation claim based on the allegation that "he was not invited to a pizza party thrown for a departing DOC employee." *Id.*

Congress's discussion of frivolous prisoner filings also specifically noted the impact such filings have on appellate courts: "the fifth circuit [has] expressed frustration with the glut of 'frivolous or malicious appeals by disgruntled state prisoners.' " 141 Cong. Rec. S7526 (1995) (quoting *Gabel* v. *Lynaugh*, 835 F.2d 124, 125 (5th Cir. 1988) (per curiam)). " 'About one appeal in every six which came to [the Fifth Circuit's] docket (17.3%) the last four months was a state prisoner's pro se civil rights case.' " *Id.* (quoting *Gabel*, 835 F.2d at 125 n.1). " 'A high percentage of these [appeals] are meritless, and many are transparently frivolous,' " with the appeals having a reversal rate of only 5.08%. *Id.* The Fifth Circuit's frustration was shared by other circuits. For example, the Fourth Circuit observed in 1995 that "during the last three years, the percentage of *in forma pauperis* filings on appeal has increased from about one-third to *one-half of all filings*," and "[p]risoner litigation constitute[d] roughly 75% of the *in forma pauperis* cases filed in the Fourth Circuit." *Nasim* v. *Warden, Md. House of Corr.*, 64 F.3d 951, 954 & n.1 (4th Cir. 1995) (en banc).

Based on these and similar concerns, Congress passed the Prison Litigation Reform Act, Pub. L. No. 104–134, 110 Stat. 1321 (Apr. 26, 1996). The PLRA amended 28 U.S.C. § 1915 in several ways. For one, it required prisoners who qualify for pauper status—

and therefore are excused from paying filing fees before filing—"to pay the full amount of a filing fee" as funds become available to them. Specifically, § 1915(b) provides that the "court shall assess and, when funds exist, collect, as partial payment of any court fees required by law, an initial partial filing fee" of 20% of the prisoner's average monthly income (or, if greater, of the prisoner's average monthly account balance). This provision reflects the fact that prisoners, unlike other individuals who qualify for *in forma pauperis* status, have all of the necessities of life—such as food, clothing, shelter, and medical care—provided to them by the state. Thus, it allows the prisoner to retain 80% of his income or balance for paying off debts (such as victims' rights payments or fees for destroying state property) and for discretionary spending.

The PLRA also added the subsection at issue in this case, commonly known as the three-strikes rule:

> 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. [§ 1915(g).]

Section 1915(g) thus "does not block a prisoner's access to the federal courts." *Abdul-Akbar* v.

McKelvie, 239 F.3d 307, 314 (3d Cir. 2001) (en banc). "It only denies the prisoner the privilege of filing before he has acquired the necessary filing fee." *Id.*

B. Coleman incurs three dismissals

Incarcerated in 1983 for armed robbery and a related firearm felony, André Lee Coleman incurred his first district-court dismissal in 1992 in *Coleman* v. *Lentin*. J.A. 33, 45. His civil action alleged that prison officials violated his due-process rights by finding him guilty of misconduct without first contacting defense witnesses or the guards accusing him to resolve factual disputes. J.A. 33. The district court concluded that the disciplinary procedures, which included "several levels of appeals," satisfied due process. J.A. 38. The district court dismissed the action "as frivolous and without merit." J.A. 39, 45. Coleman did not appeal the district court's dismissal.

Coleman incurred his second dismissal in 2008 in *Coleman* v. *Kinnunen*. J.A. 46. In that action, he alleged that he was denied access to the courts when a state-court clerk returned a petition on the ground that Coleman had filed it in the wrong county. J.A. 46. The district court concluded Coleman had not suffered any actual injury, because he could have filed a new action showing that the county was the proper venue or sought an order from the Michigan Court of Appeals directing the clerk to file the petition. J.A. 48. The district court granted the motion to dismiss the action and concluded that it could "discern no good-faith basis for an appeal," and accordingly denied Coleman's motion for pauper status on appeal. J.A. 49; see § 1915(a)(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."). Coleman nonetheless appealed, and the Sixth Circuit affirmed for the same reasons the district court had given. J.A. 51–52.

Coleman incurred his third dismissal in 2009 in *Coleman* v. *Sweeney*. J.A. 53. This time he asserted nine claims, most of which alleged denial of access to the courts and retaliation for filing grievances. J.A. 56. The district court dismissed the action "for failure to state a claim." J.A. 53. As to Coleman's claims about access to the courts, the court concluded (as had the court in *Kinnunen*) that Coleman had failed to allege any actual injury. J.A. 60. As to his retaliation claims, the court concluded that the challenged conduct—"conducting 'an unnecessary, unwarranted informal administrative hearing' "—was not an adverse action but rather an opportunity to seek redress for his grievances. J.A. 60. Rejecting Coleman's remaining claims, the district court dismissed the action and stated that it could discern "no good-faith basis for an appeal." J.A. 65. Coleman appealed anyway, and the Sixth Circuit affirmed for reasons consistent with the district court's reasoning. J.A. 162–63.

C. Coleman brings four more actions after his third action was dismissed but while it is pending on appeal

While the dismissal in *Sweeney* was pending on appeal, Coleman filed four additional civil actions within the space of roughly ten months: *Coleman* v. *Vroman*, *Coleman* v. *Bowerman*, *Coleman* v. *Tollefson*, and *Coleman* v. *Dykehouse*. J.A. 66, 93, 119, & 139. These actions include some claims

similar to those in his prior dismissals—retaliation claims, J.A. 90, 115, access-to-courts claims, J.A. 89, 134, and due-process claims, J.A. 116—but he also asserted claims based on new theories. For example, in *Dykehouse* he alleged violations of "a Constitutional Right to receive warranty replacement appliances" and of "a Constitutional Right to broadcast speakers in the form of real-time entertainment and real-time free flowing information under the First Amendment of the U.S. Constitution." J.A. 156–57.

D. The district-court decisions

The district court in *Tollefson* concluded the prior dismissals in *Lentin*, *Kinnunen*, and *Sweeney* were prior occasions that counted as dismissals under § 1915(g). Pet. App. 19a. It therefore ordered Coleman to pay the $350 filing fee within 28 days, or else it would dismiss the action without prejudice. On reconsideration, the district court rejected Coleman's argument that the dismissal did not count because an appeal remained pending. Pet. App. 23a. The court reasoned that the clear language of § 1915(g) "does not make an exception for a dismissal that has been appealed" and that "a judgment of dismissal by a district court is final and should be given full effect, unless stayed upon appeal." Pet. App. 23a. The district court further recognized that a contrary reading would allow a plaintiff to "avoid the effect of § 1915(g) by filing three frivolous lawsuits simultaneously and appealing each dismissal," while remaining free to "continue to file frivolous lawsuits while the appeals were pending." Pet. App. 24a. The district court, though, granted Coleman leave to file his appeal *in forma pauperis*. Pet. App. 2a.

The district-court decisions in *Dykehouse*, *Vroman*, and *Bowerman* followed similar reasoning. In each, the district court listed the three actions that had previously been dismissed and the dates when the district court had entered those dismissals and counted each dismissal as a prior occasion qualifying as a strike. Pet. App. 44a, 53a, & 34a.

E. The Sixth Circuit's decision

In *Tollefson*, the Sixth Circuit affirmed the denial of pauper status in a divided opinion. Pet. App. 1a. Focusing on the statute's text, the majority concluded that "§ 1915(g) requires district courts to count as strikes cases that are dismissed on the ground enumerated even when pending on appeal." Pet. App. 4a. The majority recognized that "§ 1915(g) 'does not say that the dismissal must be final in all of the courts of the United States' " to count as a strike. Pet. App. 4a. Further, counting a district-court dismissal as a strike is "consistent with how judgments are treated for purposes of res judicata," because "cases on appeal have preclusive effect until they are reversed or vacated." Pet. App. 5a.

