No. 13-1333

In the Supreme Court of the United States

ANDRE LEE COLEMAN, AKA ANDRE LEE COLEMAN-BEY,
PETITIONER

v.

TODD TOLLEFSON, ET AL.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Prison Litigation Reform Act created a three-strikes rule to limit the number of times a prisoner may qualify for *in forma pauperis* status. The question presented is:

1. Whether 28 U.S.C. § 1915(g) bars a prisoner from filing a fourth new action when a district court's dismissal of a separate action that would count as one of the prisoner's three strikes is pending on appeal.

PARTIES TO THE PROCEEDING

Petitioner is Andre Lee Coleman-Bey, a state prisoner confined in the Michigan Department of Corrections (MDOC). Respondents are Todd Tollefson, William Luetzow, Joseph Bouchard, Mary Aho, Kimberley Mieni, and James Armstrong—all of whom are, or were, MDOC employees. Respondents did not participate in the district-court proceedings because the complaint was dismissed *sua sponte* under 28 U.S.C. § 1915(g), which is the "three strikes" rule.

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OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 733 F.3d 175. The denial of the petition for rehearing *en banc* is an unpublished order. The opinion of the U.S. District Court for the Western District of Michigan is unreported, but available at 2011 WL 573590.

JURISDICTION

The district court had jurisdiction over Coleman-Bey's claims under 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. The court of appeals filed its opinion on October 23, 2013, and denied rehearing *en banc* on January 17, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1915(g) states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

INTRODUCTION

The petition presents an issue that does not often occur: is a prisoner barred from filing a fourth action under *in forma pauperis* status when one or more of his three prior strikes under 28 U.S.C. § 1915(g) is being appealed? This question arises so infrequently that it took over 17 years after the Prison Litigation Reform Act was enacted before the Sixth Circuit decided the issue in a published decision. This petition does not present an issue of sufficient importance to warrant this Court's review.

Further, the bulk of the decisions the petition relies on address a different question: whether a prisoner is barred from appealing his third strike. But this concern that an erroneous third strike might be insulated from review is not present here. To the contrary, the opinion below expressly recognized that a "third strike may be appealed even though it would count as a strike with regard to a fourth or successive suit." Pet. App. 6a. So unlike the prisoners in the leading cases he cites, Coleman-Bey is *not* being denied the opportunity to appeal a strike; he is only being precluded from bringing a new, separate action until he obtains a reversal of a dismissal in one of his prior cases.

Review is also unnecessary because the Sixth Circuit reached the correct conclusion under the plain language of 28 U.S.C. § 1915(g). The statute bars Coleman-Bey's fourth action because he "has, on 3 or more prior occasions, . . . brought an action . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim." *Id.*

STATEMENT OF THE CASE

This is a 42 U.S.C. § 1983 action originally brought *pro se* by Andre Lee Coleman-Bey, a prisoner incarcerated in the Michigan Department of Corrections. Coleman-Bey, a frequent litigator, filed his complaint on December 3, 2010, based on events that relate to the prison grievance process and that took place from November of 2004 through November of 2007.

When Coleman-Bey filed the complaint in this action, three of his previous cases had already been dismissed for failure to state a claim, which resulted in three "strikes" under 28 U.S.C. § 1915(g). The three cases that counted as strikes are *Coleman* v. *Lentin*, *Coleman* v. *Kinnunen*, and *Coleman* v. *Sweeney*. Pet. App. 3a–4a. Coleman-Bey's petition challenges the validity of the third strike (*Sweeney*), which was pending on appeal at the time Plaintiff filed his complaint in the instant case and when the district court denied *in forma pauperis* status. Pet. App. 4a. The court of appeals ultimately affirmed the dismissal in *Sweeney* on March 29, 2011—just six weeks after the district court denied *in forma pauperis* status in the instant case.

Coleman-Bey appealed the denial of *in forma pauperis* status. In a 2-1 decision, the court of appeals affirmed the district court's decision to deny *in forma pauperis* status based on Coleman-Bey having three strikes. The majority recognized that "§ 1915(g) 'does not say that the dismissal must be final in all of the courts of the United States.' " Pet. App. 4a. He sought rehearing *en banc*, which was denied.

