No. 13-1333

In the Supreme Court of the United States

ANDRÉ LEE COLEMAN,
A/K/A ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

TODD TOLLEFSON, ET AL.

ANDRÉ LEE COLEMAN, PETITIONER

v.

BERTINA BOWERMAN, ET AL.

ANDRÉ LEE COLEMAN, PETITIONER

v.

STEVEN DYKEHOUSE, ET AL.

ANDRÉ LEE COLEMAN, PETITIONER

v.

AARON J. VROMAN, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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This is the rare case in which respondents before this Court argue that a statute unambiguously compels their interpretation, yet simultaneously reject the interpretation of the lower court whose decision they are purportedly defending. Under respondents' interpretation of the "three strikes" provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. 1915(g), a district court's dismissal of a lawsuit immediately counts as a strike, even on appeal from that very dismissal. Respondents

wisely make no effort to defend the Sixth Circuit's concededly "erroneous" reasoning, under which a dismissal immediately counts as a strike against a different suit despite the Sixth Circuit's recognition that a district court's dismissal and the ensuing appeal constitute part of a single "occasion." And by advocating an interpretation that effectively bars even an appeal from a third-strike dismissal, respondents go further than the Seventh Circuit, the only other circuit to have held that a dismissal counts as a strike while it is pending on appeal (albeit with an interpretation that also differs from the Sixth Circuit's).

Further complicating matters, the United States, having previously advocated *petitioner's* interpretation, now advances an idiosyncratic interpretation of its own. While also rejecting the Sixth Circuit's interpretation (and the Seventh Circuit's approach to appeals from third-strike dismissals), the United States offers an interpretation under which a dismissal immediately counts as a strike against a fourth or successive suit, but not against an appeal from a third-strike dismissal.

If your head is spinning, you are not alone. At a minimum, the existence of four different approaches just on respondents' side of the case—two of which have never been adopted by *any* court of appeals—is nigh on conclusive proof that, when it comes to the question of when a dismissal counts as a strike, Section 1915(g) is ambiguous. Under those circumstances, there is no reason to depart from the approach taken by the vast majority of the courts of appeals, under which a dismissal counts as a strike only once it becomes final on appeal. That interpretation is the best reading of Section 1915(g), and certainly a textually permissible one. It serves the purposes of the statute; avoids the unjust and anomalous results of the various alternatives; and is the most administrable of

all the options. The contrary interpretations are solutions in search of a problem, because, as petitioner's amici have shown, there is no evidence that the majority interpretation has created any difficulties for the numerous courts applying it in the nearly two decades since the PLRA's enactment. This Court should adopt the majority interpretation and reverse the judgments below.

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

Section 1915(g) generally bars 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." While the text of Section 1915(g) addresses the question of *what* can qualify as a strike (*i.e.*, a dismissal on certain grounds of an action or appeal), it does not specifically address the discrete question of *when* a dismissal counts as a strike. The best reading of Section 1915(g) is that a dismissal does not count as a strike until it becomes final on appeal. Insofar as respondents and the United States argue that the text of the statute does not permit that interpretation, their arguments are unavailing.

1. If it were not obvious before, it should now be beyond dispute that Section 1915(g) does not have "a plain and unambiguous meaning with regard to the particular dispute in the case": *i.e.*, when a dismissal counts as a strike. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). In the decision below, the Sixth Circuit offered one interpretation of the relevant language. See Pet. App. 4a-7a. Respondents advocate another interpretation, criticizing the Sixth Circuit's reasoning as "errone-

ous." See Br. 18-32, 44. The United States disagrees with the Sixth Circuit and respondents and advances yet another interpretation. See Br. 25-27. And none of those interpretations is consonant with the Seventh Circuit's approach. See *Robinson* v. *Powell*, 297 F.3d 540, 541 (2002). About the only thing on which all of those courts and parties can agree is that the statutory text unambiguously supports their respective interpretations. See *id.*; Pet. App. 5a; Resp. Br. 18; U.S. Br. 12, 18.

Petitioner addresses the particular failings of respondents' and the United States' interpretations below. For now, however, the existence of those four competing interpretations—along with the fifth interpretation adopted by most courts of appeals—amply demonstrates that Section 1915(g) is ambiguous on the question of whether a dismissal counts as a strike immediately or only once it has become final on appeal.

