No.

In the Supreme Court of the United States

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

TODD TOLLEFSON, ET AL.

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

BERTINA BOWERMAN, ET AL.

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

STEVEN DYKEHOUSE, ET AL.

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

AARON J. VROMAN, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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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 petition for a writ of certiorari covers the judgments in four cases. Petitioner in each of the four cases is André Lee Coleman-Bey.

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

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

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

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

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PETITION FOR A WRIT OF CERTIORARI

André Lee Coleman-Bey respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in these cases. Pursuant to Rule 12.4, petitioner files a single petition covering all of the judgments in these cases, as they arise from the same court and involve identical or closely related questions.

OPINIONS BELOW

The opinion of the court of appeals in *Coleman-Bey* v. *Tollefson* (App., *infra*, 1a-14a) is reported at 733 F.3d 175. The relevant orders of the court of appeals in *Coleman-Bey* v. *Bowerman* (App., *infra*, 26a-29a), *Coleman-Bey* v. *Dykehouse* (App., *infra*, 36a-39a), and *Coleman-Bey* v. *Vroman* (App., *infra*, 46a-49a) are unreported. The opinions of the district courts in all four cases (App., *infra*, 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 (App., *infra*, 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 in these cases to and including May 12, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION 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.

STATEMENT

These cases present a deep conflict among the courts of appeals on a straightforward and important question of statutory interpretation. 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." These cases present the question whether a district court's dismissal of a lawsuit on one of the stated grounds counts as a "strike" for purposes of Section 1915(g) while it is still pending on appeal or before the time for seeking appellate review has passed.

In each of these cases, 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 have counted as his third "strike" was still on appeal. In each case, the district court denied petitioner's motion. App., *infra*, 17a-25a, 32a-35a, 42a-45a, 52a-54a.

In the first of these cases, *Tollefson*, the Sixth Circuit affirmed. App., *infra*, 1a-14a. In a divided opinion, it held that a dismissal counts as a "strike" even if it was still on appeal at the time the instant action was commenced. Notably, both the majority and the dissenting opinions acknowledged that the court's decision deepened a circuit conflict on the question whether exhaustion or forfeiture of appeal is necessary before a dismissal can count as a "strike" for purposes of Section 1915(g). And both the majority and the dissenting opinions recognized that the court's interpretation was contrary to that of most of the other courts of appeals. Ap-

plying its decision in *Tollefson*, the court of appeals subsequently denied petitioner *in forma pauperis* status in the other cases. Because these cases constitute an ideal vehicle for resolving the circuit conflict on an important and recurring question of federal law, the petition for a writ of certiorari should be granted.

1. 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). Congress most recently amended that 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. 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." *Jones* v. *Bock*, 549 U.S. 199, 203 (2007). Consistent with our legal system's "guarantee[] that prisoner claims of illegal conduct by their custodians are fairly handled according to law," Congress enacted a variety of reforms designed to "filter out" nonmeritorious prisoner claims while "facilitat[ing] consideration" of meritorious ones. *Id.* at 203-204.

Of relevance here, the PLRA added Section 1915(g) to the federal *in forma pauperis* statute. That subsection, known as the "three strikes" provision, 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). In most instances, therefore, a prisoner who is

deemed to have three or more "strikes" under Section 1915(g) is barred from proceeding with a civil action in federal court unless he first pays the full amount of the ordinary filing fee (currently set at $350). See 28 U.S.C. 1914(a).

2. Petitioner is an inmate in the Baraga Correctional Facility, a Michigan state prison. 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 that they had violated his constitutional rights by interfering with his access to the courts. He also moved for leave to proceed *in forma pauperis*. App., *infra*, 2a, 17a.

Citing the "three strikes" provision, the district court denied petitioner's motion. App., *infra*, 17a-20a. The district court identified three prior lawsuits that had been filed by petitioner and dismissed by federal district courts in 1992, 2008, and 2009. *Id.* at 19a. The court added that petitioner did not qualify for the exception to the "three strikes" rule because he was not in imminent physical danger. *Id.* at 19a-20a.

Petitioner moved for reconsideration, arguing, as is relevant here, that the third of the dismissals on which the district court relied could not count as a "strike" because it was still on appeal when petitioner filed the instant complaint (and when the district court denied him leave to proceed *in forma pauperis*). The district court denied the motion. App., *infra*, 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. The district court acknowledged that the Fifth Circuit had reached the opposite conclusion, but declined to follow its reasoning. *Id.* at 23a-24a (citing *Adepegba* v. *Hammons*, 103 F.3d 383 (1996)). The

district court asserted that "[t]he language of [Section] 1915(g) is clear, and it does not make an exception for a dismissal that has been appealed." *Id.* at 23a. In the court's view, "a judgment of dismissal by a district court is final and should be given full effect, unless stayed upon appeal." *Ibid.*

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

3. 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. App., *infra*, 1a-14a.

a. The court of appeals reasoned that "[a] literal reading of [Section] 1915(g) requires district courts to count as strikes cases that are dismissed on the grounds enumerated in the provision even when pending on appeal." App., *infra*, 4a. The court explained that, because Section 1915(g) "does not say that the dismissal must be final in all of the courts of the United States," a "case pending on appeal" still counts as a "strike." *Ibid.* (citation omitted). The court added that its 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. In so construing Section 1915(g), the court of appeals noted that the Seventh Circuit had reached the same conclusion in *Robinson* v. *Powell*, 297 F.3d 540 (2002). App., *infra*, 4a.

The court of appeals acknowledged that "several circuits have held that dismissal does not count as a strike

until the litigant has exhausted or waived his appellate rights." App., *infra*, 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. 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*, *supra*). The court of appeals, however, rejected the analysis of those courts. *Id.* at 5a-6a. Instead, the court of appeals held that a district court's dismissal of a lawsuit "count[s] as a strike continually from when it was entered." *Id.* at 7a. Because of that holding, the court of appeals did not "address the relevance" of the timing of the eventual affirmance of the dismissal at issue. *Ibid.*[1]

b. Judge Daughtrey dissented. App., *infra*, 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

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

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).

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." App., *infra*, 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. And she criticized the panel majority for "fail[ing] to provide any relief for litigants like [petitioner] who seek pauper status to litigate [a] * * * case" unrelated to the underlying dismissals. *Id.* at 12a.

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 would have reached the question that the panel majority did not: namely, "at precisely what point in the litigation process the finality of any prior dismissals should be assessed." App., *infra*, 12a. In light of the relevant statutory language, as well as various decisions of other courts, Judge Daughtrey would have assessed finality as of the date of the filing of the complaint (or, in the case of a prisoner seeking *in forma pauperis* status on appeal, the date of the notice of appeal). *Id.* at 13a. Because the dismissal at issue was still on appeal when petitioner filed the instant complaint, Judge Daughtrey concluded that the district court should have granted petitioner *in forma pauperis* status. *Id.* at 13a-14a.

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

4. Like *Tollefson*, the other cases that are the subject of this petition—*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 counted as the third "strike" was still on appeal when the instant complaint was filed. App., *infra*, 34a, 44a, 53a.[2] And the district court denied petitioner's motion for leave to proceed *in forma pauperis* 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 the complaints for want of prosecution. Unlike in *Tollefson*, however, the district court also denied petitioner leave to proceed *in forma pauperis* for purposes of appeal. App., *infra*, 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 before he could appeal the district court's underlying denial of *in forma pauperis* status. Relying on its earlier 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. App., *infra*, 26a-29a, 36a-39a,

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[2] In addition, in each case except for *Bowerman*, the dismissal was still on appeal (or the time for filing a petition for certiorari had not expired) when the district court denied petitioner's motion for leave to proceed *in forma pauperis*. App., *infra*, 32a, 42a, 52a.

46a-51a. 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 subsequently dismissed each appeal for want of prosecution. *Id.* at 30a-31a, 40a-41a, 50a-51a.

REASONS FOR GRANTING THE PETITION

These cases present a straightforward and mature conflict among the courts of appeals on an important and recurring question of statutory interpretation. In the decision below, the Sixth Circuit expressly recognized that it was deepening an existing conflict on the question whether a district court's dismissal of a lawsuit counts as a "strike" for purposes of the PLRA's "three strikes" provision before petitioner has exhausted or forfeited appellate review. In fact, all twelve of the regional circuits have now spoken to the issue in some fashion. Seven circuits have squarely held that a dismissal does not count as a "strike" while it is still pending on appeal or before the time for seeking appellate review has passed, and three others have suggested that they agree with that interpretation. By contrast, besides the Sixth Circuit, only one other circuit has held that such a dismissal does count as a "strike."

That conflict warrants the Court's review in these cases. The question presented is of substantial legal and practical importance. And these cases constitute an optimal vehicle for consideration and resolution of that question—both because they cleanly present that question and because the question, while frequently encountered and extensively addressed by the lower courts, only rarely reaches the Court (and does so here with the assistance of counsel). Because these cases readily satis-

fy the criteria for further review, the petition for certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

As both the majority and the dissenting opinions in *Tollefson* recognized, see App., *infra*, 4a-5a; *id.* at 8a-9a (Daughtrey, J., dissenting), the Sixth Circuit's decision deepens a conflict among the courts of appeals concerning whether a dismissal that is still pending on appeal counts as a "strike" under Section 1915(g) for purposes of foreclosing a prisoner's ability to proceed *in forma pauperis*. That conflict has been acknowledged not only by the Sixth Circuit, but by many others. See, *e.g.*, *Henslee* v. *Keller*, 681 F.3d 538, 541 (4th Cir. 2012); *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1099 (9th Cir. 2011); *Thompson* v. *DEA*, 492 F.3d 428, 432-433 (D.C. Cir. 2007); *Robinson* v. *Powell*, 297 F.3d 540, 541 (7th Cir. 2002). This Court's review is necessary to resolve that conflict.

