No. 13-1333

In The
Supreme Court of the United States

ANDRÉ LEE COLEMAN-BEY, *Petitioner,*
v.
TODD TOLLEFSON, ET AL., *Respondents.*

ANDRÉ LEE COLEMAN-BEY, *Petitioner,*
v.
BERTINA BOWERMAN, ET AL., *Respondents.*

ANDRÉ LEE COLEMAN-BEY, *Petitioner,*
v.
STEVEN DYKEHOUSE, ET AL., *Respondents.*

ANDRÉ LEE COLEMAN-BEY, *Petitioner,*
v.
AARON J. VROMAN, ET AL., *Respondents.*

On Petition for a Writ Of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari in this case presents an important question about the proper interpretation of the so-called "three strikes" provision of the Prison Litigation Reform Act. That provision denies *in forma pauperis* ("IFP") status to those prisoners who have "on 3 or more prior occasions, while incarcerated . . . , brought an action or appeal in a [federal] court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

which relief may be granted," unless they allege that they are in "imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Relying on this provision, the court below held that petitioner should be denied IFP status even though one of his three "strikes" was then on appeal and thus subject to reversal. Pet. App. 1a-2a.

As the Petition demonstrates, the majority of courts to consider the question have rejected the conclusion of the court below, holding that "[a] dismissal should not count against a petitioner until he has exhausted or waived his appeals." *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996). These courts have recognized that counting a non-final dismissal as a "strike" against a prisoner is inconsistent with the plain language of the statute, as well as settled appellate practice in the federal courts. *See, e.g.*, *id.* at 387-88; *see also Silva v. Di Vittorio*, 658 F.3d 1090, 1098, 1100 (9th Cir. 2011). The question at the heart of this intractable conflict is unquestionably important, as it implicates the guarantee of meaningful access to the courts for indigent litigants. This brief in support of the Petition explains that counting non-final dismissals as "strikes" raises serious constitutional questions because it significantly limits prisoners' ability to access the courts to present fundamental constitutional claims.

When the Framers drafted our enduring national charter, their design departed from the precursor Articles of Confederation in several key respects. One of the most critical was the establishment of the judiciary as an independent,

co-equal branch of government. Article III of the new Constitution vested the "judicial power" in the federal courts and broadly extended that power to nine categories of cases and controversies. In the debates about the Constitution's ratification, Anti-Federalists bitterly attacked the new federal judiciary, but the Framers recognized that constitutional limitations on government would be meaningless if the American people did not have the ability to vindicate their rights in the federal courts. Article III's grant of broad judicial powers to the federal courts ensured that "the Constitution should be carried into effect, that the laws should be executed, [and] justice equally done to all the community." 4 Debates in the Several State Conventions on the Adoption of the Constitution 160 (Jonathan Elliot ed., 1836) (Davie).

Reflecting the Framers' vision, this Court has repeatedly recognized that all people, including prisoners and the indigent, must have meaningful access to the courts to present fundamental constitutional claims. If a dismissal that can be overturned on appeal constitutes a "strike" for PLRA purposes, the statute imposes an exceptionally stringent barrier on prisoners' ability to access the courts. There is a serious question whether the PLRA, so construed, is constitutional under the Due Process and Equal Protection Clauses. These serious constitutional concerns present yet another reason—in addition to the many reasons already offered by lower courts rejecting this interpretation, *see* Pet. 11-16 (discussing the case law)—why a dismissal should

not count as a strike until it has been affirmed on appeal or the time for appellate review has lapsed.

"Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land." *Bridges v. Wixon*, 326 U.S. 135, 166 (1945). *Amicus* urges the Court to grant *certiorari*.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT, CONSISTENT WITH THE RIGHT OF ACCESS TO THE COURTS, A DISMISSAL DOES NOT COUNT AS A "STRIKE" UNDER THE PRISON LITIGATION REFORM ACT WHILE IT REMAINS SUBJECT TO REVERSAL ON APPEAL

Article III of the Constitution broadly extends the "judicial power" to nine categories of cases and controversies, including "all Cases, in Law or Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. This broad extension of judicial power reflected the Framers' belief that access to the courts was essential to protect individual liberty, prevent government abuse, and ensure compliance with the law. Consistent with this belief, this Court has repeatedly recognized that there is a constitutional right to access the courts, at least to present fundamental constitutional claims.