Coleman-Bey does not argue that any of the three earlier cases did not qualify as strikes, nor does he argue that he qualifies for the "imminent danger" exception to the three-strikes rule. The sole issue is *when* the third strike (*Sweeney*) should have counted—when the district court dismissed the case or when the court of appeals affirmed the dismissal.

Furthermore, Coleman-Bey seeks to consolidate this case with three other cases that he filed: *Coleman-Bey* v. *Bowerman*, *Coleman-Bey* v. *Dykehouse*, and *Coleman-Bey* v. *Vroman*. Pet. 9. The court of appeals denied Coleman-Bey *in forma pauperis* status in all three of these cases. The four cases have different procedural postures and do not all fit neatly into the question that he wants this Court to review.

As discussed below, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. The issue presented by Coleman-Bey affects only a small and narrow category of cases.

The underlying fundamental right involved in this case is access to the courts. Coleman-Bey is correct that "[t]his 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." Pet. 18 (citing *Denton* v. *Hernandez*, 504 U.S. 25, 31 (1992)). But that right is not without limits.

The Prison Litigation Reform Act was enacted "in 1996 in the wake of a sharp rise in prisoner litigation in the federal courts" and "contains a variety of provisions designed to bring this litigation under control." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006). The PLRA limited the *in forma pauperis* statute: "Congress imposed on prisoners, among other hurdles, the three-strikes limitation to proceeding *in forma pauperis*." *Blakely* v. *Wards*, 738 F.3d 607, 612–13 (4th Cir. 2013) (en banc).

And even before Congress enacted the PLRA, proceeding under the *in forma pauperis* statute was not an unlimited right. Focusing on the discretionary nature of the word "may" in the statute, this Court denied *in forma pauperis* status to a litigant who had abused the privilege. *In re McDonald*, 489 U.S. 180, 183 (1989). This Court observed that "paupers filing *pro se* petitions are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions." *Id*. at 184. Because of these incentive problems, "[b]efore the PLRA, courts routinely revoked a prisoner's ability to proceed i.f.p. after numerous dismissals." *Adepegba* v. *Hammons*, 103 F.3d 383, 387 (5th Cir. 1996). Thus, in enacting the three-strikes provision, Congress imposed specific, mandatory limitations to deter frivolous filings by creating more consistency in how courts applied the *in forma pauperis* statute.

Coleman-Bey does not argue that there cannot be limitations imposed on proceeding *in forma pauperis*, nor does he challenge the constitutionality of the three-strikes rule. Rather, the facts of his case

present a narrow issue—*i.e.*, whether a third strike in a separate case bars the filing of a new action immediately when the district court dismisses the action or whether the third strike does not bar a new action until the litigant has exhausted or waived his appellate rights for the prior strikes.

But a decision on the issue presented will be limited only to a narrow and highly specific category of cases: a case where (1) a prisoner has recently received a third strike in the district court, (2) appeals that decision to the court of appeals, and then (3) files a new action before the appeal of the third strike is final. Even though the Prison Litigation Reform Act has been in effect since April 1996, the dissenting court of appeals judge in this case acknowledged that the "appeal presents an issue that the Sixth Circuit has not addressed previously in a published opinion." Pet. App. 7a. That is because the issue does not arise frequently. Indeed, it is not even present in the majority of the seven cases the petition relies on as presenting a circuit split, because in most of those cases the third step (bringing a new action while a prior strike is on appeal) did not occur. Instead, if they involved the timing of counting a strike at all, they involved a different factual scenario, namely, an appeal of the third strike itself.

The issue presented is not as frequent as Coleman-Bey suggests, which may be why he also describes his case as "a surprisingly *rare* opportunity for the Court to resolve the question presented." Pet. 21. (emphasis added). And the potential harm that motivated courts addressing the other factual

scenario (barring an appeal of a third strike, as opposed to barring the filing of a fourth action) is not present here, because all of his strikes arose in different cases. See *Adepegba*, 103 F.3d at 388 ("A hyper-literal reading of the statute might also bar a prisoner's appeal of an erroneous third strike, since the appeal would follow three prior dismissals.").

In the Sixth Circuit, however, this concern is unfounded. The court of appeals explicitly held that "[t]he 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." Pet. App. 6a. The court of appeals reached this conclusion by focusing on the phrase "3 or more *prior occasions*," concluding that "[a] third strike that is on appeal is not a *prior* occasion for the purposes of that appeal, because it is the *same* occasion." *Id*. (emphasis in original).