1. As the Sixth Circuit noted in *Tollefson*, "several circuits have held that dismissal does not count as a strike until the litigant has exhausted or waived his appellate rights." App., *infra*, 5a; see *id.* at 8a-9a (Daughtrey, J., dissenting). Seven courts of appeals have squarely held that a dismissal does not count as a "strike" while it is still pending on appeal or before the time for seeking appellate review has passed, and three other courts of appeals have signaled agreement with that interpretation.

a. One of the earliest decisions interpreting Section 1915(g) was *Adepegba* v. *Hammons*, 103 F.3d 383 (5th Cir. 1996). As is relevant here, the Fifth Circuit held that "[a] dismissal should not count against a petitioner until he has exhausted or waived his appeals" because

"[a]ny other reading of the statute poses a risk of inadvertently punishing nonculpable conduct." *Id.* at 387. The court reasoned that "[i]t is uncontroversial from the plain language of the statute that Congress intended [S]ection 1915(g) only to penalize litigation that is truly frivolous, not to freeze out meritorious claims or ossify district court errors." *Id.* at 388. A "hyper-literal reading" of the statute, by contrast, could cause a prisoner's fourth action to "expire while his first three dismissals were being reversed on appeal," and could even bar "a prisoner's appeal of an erroneous third strike" on the theory that the appeal "follow[ed] three prior dismissals." *Id.* at 387-388. Applying its interpretation, the Fifth Circuit refused to count the district court's dismissal of the plaintiff's underlying complaint as a "strike," though it ultimately denied the plaintiff *in forma pauperis* status because he had three prior dismissals that had become final on appeal. *Id.* at 388.

More recently, a divided panel of the Ninth Circuit agreed with the Fifth Circuit's decision in *Adepegba* and expanded on its reasoning. In *Silva*, *supra*, the Ninth Circuit held that a dismissal does not count as a "strike" "until it becomes final, that is, after the prisoner has waived or exhausted his opportunity to appeal." 658 F.3d at 1098. The court reasoned that, although Section 1915(g) does not expressly state whether a dismissal must be "final" in this sense, "reading the statute otherwise would be a departure from the usual practice" under 28 U.S.C. 1291 and the Federal Rules of Appellate Procedure. *Ibid.* "Congress's silence on this issue," the Ninth Circuit continued, "is 'strong evidence that the usual practice should be followed,'" and "[w]e must heed the Supreme Court's warning not to 'depart from the usual practice * * * on the basis of perceived policy concerns.'" *Id.* at 1098, 1100 (quoting *Jones*, 549 U.S. at

212). The Ninth Circuit therefore concluded that none of the three dismissals at issue should be counted as "strikes" against the plaintiff, because none was final when the plaintiff filed his notice of appeal in the instant case. *Id.* at 1100-1101.[3]

A panel of the Tenth Circuit reached the same conclusion, with approval from the en banc court, in *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775 (1999). Adopting the Fifth Circuit's reasoning in *Adepegba*, the Tenth Circuit held that a district court's dismissal "does not count as a strike until after the litigant has exhausted or waived his opportunity to appeal." *Id.* at 779-780. Because some language in earlier Tenth Circuit decisions was arguably inconsistent with that holding, the panel circulated the opinion to the en banc court, and "[e]ach member of the en banc court * * * concurred with [the] holding." *Id.* at 780 n.3. Applying its interpretation, the Tenth Circuit granted the plaintiff leave to proceed *in forma pauperis* on appeal and ruled that the district court, in denying leave, had erroneously counted as "strikes" both an earlier dismissal that was still pending on appeal and the dismissal of the plaintiff's underlying complaint. *Id.* at 779, 781.

The Eighth Circuit followed suit in *Campbell* v. *Davenport Police Department*, 471 F.3d 952 (2006) (per curiam). Citing *Adepegba* and *Jennings*, the court held

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[3] Judge O'Scannlain dissented. See 658 F.3d at 1106-1108. He would have held that a court should "look no further than the fact of *dismissal* when tallying strikes," regardless of "the case's subsequent appellate process." *Id.* at 1107. He also contended that the majority's approach would place a "strain * * * upon the federal courts" by permitting more complaints by prisoners to go forward. *Id.* at 1108.

that dismissals do not count as a "strikes" where the plaintiff "had not yet exhausted or waived his appeals in those cases" at the time he filed the instant complaint. *Id.* at 952, 953. Because none of the three dismissals at issue met that standard, the Eighth Circuit reversed the district court's denial of *in forma pauperis* status. *Id.* at 953.

Similarly, in *Thompson*, *supra*, the District of Columbia Circuit held that "a dismissal does not become a strike until an appeal thereof has been resolved or waived." 492 F.3d at 439. "Although [S]ection 1915(g) nowhere expressly states that dismissals must be final to count as strikes," the court explained, "we think it fairly implied." *Id.* at 432. Citing *Adepegba*, *Jennings*, and *Campbell*, the court reasoned that "[a] contrary rule would * * * effectively eliminate our appellate function" in cases in which a third "strike" is appealed. *Ibid.* "Had Congress intended such an unusual result," the court concluded, "we expect it would have clearly said so." *Ibid.*

Most recently, in *Ball* v. *Famiglio*, 726 F.3d 448 (2013), cert. denied, 134 S. Ct. 1547 (2014), the Third Circuit adopted "the rule of those circuits that hold that a dismissal does not count as a strike until it has been affirmed on appeal, or the opportunity to appeal has otherwise concluded." *Id.* at 465. In assessing whether the plaintiff was entitled to proceed *in forma pauperis* on appeal, the court determined that three of his prior dismissals did not count as "strikes" because they were not final when he filed the instant notice of appeal. *Id.* at 465-466.

Finally with regard to this side of the conflict, the First Circuit has applied the majority rule in an unpublished opinion. In *Michaud* v. *City of Rochester*, No. 00-1263, 2000 WL 1886289 (Dec. 27, 2000), the court de-

nied the defendants' request to revoke the plaintiff's *in forma pauperis* status, reasoning that, "[f]or reasons fully explained in the case law," the plaintiff "ha[d] not accumulated the requisite 'three strikes' under the statute." *Id.* at *2 n.1. The court cited *Adepegba* and *Jennings* for the principle that "dismissals by the district court should not be counted until after a petitioner has exhausted or waived his avenues of appeal." *Ibid.*

b. In addition to those square holdings from the First, Third, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits, the Second, Fourth, and Eleventh Circuits have suggested, to varying degrees, that they would follow the majority's interpretation of Section 1915(g).

In *Henslee*, *supra*, the Fourth Circuit addressed only the question whether a dismissal can "act as a strike to preclude [*in forma pauperis*] status on its own appeal." 681 F.3d at 543. The court reasoned that "a 'prior occasion[]' under [Section] 1915(g) cannot include the dismissal of the underlying claim." *Ibid.* While the court ultimately reserved the question presented here—*viz.*, whether a dismissal must be final on appeal to count as a "strike"—it agreed with decisions applying the majority rule that "Congress would have explicitly indicated any intent to limit the general rule allowing appeal as of right." *Id.* at 543 & n.11. On that basis, the court concluded that "[i]t would * * * be improper to interpret 'occasions,' *and* [*Section*] *1915(g) generally*, to limit the Court's appellate function in a defined class of cases." *Id.* at 543 (emphasis added). The Fourth Circuit's reasoning thus strongly suggests it would hold that a dismissal does not count as a "strike" while it is still pending on appeal.

Much the same can be said of the Second Circuit's decision in *Chavis* v. *Chappius*, 618 F.3d 162 (2010). Like the Fourth Circuit in *Henslee*, the Second Circuit

ultimately reserved the question presented here. *Id.* at 169. But the court acknowledged the plaintiff's argument that denying appellate review of a dismissal that would otherwise count as a third "strike" could lead to an "unintended and untoward result," while noting that the majority rule avoided that result by "giv[ing] that dismissal no weight as of yet." *Id.* at 168-169 (citing *Adepegba*, *Jennings*, *Campbell*, and *Thompson*). Because the plaintiff in that case had three strikes from prior lawsuits, the court did not need to resolve the question whether a dismissal counts as a "strike" while it is still pending on appeal. *Id.* at 169.

As for the Eleventh Circuit, it has articulated the requirements of the "three strikes" provision in a way that suggests it would follow the majority view. In its unpublished opinion in *Casey* v. *Scott*, 493 Fed. Appx. 1000 (2012) (per curiam), the Eleventh Circuit affirmed a district court's denial of *in forma pauperis* status. In so doing, the Eleventh Circuit noted not only that the district court had dismissed three prior lawsuits for failure to state a claim, but also that the plaintiff "did not appeal these dismissals, which was the proper avenue for challenging their merit." *Id.* at 1001. Because whether or not the plaintiff appealed would be irrelevant under the approach taken by the Sixth Circuit in these cases, that statement implies that the Eleventh Circuit would adopt the majority rule.

2. By contrast, as the Sixth Circuit noted in joining it, only the Seventh Circuit had previously held that the dismissal of a lawsuit counts as a "strike" for purposes of Section 1915(g) even while it is still pending on appeal. App., *infra*, 4a.

a. In *Robinson*, *supra*, the district court had granted the plaintiff leave to proceed *in forma pauperis* on appeal from a dismissal that would otherwise have

counted as the plaintiff's third "strike." 297 F.3d at 541. The Seventh Circuit ruled that "th[e] [district court's] authorization was contrary to the language of the statute" because the plaintiff already had two prior "strikes" and the dismissal constituted the plaintiff's third. *Ibid.* The Seventh Circuit held that a district court's dismissal immediately counts as a "strike," even before the plaintiff has had an opportunity to appeal that dismissal. *Ibid.*

The Seventh Circuit recognized that other circuits had reached the opposite result, but it chastised those courts for "refus[ing] to apply the statute literally." 297 F.3d at 541 (citing *Adepegba* and *Jennings*). Although the Seventh Circuit acknowledged that those courts had expressed a "legitimate" concern about "prevent[ing] [a] prisoner * * * from obtaining appellate review of the correctness of the ruling by the district court that resulted in his getting his third strike," it concluded that such a concern "does not require twisting the statute." *Ibid.* Instead, the court asserted, a plaintiff in that position could apply to the court of appeals for leave to proceed *in forma pauperis* on appeal, and the validity of the dismissal could be reviewed in that context. *Ibid.* The court reasoned that the contrary rule "has the anomalous result of allowing a prisoner to file, without payment, a frivolous appeal from his third strike." *Ibid.*

b. In adopting the majority rule, several courts of appeals have explicitly considered, and rejected, the Seventh Circuit's reasoning in *Robinson*. See, *e.g.*, *Henslee*, 681 F.3d at 541-542; *Silva*, 658 F.3d at 1099 n.5; *Thompson*, 492 F.3d at 433. Others have more broadly considered, and rejected, the "hyper-literal" textual interpretation adopted by the Seventh Circuit in *Robinson* (and by the Sixth Circuit in these cases). See, *e.g.*, *Ball*,

726 F.3d at 465; *Jennings*, 175 F.3d at 780; *Adepegba*, 103 F.3d at 387-388.

As matters currently stand, therefore, a district court's dismissal of a prisoner's lawsuit immediately counts as a "strike," regardless of any appeal, in the Sixth and Seventh Circuits; would not count as a "strike" until the prisoner has exhausted or forfeited appellate review in the First, Third, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits; and would likely not count as a "strike" until the prisoner has exhausted or forfeited appellate review in the Second, Fourth, and Eleventh Circuits. The resulting conflict is deeply entrenched and warrants this Court's review.