In an effort to rule out the majority interpretation, respondents contend that the courts to have adopted that construction have "acknowledged that they are not following [the statutory] text." Br. 36-37. That contention, however, rests primarily on one court's disparaging characterization of a contrary interpretation as "hyperliteral." *Adepegba* v. *Hammons*, 103 F.3d 383, 388 (5th Cir. 1996). Far from engaging in a purposivist frolic from a bygone era, the courts to have favored the majority interpretation have largely *rejected* the argument that immediately counting a dismissal as a strike is the literal or most natural reading of the statutory text. See, *e.g.*, *Chavis* v. *Chappius*, 618 F.3d 162, 169 (2d Cir. 2010). Instead, those courts have concluded that the text is ambiguous because it "does not expressly state whether a prior dismissal of 'an action or appeal' must be final before it can be considered a 'strike,'" and have construed the statute to avoid the problems inherent in a contrary

interpretation. *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1098-1100 (9th Cir. 2011); see Pet. App. 9a (Daughtrey, J., dissenting).

2. The best reading of the text of Section 1915(g) is that a dismissal does not count as a strike until it becomes final on appeal. That is because, while a "dismiss[al]" on certain grounds can qualify as a strike, it counts only when the "occasion[]" on which the "dismissal" occurred is complete: *i.e.*, when the appeal from the dismissal has run its course. Respondents' and the United States' criticisms of that interpretation are unconvincing.

Respondents and the United States argue that petitioner's interpretation of "prior occasion[]" in Section 1915(g) ignores the statute's distinction between an "action" and an "appeal." See Resp. Br. 21-24, 27-32; U.S. Br. 17-19. Not so. Petitioner has consistently acknowledged that qualifying dismissals by a district court and a court of appeals constitute distinct strikes and give rise to distinct "occasions"; the relevant question is when each of those "occasions" is complete. See Pet. Br. 18-19 & n.7. If anything, the fact that a qualifying dismissal by a court of appeals initiates a distinct "occasion," but a mere affirmance does not, suggests that the "occasion" initiated by a district court's dismissal continues until the appellate process is complete. Consistent with that proposition, many courts to have acknowledged that dismissals in a district court and a court of appeals qualify as separate strikes have also held that those dismissals do not *count* as strikes until they are final on appeal. See, *e.g.*, *Chavis*, 618 F.3d at 169; *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775, 780 (10th Cir. 1999); *Adepegba*, 103 F.3d at 388.

Respondents' only other argument based on the actual text of Section 1915(g) is also readily dispatched.

Respondents contend (Br. 24) that the exception in the "three strikes" provision for cases in which the prisoner is in imminent physical danger indicates that no other exceptions exist. That is true but irrelevant. This case concerns the logically antecedent question of when a dismissal counts as a strike for purposes of triggering the "three strikes" rule in the first place—not whether a prisoner who is *already* subject to the "three strikes" rule qualifies for an exception.

3. As a textual matter, petitioner's interpretation of Section 1915(g), under which a dismissal does not count as a strike until it becomes final on appeal, is superior to the novel interpretations offered by respondents and the United States.

a. Having lauded the Sixth Circuit in their opposition to rehearing for its "thoughtfully reasoned opinion," Resp. C.A. Opp. to Pet. for Reh'g 6, respondents now disavow the Sixth Circuit's reasoning as "erroneous." Br. 44. Specifically, respondents reject the Sixth Circuit's interpretation that a district court's dismissal and the ensuing appeal constitute part of a single "occasion." Respondents instead take an even more aggressive position than either the Sixth or Seventh Circuit (or, for that matter, any other court of which we are aware), advocating an interpretation under which a dismissal immediately counts as a strike even on appeal from that very dismissal. See Br. 18-32.