Coleman-Bey does not dispute that the Sixth Circuit's decision in *Tollefson* avoided the potential problem contemplated in *Adepegba* and other earlier cases. Rather, his main concern is that an *erroneous* third strike—not yet corrected on appeal—will bar a prisoner litigant from filing a new action. Pet. 12. In this particular case, though, we *know* that this concern was unfounded. That is because the court of appeals affirmed Coleman-Bey's third strike in *Sweeney* on March 29, 2011. So, this case does not present a situation where an erroneous third strike prevented a litigant from bringing a new action. Furthermore, even if a district court dismisses a case and generates a third strike, the error is temporary,

not permanent. A prisoner litigant would simply have to wait until the erroneous third strike is reversed before bringing a new action.

If anything, the Sixth Circuit's rule avoids the outcome that a third strike in the district court may trigger a "litigation spree," whereby a prisoner litigant attempts to bring as many cases as possible under the *in forma pauperis* statute before the third strike is affirmed by the court of appeals. This outcome is more likely than the possibility of an erroneous third strike. See, e.g., *In re McDonald*, 489 U.S. at 181 (discussing a prisoner who had filed eight petitions for a writ of certiorari in a single term). Overall, reversal rates in prisoner civil rights cases are quite low. Although the reversal rate for denials of i.f.p. status is not clear, in general the reversal rate for all courts of appeals is 2.7% for U.S. prisoner petitions and 3.7% for private prisoner petitions. See Table B-5 Appeals Terminated on the Merits, by Circuit (http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/B05Mar13.pdf).

The petitioner has failed to identify a case where he—or any other prisoner—was prevented from bringing a meritorious action under the *in forma pauperis* statute because the new action could not be brought before the erroneous strike was reversed by the court of appeals. In other words, he is proposing a solution in search of a problem. Consequently, the petition for a writ of certiorari should be denied.

II. The circuit split is much less developed than the petition suggests.

On the broad question of when a dismissal counts as a strike, it is true that the circuits do not completely align. But the disagreement is not over a clearly defined question, and it is largely about a different factual scenario from the one presented here.

Under the majority rule, a dismissal does not count as a strike until a litigant's appellate rights have been exhausted or waived. But the Sixth Circuit panel majority observed that "[m]any of these cases rely on the unfounded concern that treating an appealed dismissal as a strike would preclude that very appeal." Pet. App. 5a. Thus, the actual question decided in earlier cases was whether a district court dismissal that resulted in a third strike would preclude a litigant from appealing that very decision—as opposed to bringing a fourth, separate action. On that question—whether a litigant can appeal the third strike—the Sixth Circuit's decision does *not* create a circuit split. While the petition emphasizes this distinction as if it were a virtue, Pet. 20 (stating that this case is "free of any complication that might arise where the dismissal is potentially being counted as a 'strike' *on appeal in the same case*"), the distinction shows that the facts in Coleman-Bey's primary cases addressed a different factual scenario.

Earlier cases that addressed the three-strikes rule did not focus on the specific question here—*i.e.*, whether a fourth or subsequent action would be barred after the district court's dismissal, or not

until after the litigant's appellate rights had been exhausted or waived. Instead, they focused on whether counting a district court's dismissal as a third strike would preclude appealing that dismissal.

A. The leading case on which the petition relies did not decide when to count a strike.

In *Adepegba*—one of the first cases to tackle the then-newly enacted PLRA—the Fifth Circuit faced several issues. The two main threshold issues were whether § 1915(g) applied to cases pending on the effective date of the statute and whether to count as strikes dismissals that accrued before the PLRA went into effect. *Adepegba*, 103 F.3d at 385–87. The opinion also answered several other questions, including that "both the frivolous appeal and a lower court's dismissal as frivolous count [as a strike]," but that the "reversal of a dismissal as frivolous nullifies the strike." *Id*. at 387–88.

But the court of appeals in *Adepegba* did not directly face the question presented in the instant case because *Adepegba* involved three strikes for which the appeals had already occurred: the first strike was a district-court dismissal that had already been affirmed, the second strike was another district-court dismissal that had already been affirmed, and the third strike was an appeal in another case that the Fifth Circuit had dismissed as a frivolous appeal. *Id.* at 387–88. In fact, the conclusion in *Adepegba* was to dismiss that case, "as well as any other appeal not involving physical injury, pending in this circuit on the date of this opinion." *Id*. at 388.