B. The Question Presented Is An Important And Recurring One That Warrants Review In These Cases

The question presented in these cases is a recurring one of substantial legal and practical importance. The applicability of the "three strikes" provision to suits brought by prisoners arises with great frequency. Yet the courts of appeals are intractably divided on the fundamental question whether the dismissal of a prisoner's suit must be final on appeal in order to count as a "strike" in the first place. These cases present the Court with an excellent and rare opportunity to resolve the conflict on that question.

1. The question presented implicates prisoners' fundamental right of access to the courts. See, *e.g.*, *Bounds* v. *Smith*, 430 U.S. 817, 821-822 (1977). This Court has long stressed the important role that the federal *in forma pauperis* statute plays in guaranteeing meaningful access to the courts for indigent litigants. See, *e.g.*, *Denton* v. *Hernandez*, 504 U.S. 25, 31 (1992); *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948). Because of the circuit conflict on the question presented,

however, there is a lack of uniformity concerning the ability of indigent prisoners to obtain further access to the federal courts: prisoners in the Sixth and Seventh Circuits are denied access in circumstances where similarly situated prisoners in the majority of other circuits are not.

Beyond the lack of uniformity, moreover, the interpretation of Section 1915(g) adopted by the Sixth and Seventh Circuits threatens to deprive prisoners with potentially meritorious claims of meaningful access to the courts. As this Court has noted, in enacting the PLRA, Congress sought to balance the need to facilitate consideration of meritorious claims by prisoners in the federal courts with the need to restrict the repeated filing of nonmeritorious claims. See, *e.g.*, *Jones*, 549 U.S. at 203-204. In light of its desire to balance those interests, "Congress could not have intended that dismissals would count as strikes immediately." App., *infra*, 10a (Daughtrey, J., dissenting). Interpreting Section 1915(g) to require that a dismissal be final on appeal before it can count as a "strike" "not only respects Congress' intent to curb meritless lawsuits, but ensures that meritorious lawsuits are not swept away in the process." *Silva*, 658 F.3d at 1100 (citation omitted).

Not only is the question presented in these cases of exceptional importance, but it recurs with great frequency. It is no coincidence that, in the less than two decades since the PLRA was enacted, all twelve of the regional circuits have spoken to the question presented in some fashion. Complaints by prisoners challenging prison conditions or claiming civil-rights violations account for approximately 9% of all civil cases in the federal system nationwide (excluding habeas petitions). See United States Courts, *Judicial Facts and Figures 2012*, tbl. 4.4 <tinyurl.com/civilcasesfiledtable>. As the cases dis-

cussed above illustrate, a prisoner filing such a complaint will often have one or more prior dismissals that are still pending on appeal at the time of filing. Whether or not those dismissals count as "strikes," in turn, will usually be dispositive of the prisoner's ability to proceed with his complaint. It thus cannot seriously be disputed that the question presented is an important and recurring one that warrants this Court's review.

2. These cases, moreover, constitute an ideal vehicle in which to consider and resolve the question presented. In each case, the dismissal that would have counted as petitioner's third "strike" was still on appeal when petitioner filed the instant complaint. See App., *infra*, 4a, 28a, 38a, 48a. And in each case, the instant complaint was unrelated to any of the complaints whose dismissals constituted the potential "strikes" against petitioner. See *id.* at 3a-4a, 27a-28a, 37a-38a, 47a-48a. That is the paradigmatic fact pattern of the cases in the circuit conflict. See, *e.g.*, *Ball*, 726 F.3d at 465-466; *Silva*, 658 F.3d at 1098; *Campbell*, 471 F.3d at 953; *Jennings*, 175 F.3d at 779-780. These cases therefore cleanly and squarely present the question whether a dismissal counts as a "strike" while it is still pending on appeal, free of any additional complication that might arise where the dismissal is potentially being counted as a "strike" *on appeal in the same case*. Cf. *Henslee*, 681 F.3d at 543 (holding that treating such a dismissal as a "strike" would contravene the discrete statutory requirement that the prisoner have brought the action or appeal giving rise to the "strike" on a "prior occasion[]").

3. The Court should take this opportunity to resolve the circuit conflict for two additional reasons.

a. No benefit would be served by allowing further percolation in the lower courts because the arguments on both sides of the conflict are so well developed. As noted

above, all twelve of the regional courts of appeals have spoken to the question presented in some fashion. And while courts often address prisoners' entitlement to *in forma pauperis* status in opinions or orders containing little analysis, the opinions in the conflict—especially the majority and dissenting opinions below in *Tollefson* and from the Ninth Circuit in *Silva*—comprehensively set out the arguments on both sides. The likelihood of further meaningful development in the law on the question presented is therefore slim.

b. Finally, these cases present a surprisingly rare opportunity for the Court to resolve the question presented. Although there have been numerous court of appeals decisions addressing the question, we are unaware of any previous petitions for certiorari that have raised it.[4] And of course, the overwhelming majority of cases presenting this question will involve prisoners who are proceeding without the assistance of counsel. See United States Courts, *Judicial Facts and Figures 2012*, tbls. 2.3 & 2.4 <tinyurl.com/2012appealsfiledbytype; tinyurl.com/2012proseappeals> (showing that 90.4% of civil appeals filed by prisoners are pro se, compared with 35.5% of civil appeals filed by non-prisoners). Here, petitioner is represented by counsel and the question has been thoroughly addressed by the lower courts, making these cases an optimal vehicle in which to decide the question.

In sum, the Sixth Circuit's decision deepens a widely recognized conflict on the question presented; that question is an undeniably important and recurring one; these

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[4] The petition for certiorari in *Ball* raised a distinct question concerning whether a dismissal on certain grounds could count as a "strike." See Pet. at i, *Ball*, *supra* (No. 13-8254).

cases constitute an ideal vehicle in which to consider the question; and it is far from clear when, if ever, the Court would have another opportunity to address the question if it denies review here. Accordingly, the Court should grant the petition for certiorari and resolve the conflict on the proper interpretation of the "three strikes" provision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2014

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1502

ANDRE LEE COLEMAN, NAMED AS "ANDRE LEE COLEMAN-BEY" ON COMPLAINT,
Plaintiff-Appellant

v.

TODD TOLLEFSON, ET AL., Defendants-Appellees.

Decided and Filed: October 23, 2013

Before: BATCHELDER, Chief Judge; DAUGHTREY and ROGERS, Circuit Judges.

ROGERS, J., delivered the opinion of the court, in which BATCHELDER, C. J., joined. DAUGHTREY, J. delivered a separate dissenting opinion.

OPINION

ROGERS, Circuit Judge.

Under the three-strikes provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g), the district court in this case properly denied pauper status to plaintiff André Lee Coleman-Bey in his civil suit, even

though one of his three previous case dismissals ("strikes") was still on appeal when this case was brought. This counting of a third dismissal still on appeal as a strike does not lead to the anomalous conclusion that the third dismissal was itself precluded from being appealed by the three-strikes rule. The district court therefore properly dismissed this case for failure to pay court fees in the absence of pauper status.

Coleman-Bey, pro se, filed a complaint in the Western District of Michigan alleging claims under 42 U.S.C. § 1983 against six workers at the Baraga Correctional Facility. He also moved for leave to proceed in forma pauperis. The district court denied that motion on the grounds that Coleman-Bey was barred from receiving pauper status under the three-strikes provision of the PLRA. *Coleman v. Tollefson*, No. 2:10-cv-337, 2011 WL 573590, at *2 (W.D. Mich. Feb. 15, 2011). The court also ordered Coleman-Bey to pay the $350 filing fee within twenty-eight days. *Id.* After twenty-eight days passed and Coleman-Bey failed to pay the fee, the court dismissed the action. Coleman-Bey subsequently moved for leave to proceed in forma pauperis on appeal, which the district court granted. This appeal followed.

The district court properly relied on the three-strikes provision of the PLRA, which prohibits prisoners who have brought multiple frivolous appeals from receiving pauper status:

> 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.

28 U.S.C. § 1915(g). Each of the three civil cases that Coleman-Bey had previously filed while incarcerated counts as a strike under the PLRA.

First, *Coleman v. Lentin*, No. 2:92-cv-120 (W.D. Mich. Aug. 31, 1992), qualifies as a strike because the docket clearly indicates that when the district judge adopted the report and recommendation of the magistrate judge and dismissed the case, he did so because he found Coleman-Bey's complaint to be "frivolous and without merit." Coleman-Bey argues that the dismissal of *Coleman v. Lentin* does not qualify as a strike because the district court failed to follow various procedural requirements outlined in *Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983), in particular the requirement that before dismissing a complaint the court must permit the petitioner to amend his complaint to correct any defects. However, the PLRA generally overruled the set of procedures outlined in *Tingler*, including the requirement that Coleman-Bey claims was violated. *See Palacio v. Hofbauer*, 106 Fed. App'x. 1002, 1005 (6th Cir. 2004). Under the PLRA, a court may dismiss an action that it finds "frivolous or malicious" without permitting the plaintiff to amend the complaint. *LaFountain v. Henry*, 716 F.3d 944, 951 (6th Cir. 2013); *see also* 28 U.S.C. § 1915(e)(2).

Second, the dismissal of *Coleman v. Kinnunen*, No. 2:05-CV-256, 2008 WL 724780 (W.D. Mich. Mar. 17, 2008), counts as a strike because it was dismissed for

failure to state a claim. Coleman-Bey argues that the dismissal of this complaint does not count as a strike because it is not a dismissal for "failure to state a claim" but rather an order granting summary judgment for absence of material issues of fact. The order of the district court, however, clearly enough indicates that the dismissal was made pursuant to a Rule 12(b)(6) motion to dismiss for failure to state a claim. Section 1915(g)'s language was clearly modeled after Rule 12(b)(6), and dismissals pursuant to that rule count as a strike. *See Thompson v. DEA*, 492 F.3d 428, 437–38 (D.C. Cir. 2007). The issue of whether an adverse summary judgment may be a strike is not before us.