The majority concluded, however, that a "third strike may be appealed even though it would count as a strike with regard to a fourth or successive suit." Pet. App. 6a. In its view, "[a] third strike that is on appeal is not a *prior* occasion for the purposes of that appeal, because it is the *same* occasion." Pet. App. 6a.

In dissent, Judge Daughtrey contended that § 1915(g) "is ambiguous, not only with respect to when dismissals should count as strikes but also with respect to what counts as a 'prior occasion.' "

Pet. App. 9a. Expressing concern that counting a district-court dismissal as a third strike would "effectively eliminate [the court's] appellate function," she therefore would count a dismissal only if it were final on appeal. Pet. App. 8a, 11a (quoting *Thompson* v. *Drug Enforcement Admin.*, 492 F.3d 428, 432 (D.C. Cir. 2007)).

Relying on its decision in *Tollefson*, the Sixth Circuit subsequently affirmed the decisions denying pauper status in *Bowerman*, *Dykehouse*, and *Vroman*. Pet. App. 28a, 38a, & 48a.

SUMMARY OF ARGUMENT

1. Section 1915(g)'s plain text readily answers the timing question presented by this case. In ordinary usage, the point in time when "an action . . . was dismissed" is the date on which the district court entered its judgment of dismissal. Here, as Coleman acknowledges, district courts dismissed his prior actions on qualifying grounds (i.e., as frivolous or for failure to state a claim) in 1992, 2008, and 2009. Pet. Br. 6–7. Therefore, because his actions brought in 2010 and 2011 did not allege any imminent danger of serious physical injury, the statute required that he pay the district-court or appellate-court filings fees before he could bring another action or appeal: "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action . . . under this section if the prisoner has, on 3 or more occasions . . . brought an action . . . that was dismissed on [qualifying] grounds." § 1915(g).

The statute thus is neither silent nor ambiguous on when a strike counts: it counts when "an action

. . . was dismissed." As this Court's decisions and the federal rules each confirm, this phrase has a common meaning that is clear and well understood. Coleman had three prior dismissals when he filed his actions in 2010 and 2011, so under the statute's unambiguous language, he can no longer file as a pauper.

The fact that § 1915(g) expressly differentiates between "action or appeal" separately confirms that Congress intended for strikes to count at each stage of a suit, not only when the appeal was complete. As the federal rules illustrate, the word "action" refers to the district-court stage of a case, while the word "appeal" refers to a different stage. This distinction makes perfect sense in context, given that filing fees are assessed separately at each of those stages.

Further, the phrase "prior occasions" is not, as Coleman contends, ambiguous. To the contrary, the entire point of the statute is to spell out which occasions can give rise to a strike. The statute identifies two occasions: (1) when an "action . . . was dismissed" and (2) when an "appeal . . . was dismissed." By enumerating these two separate occasions, Congress made clear that they are not, as Coleman contends, just a single occasion. In short, Congress recognized that prisoners should be deterred not just from filing meritless actions, but also from taking meritless appeals. That is why the courts of appeals have unanimously agreed that prisoners can be awarded two strikes *in the same case*, if they follow a meritless action with a frivolous appeal. But under Coleman's approach a prisoner would never be deterred from taking a frivolous appeal from a third district-court dismissal.

Even setting aside the ordinary meaning of "was dismissed, "action or appeal," and "prior occasions," two other principles of statutory interpretation bar reading Coleman's proposed exception into the statute.

First, the fact that Congress enumerated one exception in the statute (allowing pauper status even after three actions have been dismissed when there is an imminent risk of serious physical injury) shows that courts may not read in Coleman's proposed unenumerated exception (allowing pauper status even after three actions have been dismissed if the third action is still pending on appeal).

Second, just *two days* before Congress passed § 1915(g)'s three-strikes provision, it passed two other statutes that expressly provided that district-court judgments would not have a particular legal effect until they were final on appeal. For example, in 28 U.S.C. § 2244(d)(1)(A), Congress expressly provided that district-court judgments would not trigger a limitations period until "the date on which the judgment became *final by the conclusion of direct review or the expiration of the time for seeking such review*." (Emphasis added). The fact that the same Congress that included this final-on-appeal requirement in § 2244(d)(1) chose not to include similar language in § 1915(g) is strong evidence that Congress did not intend to include any final-on-appeal requirement in the three-strikes rule.

Following the statute's plain text by counting a strike at the time of a district-court dismissal is consistent with the ordinary rule that district-court dismissals of civil actions have immediate legal

effect. The fact that stays pending appeal are not automatic, that district-court judgments have res judicata effect even when pending on appeal, and that interest begins accumulating from the date of the district-court judgment all illustrate this.

And § 1915(g)'s text is plain—so much so that circuits imposing a final-on-appeal requirement have been forced to acknowledge that they were not following the "literal" words of the statute when they read in this exception. But a judicial desire to make the statute more lenient cannot justify departing from Congress's clear directive. Dismissed means dismissed.

2. The statutory text reveals Congress's purpose: to preclude both actions and appeals after a third action has been dismissed. While Coleman complains that this negative consequence is a harsh one, it is the consequence Congress intended. Thus, to the extent counting a strike immediately raises an obstacle to appellate review (as some courts of appeals have charged, worrying that it might ossify district-court errors) or makes it more difficult to file further possibly meritorious actions, Congress intended those outcomes for those who have repeatedly abused pauper status. Further, those outcomes are caused by *all* filing fees: the mere existence of filings fees means that even non-indigent litigants will sometimes not pursue meritorious claims or not appeal district-court dismissals that might have been erroneous. And regardless of whether a third district-court dismissal counts immediately as a strike or not until it is final on appeal, the three-strikes rule necessarily will

preclude prisoners from "bring[ing] a civil action or appeal[ing] a judgment" from that point forward (unless they pay the required fees at the time of filing). It is filing fees themselves and the existence of a three-strikes rule that cause those effects, regardless of how this case is resolved.

In any event, this is not an unduly harsh outcome. It merely returns specific prisoners who have repeatedly abused the pauper status to the status quo that law-abiding citizens face every day: they must decide if the action or appeal is worth the cost. It is an outcome that this Court itself has repeatedly imposed on prisoners who have abused the opportunity to file *in forma pauperis* at the Supreme Court stage, even though this Court's denial of pauper status also risks ossifying lower court errors—and to a greater degree, since those circuit-court errors might be precedential.

3. Counting strikes from the day a district court dismisses an action is an easily administrable rule. It simply requires checking the docket to determine when the action was dismissed. And if a dismissal of a third strike is later reversed, then the ordinary rules of judgments will also be easy to apply. Just as a district-court judgment ceases to have res judicata effect once it is reversed—because a reversal renders the judgment void, as if it had never occurred—so too will a third strike be erased, as if it never occurred. Nothing in the statute suggests Congress intended to change this well settled rule.

ARGUMENT

I. Actions dismissed by a district court count immediately as strikes under § 1915(g).

Section 1915(g)'s plain text applies in a straightforward manner to this case. When Coleman filed four civil actions in 2010 and 2011, he had, on "3 or more prior occasions" "brought an action or appeal in a court of the United States that was dismissed on the grounds that it was frivolous . . . or fails to state a claim upon which relief may be granted." § 1915(g). Specifically, he had brought three actions, and each was dismissed—*Lentin* in 1992, *Kinnunen* in 2008, and *Sweeney* in 2009—either as frivolous or for failing to state a claim. J.A. 39, 49, 53. Coleman alleges no facts implicating the one exception enumerated in the statute—he does not claim to be "under imminent danger of serious physical injury." Pet. App. 19a–20a. Accordingly, § 1915(g)'s plain text dictates that "[i]n no event" shall he be allowed "to bring a civil action or appeal a judgment in a civil action or proceeding under this section"—that is, as a pauper who is excused from paying the filing fees before filing.