Respondents apparently rest their interpretation on the view that the "occasion[]" corresponding to a "dismissal" begins and ends with the act of dismissal, without taking into account any subsequent proceedings on appeal. In support of that view, respondents devote many pages to the undisputed proposition that a dismissal by a district court and a subsequent dismissal by a court of appeals qualify as distinct strikes and give rise

to distinct "occasions." See Br. 18-24. It does not follow, however, that an "occasion[]" is *complete* when the dismissal is entered, rather than when the appeal from the dismissal has run its course. As noted above, the fact that the text of Section 1915(g) addresses the question of *what* can qualify as a strike does not answer the discrete question of *when* a dismissal counts as a strike. As to that latter question, respondents simply have nothing to say about the statutory text.

b. For its part, the United States also rejects the Sixth Circuit's interpretation, but reaches the same result as the Sixth Circuit through its own interpretation of the phrase "prior occasion[]"—an interpretation, like respondents', that (to the best of our knowledge) no court at any level has accepted. See Br. 12-19, 25-27.

To begin with, the United States barely acknowledges the fact that, as recently as the last Administration, it argued to the D.C. Circuit that *petitioner's* interpretation of Section 1915(g) was the correct one. See Br. of Appellees at 24, *Thompson* v. *DEA*, 492 F.3d 428 (D.C. Cir. 2007) (Nos. 04-5450 & 05-5082) (filed Oct. 30, 2006). The sole explanation the Solicitor General provides for the government's about-face is that, in the prior case, "[t]he brief's discussion of the issue was perfunctory." Br. 14 n.2. The government's discussion in that brief of when a dismissal counts as a strike, however, was not some passing aside: that question was one of the issues presented to, and decided by, the D.C. Circuit. Indeed, the D.C. Circuit expressly noted the government's position, even quoting from its brief, in adopting the majority view that a dismissal does not count as a strike until it has become final on appeal. See *Thompson*, 492 F.3d at 432-433.

Astoundingly, the United States now asks this Court to hold that Section 1915(g) *unambiguously forecloses*

the interpretation that it previously advocated. See Br. 12, 18. While the government has been known to change position from time to time, we are unaware of any case in which the Solicitor General has argued that the "plain text" of a statute forecloses its previous interpretation (and instead compels an interpretation that no court, to the best of our knowledge, has adopted).

The change in position aside, the interpretation the United States now offers is unmoored from the statutory text. In an effort to preserve a prisoner's ability to appeal from a third-strike dismissal, the United States contends that the statutory phrase "prior occasion[]" refers to a prior dismissal *in a different suit*. See Br. 25-27.[1] But if the "occasion[]" corresponding to a "dismissal" begins and ends with the act of dismissal, it would necessarily follow that a "prior occasion[]" is an "occasion" (*i.e.*, an act of dismissal) that occurs before the strikes are being counted. See 12 *Oxford English Dictionary* 508 (2d ed. 1989) (defining "prior" as "[p]receding (in time or order); earlier, former, anterior, antecedent"). To avoid that implication—which would effectively prohibit an appeal from a third-strike dismissal—the government simply reads into the statute a limitation to dismissals in different suits. See Br. 25.

The only explanation the United States offers for its linguistic gymnastics is that, under any other interpretation, the word "prior" would be superfluous because, in determining whether a prisoner has three strikes, a

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[1] Although the United States defines "prior occasions" at one point as "strikes imposed in prior-filed suits" (Br. 25), that appears to be an imprecise formulation: presumably, the United States would consider a dismissal in a case that was filed *later* than the instant suit to qualify as a strike, as long as the dismissal itself has occurred by the time the strikes are being counted.

court will always be looking back to "prior" strikes. See Br. 26. Temporal words such as "prior," however, are often unnecessary in this sense, yet they are naturally understood to refer to events occurring earlier in time. See, *e.g.*, 21 U.S.C. 851(a)(1) (providing that "[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions" unless the government sets out the prior convictions in writing before trial). And even if the United States were correct, it offers no affirmative explanation for how it can get from "prior occasion[]" to a prior dismissal *in a different suit*—much less for how that interpretation is unambiguously compelled by the statutory text.