Third, *Coleman v. Sweeney*, No. 2:09-cv-178, 2009 WL 3270006 (W.D. Mich. Oct. 8, 2009), counts as a strike, even though the district court's order in that case was on appeal at the time that the instant suit was brought. A literal reading of § 1915(g) requires district courts to count as strikes cases that are dismissed on the grounds enumerated in the provision even when pending on appeal. The Seventh Circuit so reasoned in *Robinson v. Powell*, 297 F.3d 540, 541 (7th Cir. 2002). See also our unpublished order in *Shavers v. Stasewich*, No. 09-1740 (6th Cir. Oct. 22, 2009), in which we rejected the plaintiff's argument that the district court erred in denying him pauper status because one of the dismissals that the district court counted as a strike was still pending on appeal. We reasoned that, because § 1915(g) "does not say that the dismissal must be final in all of the courts of the United States," the district court had not erred in counting the case pending on appeal as a strike under the PLRA.

Not only does this rule follow the plain meaning of the statute, but it is also consistent with how judgments are treated for purposes of res judicata. Under that doctrine, cases on appeal have preclusive effect until they are reversed or vacated. *See In re Dublin Sec., Inc.*, 133 F.3d 377, 381 (6th Cir. 1997).

We recognize that several circuits have held that dismissal does not count as a strike until the litigant has exhausted or waived his appellate rights. *See Henslee v. Keller*, 681 F.3d 538, 541 (4th Cir. 2012); *Silva v. Di Vittorio*, 658 F.3d 1090, 1100 (9th Cir. 2011); *Smith v. Veterans Admin.*, 636 F.3d 1306, 1310–11 (10th Cir. 2011); *Thompson v. DEA*, 492 F.3d 428, 432 (D.C. Cir. 2007); *Nicholas v. Am. Detective Agency*, 254 Fed. Appx. 116, 116 (3d Cir. 2007) (per curiam); *Campbell v. Davenport Police Dep't*, 471 F.3d 952, 953 (8th Cir. 2006) (per curiam); *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996); *see also Chavis v. Chappius*, 618 F.3d 162, 169 (2d Cir. 2010) (reserving judgment on whether an appealed dismissal may be a strike, but suggesting that denying an appeal of a third strike would be an illogical result).

Many of these cases rely on the unfounded concern that treating an appealed dismissal as a strike would preclude that very appeal. They reason that such a result would be a departure from the usual practice under the Federal Rules of Civil Procedure, which is to grant all litigants an appeal as of right from all final district court decisions. *See, e.g.*, *Silva*, 658 F.3d at 1098–99. In *Thompson*, 492 F.3d at 432, the D.C. Circuit asserted that counting a third strike while it is on appeal "would, within those narrow set of cases in which the third strike is appealed, effectively eliminate our appellate function."

The Fifth and Ninth Circuits also warned against a "hyper-literal reading of the statute [that] might . . . bar a prisoner's appeal of an erroneous third strike." *Silva*, 658 F.3d at 1099 (quoting *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996)). The Fifth Circuit has also suggested that to prevent the appeal of the third strike would violate Congress's purpose "only to penalize litigation that is truly frivolous, not to freeze out meritorious claims or ossify district court errors." *Adepegba*, 103 F.3d at 387–88. All of these rationales assume that to make a strike effective immediately upon dismissal at the district court level would preclude the prisoner from pursuing the appeal of that dismissal in forma pauperis.

The concern about this anomalous result is not warranted, however, because the third strike may be appealed even though it would count as a strike with regard to a fourth or successive suit. The statute states that the bar on in forma pauperis actions is only triggered when "the prisoner has, on 3 or more *prior occasions* . . . brought an action or appeal . . . that was dismissed" because it was frivolous, malicious, or failed to state a claim. 28 U.S.C. § 1915(g) (emphasis added). A third strike that is on appeal is not a *prior* occasion for the purposes of that appeal, because it is the *same* occasion. In Coleman-Bey's case, however, *Coleman v. Sweeney* is a "prior occasion" because the present action is a new and distinct action. It counts as a strike because it is an action that was dismissed on a prior occasion for failure to state a claim. This reasoning remains true to the statute and directly addresses the concern of some of our sister circuits regarding the appeal of the third strike.

The dismissal of *Coleman v. Sweeney*, never reversed, accordingly counted as a strike continually from when it was entered. We therefore do not rely on the fact that the dismissal had been affirmed by the time that the court denied in forma pauperis status, nor do we address the relevance of that fact. Coleman-Bey had three effective strikes both when he filed his case and when his in forma pauperis status was denied, and was thus prohibited by § 1915(g) from bringing this action in forma pauperis.

AFFIRMED.

DISSENT

DAUGHTREY, Circuit Judge, dissenting.

This appeal presents an issue that the Sixth Circuit has not addressed previously in a published opinion: whether a cause of action's dismissal that still is on appeal nevertheless can constitute a "strike" for purposes of the "three-strikes" provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g).[1] All but one of

[1] We, however, have addressed this question in two unpublished orders that provide little guidance because they reach diametrically opposed conclusions. In *Nali v. Caruso*, No. 08-2083 (6th Cir. Apr. 15, 2009), a panel of this court asserted, "Under § 1915(g), an appeal from a third frivolous suit must be final before the third suit in district court may be counted as a strike[.]" We therefore vacated a district court order that counted a non-final dismissal as a strike, and remanded the matter to the district court to "consider Nali's claims on the merits." *Id.* Sixth months later, a different panel reached the opposite conclusion. In *Shavers v. Stasewich*, No. 09-1740 (6th Cir. Oct. 22, 2009), the panel rejected the plaintiff's argument that the district court erred in denying him *in forma pauperis* status because one of the dismissals that the district court counted

our sister circuit courts that have addressed the issue have concluded that an order of dismissal must be final before it may count as a "strike" that cuts off a prisoner's right to challenge constitutional violations in most instances. Because I believe that approach is the better response to the question, I respectfully dissent from the majority's contrary conclusion.

One of the earliest opinions interpreting the three-strikes provision of section 1915(g) was issued by the Fifth Circuit shortly after the PLRA was enacted. In *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996), the court held that "[a] dismissal should not count against a petitioner [as a strike under the PLRA] until he has exhausted or waived his appeals." In the ensuing 17 years, all but one of the circuit courts addressing the issue have followed suit, either by explicitly adopting *Adepegba*'s conclusion or by indicating that this majority rule presumptively should apply. *See, e.g.*, *Ball v. Famiglio*, 726 F.3d 448, 465 (3d Cir. 2013); *Henslee v. Keller*, 681 F.3d 538, 543–44 (4th Cir. 2012); *Silva v. Di Vittorio*, 658 F.3d 1090, 1100 (9th Cir. 2011); *Smith v. Veterans Admin.*, 636 F.3d 1306, 1310–11 (10th Cir. 2011); *Chavis v. Chappius*, 618 F.3d 162, 169 (2d Cir. 2010); *Thompson v. Drug Enforcement Admin.*, 492 F.3d 428, 432–33 (D.C. Cir. 2007); *Campbell v. Davenport Police Dep't*, 471 F.3d 952, 953 (8th Cir. 2006);

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as a strike was still pending on appeal. That panel concluded that, because "[t]he statute [section 1915(g)] does not say that the dismissal must be 'final' in all of the courts of the United States," the district court had not erred in counting the case pending on appeal as a strike under the PLRA. *Id.* In the case now before us, the majority opinion follows this latter reasoning and thus reaches the same result as was reached in *Shavers*.

Michaud v. City of Rochester, No. 00-1263, 2000 WL 1886289, at *2 n.1 (1st Cir. Dec. 27, 2000) (unpublished). To date, only the Seventh Circuit has offered a different interpretation of the statute. It alone has concluded that a literal reading of the provision requires district courts to count as strikes, for purposes of the PLRA, cases that are dismissed on the grounds enumerated in section 1915(g) even while pending on appeal. *Robinson v. Powell*, 297 F.3d 540, 541 (7th Cir. 2002) (arguing that the majority rule reflects a "refus[al] to apply the statute literally").

I find 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—both more compelling and more fair. Although the Seventh Circuit and, now, my colleagues in this case argue that the majority rule distorts the plain meaning of the PLRA, the Ninth Circuit has pointed out that "[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. . . .'" *Silva*, 658 F.3d at 1098. Instead, section 1915(g) states simply 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 accorded *in forma pauperis* status "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

Thus, as the Fourth Circuit has noted, 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." *Henslee*, 681 F.3d at 542

(noting that the term "prior occasion" "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"). Hence, there are as many as three possible readings of what counts as a strike: (1) a suit dismissed under § 1915(g); (2) a suit dismissed under § 1915(g) but only after an appeal of that ruling has been waived or exhausted; (3) an appeal dismissed as frivolous, regardless of the ruling below. Given this statutory ambiguity, it is proper for us to interpret the meaning of the statute in light of its history and purpose. *See Blum v. Stenson*, 465 U.S. 886 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.").

The overwhelming majority of other circuits have concluded 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. "It is uncontroversial from the plain language of the statute that Congress intended section 1915(g) only to penalize litigation that is truly frivolous, not to freeze out meritorious claims or ossify district court errors." *Adepegba*, 103 F.3d at 388. *See also Jones v. Bock*, 549 U.S. 199, 204 (2007) (noting that the reforms in the PLRA were "designed to filter out the bad claims and facilitate consideration of the good"). Construing section 1915(g) to require courts to count dismissals as strikes even when pending on appeal could potentially bar the filing of meritorious claims and preserve district court errors by preventing prisoners from bringing claims in federal court while one or more

of their first three dismissals were being reversed on appeal. *See Adepegba*, 103 F.3d at 387–88. *See also Thompson*, 492 F.3d at 432 (noting that an interpretation of the statute that counted dismissals as strikes even prior to appeal "would, within those narrow set of cases in which the third strike is appealed, effectively eliminate our appellate function," and concluding that "[h]ad Congress intended such an unusual result, . . . it would have clearly said so"); *Silva*, 658 F.3d at 1098–99 (recognizing that, because the minority view represents a departure from the usual practice under 28 U.S.C. § 1291 and the Federal Rules of Appellate Procedure that grants all litigants an appeal as of right from final district court decisions, "Congress's silence on this issue is 'strong evidence that the usual practice should be followed. . . .'" (quoting *Jones*, 549 U.S. at 212)).