Despite this plain text, some courts have read into § 1915(g) a requirement that district-court dismissals must be final on appeal to count as a strike. But what this Court said in *Jones* v. *Bock* when addressing the PLRA is just as true here—"such a result 'must be obtained by the process of amending the [statute], and not by judicial interpretation.' " 549 U.S. 199, 217 (2007).

A. Under § 1915(g)'s plain text, an action is dismissed when a district court acts, regardless of whether an appeal follows.

The plain language of the statute is, as this Court has frequently observed, the best evidence of Congress's intent. E.g., *Nixon* v. *United States*, 506 U.S. 224, 232 (1993) (citing "the well-established rule that the plain language of the enacted text is the best indicator of intent."). This is why this Court has recognized that it "must enforce plain and unambiguous statutory language according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

Section 1915(g)'s plain language shows that Congress specifically intended (1) to count a district-court dismissal when the district court enters it, (2) to count dismissals of a district-court action separately from dismissals of an appeal, and (3) to treat district-court dismissals and appellate-court dismissals as separate occasions under the statute.

1. In ordinary usage, an action is considered "dismissed" when the district court dismisses it, not when any appeal has been resolved.

Contrary to Coleman's assertions, e.g., Pet. Br. 11–12, 16, the statutory text *does* expressly address when a strike counts: it counts when "an action or appeal . . . was dismissed" for a qualifying reason. In ordinary English, an action is dismissed when the district court issues an opinion and order saying so, regardless of whether an appeal might ensue. As Judge O'Scannlain observed, "[a] strike is not contingent in any way on the case's subsequent

appellate process, which is nowhere mentioned in section 1915." *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1107 (9th Cir. 2011) (O'Scannlain, J., dissenting).

For example, an English speaker of ordinary competence would have no difficulty understanding the following statement from Coleman's brief about when Coleman's third dismissal occurred: "The district court dismissed for failure to state a claim in October 2009, but petitioner appealed." Pet. Br. 7. That sentence, consistent with common usage, properly treats the dismissal as having occurred at the time the district court reached its decision in October 2009. J.A. 65. This usage does not jump out as internally inconsistent or as a distortion of what the word "dismissed" means, even if the reader knows that the *Sweeney* dismissal did not become final on appeal until March 2011. J.A. 160. But if Coleman were right that an action should not be considered "dismissed" until "it has become final on appeal," Coleman Br. 12, then the sentence should cause a reader to pause.

Nor would an ordinary English speaker have any difficulty understanding the following sentence from one of this Court's leading cases about dismissals, even though the sentence says nothing about whether the dismissal was final on appeal: "The United States District Court . . . dismissed the complaint for failure to state a claim upon which relief can be granted." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 552 (2007). An everyday reader would understand that the term "dismissed" was talking about an event that occurred in the district court at a

particular point in time, regardless of a subsequent appeal (or lack thereof).

In short, common usage of the phrase "an action . . . that was dismissed" refers to the district court's act of dismissing a case. It does not refer to the appellate court's act of resolving an appeal arising from a district court's dismissal.

One need look no further than recent Supreme Court Reporters to confirm this understanding. E.g., *Millbrook* v. *United States*, 133 S. Ct. 1441, 1442 (2013) ("The District Court dismissed Millbrook's action, and the Court of Appeals affirmed."); *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1333 (2013) ("The District Court dismissed the action for failure to state a claim. . . . The Court of Appeals for the Ninth Circuit reversed."); *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1314 (2012) ("The state trial court dismissed the action for postconviction relief . . . . The Arizona Court of Appeals affirmed Martinez's conviction."); *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1065 (2014) ("[T]he court dismissed the class actions under the Litigation Act. . . . The Fifth Circuit reversed."). As these cases show, in ordinary usage an "action" was "dismissed" regardless of what subsequently happened on appeal. And the point in time when those dismissals occurred may be easily ascertained by determining the date of the relevant district-court order.

If one wants to look further than the Reporters, the relevant federal rules also confirm that the dismissal of "an action" refers to an event that occurs in the district court. While the rules that govern *district courts* refer repeatedly to *an action* being

dismissed, the rules that govern the *courts of appeals* use the word "dismissed" *only* to refer to the dismissal of *an appeal*. Compare, e.g., FED. R. CIV. P. 19(b) ("the *action* should proceed among the existing parties or should be *dismissed*"), 19(b)(4) ("whether the plaintiff would have an adequate remedy if the *action* were *dismissed* for nonjoinder"), 23.1(c) ("A derivative *action* may be . . . voluntarily *dismissed*"), 25(a) ("the *action* by or against the decedent must be *dismissed*"), and 41(a)(2) ("an *action* may be *dismissed* at the plaintiff's request only by court order"), with FED. R. APP. P. 3(a)(2) ("*dismissing* the *appeal*"), 3(c)(4) ("An *appeal* must not be *dismissed* for informality of form"), 12.1(b) ("*dismisses* the *appeal*"), 27(c) (a circuit judge acting alone "may not *dismiss* or otherwise determine an *appeal*"), 31(c) ("an *appellee* may move to dismiss the *appeal*"), 39(a)(1) ("if an *appeal* is *dismissed*, costs are taxed against the appellant, unless the parties agree otherwise"), 42(a) ("*dismiss* the *appeal*"), 42(b) ("An *appeal* may be *dismissed* on the appellant's motion on terms agreed to by the parties or fixed by the court.") (emphasis added to each quote). This too shows that the ordinary meaning of the clause "an action . . . was dismissed" is that it refers to the district court's dismissal, regardless of any appeal.

2. Section 1915(g) counts a dismissal whether it is the dismissal of "an action" or of an "appeal."

This common understanding—that the dismissal of "an action" is the act of a district court—is independently verified by the fact that § 1915(g)'s text expressly distinguishes between actions and appeals and counts a dismissal of each as a separate

strike. § 1915(g) ("an action *or* appeal . . . that was dismissed") (emphasis added). This contrast between an "action" and an "appeal" confirms that "an action" refers not to the entire life of the lawsuit but to the district-court component of the suit. See also § 1915(a)(1), (a)(2), (b)(1), (b)(3), (b)(4), (e)(2) (each distinguishing between "action" and "appeal"). And this distinction makes sense, given the context of the statute: the *in forma pauperis* statute focuses on the events that cause fees—"bring[ing] a civil action or appeal[ing] a judgment in a civil action," e.g. § 1915)(a)(2), (g)—and all agree that filing fees are imposed separately for filings at the district-court level and at the appellate-court level. Accord Pet. Br. 5–6.

Again, the federal rules are helpful: they confirm that "an action" usually refers to the district-court component of a suit. The Federal Rules of Civil Procedure begin by stating they "govern the procedure in all civil *actions* and proceedings *in the United States district courts*." FED. R. CIV. P. 1 (emphasis added). Consistent with this usage, the Federal Rules of Appellate Procedure use a different term—"appeal"—to refer to the appellate component of the suit. Even more tellingly, the appellate rules repeatedly use "district-court action" when referring to the district-court component of a case. FED. R. APP. P. 5 ("The petition must be filed . . . with proof of service on all other parties to the *district-court action*."), 12(a) ("circuit clerk must docket the appeal under the title of the *district-court action*"), 30(e) ("[i]f a transcript of a proceeding before an administrative agency . . . was used in a *district-court action*") (emphasis added in each quote).

In fact, the Federal Rules of Appellate Procedure draw this distinction in the specific context at issue in this case—in addressing *in forma pauperis* status. Rule 24(a)(1) provides that "[e]xcept as stated in Rule 24(a)(3), a party to a *district-court action* who desires to appeal in forma pauperis must file a motion in the district court." (Emphasis added). And Rule 24(a)(3) specifies that "[a] party who was permitted to proceed in forma pauperis in the *district-court action*, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization," unless the district court certifies that the appeal would not be taken in good faith or unless a statute precludes granting pauper status. (Emphasis added).