4. With little to say about the actual text of Section 1915(g), respondents and the United States primarily argue that this Court should read into the statute a requirement that a dismissal immediately counts as a strike in some or all circumstances. See Resp. Br. 24-27, 32-35; U.S. Br. 14-17. But as petitioner has explained, where a statute "says nothing explicitly" about the issue in question, "such silence * * * normally creates ambiguity[;] [i]t does not resolve it." *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002). Respondents' and the United States' contrary arguments are unavailing.

a. Respondents and the United States note that, in a variety of other statutory provisions, Congress has expressly addressed the issue of when an order or judgment should have particular legal consequences. See Resp. Br. 24-27; U.S. Br. 15-17. That is true—in both directions. In some contexts, Congress has attached legal consequences immediately upon entry of the order or judgment. See, *e.g.*, Fed. R. Evid. 609(e) (providing that a witness's character may be attacked by evidence of a criminal conviction "even if an appeal is pending" from

the conviction). In other contexts, Congress has deferred legal consequences until after the order or judgment becomes final on appeal. See, *e.g.*, 21 U.S.C. 841(b) (imposing a higher minimum sentence for distributing a controlled substance if "[a] person commits such a violation after a prior conviction for a felony drug offense has become final"). Those provisions stand only for the unremarkable propositions that Congress can speak unambiguously on the issue of when an order or judgment should have particular legal consequences—and that, when it does, it does so in context-specific ways. They provide little guidance about what to do where, as here, Congress does not expressly address the issue.

Selectively citing those statutes that expressly defer legal consequences until after an order or judgment becomes final on appeal, respondents and the United States contend that this Court should draw a negative inference from Congress's failure to include similar language in Section 1915(g). As this Court has made clear in the specific context of the PLRA, however, no "negative inference * * * arise[s] from the silence" of one provision of a statute, as compared with another, where the two provisions "address wholly distinct subject matters," *Martin* v. *Hadix*, 527 U.S. 343, 356 (1999), and contain "difference[s] in the[ir] formulation," *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 435-436 (2002).

By way of example, respondents cite 28 U.S.C. 2244(d)(1)(A) and 2255(f)(1), the provisions establishing the limitations period for collateral review of state and federal convictions (which run from, *inter alia*, the date on which the underlying conviction becomes final). See Br. 24-27. No negative inference can be drawn from those provisions for the simple reason that they were not contained in the same statute as Section 1915(g). See,

e.g., *Johnson* v. *United States*, 559 U.S. 133, 143 (2010). Respondents cite the fact that those provisions were enacted almost simultaneously with the PLRA (Br. 26), but a negative inference is still inappropriate because the relevant provisions "evolved separately in the congressional process, only to be passed together at the last minute." *Lindh* v. *Murphy*, 521 U.S. 320, 329 (1997). The language that ultimately became Sections 2244(d)(1)(A) and 2255(f)(1) appears to have been introduced many years before the language that became Section 1915(g). Compare S. 88, 101st Cong. § 6 (1989), and S. 271, 101st Cong. § 6 (1989), with S. 1275, 104th Cong. § 4 (1995).

For its part, the United States focuses on the PLRA's automatic-stay provision, 18 U.S.C. 3626(e)(2), which addresses the operation of a court order granting prospective relief in a civil action challenging prison conditions. See Br. 17. Under that provision, a motion to terminate or modify such an order automatically stays the order until the court rules on the motion. The government argues that the automatic-stay provision "contains what the three strikes provision lacks—namely, a direct indication that Congress wanted to * * * giv[e] the party aggrieved by the judgment a right to delay its effect while challenging it." *Id.*

Section 1915(g), however, addresses entirely different subject matter from that addressed by Section 3626(e)(2), and there is no parallelism in the language of the two provisions. Whereas Section 3626(e)(2) is part of a detailed scheme for ensuring that injunctive relief with respect to prison conditions is narrowly drawn and promptly terminated, Section 1915(g) sets forth the conditions under which prisoners can obtain *in forma pauperis* status to bring claims challenging prison conditions (and other types of claims) in the first place. Neither the automatic-stay provision nor any of the other cited pro-

visions justifies ascribing intentionality to Congress's failure more explicitly to provide that a dismissal counts as a strike only when it becomes final on appeal.

b. Respondents and the United States also seek to infer the requirement that a dismissal immediately counts as a strike from certain non-statutory doctrines that attach legal consequences immediately upon the entry of an order or judgment. See Resp. Br. 32-34; U.S. Br. 14-15. As with statutes, however, there is no uniform or default rule; the non-statutory doctrines cut in both directions, with some doctrines deferring legal consequences until after an order or judgment becomes final on appeal. See, *e.g.*, *Griffith* v. *Kentucky*, 479 U.S. 314, 321 & n.6 (1987) (holding that the retroactivity of new constitutional rules of criminal procedure depends on whether the conviction is final on appeal).