Nevertheless, my colleagues in this case suggest that prisoners attempting to appeal a third dismissal for filing an allegedly frivolous complaint would not necessarily suffer the hardships envisioned by the decisions in *Jones*, *Adepegba*, and *Thompson*. Specifically, they maintain, in cases where a prisoner seeks to appeal his third strike but is without funds to proceed unless accorded pauper status, that prisoner still may obtain appellate review of that dismissal by filing, pursuant to Federal Rule of Appellate Procedure 24(a)(5), a motion seeking leave from the appellate court to proceed *in forma pauperis* on appeal. In resolving the prisoner's Rule 24(a)(5) motion, so goes the argument, the appellate court could review the merits of the district court decision to determine whether "the district court might have erred" in dismissing the suit as frivolous, malicious, or meritless. *See Robinson*, 297 F.3d at 541.

This alternative is far from satisfying. For one thing, it threatens to make the resolution of a Rule 24(a)(5) motion more complex and involved than it is at present. *See Thompson*, 492 F.3d at 433 (quoting claim in government brief that the Seventh Circuit approach "creat[es] more work than is appropriate for either the courts or the litigants to resolve a request for [*in forma pauperis*] privileges"). Furthermore, this alternative fails to provide any relief for litigants like Coleman who seek pauper status to litigate an unrelated case rather than to appeal a third dismissal decision. By following the majority's lead in this case, the only way we could ensure that Coleman was not precluded erroneously from proceeding *in forma pauperis* in district court would be to conduct our own merits analysis of the prior dismissal currently pending on appeal before (presumably) a different panel of this court. Obviously, such a proposed solution to the problem is unwieldy, problematic, and creates unnecessary, extra work for the courts.

Because I would hold that dismissals of causes of action do not count as strikes under the PLRA until the prisoner-plaintiffs have exhausted or waived their appeals, I also would decide at precisely what point in the litigation process the finality of any prior dismissals should be assessed. Our sister circuits have differed somewhat in the approaches they have taken to this timing question. The Third Circuit has held that the language of section 1915(g) suggests that a prisoner's status under the statute should be assessed as of the date the latest complaint is filed. *See Gibbs v. Ryan*, 160 F.3d 160, 162 (3d Cir. 1998) (noting that section 1915(g) applies to prisoners who "*bring* a civil action or appeal a judgment in a civil action or proceeding" and that "[i]n the context of filing a civil action, 'bring' ordinarily refers to the 'ini-

tiation of legal proceedings in a suit'") (emphasis added)). Most of the circuits that have adopted the majority view set forth in *Adepegba* agree. *See, e.g.*, *Silva*, 658 F.3d at 1100 ("Section 1915(g) does not apply unless the inmate litigant has three strikes at the time he files his lawsuit or appeal." (quoting *Campbell*, 471 F.3d at 952)). However, at least one circuit has suggested that a prisoner's status under the three-strikes provision should be assessed *after* litigation has commenced—presumably at the point the district court grants or denies the motion for pauper status. *See Jennings v. Natrona Cnty. Det. Ctr. Med. Facility*, 175 F.3d 775, 779 (10th Cir. 1999) (refusing to count as a strike a dismissal that was appealed after the plaintiff filed his complaint in the subsequent case).

In light of the relevant statutory language, and given the ease in applying the rule adopted by the majority of other circuits, I would adopt the view that the question whether a prior dismissal is final should be assessed as of the date of the filing of the complaint or notice of appeal. Adopting this timing rule also would reduce the possibility that litigants could seek to manipulate the judicial calendar to advance their own positions. In the present case, however, whether Coleman's pauper status should have been assessed as of the date he filed his new, fourth complaint or the date the district court resolved his motion for pauper status in that proceeding is irrelevant. The plaintiff's latest cause of action against the correctional-facility defendants was filed in December 2010, well before the district court denied his *in forma pauperis* request in February 2011 or this court affirmed the dismissal of his prior, third civil-rights complaint in March 2011.

I would hold that the proper interpretation of § 1915(g) is the one adopted by the majority of circuits, rather than that proposed by the majority in this case. I thus respectfully dissent and would conclude that the district court should have granted Coleman's motion to proceed *in forma pauperis* on his complaint against these defendants because, at the time Coleman filed that cause of action, he had not yet received the three *final* "strikes" that subsequently cut off his ability to petition the federal courts for redress of grievances.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1502

ANDRE LEE COLEMAN, NAMED AS "ANDRE LEE COLEMAN-BEY" ON COMPLAINT,
Plaintiff-Appellant,

v.

TODD TOLLEFSON, ET AL., Defendants-Appellees.

Filed: January 17, 2014

ORDER

BEFORE: BATCHELDER, Chief Judge; DAUGHTREY and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the peti-

tion were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Daughtrey would grant rehearing for the reasons stated in her dissent. However, the panel replaces the last two sentences of the first paragraph on page 3 of the opinion:

"Under the PLRA, a court must dismiss an action that it finds "frivolous or malicious" sua sponte, without permitting the plaintiff to amend the complaint. *McGore v. Wrigglesworth*, 114 F.3d 601, 612 (6th Cir. 1997), *overruled on other grounds by Jones v. Bock*, 549 U.S. 199 (2007); *see also* 28 U.S.C § 1915(e)(2)."

The new language:

"Under the PLRA, a court may dismiss an action that it finds "frivolous or malicious" without permitting the plaintiff to amend the complaint. *LaFountain v. Henry*, 716 F.3d 944, 951 (6th Cir. 2013); *see also* 28 U.S.C. § 1915(e)(2)."

A corrected opinion will issue forthwith.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt
Deborah S. Hunt
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 10-cv-337

ANDRE LEE COLEMAN, Plaintiff,

v.

TODD A. TOLLEFSON ET AL., Defendants.

February 15, 2011

OPINION DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS*—THREE STRIKES

EDGAR, District Judge.

Plaintiff Andre Lee Coleman, a prisoner incarcerated at Baraga Maximum Correctional Facility, filed a complaint pursuant to 42 U.S.C. § 1983. Plaintiff seeks leave to proceed *in forma pauperis.* Because Plaintiff has filed at least three lawsuits that were dismissed as frivolous, malicious or for failure to state a claim, he is barred from proceeding *in forma pauperis* under 28 U.S.C. § 1915(g). The Court will order Plaintiff to pay the $350.00 civil action filing fee within twenty-eight (28) days of this opinion and accompanying order, and if Plaintiff fails to do so, the Court will order that his action be dismissed

without prejudice. Even if the case is dismissed, Plaintiff will be responsible for payment of the $350.00 filing fee in accordance with *In re Alea*, 286 F.3d 378, 380–81 (6th Cir. 2002).

Discussion

The Prison Litigation Reform Act (PLRA), Pub.L. No. 104-134, 110 Stat. 1321 (1996), which was enacted on April 26, 1996, amended the procedural rules governing a prisoner's request for the privilege of proceeding *in forma pauperis*. As the Sixth Circuit has stated, the PLRA was "aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts." *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997). For that reason, Congress put into place economic incentives to prompt a prisoner to "stop and think" before filing a complaint. *Id.* For example, a prisoner is liable for the civil action filing fee, and if the prisoner qualifies to proceed *in forma pauperis*, the prisoner may pay the fee through partial payments as outlined in 28 U.S.C. § 1915(b). The constitutionality of the fee requirements of the PLRA has been upheld by the Sixth Circuit. *Id.* at 1288.

In addition, another provision reinforces the "stop and think" aspect of the PLRA by preventing a prisoner from proceeding *in forma pauperis* when the prisoner repeatedly files meritless lawsuits. Known as the "three-strikes" rule, the provision states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [the section governing proceedings *in forma pauperis*] if the prisoner has, on 3 or more

> prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). The statutory restriction "[i]n no event," found in § 1915(g), is express and unequivocal. The statute does allow an exception for a prisoner who is "under imminent danger of serious physical injury." The Sixth Circuit has upheld the constitutionality of the "three-strikes" rule against arguments that it violates equal protection, the right of access to the courts, and due process, and that it constitutes a bill of attainder and is *ex post facto* legislation. *Wilson v. Yaklich*, 148 F.3d 596, 604–06 (6th Cir. 1998); *accord Rodriguez v. Cook*, 169 F.3d 1176, 1178–82 (9th Cir. 1999); *Rivera v. Allin*, 144 F.3d 719, 723–26 (11th Cir. 1998); *Carson v. Johnson*, 112 F.3d 818, 821–22 (5th Cir. 1997).

Plaintiff has been an active litigant in the federal courts in Michigan. The Court has dismissed at least three of Plaintiff's lawsuits for failure to state a claim. *See Coleman v. Sweeney et al.*, 2:09-cv-178 (W.D. Mich. Oct. 8, 2009); *Coleman v. Kinnunen*, No. 2:05-cv-256 (W.D. Mich. Mar. 17, 2008); *Coleman v. Lentin et al.*, 2:92-cv-120 (W.D. Mich. Aug. 31, 1992). Although one of the dismissals was entered before enactment of the PLRA on April 26, 1996, the dismissal nevertheless counts as strikes. *See Wilson*, 148 F.3d at 604. Moreover, Plaintiff's allegations do not fall within the exception to the three-strikes rule because he does not allege any

facts establishing that he is under imminent danger of serious physical injury.

In light of the foregoing, § 1915(g) prohibits Plaintiff from proceeding *in forma pauperis* in this action. Plaintiff has twenty-eight (28) days from the date of entry of this order to pay the entire civil action filing fee, which is $350.00. When Plaintiff pays his filing fee, the Court will screen his complaint as required by 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c). If Plaintiff fails to pay the filing fee within the 28-day period, his case will be dismissed without prejudice, but he will continue to be responsible for payment of the $350.00 filing fee.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 10-cv-337

ANDRE LEE COLEMAN, Plaintiff,

v.

TODD A. TOLLEFSON ET AL., Defendants.

April 12, 2011

ORDER ON MOTIONS

EDGAR, District Judge.