These examples confirm that when Congress used the phrase "action or appeal . . . was dismissed" in § 1915(g), it intended for courts to count district-court dismissals as strikes, separate from what happens on appeal. And even though his argument depends on the proposition that "a district court's dismissal and the ensuing appeal from that dismissal constitute a single 'occasion' for purposes of the statute," Pet. Br. 12, Coleman makes no attempt to reconcile this proposition with the fact that the statute separates "action" from "appeal" and counts the dismissal of each as strikes. Nor does he ever address the everyday meaning of "action . . . was dismissed" or the distinction between an "action" and an "appeal." Instead, he asserts that § 1915(g) is silent as to when a dismissal should count as a strike, and that " 'such silence . . . normally creates ambiguity[;] [i]t does not resolve it.' " Pet. Br. 17

(quoting *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002)). But even setting aside the fact that the statute is *not* silent—the phrase "action . . . was dismissed" *does* specify a point in time—silence would not help Coleman here, because the meaning of statutory silence depends on context, and applying two common rules of statutory interpretation here would remove any possible ambiguity.

First, when a statute enumerates specific exceptions, silence as to additional exceptions means that no more exceptions exist. *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1953 (2013) (" '[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.' ") (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980)). Here, the statute is emphatic that only one exception exists: "*In no event* shall a prisoner bring a civil action or appeal a judgment . . . if the prisoner has, on 3 or more occasions . . . brought an action or appeal . . . that was dismissed" for qualifying reasons "*unless the prisoner is under imminent danger of serious physical injury*." § 1915(g) (emphasis added). The statute does not include the additional caveat, as Coleman would have it, that a prisoner is barred "unless an action that was dismissed is still pending on appeal."

Second, two other statutes, 28 U.S.C. § 2244(d)(1)(a) and § 2255(f)(1), each relating to habeas procedure, show that Congress knew how to include the exception that Coleman wants to insert here: that a district-court decision would not have a

particular legal effect until it was final on appeal. In 28 U.S.C. § 2244(d)(1)(A), Congress specified that a judgment would not trigger a specific legal effect (starting the clock for the statute of limitations applicable to state prisoners seeking postconviction relief) until it was final on appeal: "The limitation period shall run from the latest of . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . ." Similarly, in 28 U.S.C. § 2255(f)(1) Congress provided that a limitation period for petitions by federal prisoners could be triggered by "the date on which the judgment of conviction becomes final." This Court has interpreted the phrase "becomes final" in § 2255(f)(1) to mean final on appeal. *Clay* v. *United States*, 537 U.S. 522, 527–528 (2003) (explaining that Congress's use of this phrase in the context of postconviction relief, given this Court's "unvarying understanding of finality for collateral review purposes," means that a judgment is not final under § 2255(f)(1) until direct review by this Court ends or the time for such review expires). In other words, in each of these statutes, Congress used specific language to indicate that a judgment would not have legal effect until final on appeal.

Here, in contrast, when Congress was considering when a dismissal would trigger a particular legal effect (counting as a strike), it did not include any language relating to finality. See *Silva*, 658 F.3d at 1107 (O'Scannlain, J., dissenting) ("The fact that the statute does *not* state that a dismissal must become 'final' to count against the prisoner counsels that we look no further than the fact of *dismissal* when tallying strikes."). And unlike

in the context of a postconviction collateral attack addressed in *Clay*, the ordinary rule for district-court dismissals is, as explained more fully in Part I.B below, that district-court dismissals have immediate effect.

The inclusion of this finality requirement in § 2244(d) and § 2255(f)—but not in § 1915(g)—is particularly significant because of *when* Congress included this language in § 2244 and § 2255. As this Court has explained, " '[n]egative implications raised by disparate provisions are strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted.' " *Gomez-Perez* v. *Potter*, 553 U.S. 474, 486 (2008) (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997)). Here, the negative implication is at its strongest, as these two habeas statutes that do include a final-on-appeal requirement were passed *two days* before the PLRA was amended to add § 1915(g). See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1214 (Apr. 24, 1996); Prison Litigation Reform Act of 1995, Pub. L. 104–134, 110 Stat 1321 (Apr. 26, 1996); see also *Carson* v. *Johnson*, 112 F.3d 818, 820 (5th Cir. 1997) (observing that AEDPA "became effective two days before the PLRA did").

Given that Congress expressly decided on April 24, 1996, to include language in two statutes (§ 2244 and § 2255) that would limit the legal effect of a district court's judgment until it was final on appeal, the decision of the same Congress to omit any reference to finality in this statute (§ 1915(g)) just

two days later, on April 26, 1996, is quite telling: It shows that Congress knew exactly how to limit the effect of a district court's judgment when it was pending on appeal, but chose *not* to impose that limitation in § 1915(g). See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Courts, therefore, are not free to undo Congress's decision by reading that limitation into the statute.

3. "Prior occasions" refers to the occasions expressly identified in the statute: dismissal by a district court or dismissal by an appellate court.

The context just discussed confirms that § 1915 is unambiguous about what the phrase "prior occasions" means. *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) ("A statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.' "). Section 1915(g) enumerates two—and only two—types of prior occasions that can count as strikes: first, where a prisoner has "brought an action . . . that was dismissed" for a qualifying reason, and second, where a prisoner has "brought an . . . appeal . . . that was dismissed" for a qualifying reason. This enumeration of the two events that can give rise to a strike expressly distinguishes between dismissal of "an action"

(again, a district-court event) and dismissal of "an . . . appeal" (an appellate event).

As Judge Calabresi has explained, "[g]iven that § 1915(g)'s phrase 'action or appeal' disjunctively juxtaposes 'action' and 'appeal,' it seems most natural to read them as connoting two separate parts of one larger lawsuit." *Chavis* v. *Chappius*, 618 F.3d 162, 168 (2d Cir. 2010). Quoting a Seventh Circuit decision, he further explained that this understanding is consistent with Congress's intent to deter frivolous appeals too, not just frivolous complaints:

> "Under this language, bringing an action and filing an appeal are separate acts. One could be frivolous, the other not. Having been told that his complaint is frivolous, a prisoner must decide whether to appeal. Prisoners who learn from their mistakes will suffer one strike, at most, in a case. Obstinate or malicious litigants who refuse to take no for an answer incur two strikes. That approach not only comports with the statutory language but also fortifies the deterrence of frivolous activities in litigation." [*Id.* (quoting *Newlin* v. *Helman*, 123 F.3d 429, 433 (7th Cir. 1997) (Easterbrook, J.), overruled on other grounds by *Walker* v. *O'Brien*, 216 F.3d 626 (7th Cir. 2000), and *Lee* v. *Clinton*, 209 F.3d 1025 (7th Cir. 2000).]

Consistent with this plain text, "[*e*]*very circuit court to address the matter* has held that sequential dismissals"—i.e., a district-court dismissal and an appellate dismissal *in the same case*—"count as two

strikes." *Chavis*, 618 F.3d at 167 (emphasis added); accord *Jennings* v. *Natrona County Det. Ctr. Med. Facility*, 175 F.3d 775, 780 (10th Cir. 1999) ("If we dismiss as frivolous the appeal of an action the district court dismissed . . . , both dismissals count as strikes."); *Hains* v. *Washington*, 131 F.3d 1248, 1250 (7th Cir. 1997) (per curiam) ("A frivolous complaint (or as in this case a complaint that is dismissed . . . for failure to state a claim) followed by a frivolous appeal leads to two 'strikes' under 28 U.S.C. § 1915(g)."); *Henderson* v. *Norris*, 129 F.3d 481, 485 (8th Cir. 1997) (per curiam) ("[W]e . . . conclude that Henderson's appeal is frivolous, and notify him that the dispositions of both his complaint and his appeal are 'strikes' under § 1915(g).") (footnote omitted); *Adepegba* v. *Hammons*, 103 F.3d 383, 388 (5th Cir. 1996) ("Congress suggests in the statute that *any* appeal dismissed as frivolous counts against the petitioner; it makes no exception for frivolous appeals of district court dismissals. Therefore we find that Congress would have us count both the dismissal in the district court *and* the separate dismissal of the appeal as frivolous.").