The cited non-statutory doctrines, moreover, arise in readily distinguishable contexts. For example, respondents and the United States note that a judgment is ordinarily enforceable immediately, absent a stay pending appeal. See Resp. Br. 32-33; U.S. Br. 14. But the purpose of that rule is to preserve a prevailing party's right *ultimately* to enforce a favorable judgment. For example, as to money judgments, if an appellant posts a bond—thereby "assur[ing] * * * that sheer passage of time will not render the judgment uncollectible"—the appellant is entitled to a stay as a matter of right and will not be required to "pay the judgment before its validity has been finally determined." *Donovan* v. *Fall River Foundry Co.*, 696 F.2d 524, 526 (7th Cir. 1982); see Fed. R. Civ. P. 62(d). Here, by contrast, there is no question that a qualifying dismissal will *ultimately* count as a strike if it is affirmed on appeal; the only question is whether such a dismissal will *also* (and automatically) count as a strike in the interim.

Like the Sixth Circuit, respondents and the United States also rely on the doctrine of res judicata or claim preclusion, which, in some jurisdictions, prevents parties from relitigating claims in another lawsuit after judgment has been entered in a lawsuit between the parties. See Resp. Br. 33-34; U.S. Br. 14-15. But as petitioner has explained (Br. 31), that doctrine serves the purpose of preventing the losing party in the initial lawsuit from getting a second bite at the apple, whereas Section 1915(g) serves the distinct purpose of preventing a prisoner from pursuing *any* additional lawsuits *in forma pauperis*, however unrelated the claims in those lawsuits might be.[2] Given their distinct contexts, the cited nonstatutory doctrines provide no valid basis for reading into Section 1915(g) a requirement that a dismissal immediately counts as a strike.

5. The PLRA's underlying purposes, as expressed in the text and legislative history, support the conclusion that Congress did not intend for a dismissal to count as a strike until it becomes final on appeal. Respondents and the United States do not dispute that, as the text indicates, Congress intended the PLRA's "three strikes" provision to penalize only prisoner litigation that is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. 1915(g). Nor do they seriously dispute that counting a dismissal as a strike while it is still pending on appeal poses "a risk of inadvertently

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[2] Although the United States contends (Br. 27) that a judgment may not be accorded preclusive effect where the precluded party is unable to obtain appellate review, that principle appears to apply only to *issue* preclusion, which requires the precluded party to have had a full and fair opportunity to litigate the relevant issue. See *Standefer* v. *United States*, 447 U.S. 10, 22-23 & n.18 (1980).

punishing nonculpable conduct," contrary to Congress's stated intent. *Adepegba*, 103 F.3d at 387.

The interpretation of the "three strikes" provision that most faithfully hews to Congress's intent is the one that waits until appellate review is complete before counting a dismissal as a strike. Because that approach is a textually permissible interpretation, indeed the best one, of the language Congress used in Section 1915(g), this Court should follow the vast majority of the courts of appeals and adopt it.

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

As petitioner has explained (Br. 21), considerations of workability and administrability are highly relevant to interpreting a statute, such as Section 1915(g), that governs the processing of lawsuits by federal courts. Respondents and the United States do not seriously dispute that the majority interpretation, under which a dismissal counts as a strike only once it has become final on appeal, is readily administrable; as the United States puts it, that is "a task with which district courts are already quite familiar." Br. 25. Instead, they contend that their alternative interpretations, under which a dismissal immediately counts as a strike in some or all circumstances, are equally administrable. See Resp. Br. 46-50; U.S. Br. 20-25. Those contentions lack merit.

1. Respondents and the United States do not dispute that, under their interpretations, a prisoner could go from having three strikes (and being barred from proceeding *in forma pauperis*) to having two strikes (and being unbarred). That is because, if a dismissal can immediately count as a third strike, a prisoner could lose

that strike if the dismissal is reversed or modified on appeal.