This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. § 1983. By opinion and order entered February 15, 2011 (dockets ##5-6), the Court denied Plaintiff leave to proceed *in forma pauperis* because he has "three strikes" within the meaning of 28 U.S.C. § 1915(g). Plaintiff has filed a motion to vacate the Court's order denying him leave to proceed *in forma pauperis* (docket #8), objections to the Court's order (docket #9), a "Motion to Make Findings of Facts and Law" (docket #10) and a supporting brief (docket #11). The Court construes Plaintiff's motions and objections as a motion for reconsideration. Under Rule 54(b) of the

Federal Rules of Civil Procedure, a non-final order is subject to reconsideration at any time before entry of a final judgment. *Id.*; *see also ACLU v. McCreary County*, 607 F.3d 439, 450 (6th Cir. 2010). Western District of Michigan Local Civil Rule 7.4(a) provides that "motions for reconsideration which merely present the same issues ruled upon by the Court shall not be granted." Further, reconsideration is appropriate only when the movant "demonstrate[s] a palpable defect by which the Court and the parties have been misled . . . [and] that a different disposition must result from a correction thereof." *Id.*

In his supporting brief, Plaintiff contends that the Court relied upon three previously dismissed cases as strikes without making findings of fact to determine whether those cases actually constituted strikes under section 1915(g). Plaintiff further argues that the Court erred in counting those cases as strikes. For the reasons set forth below, Plaintiff's arguments are without merit.

Plaintiff concedes that *Coleman v. Sweeney et al.*, 2:09-cv-178 (W.D. Mich.) was dismissed on October 8, 2009, for failure to state a claim but appears to argue that the reasoning in the Court's opinion was not sufficient to support its determination. Contrary to Plaintiff's assertions, the court issued a twelve-page opinion analyzing each of Plaintiff's legal claims and concluding that he failed to state a claim upon which relief could be granted. A strike includes "an action or appeal in a court of the United States that was dismissed on the ground that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). Plaintiff cannot circumvent the three-strike provision by mounting a collateral attack upon the Court's decision.

Accordingly, the dismissal for failure to state a claim constitutes a strike under the plain language of the statute.

Plaintiff further argues that *Coleman v. Sweeney et al.*, 2:09-cv-178 (W.D. Mich.) cannot be counted as a strike because an appeal remains pending in the Sixth Circuit. The language of § 1915(g) is clear, and it does not make an exception for a dismissal that has been appealed. Congress could have included an exception for a dismissal that had been appealed, but did not. The only exception is when a prisoner is under imminent danger of serious physical injury. *Id.* Moreover, a judgment of dismissal by a district court is final and should be given full effect, unless stayed upon appeal. F.R. Civ. P. 62; *see also National Labor Rel. Bd. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (pendency of an appeal does not disturb finality of a judgment). Plaintiff has not obtained a stay of the dismissal.

This Court declines to follow the decision of the Fifth Circuit in *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1996). In *Adepegba*, the Fifth Circuit held that a dismissal by a district court should not be counted as a strike until the appeal was exhausted or waived. *Id.* at 387-88. The Fifth Circuit reasoned that to do so would pose "a risk of inadvertently punishing nonculpable conduct," hypothesizing that a fourth claim could expire while the three strikes were in the process of being reversed on appeal and furthermore, an appeal of an erroneous third strike could be barred because it would follow three dismissals. *Id.* The Fifth Circuit failed to cite any authority to support its conclusion in *Adepegba*. Neither of the foregoing concerns—the plain language of § 1915(g) and the finality of judgments—was mentioned in *Adepegba*.

Moreover, the Fifth Circuit's conclusion in *Adepegba* could eviscerate the purpose of § 1915(g) to deter abusive litigants. If the reasoning underlying *Adepegba* is followed, a plaintiff could avoid the effect of § 1915(g) by filing three frivolous lawsuits simultaneously and appealing each dismissal. The plaintiff could then continue to file frivolous lawsuits while the appeals were pending, without being subject to the constraints of § 1915(g). Because the filing fee requirements are triggered at the time the action is filed, the plaintiff could proceed *in forma pauperis* in each new lawsuit, even if the appeals were subsequently affirmed. The result could be a multitude of frivolous lawsuits, with no possibility of applying § 1915(g) to deter the frivolous litigation.

It goes without saying that Congress's intent in enacting § 1915(g) was not to encourage abusive litigants to file multiple lawsuits to avoid the application of § 1915(g). Consequently, the court concludes that where a plaintiff has had three lawsuits dismissed as defined in § 1915(g), a dismissal counts as a strike even if it is pending on appeal at the time that the plaintiff files his new action. Moreover, the Sixth Circuit affirmed the dismissal of Plaintiff's action in an order issued on March 29, 2011. *See Coleman v. Sweeney, et al.*, No. 09-2419 (6th Cir. Mar. 29, 2011).

Plaintiff also contends that *Coleman v. Kinnunen*, 2:05-cv-256 (W.D. Mich.) is not a strike because it was dismissed pursuant to a motion to dismiss brought under F.R. Civ. P. 12(b)(6). The language of Rule 12(b)(6), which permits dismissal for "failure to state a claim upon which relief can be granted," tracks the language of § 1915(g). When Congress uses the same language in two different statutory provisions, federal courts presume

Congress means the same thing in both statutes. Thus, this Court finds that the dismissal of Plaintiff's access to the courts claims under Rule 12(b)(6) for failing to state a claim constitutes a strike for purposes of § 1915(g). *See McLean v. U.S.*, 566 F.3d 391, 405 (4th Cir. 2009).

Plaintiff further asserts that *Coleman v. Lentin*, 2:92-cv-120 (W.D. Mich.) was not dismissed "for failure to state a claim" as stated in the Court's opinion denying him leave to proceed *in forma pauperis*, but was dismissed "as frivolous and without merit." This case was dismissed on August 31, 1992, before the PLRA was enacted in 1996. As discussed in the Court's previous opinion, dismissals entered before enactment of the PLRA nevertheless count as strikes. *See Wilson v. Yaklich*, 148 F.3d 596, 604 (6th Cir. 1998). In this case, the Court expressly dismissed the complaint as "frivolous," which constitutes a strike under § 1915(g). The fact that the Court used the words "and without merit" rather than "and for failure to state a claim" as an alternative ground for dismissal is without consequence. Thus, the Court properly counted the dismissal of this case as a strike.

In light of the foregoing, this Court finds no error in its decision denying Plaintiff leave to proceed *in forma pauperis* and Plaintiff's motion for reconsideration fails to meet the standard set forth by Rule 7.4(a). Therefore:

IT IS ORDERED that Plaintiff's motion to vacate the Court's order denying him leave to proceed *in forma pauperis* (docket #8), objections to the Court's order (docket #9) and "Motion to Make Findings of Facts and Law" (docket #10) are DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-1726

ANDRE LEE COLEMAN, Plaintiff-Appellant

v.

BERTINA BOWERMAN, Correctional Officer; KIMBERLY HILL, Correctional Officer; MARY BONEVILLE, Hearing Investigator, Defendants-Appellees.

January 10, 2014

ORDER

Andre L. Coleman, a pro se Michigan prisoner, moves the court to grant him permission to proceed in forma pauperis in his appeal from a district court order dismissing his civil complaint.

The complaint challenges alleged violations of Coleman's rights when he was imprisoned at the Alger Correctional Facility. Seeking monetary and equitable relief, Coleman sued correctional officers Bertina Bowerman and Kimberly Hill, and Hearing Investigator Mary Boneville. Coleman alleged that the defendants retaliated against him by threatening him with misconduct

charges based on the exercise of his rights under the grievance process and violated his due process rights by failing to provide him access to security videotapes.

The district court initially granted Coleman's request to proceed in forma pauperis. However, the district court subsequently granted the defendants' motion to revoke Coleman's pauper status because he has at least three prior cases that had been dismissed as frivolous or for failure to state a claim. *See Coleman v. Sweeney, et al.*, 2:09-cv-178 (W.D. Mich. Oct. 8, 2009); *Coleman v. Kinnunen*, No. 2:05-cv-256 (W.D. Mich. Mar. 17, 2008); *Coleman v. Lentin, et al.*, 2:92-cv-120 (W.D. Mich. Aug. 31, 1992). The district court instructed Coleman to pay his filing fee within twenty-eight days of its order, and warned him that failure to comply would result in the dismissal of his complaint. Subsequently, the district court dismissed Coleman's complaint, without prejudice, because he had not paid the filing fee. The district court also denied Coleman permission to proceed in forma pauperis on appeal.

An appeal in this case would be frivolous as it lacks an arguable basis in law. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Callihan v. Schneider*, 178 F.3d 800, 804 (6th Cir. 1999).

The district court properly denied Coleman's application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(g). The "three strikes" provision of § 1915(g) provides that:

> 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 de-

> tained 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.

28 U.S.C. § 1915(g).

The district court determined that Coleman had previously filed three complaints that had been dismissed as frivolous. Although Coleman argued that the dismissal of *Coleman v. Sweeney* does not constitute a "strike" because his appeal from the dismissal of that case was still pending when the district court denied his application for in forma pauperis status, this court has recently 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. *Coleman v. Tollefson*, 733 F.3d 175, 177 (6th Cir. 2013). A review of the other dismissals reflect that *Coleman v. Kinnunen* was dismissed for failure to state a claim and that *Coleman v. Lentin, et al.* was dismissed as frivolous. In addition, Coleman did not allege any facts to establish that he is in imminent danger of serious physical injury, and thus he does not fit within the exception to the statutory mandate that prohibits him from proceeding in forma pauperis in light of his three prior frivolity dismissals. Therefore, the district court properly dismissed Coleman's complaint for failure to pay the filing fee in the absenceof pauper status.

Accordingly, the motion for in forma pauperis status is hereby denied pursuant to 28 U.S.C. § 1915(a)(3). Coleman is directed to pay the appellate filing fee of $455

in full with the district court within 30 days of the filing date of this order, or else this appeal will be dismissed for lack of prosecution.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-1726

ANDRE LEE COLEMAN, Plaintiff-Appellant

v.

BERTINA BOWERMAN, Correctional Officer; KIMBERLY HILL, Correctional Officer; MARY BONEVILLE, Hearing Investigator, Defendants-Appellees

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February 19, 2014

ORDER

Appellant having previously been advised that failure to satisfy certain specified obligations would result in dismissal of the case for want of prosecution and it appearing that the appellant has failed to satisfy the following obligation(s):

The proper fee was not paid by February 10, 2014.

It is therefore **ORDERED** that this cause be, and it hereby is, dismissed for want of prosecution.

ENTERED PURSUANT TO RULE 45(a),
RULES OF THE SIXTH CIRCUIT

Deborah S. Hunt, Clerk

Issued: February 19, 2014 s/Deborah S. Hunt

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 10-cv-322

ANDRE LEE COLEMAN, Plaintiff,

v.

BERTINA M. BOWERMAN, Defendants.

March 16, 2012

Before: EDGAR, District Judge.