This is significant: all of these circuits recognize that Congress intended the dismissal of an action and the dismissal of an appeal to count as *separate* occasions under § 1915(g) and to result in two strikes in the same case. Indeed, reading it otherwise would allow a prisoner who filed a frivolous appeal after each district-court dismissal to get "three frivolous actions and three frivolous appeals." *Rodriguez* v. *Cook*, 169 F.3d 1176, 1178 (9th Cir. 1999). It therefore would be inconsistent with Congress's intent to conclude, as Coleman wishes, that "a

district court's dismissal and the ensuing appeal from that dismissal constitute a single 'occasion' for purposes of the statute." Pet. Br. 12.

Although Coleman cites *Chavis*, *Jennings*, and *Adepegba* repeatedly, he never mentions the two-strikes-in-one case rule. Nor does he grapple with its implications: the rule confirms that the language "action or appeal" conveys Congress's intent to count district-court dismissals and appellate dismissals as separate occasions under the statute.

Instead, Coleman observes that "a court of appeals' *affirmance* of [a district-court] dismissal does not count as a distinct strike; only a qualifying *dismissal* of the appeal would do so." Pet. Br. 18. This is true, but all it proves is that statutory language matters. Congress did not use the word "affirmance" or "affirmed" in § 1915(g); it instead referred to "an . . . appeal . . . that was dismissed," and dismissing an appeal is different from affirming a judgment. E.g, FED. R. APP. P. 39(a) (addressing the assessment of costs "if an appeal is *dismissed*" in one subsection, but addressing the assessment "if a judgment is *affirmed*" in a separate subsection) (emphasis added); *Riley* v. *Plump*, 128 S. Ct. 1930 (2008) ("[P]ending this Court's action on the appeal," "[i]f the appeal is dismissed, or judgment affirmed, this order shall terminate automatically.").

Dismissing an appeal is when, for example, a court terminates a frivolous appeal in midstream, rather than wasting its limited resources by going through the full appellate process simply to affirm in the end. Indeed, in another provision of § 1915 Congress acted to protect judicial resources by

directing that courts *must* dismiss an action once they determine it is frivolous: "Notwithstanding any filing fee . . . , the court *shall* dismiss the case at any time if the court determines that . . . the action or appeal . . . is frivolous or malicious . . . ." § 1915(e)(2)(B)(i) (emphasis added). And not only do courts have that statutory obligation, they also have inherent authority to dismiss an appeal once it becomes apparent it is frivolous. *Mallard* v. *United States Dist. Ct.*, 490 U.S. 296, 307–08 (1989) ("Section 1915(d)"—now § 1915(e)—"for example, authorizes courts to dismiss a 'frivolous or malicious' action, but there is little doubt they would have power to do so even in the absence of this statutory provision."); see also *Pillay* v. *INS*, 45 F.3d 14, 17 (2d Cir. 1995) ("[T]his court has inherent authority, wholly aside from any statutory warrant, to dismiss an appeal or petition for review as frivolous when the appeal or petition presents no arguably meritorious issue for our consideration.").

This distinction between what an affirmance is and a dismissal is explains why, for example, when the Tenth Circuit in *Jennings* summarized the rules flowing from its interpretation of § 1915(g), it set out one rule for if it "affirm[ed] a district court dismissal" and another for if it "dismiss[ed] as frivolous the appeal of an action the district court dismissed"; in the former circumstance, the district-court dismissal counts as "a single strike," while for the latter "both dismissals count as strikes." 175 F.3d at 780; accord *Thompson*, 492 F.3d at 440 ("Appellate dismissals count as strikes" but "[a]ppellate affirmances do not," "unless the court expressly states that the appeal

itself was frivolous, malicious or failed to state a claim.").

In short, the relevant statutory words—"action," "appeal," "prior occasions," and "was dismissed"—all confirm that Congress intended district-court dismissals to count as strikes when the district court enters the dismissal. The interpretation of the "three strikes" provision, therefore, that most faithfully hews to § 1915's text—which is the best indicator of Congress's purpose—is the one that counts a district-court dismissal as a strike when it occurs.

B. Treating district-court dismissals as strikes is consistent with the ordinary rules about district-court judgments.

This understanding of the phrase "an action . . . was dismissed" is also consistent with the usual rule that district-court judgments, including dismissals, have legal effect even before they are final on appeal. And, as Coleman acknowledges, courts should follow the usual procedural rules unless Congress expressly departs from them, Pet. Br. 26–27 (citing *Jones*, 549 U.S. at 216), which it did not do here.

Stays pending appeal demonstrate the usual rule that district-court judgments have legal effect when entered. If a party that loses in a district court wants to escape the fact that a judgment against it can be enforced even during the period for appeal, the party must seek a stay. E.g., FED. R. CIV. P. 62(d) (requiring a party to post a bond to stay a judgment); FED. R. APP. P. 8(a) (requiring the permission of a court to stay the effect of a judgment); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE

§ 2905 (3d ed.) ("In the absence of a stay obtained in accordance with Rule 62(d), the pendency of an appeal does not prevent the judgment creditor from acting to enforce the judgment."). In other words, the party seeking a stay must justify why a court should deviate from the normal course of treating the judgment as immediately enforceable and should instead grant a stay pending appeal.

Rules governing res judicata also recognize that district-court judgments have effect even if the period for appeal is still open. As this Court has explained, "[t]ypically, a federal judgment becomes final for appellate review and claim preclusion purposes when the district court disassociates itself from the case, leaving nothing to be done at the court of first instance save execution of the judgment." *Clay* v. *United States*, 537 U.S. 522, 527 (2003); accord *Erebia* v. *Chrysler Plastics Prods. Corp.*, 891 F.2d 1212, 1215 n. 1 (6th Cir. 1989) ("[T]he established rule in the federal courts is that a final judgment retains all of its preclusive effect pending appeal."); *Nat'l Post Office Mail Handlers* v. *Am. Postal Workers Union*, 907 F.2d 190, 192 (D.C. Cir. 1990) (explaining that the "federal rule is to grant preclusive effect to [a] final judgment even when appeal is pending"); *Ross ex rel. Ross* v. *Bd. of Educ. of Twp. High Sch. Dist. 211*, 486 F.3d 279, 284 (7th Cir. 2007) ("the fact that an appeal was lodged does not defeat the finality of the judgment"); 18A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4433 (2d ed. 2002) ("The bare act of taking an appeal is no more effective to defeat preclusion than a failure to appeal."); 18 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 131.30[2][c] (3d

ed.) ("A final judgment in federal court can be the basis for claim preclusion despite the fact that an appeal is pending, or that the judgment may be subject to appeal in the future.").

Even comparatively minor details—like when interest begins to run—confirm that district-court judgments have legal consequences. FED. R. APP. P. 37(a) ("Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered."); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE PROCEDURE § 2785 (3d ed.) ("Ordinarily interest on a judgment runs from the date of its entry . . . ."). And nothing in § 1915(g) suggests that Congress intended to depart from the usual practice in the federal courts that district-court dismissals have legal effects, even if pending on appeal and therefore subject to reversal.

Quite the opposite, another provision of § 1915 shows that Congress affirmatively wanted district-court judges to be able to deny a prisoner pauper status for purposes of appealing a ruling *in the same case*: "*An appeal may not be taken* in forma pauperis if the *trial court* certifies in writing that it is not taken in good faith." § 1915(a)(3) (emphasis added). Both the statutory language and the usual practice point in the same direction: Congress intended a district court's dismissal of an action to count when entered by the district court, regardless of any appeal.