This case well illustrates the potential oddity of that approach. Consider *Kinnunen*, the lawsuit that resulted in petitioner's second strike. See J.A. 46-49. The district court initially dismissed the lawsuit for failure to state a claim. Under the dynamic approach to strike counting advocated by respondents and the United States, if that had been petitioner's third such dismissal, petitioner would have accumulated three strikes at that point and been barred from proceeding *in forma pauperis* in future proceedings (and potentially even on appeal). The court of appeals then vacated in part and remanded for further proceedings. Under the dynamic approach, petitioner would no longer have had three strikes, and the bar would have been lifted. On remand, however, the district court again dismissed for failure to state a claim. Under the dynamic approach, petitioner would again have had three strikes and been barred. Nothing in the statute suggests that Congress contemplated such a dizzying process, under which a prisoner would be barred from proceeding *in forma pauperis* one day but not the next. To the contrary, the evident premise of the "three strikes" provision is that, once a prisoner reaches three strikes, he is barred from claiming *in forma pauperis* status for the entirety of his remaining term of imprisonment. See 28 U.S.C. 1915(g).

2. Beyond that incongruity, respondents' and the United States' interpretations would have pernicious consequences in two principal respects.

a. As petitioner has explained (Br. 22-23), those interpretations could bar a prisoner from proceeding *in forma pauperis* in a fourth, potentially meritorious, lawsuit where a dismissal that counts as a third strike is later reversed or modified on appeal. While the appeal is

pending, the running of the limitations period on the claims in the fourth suit could bar the prisoner from pursuing those claims altogether.

Respondents acknowledge that their interpretation of Section 1915(g) could give rise to that deeply troubling scenario. Br. 50. The United States does the same, but asserts that a prisoner caught in that scenario "is not without recourse" because the prisoner could move to reopen the fourth suit under Federal Rule of Civil Procedure 60(b)(5) on the ground that the order denying *in forma pauperis* status was "based on an earlier judgment that has been reversed or vacated." Br. 23.

It is questionable, however, whether a prisoner with expired claims would be able to obtain relief under Rule 60(b)(5). That provision is generally understood to reach only "cases in which the present judgment is based on the prior judgment in the sense of claim or issue preclusion." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2863, at 451-453 (3d ed. 2012). In addition, a prisoner can lose a strike not only where a court of appeals "reverse[s]" or "vacate[s]" the earlier judgment ordering dismissal, but also where the court of appeals affirms the judgment but rejects the district court's characterization of the suit as a qualifying dismissal under Section 1915(g). See, *e.g.*, *Munn* v. *Martin*, 502 Fed. Appx. 627, 627 (8th Cir. 2013); *Bennett* v. *Cannon*, 206 Fed. Appx. 311, 312 (4th Cir. 2006); *Stafford* v. *Brown*, 114 Fed. Appx. 769, 769-770 (8th Cir. 2004). Rule 60(b)(5) would indisputably be unavailable in the latter circumstance.

It is also questionable whether reopening would serve to eliminate the limitations bar. The United States contends that a case that has been reopened under Rule 60(b) is reinstated as of the date on which it was originally filed. See Br. 23. In the specific context of the denial

of *in forma pauperis* status, however, some courts have held that a later filing (such as a paid complaint) does not relate back to the date of the constructive filing of the initial complaint, because the denial of *in forma pauperis* status ends the tolling afforded by that "filing." See, *e.g.*, *Williams-Guice* v. *Board of Education of Chicago*, 45 F.3d 161, 162-165 (7th Cir. 1995); *Jarrett* v. *US Sprint Communications Co.*, 22 F.3d 256, 259 (10th Cir. 1994).

It is thus far from clear that Rule 60(b)(5) would afford relief in cases in which a prisoner is erroneously barred from proceeding *in forma pauperis* in a fourth or successive lawsuit. And even if it would, requiring a prisoner to jump through that additional hoop would hardly serve the interest in judicial efficiency underlying the PLRA. In previously urging adoption of petitioner's interpretation, the United States said it best: a contrary interpretation would "create[] more work than is appropriate for either the courts or the litigants to resolve a request for [*in forma pauperis*] privileges." Br. of Appellees at 24, *Thompson*, *supra*.

b. As petitioner has explained (Br. 23-25), a contrary interpretation would also introduce needless complexity and inefficiency into a statute that was intended to reduce, not increase, the courts' work in processing prisoner litigation.