Thus, to the extent that the *Adepegba* court commented on when a strike should count for purposes of bringing a new action, those comments were dicta, not necessary for the outcome of the case, and, worse, dicta that was addressing a different concern. In short, the scenario presented here was not resolved by *Adepegba*.

B. The three cases cited in the petition that did address timing involved a different factual scenario.

As to the First, Tenth, and D.C. Circuits decisions the petition cites, those cases involved the concern that counting a district-court dismissal as a strike would preclude appealing that dismissal. That concern is not present on Coleman-Bey's facts.

For example, the D.C. Circuit's decision on this issue, *Thompson* v. *Drug Enforcement Admin.*, 492 F.3d 428 (D.C. Cir., 2007), focused on the concern that if dismissals counted before the appeals process had come to a close, that rule would "effectively eliminate [its] appellate function." *Id.* at 432. Accordingly, for the first defendant (Michael Thompson), the D.C. Circuit refused to count a dismissal as a second strike because the dismissal was being appealed in that very case. *Id.* at 439 (discussing the dismissal "in this case"). The court thus concluded he had only one strike, not counting other dismissals for reasons unrelated to timing. *Id.* at 431, 437–38 (rejecting other potential strikes because an affirmance does not count as an additional strike, because it could not determine the grounds for dismissals in two prior cases, and because another dismissal was for lack of subject-

matter jurisdiction, not for failure to state a claim). And as to the second defendant (Charles Thompson), the court did not focus on timing; rather, it did not reach a third strike because the prior dismissals were on grounds not covered by § 1915(g). *Id.* at 431–32, 439 (i.e., statute of limitation, lack of standing, and lack of jurisdiction).

In fact, the timing issue was not even contested in *Thompson*: "Both sides also agree that the district court dismissals in the two cases on appeal here could not possibly count as strikes until the respective appeals are exhausted." 492 F.3d at 432. In any event, *Thompson* would have come out the same in the Sixth Circuit, given that the Sixth Circuit expressly stated that a "third strike may be appealed even though it would count as a strike with regard to a fourth or successive suit." Pet. App. 6a.

Another leading case involving when to count a strike, *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775, 778 (10th Cir. 1999), also did not address a factual scenario like Coleman-Bey's. In *Jennings*, the Tenth Circuit faced the question whether the three-strikes rule could prohibit an appeal of that same case. It involved two consolidated appeals, where the district court had dismissed both of his cases and then, adding those two strikes to a prior dismissal, denied him leave to file his appeal *in forma pauperis*. The Tenth Circuit reversed, concluding he could appeal those cases *in forma pauperis*, *id.* at 777, but then dismissed the appeals as frivolous and barred him from further *in forma pauperis* filings, *id.* at 781. As with *Thompson*,

the factual scenario in *Jennings* would have come out the same in the Sixth Circuit. Pet. App. 6a.

And as for the First Circuit, it made only a passing reference to the rule in a footnote in an unpublished decision, relying on *Adepegba* and *Jennings* without discussing the specific strikes. *Michaud* v. *City of Rochester*, 248 F.3d 1127 n.1 (1st Cir. 2000).

C. The remaining circuits simply relied on prior cases that had addressed a different issue and did not separately analyze this factual scenario.

Very few cases have directly addressed the issue presented here—*i.e.*, whether a dismissal that is pending on appeal counts as a strike to bar a fourth or successive lawsuit.

The Eighth Circuit confronted this factual scenario in a *per curiam* opinion. *Campbell* v. *Davenport Police Dept.*, 471 F.3d 952 (8th Cir. 2006). But the court simply applied the rule from *Adepegba* and *Jennings* without any critical analysis; it did not address whether the rule that those cases developed out of a concern that a third strike could not be appealed also made sense in the separate context of whether a fourth action could be brought.