This reasoning tracks this Court's decision in *Jones*. There, the Sixth Circuit imposed procedural

requirements on prisoners that were not found in the text of the PLRA itself. Specifically, the court of appeals required the prisoner to plead facts with specificity to show exhaustion. 549 U.S. at 202. The Sixth Circuit imposed this heightened-pleading requirement for what it thought were good policy reasons: " 'to facilitate the Act's screening requirements' " so that the PLRA would "function effectively." *Id.* at 213, 214 (quoting *Baxter* v. *Rose*, 305 F.3d 486, 488 (6th Cir. 2002)). In response, this Court admonished "that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Id.* at 212. While this Court understood "the reasons behind the decisions of some lower courts to impose a pleading requirement on plaintiffs in this context," "that effort cannot fairly be viewed as an interpretation of the PLRA." *Id.* at 216. Because "the lower court's procedural rule lack[ed] a textual basis in the PLRA," this Court refused to read the procedural requirement into the statute. *Id.* 217.

This same analysis applies here. As Coleman concedes with commendable candor, it is "true" that "the statute 'does not say that the dismissal must be final in all of the courts of the United States.' " Pet. Br. 30 (quoting Pet. App. 4a). In other words, the text of the PLRA does not require that a district-court dismissal be final on appeal to count as a strike. Even if lower courts think there are good reasons for departing from the statute's text—in other words, even if they would write the statute differently were it up to them—this Court should not follow them by penciling into the PLRA a finality requirement that Congress did not impose.

C. Courts that have imposed a finality requirement have acknowledged that they are not following § 1915(g)'s text.

Despite § 1915(g)'s plain text, a number of circuits have relied on "the policy concern that a 'hyper-literal' reading of § 1915(g)"—i.e., applying the plain text—"will 'freeze out meritorious claims or ossify district court errors' by effectively preventing appellate courts from performing their function." *Henslee* v. *Keller*, 681 F.3d 538, 543 (4th Cir. 2012). But like *Henslee*, every circuit that has relied on this policy concern has affirmatively admitted that it is departing from the statute's plain text.

Take the Fifth Circuit's 1995 decision in *Adepegba*, the case that started the trend of reading a finality requirement into § 1915(g). There, the Fifth Circuit openly admitted that the statutory text would count a district-court dismissal as a strike even if it were still subject to appeal: "A hyper-literal reading of the statute might also bar a prisoner's appeal of an erroneous third strike, since the appeal would follow three prior dismissals." 103 F.3d at 388. The court nonetheless decided that a dismissal "should not count against a petitioner until he has exhausted or waived his appeals." *Id.* at 387. The Fifth Circuit thus substituted its view of when a dismissal should count for Congress's. But see *Jones*, 549 U.S. at 216 ("the judge's job is to construe the statute—not to make it better").

Other circuits adopting the rule that Coleman urges have, like the Fourth and Fifth Circuits, overtly admitted that the text Congress actually wrote requires a prisoner to pay filing fees up front

after a third district-court dismissal. *Jennings*, 175 F.3d at 780 (10th Cir.) ("[A] 'hyper-literal' reading of § 1915(g) to count all district court dismissals as 'prior occasions' whether or not the litigant has appealed those decisions could bar a prisoner's appeal of an erroneous third strike, since the appeal would follow three prior dismissals. Or, an indigent prisoner's fourth claim could expire while one or more of his first three dismissals was being reversed on appeal."); *Ball* v. *Famiglio*, 726 F.3d 448, 465 (3d Cir. 2013) (same); *Chavis*, 618 F.3d at 169 (2d Cir.) (admitting that "the seemingly natural reading of § 1915(g)" means that "a district court dismissal that counts as a third strike would effectively be unreviewable," but reading a finality-on-appeal requirement into the statute to avoid this outcome); *Silva*, 658 F.3d at 1099 n.5 (9th Cir.) (criticizing the Seventh Circuit because it "applied § 1915(g) 'literally' and reasoned that once a case is dismissed, it must immediately be counted as a strike"); *Thompson*, 492 F.3d at 432 (D.C. Cir.) (recognizing that "section 1915(g) nowhere expressly states that dismissals must be final to count as strikes," but concluding that limitation is "fairly implied"). Even the dissent below makes this admission. Pet. App. 9a (criticizing the Seventh Circuit for its "literal reading of the provision"). In short, these decisions concede that they are failing to apply the statute as Congress wrote it.

II. Applying § 1915(g)'s plain text furthers Congress's purpose of ending abusive filings.

Courts taking the tack of inserting a final-on-appeal requirement into the statute have justified

the insertion by asserting that applying the text "would, within those narrow set of cases in which the third strike is appealed, effectively eliminate our appellate function." *Thompson*, 492 F.3d at 432; see also, e.g., *Chavis*, 618 F.3d at 169; *Silva*, 658 F.3d at 1099 n.5. They have argued that "[h]ad Congress intended such an unusual result, we expect it would have clearly said so." *Thompson*, 492 F.3d at 432.

The first problem with this argument is that Congress *did* clearly say it was eliminating *in forma pauperis* appeals. The opening words of the three-strikes statute show that Congress specifically intended to deny pauper status for appellate filings after a third district-court dismissal: "*In no event* shall a prisoner . . . *appeal a judgment* . . . under this section if the prisoner has, on 3 or more prior occasions . . . brought *an action* . . . that was dismissed" on qualifying grounds. § 1915(g) (emphasis added). Under this plain language, once a prisoner has incurred three dismissals (whether district-court or appellate), he may no longer initiate a new appeal as a pauper. And another provision of § 1915 also confirms that Congress was willing to terminate pauper status *on appeal*: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." § 1915(a)(3).

The argument's second problem is that requiring a prisoner to pay a filing fee before appealing a civil judgment does not eliminate her ability to appeal—it simply returns her to the place of the ordinary American citizen who must pay the filing fee before filing. "Adherence to this procedure no more

'effectively eliminate[s] our appellate function' than does the requirement of filing fees in general." *Silva*, 658 F.3d at 1108 (O'Scannlain, J., dissenting).

Along the same lines, the argument started in *Adepegba* and carried forward through its progeny—the argument that § 1915(g) must be read to include a final-on-appeal requirement so as "not to freeze out meritorious claims or ossify district court errors," 103 F.3d at 388; see also *Jennings*, 175 F.3d at 780; *Thompson*, 492 F.3d at 433; *Silva*, 658 F.3d at 1100; *Henslee*, 681 F.3d at 541; *Ball*, 726 F.3d at 465—is really a criticism that applies to filing fees in general, not just to filing fees that apply because of § 1915(g). *All* filing fees create a risk of barring meritorious claims or leaving district-court errors intact, in cases filed by the indigent and the non-indigent alike, yet that is not a reason to second-guess Congress's decision to impose filing fees.

Treating a prisoner—someone who has all of life's necessities provided for him (food, shelter, clothing, and medical care) by his fellow citizens—like an ordinary law-abiding citizen who must decide if filing an action or an appeal is worth the cost is not, as Coleman would have it, a "harsh" result. E.g., Pet. Br. 13. To the contrary, it is precisely what Congress intended. As Senator Kyl explained, requiring prisoners to pay filing fees before filing "will force prisoners to think twice about the case and not just file reflexively." 141 Cong. Rec. S7526 (May 25, 1995). "Prisoners will have to make the same decision that lawabiding Americans must make: Is the lawsuit worth the price?" *Id.*

As the Fourth Circuit recognized when rejecting a challenge to other provisions of the PLRA, the statute's approach is "hardly draconian": "Requiring prisoners to make economic decisions about filing lawsuits does not deny access to the courts; it merely places the indigent prisoner in a position similar to that faced by those whose basic costs of living are not paid by the state." *Roller* v. *Gunn*, 107 F.3d 227, 233 (4th Cir. 1997). "Those living outside of prisons cannot file a lawsuit every time they suffer a real or imagined slight[;] [i]nstead, they must weigh the importance of redress before resorting to the legal system." *Id.* In fact, "[i]f a prisoner determines that his funds are better spent on other items rather than filing a civil rights suit, 'he has demonstrated an implied evaluation of that suit' that the courts should be entitled to honor." *Id.* (quoting *Lumbert* v. *Illinois Dep't of Corrs.*, 827 F.2d 257, 259 (7th Cir. 1987)); *Rodriguez* v. *Cook*, 169 F.3d 1176, 1180 (9th Cir. 1999) ("If inmates are unwilling to save their money and prepay filing fees, such a decision may be a good indicator of the merits of the case. Courts would be well served by prisoners making such a decision before filing claims.").