The so-called "three strikes" provision of the Prison Litigation Reform Act, which generally prevents a prisoner from proceeding IFP if he has "on 3 or more prior occasions, while incarcerated . . . , brought an action or appeal in a [federal] 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," 28 U.S.C. § 1915(g), limits prisoners' access to the courts to present fundamental constitutional claims.

The decision challenged by the Petition further limited prisoners' access to the courts by holding that a dismissal counts as a "strike" for PLRA purposes even if it is "on appeal [and thus subject to reversal] at the time" that the prisoner brings his claim. Pet. App. 4a. Thus interpreted, the "3 strikes provision" could deny a prisoner access to the courts even if *all* of his previous suits were improperly dismissed by lower courts. *See Adepegba*, 103 F.3d at 387-88 (noting that "an indigent prisoner's fourth claim could expire while his first three dismissals were being reversed on appeal"). Such a construction of the PLRA raises serious constitutional questions in light of this Court's decisions recognizing a fundamental right to access the courts.

A. The Question Presented Implicates the Constitution's Guarantee of Meaningful Access to Courts

Article III of the U.S. Constitution provides that "[t]he judicial Power of the United States[]

shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1, cl. 1. The Constitution's establishment of the judiciary as an independent, co-equal branch of government was a direct response to the infirmities of the Articles of Confederation, which had created a single branch of the federal government—"the United States, in Congress assembled," Arts. of Confed. art. III—and no independent court system. *See* Akhil Reed Amar, *Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (noting that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). As a result, the federal government could not enforce its laws, prompting Alexander Hamilton to observe that a "most palpable defect of the subsisting Confederation is a total want of a SANCTION to its laws." The Federalist No. 21, at 106, 107 (Hamilton); *see id.* No. 22, at 118 (Hamilton) (explaining that "[l]aws are a dead letter without courts to expound and define their true meaning and operation").

When the Framers gathered in Philadelphia to draft the new national charter, they recognized that "there ought always to be a constitutional method of giving efficacy to constitutional provisions." *Id.* No. 80, at 443-44 (Hamilton). They debated at length what that method ought to be and ultimately concluded that federal courts should be given the power to enforce the Constitution's guarantees and ensure the supremacy of federal law in adjudicating cases that came before them. *See generally* James S. Liebman & William F.

Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required by Article III Courts*, 98 Colum. L. Rev. 696, 705-73 (1998); Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1346-55 (2001).[2]

To ensure that the federal courts would be up to this task, the Framers provided for an expansive federal judicial power vested in an independent judiciary. *See generally* U.S. Const. art. III (establishing independent judiciary whose members "shall hold their Offices during good Behavior"). Indeed, after the other possible methods of ensuring state compliance with federal law were rejected, the Convention substantially expanded the federal judicial power. First, the Convention approved the power of Congress to appoint lower federal courts, recognizing that "[i]nferior tribunals are essential to render the authority of the Natl. Legislature effectual." 2 The Records of the Federal Convention of 1787 at 46 (Max Farrand ed., 1966). The Convention also expanded the jurisdiction of the federal courts, making explicit in the text that the "jurisdiction of the national Judiciary shall extend to all cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony." *Id.* It subsequently further expanded their jurisdiction,

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[2] The Framers also considered, but rejected, a federal negative on state laws to be exercised by Congress and the use of executive power to coerce states' compliance with federal law. *See* Liebman & Ryan, at 705-73.

giving them the power to hear cases arising under "this Constitution" as well as federal laws. *Id.* at 430.

In the debates about the Constitution's ratification, Federalists and Anti-Federalists alike agreed that Article III conferred broad, substantial powers on the federal courts. Indeed, the Anti-Federalists bitterly attacked the new federal judiciary, claiming that the Supreme Court would be "exalted above all other power in the government," Brutus XV (Mar. 20, 1788), *reprinted in* The Anti-Federalists: Selected Writings and Speeches 476 (Bruce Frohnen ed. 1999), and would have "more power than any court under heaven," 3 Elliot's Debates, at 564 (Grayson); *id.* at 523 (George Mason) (the grant of power to the federal courts was "the most extensive jurisdiction").