MEMORANDUM OPINION REVOKING LEAVE TO PROCEED *IN FORMA PAUPERIS*—THREE STRIKES

Plaintiff Andre Lee Coleman, a prisoner incarcerated at Ionia Maximum Correctional Facility, filed a complaint pursuant to 42 U.S.C. § 1983. Plaintiff was granted leave to proceed *in forma pauperis*. Defendants have filed motions to revoke Plaintiff's pauper status (docket #10). Because Plaintiff has filed at least three lawsuits which were dismissed as frivolous or failing to state a claim, he is barred from proceeding *in forma pauperis* under 28 U.S.C. § 1915(g). The court will vacate the earlier order allowing Plaintiff to proceed *in forma*

pauperis and order Plaintiff to pay the civil action filing fee within twenty-eight (28) days of this opinion and accompanying order. If Plaintiff fails to do so, the court will order that his action be dismissed without prejudice.

The Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996), which was enacted on April 26, 1996, amended the procedural rules governing a prisoner's request for the privilege of proceeding *in forma pauperis*. As the Sixth Circuit has stated, the PLRA was "aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts." *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997). For that reason, Congress put into place economic incentives to prompt a prisoner to "stop and think" before filing a complaint. *Id.* For example, a prisoner is liable for the civil action filing fee, and if the prisoner qualifies to proceed *in forma pauperis*, the prisoner may pay the fee through partial payments as outlined in 28 U.S.C. § 1915(b). The constitutionality of the fee requirements of the PLRA has been upheld by the Sixth Circuit. *Id.* at 1288.

In addition, another provision reinforces the "stop and think" aspect of the PLRA by preventing a prisoner from proceeding *in forma pauperis* when the prisoner repeatedly files meritless lawsuits. Known as the "three-strikes" rule, the provision states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [the section governing proceedings *in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in

> any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

The statutory restriction "[i]n no event," found in § 1915(g), is express and unequivocal. The statute does allow an exception for a prisoner who is "under imminent danger of serious physical injury." The Sixth Circuit has upheld the constitutionality of the "three-strikes" rule against arguments that it violates equal protection, the right of access to the courts, and due process, and that it constitutes a bill of attainder and is *ex post facto* legislation. *Wilson v. Yaklich*, 148 F.3d 596, 604-06 (6th Cir. 1998); *accord Pointer v. Wilkinson*, 502 F.3d 369, 377 (6th Cir. 2007) (citing *Wilson*, 148 F.3d at 604-06); *Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9th Cir. 1999); *Rivera v. Allin*, 144 F.3d 719, 723-26 (11th Cir. 1998); *Carson v. Johnson*, 112 F.3d 818, 821-22 (5th Cir. 1997).

The docket sheets of each of the previously dismissed cases, and concludes that at least three previous dismissals qualify under section 1915(g): *Coleman v. Lentin*, No. 2:92-cv-120 (W.D. Mich. Aug. 31, 1992); *Coleman v. Kinnunen*, 2:05-cv-256 (W.D. Mich. Mar. 17, 2008); *Coleman v. Sweeney*, 2:09-cv-178 (W.D. Mich. Oct. 8, 2009). Judge Janet Neff of this court has previously determined that Plaintiff falls within this "three strikes" provision of section 1915(g) and has revoked *in forma pauperis* status on that basis. *Coleman v. Vroman*, No. 1:10-cv-354 (W.D. Mich. May 27, 2011). In her opinion

and order, Judge Neff analyzed and rejected each of Plaintiff's arguments as to why the same three cases cited above should not be considered as "strikes" under section 1915(g). On the present record, there can be no doubt that Plaintiff is subject to section 1915(g) because he has filed at least three lawsuits that were previously dismissed as frivolous, malicious, or for failure to state a claim.

Section 1915(g) grants an exemption for an inmate who is "under imminent danger of serious physical injury." To qualify under this exemption, a plaintiff must allege facts showing "real and proximate" danger that exists at the time the complaint is filed. *See Rittner v. Kinder*, 290 F. App'x 796, 797-98 (6th Cir. 2008). A prisoner's assertion that he or she faced danger in the past is insufficient to invoke the exception. *Id.* In the present case, the facts alleged by Plaintiff do not establish imminent danger of serious physical injury. Plaintiff's claims concern retaliatory misconduct tickets and interference with his right of access to the courts.

In conclusion, section 1915(g) prohibits Plaintiff from proceeding *in forma pauperis* in this action. The court will vacate the order granting *in forma pauperis* status and require Plaintiff to pay the entire civil action filing fee, which is $350, within 28 days of the date of entry of this order. If Plaintiff fails to pay the filing fee within the 28-day period, his case will be dismissed without prejudice, but he will continue to be responsible for payment of the entire filing fee. *See In re Alea*, 286 F.3d 378, 380-81 (6th Cir. 2002).

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1678

ANDRE LEE COLEMAN, Plaintiff-Appellant

v.

STEVEN DYKEHOUSE, Case Manager; RONALD T. EMBRY, Resident Unit Manager; DEBRA OLGER, Corrections Officer; AND SAM NORMAN, Sergeant, Defendants-Appellees.

January 10, 2014

ORDER

Andre L. Coleman, a pro se Michigan prisoner, moves the court to grant him permission to proceed in forma pauperis in his appeal from a district court order dismissing his civil complaint.

Seeking monetary and equitable relief, Coleman, an inmate at the Ionia Correctional Facility, sued Case Manager Steven Dykehouse; Resident Unit Manager Ronald T. Embry; Correctional Officer Debra S. Olger; and Sergeant Sam Norman. Coleman alleged that the defendants interfered with his attempts to replace a radio that he had previously purchased after the handle

broke on the old radio by sabotaging his rights to a proper administrative hearing.

The district court denied Coleman permission to proceed in forma pauperis because he has at least three prior cases that had been dismissed as frivolous or for failure to state a claim. *See Coleman v. Sweeney, et al.*, 2:09-cv-178 (W.D. Mich. Oct. 8, 2009); *Coleman v. Kinnunen*, No. 2:05-cv-256 (W.D. Mich. Mar. 17, 2008); *Coleman v. Lentin, et al.*, 2:92-cv-120 (W.D. Mich. Aug. 31, 1992). The district court instructed him to pay his filing fee within twenty-eight days of its order, and warned him that failure to comply would result in the dismissal of his complaint. Coleman filed a motion for reconsideration, arguing that the dismissal of *Coleman v. Sweeney* does not constitute a "strike" because his appeal from the dismissal of that case was still pending when the district court denied his application for in forma pauperis status. He argued that, pursuant to the Fifth Circuit's holding in *Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996), a prior dismissal should not be counted as a strike until the litigant has had an opportunity to exhaust his appeal from the dismissal of his complaint. The district court denied the motion for reconsideration and dismissed Coleman's complaint, without prejudice, because he had not paid the filing fee. The district court denied Coleman permission to proceed in forma pauperis on appeal.

An appeal in this case would be frivolous as it lacks an arguable basis in law. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Callihan v. Schneider*, 178 F.3d 800, 804 (6th Cir. 1999).

The district court properly denied Coleman's application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(g). The "three strikes" provision of § 1915(g) provides that:

> 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.

28 U.S.C. § 1915(g).

The district court determined that Coleman had previously filed three complaints that had been dismissed as frivolous. Although Coleman argued that the dismissal of *Coleman v. Sweeney* does not constitute a "strike" because his appeal from the dismissal of that case was still pending when the district court denied his application for in forma pauperis status, this court has recently 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. *Coleman v. Tollefson*, 733 F.3d 175, 177 (6th Cir. 2013). In addition, Coleman did not allege any facts to establish that he is in imminent danger of serious physical injury, and thus he does not fit within the exception to the statutory mandate that prohibits him from proceeding in forma pauperis in light of his three prior frivolity dismissals. Therefore, the district court properly dismissed

Coleman's complaint for failure to pay the filing fee in the absence of pauper status.

Accordingly, the motion for in forma pauperis status is hereby denied pursuant to 28 U.S.C. § 1915(a)(3). Coleman is directed to pay the appellate filing fee of $455 in full with the district court within 30 days of the filing date of this order, or else this appeal will be dismissed for lack of prosecution.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt
Clerk

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1678

ANDRE LEE COLEMAN, Plaintiff-Appellant

v.

STEVEN DYKEHOUSE, Case Manager; RONALD T. EMBRY, Resident Unit Manager; DEBRA OLGER, Corrections Officer; SAM NORMAN, Sergeant, Defendants-Appellees

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February 11, 2014

ORDER

Appellant having previously been advised that failure to satisfy certain specified obligations would result in dismissal of the case for want of prosecution and it appearing that the appellant has failed to satisfy the following obligation(s):

The proper fee was not paid by February 10, 2014.

It is therefore **ORDERED** that this cause be, and it hereby is, dismissed for want of prosecution.

**ENTERED PURSUANT TO RULE 45(a),
RULES OF THE SIXTH CIRCUIT**

Deborah S. Hunt, Clerk
Issued: February 11, 2014 s/Deborah S. Hunt

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 11-cv-108

ANDRE LEE COLEMAN, Plaintiff,

v.

STEVEN DYKEHOUSE, ET AL., Defendants.

March 9, 2011

Before: QUIST, District Judge.

OPINION DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS*—THREE STRIKES

Plaintiff Andre Lee Coleman, a prisoner incarcerated at Baraga Maximum Correctional Facility, filed a complaint pursuant to 42 U.S.C. § 1983. Plaintiff seeks leave to proceed *in forma pauperis.* Because Plaintiff has filed at least three lawsuits that were dismissed as frivolous, malicious or for failure to state a claim, he is barred from proceeding *in forma pauperis* under 28 U.S.C. § 1915(g). The Court will order Plaintiff to pay the $350.00 civil action filing fee within twenty-eight (28) days of this opinion and accompanying order, and if Plaintiff fails to do so, the Court will order that his action be dismissed

without prejudice. Even if the case is dismissed, Plaintiff will be responsible for payment of the $350.00 filing fee in accordance with *In re Alea*, 286 F.3d 378, 380-81 (6th Cir. 2002).

Discussion

The Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996), which was enacted on April 26, 1996, amended the procedural rules governing a prisoner's request for the privilege of proceeding *in forma pauperis*. As the Sixth Circuit has stated, the PLRA was "aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts." *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997). For that reason, Congress put into place economic incentives to prompt a prisoner to "stop and think" before filing a complaint. *Id.* For example, a prisoner is liable for the civil action filing fee, and if the prisoner qualifies to proceed *in forma pauperis*, the prisoner may pay the fee through partial payments as outlined in 28 U.S.C. § 1915(b). The constitutionality of the fee requirements of the PLRA has been upheld by the Sixth Circuit. *Id.* at 1288.