In short, "[p]risoners are not similarly situated to non-prisoners": unlike non-prisoners, "[t]hey have their basic material needs provided at state expense," "[t]hey are further provided with free paper, postage, and legal assistance," and "[t]hey often have free time on their hands that other litigants do not possess." *Roller*, 107 F.3d at 234.

Nor does requiring a prisoner to pay a full filing fee up front after a third strike necessarily preclude

the prisoner from filing an appeal. A prisoner with three strikes has a "list of options." *Lewis*, 279 F.3d at 530. He could "[p]ay the filing fee" "using assets on hand." *Id.* He could "[s]ave up in advance to be able to pay the fee in a lump sum." *Id.* He could "[b]orrow the filing fee from friends and relatives." *Id.* He could "[b]orrow the filing fee from a lawyer—for 42 U.S.C. § 1988 promises reimbursement of prevailing prisoners' legal expenses, and this plus a share of any recovery may well attract the assistance of counsel, who may (and often do) advance their clients' expenses in contingent-fee cases." *Id.* This option would be available to a prisoner with a truly meritorious claim. Or he could "[s]ue in state rather than federal court," *id.*, assuming he has not already run afoul of a state three-strikes provision, e.g., MICH. COMP. LAWS § 600.5507(1).

To put the first two options in perspective, it is important to remember that prisoners are not without the opportunity to earn money. They can earn income by working within the prison in a variety of unskilled or skilled positions, by attending educational or training programs, by working outside the prison on public works, or by working within a correctional industrial facility. In Michigan, for example, inmates can earn wages at a rate of roughly $850 a year by taking educational classes or by working in the prisoner food service. See, e.g., Mich. Dep't of Corr. Policy Directive 05.02.110 at attachment A (listing daily and hourly pay schedule). Michigan prisoners can earn higher wages by qualifying to work for Michigan State Industries, a program that teaches prisoners marketable skills and provides work experience; working for MSI, a

prisoner can earn wages at a rate of up to almost $1,850 a year. See Mich. Dep't of Corr. 2013 Statistical Report at F-12 (listing hourly pay schedule). Given that filing a complaint costs $400 and filing an appeal costs $505, accord Pet. Br. 6, a diligent Michigan prisoner could earn sufficient funds to pay the appellate filing fee in about three months. Accord *Lewis*, 279 F.3d at 530 ("Sav[ing] up in advance to be able to pay the fee in a lump sum . . . would have taken Lewis about two months, had he deemed the litigation sufficiently important to justify using all of his income for this purpose").

Any claim that this is a harsh result is further undermined by the fact that not being able to appeal a third strike is a risk that falls only on prisoners who have already demonstrated on three occasions a propensity to abuse the judicial system. There is nothing harsh about subjecting such a prisoner to consequences for that continued abuse. *Lewis*, 279 F.3d at 531 ("Section 1915(g) imposes a penalty for crying 'wolf.' "). As the Seventh Circuit has observed, "[s]ection 1915(g) singles out only a subset of prisoners—those who have established, by their own conduct, that they are among the abusers of the judicial system," and [r]equiring persons who have abused the *forma pauperis* privilege in the past to pay in the future is a sensible and modest step." *Id.* at 529. And as the Eighth Circuit put it, prisoners "risk the known possibility of being denied IFP status for future nonfrivolous § 1983 action when they choose to continue filing frivolous, malicious, and meritless suits after receiving notice of dismissals that would count as § 1915(g) strikes; indigent inmates therefore control whether the

three-strikes rule is ever applied to them." *Higgins* v. *Carpenter*, 258 F.3d 797, 800 (8th Cir. 2001).

Indeed, this Court itself has cut off appeals for prisoners who have demonstrated that they are abusing the *in forma pauper* privilege, even though that too risks ossifying lower court errors—which, if published, are binding precedent in their circuit—and freezing out meritorious appeals. E.g., *In re McDonald*, 489 U.S. 180, 184 (1989) (barring prisoner from filing extraordinary writs *in forma pauperis*); *In re Sindram*, 498 U.S. 177, 180 (1991) (per curiam) (same); *Shieh* v. *Kakita*, 517 U.S. 343 (1996) (barring prisoner from filing petitions for certiorari *in forma pauperis*); *Martin* v. *D.C. Court of Appeals*, 506 U.S. 1 (1992) (same). In *Sindram*, this Court recognized that it "has a duty to deny *in forma pauperis* status to those individuals who have abused the system" to prevent frivolous filings "from unsettling the fair administration of justice." 498 U.S. at 597. And it has observed that " '[e]very paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources," and that "[a] part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice." *Martin*, 506 U.S. at 3 (quoting *In re McDonald*, 489 U.S. at 184).

In the end, the "negative consequences" that Coleman complains about "are precisely the consequences intended by Congress." *Abdul-Akbar*, 239 F.3d at 315. When an inmate who has already incurred two qualifying dismissals files a meritless action, Congress intended that "[i]n no event" should

the prisoner be allowed either to "bring a civil action"—let alone the four Coleman brought—or to "appeal" that dismissal while using the privilege of pauper status. § 1915(g). Congress intended to take away a statutory privilege that it created—the privilege of paying later, instead of up front—from those who have abused it. See *White* v. *Colorado*, 157 F.3d 1226, 1233 (10th Cir. 1998) (" 'proceeding [*in forma pauperis*] in a civil case is a privilege, not a right—fundamental or otherwise' ") (quoting *Rivera* v. *Allin*, 144 F.3d 719, 724 (11th Cir. 1998, and adding alteration), abrogated on other grounds by *Jones*, 549 U.S. at 204 n.2); accord *Abdul-Akbar*, 239 F.3d at 314 ("the privilege of filing I.F.P."); *Adepegba*, 103 F.3d at 385 ("the PLRA revokes prisoners' privileges to proceed i.f.p."); *Lewis*, 279 F.3d at 528 ("there is no constitutional entitlement to subsidy").

Two more points warrant brief comment, each relating to Coleman's call for leniency. First, Coleman observes that "the Sixth Circuit offered virtually no affirmative reasoning to support its interpretation of the statute" that "a dismissal that counts as a third strike would not constitute a 'prior occasion' in an appeal from that dismissal." Pet. Br. 28. That criticism is valid, but Coleman draws the wrong conclusion from it. Pet. Br. 29 (arguing that "the 'occasion' is not complete, and a strike should not be assessed, until the appeal has concluded"). As already explained, § 1915(g) specifies the "prior occasions" that it is talking about: the dismissal of an action and the dismissal of an appeal. Thus, the Sixth Circuit's erroneous premise that an action and an appeal can be the same occasion—the premise on

which Coleman's case rests—cannot be reconciled with the fact "that § 1915(g)'s phrase 'action or appeal' disjunctively juxtaposes 'action' and 'appeal.' " *Chavis*, 618 F.3d at 168.