The Framers rejected these concerns, recognizing that constitutional limitations on government would be meaningless if individuals did not have recourse to federal courts to vindicate their rights. *See, e.g.*, 3 Debates in the Several State Conventions on the Adoption of the Constitution 554 (Jonathan Elliot ed. 1836) ("[t]o what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection"). Indeed, the existence of the federal courts to vindicate constitutional rights was a powerful argument in favor of the adoption of the Bill of Rights: in March 1789, Thomas Jefferson wrote to James Madison that an "argument[] in favor of a declaration of

rights" that carried "great weight with [him]" was the "legal check which it puts into the hands of the judiciary." 12 The Papers of James Madison 13 (William T. Hutchinson et al., eds. 1961). As Madison explained in proposing the Bill of Rights that June, "[i]f the [Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 Annals of Congress, 457 (1789) (Joseph Gales, ed. 1834).

In short, Article III's grant of broad judicial powers to the federal courts ensured that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 Elliot's Debates, at 160 (Davie). The American people recognized that "[t]hese ends can only be accomplished by a general, paramount judiciary." *Id.*

Consistent with the Framers' vision, this Court has long recognized that "no person [should] be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). As the next section demonstrates, interpreting the PLRA to count a dismissal that is pending on appeal as a "strike" raises serious constitutional concerns in light of this fundamental principle.

B. Counting Non-Final Dismissals as "Strikes" Under the PLRA Raises Serious Constitutional Questions

As just discussed, the Framers believed that broad access to the courts was essential to protecting individual liberty and ensuring compliance with the nation's laws. *See supra* at 6-9. Reflecting the Framers' belief that a strong federal judiciary is essential to the protection of individual liberties, this Court has long recognized the important role that the courts play in ensuring fealty to the nation's laws and has ensured that indigent prisoners have full access to the courts to raise fundamental constitutional claims.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), a plurality of this Court held that under the Equal Protection and Due Process Clauses indigent convicted defendants must be "afford[ed] adequate and effective appellate review" and thus could not be required to pay a fee for transcripts needed to appeal their convictions. *Id.* at 20. As this Court explained it, denying the indigent effective appellate review is "a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law." *Id.* at 19. This Court subsequently extended that principle to the habeas context, holding that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961); *see Burns v. State of Ohio*, 360 U.S. 252, 258

(1959) ("[t]he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law").

As these cases make clear, the right to access the courts extends to prisoners. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts."). And the right extends beyond claims simply attacking convictions and sentences. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Court held that the Due Process Clause "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579; *id.* (noting that there is "no reasonable distinction between" habeas and civil rights actions and that the right of court access includes litigation related to "basic constitutional rights").

The "three strikes" provision of the PLRA, by requiring even those prisoners who are bringing claims involving fundamental constitutional rights "to pay all filing fees upfront," threatens to impose a "'total barrier' to [prisoners] bringing their claims." *Thomas v. Holder*, 2014 WL 1776000, at *6 (D.C. Cir. May 6, 2014) (Tatel, J., concurring). By deeming a dismissal a "strike" even though an appellate court may ultimately reverse that determination, the court below read the PLRA to impose an even more stringent barrier on prisoners' ability to vindicate their fundamental rights in court. There is thus a serious question whether the

PLRA, so construed, is constitutional under the Due Process and Equal Protection Clauses. *Cf. Thomas*, 2014 WL 1776000, at *4 (Tatel, J., concurring) (expressing "doubts" on the question whether the three strikes provision of the PLRA is constitutional); *id.* at *7 (noting that "several Courts of Appeals have left open the possibility that a prisoner might bring a successful as-applied challenge to the PLRA's three-strikes provision").

These serious constitutional concerns should inform the statutory interpretation of the PLRA's "three strikes" provision. As this Court has repeatedly recognized, "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons v. Bedford*, 3 Pet. 433, 448-49 (1830). Regardless whether the PLRA's "three strikes" provision is constitutional under the majority view, *see Thomas*, 2014 WL 1776000, at *4 (Tatel, J., concurring), it plainly raises serious constitutional concerns under the interpretation adopted by the court below. The lower courts have supplied many reasons why the decision of the court below is wrong, *see* Pet. 11-16, but these serious constitutional concerns—and the underlying constitutional values they reflect—present an additional reason why a dismissal should not count as a strike until it has been affirmed on appeal or the time for appellate review has lapsed.

This Court should grant *certiorari* to address the proper meaning of the term "dismissal" in the PLRA and hold that a non-final dismissal does not

count as a "strike" for purposes of the PLRA's "three strikes" provision.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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