In addition, another provision reinforces the "stop and think" aspect of the PLRA by preventing a prisoner from proceeding *in forma pauperis* when the prisoner repeatedly files meritless lawsuits. Known as the "three-strikes" rule, the provision states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [the section governing proceedings *in forma pauperis*] if the prisoner has, on 3 or more

> prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). The statutory restriction "[i]n no event," found in § 1915(g), is express and unequivocal. The statute does allow an exception for a prisoner who is "under imminent danger of serious physical injury." The Sixth Circuit has upheld the constitutionality of the "three-strikes" rule against arguments that it violates equal protection, the right of access to the courts, and due process, and that it constitutes a bill of attainder and is *ex post facto* legislation. *Wilson v. Yaklich*, 148 F.3d 596, 604-06 (6th Cir. 1998); *accord Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9th Cir. 1999); *Rivera v. Allin*, 144 F.3d 719, 723-26 (11th Cir. 1998); *Carson v. Johnson*, 112 F.3d 818, 821-22 (5th Cir. 1997).

Plaintiff has been an active litigant in the federal courts in Michigan. The Court has dismissed at least three of Plaintiff's lawsuits for failure to state a claim. *See Coleman v. Sweeney et al.*, 2:09-cv-178, (W.D. Mich. Oct. 8, 2009); *Coleman v. Kinnunen*, No. 2:05-cv-256, (W.D. Mich. Mar. 17, 2008); *Coleman v. Lentin et al.*, 2:92-cv-120 (W.D. Mich. Aug. 31, 1992). Although one of the dismissals was entered before enactment of the PLRA on April 26, 1996, the dismissal nevertheless counts as strikes. *See Wilson*, 148 F.3d at 604. Moreover, Plaintiff's allegations do not fall within the exception to the three-strikes rule because he does not allege any

facts establishing that he is under imminent danger of serious physical injury.

In light of the foregoing, § 1915(g) prohibits Plaintiff from proceeding *in forma pauperis* in this action. Plaintiff has twenty-eight (28) days from the date of entry of this order to pay the entire civil action filing fee, which is $350.00. When Plaintiff pays his filing fee, the Court will screen his complaint as required by 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c). If Plaintiff fails to pay the filing fee within the 28-day period, his case will be dismissed without prejudice, but he will continue to be responsible for payment of the $350.00 filing fee.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1772

ANDRE LEE COLEMAN, Plaintiff-Appellant,

v.

AARON J. VROMAN, ARUS, in his Official and Individual Capacities; MARY E. FATE, RUM, in her Official and Individual Capacities, Defendants-Appellees.

January 10, 2014

ORDER

Andre L. Coleman, a pro se Michigan prisoner, moves the court to grant him permission to proceed in forma pauperis in his appeal from a district court order dismissing his civil complaint.

Seeking monetary and equitable relief, Coleman, an inmate at the Ionia Correctional Facility, sued Resident Unit Manager Mary Fate and Assistant Resident Unit Manager Aaron Vroman, claiming that the defendants violated his rights by: (1) failing to properly process his legal mail; and (2) retaliating against him for complaining about prison staff by having him transferred to a different facility.

The district court initially granted Coleman's request to proceed in forma pauperis. However, the defendants filed a motion to revoke Coleman's pauper status because he has at least three prior cases that had been dismissed as frivolous or for failure to state a claim. A magistrate judge filed a report recommending that the district court grant the defendants' motion and revoke Coleman's pauper status. *See Coleman v. Sweeney, et al.*, 2:09-cv-178 (W.D. Mich. Oct. 8, 2009); *Coleman v. Kinnunen*, No. 2:05-cv-256 (W.D. Mich. Mar. 17, 2008); *Coleman v. Lentin, et al.*, 2:92-cv-120 (W.D. Mich. Aug. 31, 1992). Coleman objected, arguing that the prior dismissals did not qualify as strikes. He also argued that, pursuant to *Thompson v. Drug Enforcement Admin.*, 492 F.3d 428, 432-33, 440 (D.C. Cir. 2007), the dismissal of *Coleman v. Sweeney* does not constitute a "strike" because his appeal from the dismissal of that case was still pending when the district court denied his application for in forma pauperis status. The district court rejected Coleman's objections and revoked his pauper status. The district court also instructed Coleman to pay his filing fee within thirty days of its order, and warned him that failure to comply would result in the dismissal of his complaint. Subsequently, the district court dismissed Coleman's complaint, without prejudice, because he had not paid the filing fee. The district court denied Coleman permission to proceed in forma pauperis on appeal.

An appeal in this case would be frivolous as it lacks an arguable basis in law. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Callihan v. Schneider*, 178 F.3d 800, 804 (6th Cir. 1999).

The district court properly denied Coleman's application to proceed in forma pauperis pursuant to 28 U.S.C.

§ 1915(g). The "three strikes" provision of § 1915(g) provides that:

> 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.

28 U.S.C. § 1915(g).

The district court determined that Coleman had previously filed three complaints that had been dismissed as frivolous. Although Coleman argued that the dismissal of *Coleman v. Sweeney* does not constitute a "strike" because his appeal from the dismissal of that case was still pending when the district court denied his application for in forma pauperis status, this court has recently 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. *Coleman v. Tollefson*, 733 F.3d 175, 177 (6th Cir. 2013). A review of the other dismissals reflect that *Coleman v. Kinnunen* was dismissed for failure to state a claim and that *Coleman v. Lentin et al.* was dismissed as frivolous. In addition, Coleman did not allege any facts to establish that he is in imminent danger of serious physical injury, and thus he does not fit within the exception to the statutory mandate that prohibits him from proceeding in forma pauperis in light of his three prior frivolity dismis-

sals. Therefore, the district court properly dismissed Coleman's complaint for failure to pay the filing fee in the absence of pauper status.

Accordingly, the motion for in forma pauperis status is hereby denied pursuant to 28 U.S.C. § 1915(a)(3). Coleman is directed to pay the appellate filing fee of $455 in full with the district court within 30 days of the filing date of this order, or else this appeal will be dismissed for lack of prosecution.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt
Clerk

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1772

ANDRE LEE COLEMAN, named as "Andre Lee Coleman-Bey," Plaintiff-Appellant

v.

AARON J. VROMAN, ARUS, in his Official and Individual Capacities; MARY E. FATE, RUM, in her Official and Individual Capacities, Defendants-Appellees.

February 24, 2014

ORDER

Appellant having previously been advised that failure to satisfy certain specified obligations would result in dismissal of the case for want of prosecution and it appearing that the appellant has failed to satisfy the following obligation(s):

The proper fee was not paid by February 10, 2014.

It is therefore **ORDERED** that this cause be, and it hereby is, **dismissed** for want of prosecution.

**ENTERED PURSUANT TO RULE 45(a),
RULES OF THE SIXTH CIRCUIT**

Deborah S. Hunt, Clerk
Issued: February 24, 2014 s/Deborah S. Hunt

APPENDIX M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 10-cv-354

ANDRE LEE COLEMAN, #173324, Plaintiff,

v.

AARON J. VROMAN, ET AL., Defendants.

May 27, 2011

OPINION AND ORDER

NEFF, District Judge.

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff was granted leave to proceed as a pauper on April 27, 2010 (Dkt 3). On January 10, 2011, Defendant Vroman filed a motion requesting that the Court revoke Plaintiff's pauper status (Dkt 31). The Magistrate Judge issued a Report and Recommendation (R & R), recommending that this Court grant Defendant's motion (Dkt 47). The matter is presently before the Court on Plaintiff's objections to the Report and Rec-

ommendation (Dkts 48, 50).[1] In accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

Plaintiff objects that the Magistrate Judge incorrectly determined that several of Plaintiff's previous cases qualify for purposes of the "three strikes" rule under 28 U.S.C. § 1915(g). Plaintiff's objections are without merit. Plaintiff has three cases that so qualify. Contrary to Plaintiff's argument, in *Coleman v. Lentin*, 2:92-cv-120 (W.D. Mich., Aug. 31, 1992), Plaintiff's case was dismissed as frivolous and without merit pursuant to the R & R (2:92-cv-120, Dkt 3), which the district court adopted as its opinion (Pl's. Obj., Dkt 50, Ex. 1). Further, to the extent Plaintiff argues that § 1915(g) applies only after an appeal has been either waived or resolved, the pending appeal in *Coleman v. Sweeney*, 2:09-cv-178 (W.D. Mich., Oct. 8, 2009), has been resolved: Plaintiff's case was dismissed for failure to state a claim, and the Judgment was affirmed on appeal on March 29, 2011. In *Coleman v. Kinnunen*, 2:05-cv-256 (W.D. Mich., Mar. 17, 2008), Plaintiff's case was dismissed for failure to state a claim, not by some other procedural mechanism, and was affirmed on appeal (2:05-cv-256, Dkts 57-58, Dkt 63 at 2). *See Pointer v. Wilkinson*, 502 F.3d 369, 377 (6th Cir. 2007). Plaintiff's objections are denied.

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[1] Plaintiff filed an Objection (Dkt 48) to Defendant's reply brief and subsequently filed another Objection (Dkt 50) objecting to the R & R. The Court does not address the propriety of these distinct filings since both Objections merely address the overall issue presented, and both Objections are without merit.

Accordingly, this Court adopts the Magistrate Judge's Report and Recommendation as the Opinion of this Court.

Therefore:

IT IS HEREBY ORDERED that the Objections (Dkts 48, 50) are DENIED and the Report and Recommendation (Dkt 47) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that Defendant's Motion to Revoke Plaintiff's *In Forma Pauperis* Status (Dkt 31) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's *In Forma Pauperis* Status is REVOKED.

IT IS FURTHER ORDERED that Plaintiff is required to submit the entire $350.00 filing fee[2] within thirty (30) days of the date of entry of this Order; Plaintiff's failure to do so will result in dismissal of this action (any such dismissal will not, however, negate Plaintiff's obligation to pay the filing fee in full).

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[2] The Court's records indicate that Plaintiff has paid only the initial filing fee of eighty-three cents ($0.83). Thus, Plaintiff still owes three hundred forty-nine dollars and seventeen cents ($349.17) of the filing fee.