Second, Coleman also notes that the Seventh Circuit attempted, in *Robinson* v. *Powell*, 297 F.3d 540, 541 (7th Cir. 2002), "to mitigate the harsh effects of the purportedly 'literal' interpretation" of § 1915(g) by allowing a prisoner to ask the court of appeals for leave to file *in forma pauperis* under Federal Rule of Appellate Procedure 24(a)(5). Pet. Br. 33. But asking for leave under Rule 24(a) should not be an option, because, as Coleman correctly acknowledges, "a court cannot use a procedural rule to circumvent the requirements imposed by a later-enacted statute." Pet. Br. 33–34. That is why, after the Seventh Circuit's decision in *Powell*, Rule 24 was amended "to clarify that the rule is not meant to conflict with anything required by the PLRA or any other statute." Advisory Committee's Notes on 2002 Amendment to FED. R. APP. P. 24. The 2002 amendments, which took effect about five months after the Seventh Circuit decided *Powell*, added subsection (a)(3)(B) to Rule 24. That subsection provides that although someone granted pauper status in the district court ordinarily will automatically qualify for pauper status on appeal, this automatic qualification does not apply if "a statute provides otherwise." Some ambiguity remains in the rule as a textual matter because this new subsection appears only under the automatic IFP provision—subsection (a)(3)—and not under the discretionary IFP provision—subdivision (a)(5). But to the extent that subsection (a)(5) formerly gave

appellate courts discretion to grant pauper status regardless of the number of prior dismissals a prisoner had incurred, Congress eliminated that discretion by passing the PLRA. See, e.g., *Jackson* v. *Stinnett*, 102 F.3d 132, 135 (5th Cir. 1996) ("Rule 24 does not nullify section 1915 of the PLRA . . . . Quite the opposite, the PLRA repeals the inconsistent provisions of Rule 24(a).").

In the end, courts must apply § 1915(g) as written. They can no more circumvent it by means of a procedural rule than they can rewrite it by inserting a finality-on-appeal requirement.

III. Counting a district-court dismissal is an easily administrable rule.

Coleman spends much effort arguing that his proposed rule would be easier for courts to administer. Pet. Br. 12, 13, 21–25. To justify this effort, Coleman relies on the proposition that "this Court should attach particular weight to considerations of workability and administrability" when "interpreting a statute that governs the processing of lawsuits by federal courts." Pet. Br. 21 (citing *Hertz Corp.* v. *Friend*, 559 U.S. 77, 80 (2010)). But while those considerations properly apply when interpreting "ambiguous language," *Hertz*, 559 U.S. at 83–84, they do not justify disregarding unambiguous text. "However attractive" "an 'easily administrable standard' " might be, it cannot be imposed if "it is not a rule rooted in the [statutory] text." *Golan* v. *Holder*, 132 S. Ct. 873, 891 n.32 (2012). In statutory construction, "one cardinal rule must govern, and it is this; that wherever the will or intention of the lawmaking power is declared in

plain and unequivocal terms, that will or intention must be followed—absolutely followed." *Binns* v. *Lawrence*, 53 U.S. 9, 17 (1851).

In short, the question before the Court is not how Congress *should* have drafted the statute. The question is what rule *did* Congress draft. See *Jones*, 549 U.S. at 216 ("The judge 'must not read in by way of creation,' but instead abide by the 'duty of restraint, th[e] humility of function as merely the translator of another's command.' ") (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533–34 (1947)).

In any event, there is nothing difficult about applying a rule that a third strike counts at the time the district court dismissed the action. As this case illustrates, all a court needs to do to apply § 1915(g)'s text is determine when the district court dismissed the action. The courts in this case had no difficulty with this approach. E.g., Pet. App. 4a (relying on the date of the district court dismissal), 19a, 34a, 44a, 53a. Indeed, this step merely requires looking at the district court's docket, and so is simpler than doing the math required to determine whether the time for an appeal has run (or whether extensions are available, such as to petition for certiorari). See *Ball*, 726 F.3d at 465 n. 22 (observing that a finality-on-appeal rule "leaves open the question of whether a prisoner accrues a strike as soon as a dismissal by the district court is affirmed by a court of appeals, or only when the Supreme Court has denied or dismissed a petition for a writ of certiorari or the time for filing one has passed").

Coleman's primary argument that Congress's rule is difficult to apply focuses on the possibility that a prisoner who already has two prior strikes against him for meritless filings might suffer an erroneous dismissal of a third action that was actually meritorious. As an initial matter, this is, probability-wise, likely to be a very small subset of cases. But more fundamentally, it is simply a consequence of the ordinary principle that district-court judgments have legal effect from the time they are entered, unless they are subsequently reversed (or stayed).

Again, settled principles of res judicata show that this "fluid approach," to use Coleman's phrase, Pet. Br. 22, is a routine aspect of the law of judgments. As one circuit recently observed, "[d]ating back at least to *Butler* v. *Eaton*, 141 U.S. 240, 242–44 (1891), a bedrock principle of preclusion law has been that a reversed judgment cannot support preclusion; indeed, 'a second judgment based upon the preclusive effects of the first judgment should not stand if the first judgment is reversed.' " *Levi Strauss & Co.* v. *Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1372 (Fed. Cir. 2013) (quoting 18A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4433 (2d ed. 2002) (footnote and parallel citations omitted)); *id.* (" 'Should the judgment be . . . reversed on appeal, however, res judicata [in the sense covering both preclusion doctrines] falls with the judgment.' ") (quoting 18A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4427 at 5, and adding alteration); accord *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 15–16 (2001) (Ginsburg, J., concurring in the judgment) ("a 'judgment based

upon the preclusive effects of [a prior] judgment should not stand if the [prior] judgment is reversed' ") (alterations in original); *State of California Dep't of Soc. Servs.* v. *Thompson*, 321 F.3d 835, 847 (9th Cir. 2003) ("Once a decision of the district court is reversed, the 'judgment cannot serve as the basis for a disposition on the grounds of res judicata or collateral estoppel.' "); *Salton, Inc.* v. *Philips Domestic Appliances & Pers. Care B.V.*, 391 F.3d 871, 881 (7th Cir. 2004) ("[O]nce a judgment is reversed it ceases to have collateral estoppel effect.").

This rule makes sense, because a reversal "vacates the judgment entirely, technically leaving nothing to which [a court] may accord preclusive effect." *Dodrill* v. *Ludt*, 764 F.2d 442, 444 (6th Cir. 1985); accord *Butler*, 141 U.S. at 244 (describing a judgment that had been reversed as "without any validity, force, or effect, and ought never to have existed"); 36 C.J.S. *Federal Courts* § 739 ("the effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the cause standing as if such judgment, order, or decree had never been rendered"); 5 AM. JUR. 2D *Appellate Review* § 803. This reasoning shows that once a district-court dismissal has been reversed, it is completely nullified, as if it had never occurred, so no strike could be based on a reversed dismissal.

Applying these same principles to § 1915(g) is no more difficult to administer than this "bedrock principle of preclusion law" is. *Levi Strauss & Co.*, 719 F.3d at 1372. It is simple to apply the rule that a strike counts until it is reversed. If a third strike is reversed, then the prisoner can resume using pauper

status for any new claims that might have arisen since the erroneous dismissal. And during that time period when the appeal is pending, the prisoner may proceed like any other citizen, by paying the filing fee up front out of his income (which is available for discretionary spending, given that the state is providing his necessities) or by borrowing the money. And while Coleman expresses concern that a statute of limitations might run on a meritorious claim during the pendency of appeal, Pet. Br. 22–23, a prisoner with a meritorious claim could borrow from a lawyer or even buckle down to earn the money before the limitations period ends. Again, "[i]f inmates are unwilling to save their money and prepay filing fees, such a decision may be a good indicator of the merits of the case." *Rodriguez*, 169 F.3d at 1180.

Thus, even setting aside the fact that courts must enforce statutes as written, the statute that Congress wrote is in fact readily administrable.

* * *

In the end, there is nothing in § 1915(g) that suggests Congress intended to impose a final-on-appeal requirement or to deviate from the usual procedure that a district-court judgment would have legal effect when entered. To the contrary, all signs indicate that Congress intended just the opposite. Accordingly this Court should affirm the court of appeals and hold that an action is dismissed under § 1915(g) when the district court enters its judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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APPENDIX

28 U.S.C. § 1915 provides:

(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.