The Third Circuit, in a decision that addressed numerous issues, decided to "follow 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." *Ball* v. *Famiglio*, 726 F.3d 448, 465 (3rd Cir. 2013). The

Third Circuit simply followed *Adepegba*, *Thompson*, and *Jennings*, none of which involved an attempt to bring a fourth action, so it too rested on the premise underlying those cases—that a third strike might not be appealable. And as with *Adepegba*, the question in the instant case was not presented in *Ball*. *Ball* was not an appeal from the denial of *in forma pauperis* status. Rather, the litigant in *Ball* "appeal[ed] the denial of her motion for a preliminary injunction and the grant of summary judgment to the defendants . . . ." *Id.* at 451. Furthermore, the *Ball* court noted that the majority rule itself is not clear. "That rule leaves open the question of whether a prisoner accrues a strike as soon as a dismissal by the district court is affirmed by a court of appeals, or only when the Supreme Court has denied or dismissed a petition for writ of certiorari or the time for filing one has passed." *Id.* at 465 n.22. In other words, the majority rule is not yet clearly defined.

Finally, in a divided opinion, the Ninth Circuit decided the issue in *Silva* v. *Di Vittorio*, 658 F.3d 1090 (9th Cir. 2011). But the court in *Silva* reached the issue only because the defendants argued that the court should not reach the merits of the appeal because the plaintiff's appeal was barred by the "three strikes" rule. And, following the pattern of *Campbell* and *Ball*, the Ninth Circuit focused on the concern that a third strike could not itself be appealed and the concern that such a rule would " 'effectively eliminate [its] appellate function.' " *Id.* at 1098, 1099 (quoting *Thompson*, 429 F.3d at 432. Further, the case was not an appeal from the denial of *in forma pauperis* status, like the instant case. And as noted by the Third Circuit in *Ball*, it is not

yet clear how far into the appellate process a litigant must go until the dismissal may be counted as a strike.

In short, the circuit split is not as straightforward and clean as Coleman-Bey implies. The issue requires further development in the lower courts, so that courts can apply the actual language of § 1915(g) to the fact pattern presented here, rather than just assuming the outcome.

Furthermore, the four cases sought to be consolidated in the petition do not all fit neatly into its question presented. Again, even if Coleman-Bey's proposed rule is followed, he accrued his third strike when the court of appeals affirmed *Sweeney* on March 29, 2011. In *Bowerman* and *Vroman*, the district court initially granted him *in forma pauperis* status. In both cases, though, the district court then revoked *in forma pauperis* status after *Sweeny* was affirmed and the defendants filed a motion. Pet. 32a, 52a. Including these cases therefore muddies the issue further. These cases present the additional question whether *in forma pauperis* status can be revoked after the third strike is affirmed on appeal. And of course, it is unclear whether "appellate review" means review by a court of appeals or whether it means that a strike is not counted until this Court has denied or dismissed a petition for writ of certiorari or the time for filing one has passed.

In sum, the question is ambiguous, and the issue is underdeveloped, because most circuits have been addressing a different fact pattern. This is not the proper case for resolving the general issue of when a dismissal should be counted as a strike.

III. The decision below was correct.

The petition also does not warrant review because the Sixth Circuit's decision was consistent with the plain language of the statute. Coleman-Bey "has, on 3 or more prior occasions, . . . brought an action . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim." § 1915(g).

Coleman-Bey no longer disputes that the dismissals fall within the three grounds specified in the statute. Instead, he contests whether the prior dismissals count as "dismissed" when "still pending on review or before the time for seeking appellate review has passed," Pet. 3, in effect inserting into the statute a requirement that a dismissal be final on appeal. See Pet. App. 9a (Daughtrey, J., dissenting) (concluding that dismissals count only when they have become final).

But the plain language of § 1915(g) imposes no such finality requirement. To the contrary, the statutory text clearly differentiates between dismissal of an action and dismissal of an appeal, and it requires counting each as strikes. 28 U.S.C. § 1915(g) (counting "an action *or* appeal . . . that was dismissed") (emphasis added). Coleman-Bey's argument that prior actions count as strikes only if they culminated in an appeal ignores the statutory language distinguishing between trial-court dismissals and appellate dismissals. Under a plain reading of the statute, a strike may be accrued when "an action . . . was dismissed," § 1915(g), not after appellate rights have been waived or exhausted. See *Chavis* v. *Chappius*, 618 F.3d 162, 167 (2d Cir. 2010)

(discussing the fact that "§ 1915(g)'s phrase 'action or appeal' disjunctively juxtaposes 'action' and 'appeal,' " and recognizing that the "most natural" reading is that they "connot[e] two separate parts of one larger lawsuit"). Reading a finality requirement into § 1915(g) would eliminate this distinction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: AUGUST 2014