To be sure, as the United States notes (Br. 24-25), under any of the available interpretations, a court calculating strikes while a third qualifying dismissal is pending on appeal will have to check on the status of the appeal. Under the majority interpretation, however, once the dismissal becomes final on appeal, the prisoner will have three strikes and be out. That approach has an obvious and undisputed practical advantage: a court will be able to rely on a determination from a previous case that a given prisoner has three strikes when assessing the

prisoner's eligibility for *in forma pauperis* status in a later case.

Under a contrary interpretation, by contrast, a court will not be able to take a previous determination for granted, but will instead have to conduct its own assessment to ensure that intervening activity has not returned the prisoner to two strikes. And even if a court were to determine that the prisoner has three strikes, that will not necessarily be the end of the matter. If the fourth suit is dismissed without prejudice for want of prosecution, the prisoner will retain the ability to refile the suit if the dismissal that counted as the third strike is reversed or modified on appeal. If the prisoner does refile (and the limitations period has not yet run), the court would be required to reassess whether the prisoner has three strikes at that time. Again, the perverse result is more work for the courts, under a statute that was intended to promote judicial efficiency.

3. As noted above, respondents take a more extreme position than the United States, immediately counting a district court's dismissal of a lawsuit as a strike even on appeal from that very dismissal. As the United States correctly notes, however, that approach is not "consistent with common practice, in which a litigant is permitted an appeal as of right from any adverse district court ruling that is final." Br. 26-27. If Congress had intended effectively to abrogate the right to appeal in a category of cases, "it would have clearly said so." *Thompson*, 492 F.3d at 432. Indeed, as respondents acknowledge (Br. 38), Congress did provide such a clear statement elsewhere in Section 1915, when it provided that *in forma pauperis* status should be denied on appeal "if the trial court certifies in writing that [the appeal] is not taken in good faith." 28 U.S.C. 1915(a)(3). The absence of such a clear statement in Section 1915(g)

strongly suggests that Congress did not intend to deny *in forma pauperis* status on appeal from *every* dismissal that counts as a third strike—a result that would "ossify district court errors," *Adepegba*, 103 F.3d at 388, and would be "unreasonably severe in light of congressional intent to foster meritorious prisoner lawsuits," *Henslee* v. *Keller*, 681 F.3d 538, 542 n.9 (4th Cir. 2012).

Remarkably, respondents do not seem troubled by the harsh results of their interpretation. They claim that it "simply returns [a prisoner] to the place of the ordinary American citizen who must pay the filing fee before filing." Br. 38. But that analogy is obviously misplaced. A prisoner is more closely analogous to an *indigent* citizen, who retains the right to proceed *in forma pauperis* on appeal. While the PLRA imposes certain obligations on prisoners who qualify for *in forma pauperis* status, there is no indication that Congress intended to prevent prisoners from obtaining appellate review of an order that has the effect of denying them *in forma pauperis* status in future litigation.

Not to worry, say respondents: a prisoner who wishes to appeal from a third-strike dismissal need only "buckle down to earn the money before the limitations period ends." Br. 50. Especially coming from a State, that is a breathtakingly disingenuous suggestion. Petitioner earns 17½ cents per hour working in the kitchen at Michigan's St. Louis Correctional Facility, where he is currently incarcerated. Even assuming that petitioner could put aside every penny he earns to pay for filing fees, and that he is permitted to work the regulatory maximum of 30 hours every week, it would take him *almost two years* to pay the appellate filing fee of $505. See Pet. Br. 6.

In any event, prisoners such as petitioner cannot put aside every penny. In Michigan, prisoners are required

to pay for, *inter alia*, restitution, fees for medical services, and institutional debts (including for the purchase of such basics as toothpaste) before they are allowed to withdraw funds for "discretionary" spending. See Michigan Department of Corrections, Policy Directive 04.02.105, at 5 (¶ V) (Jan. 1, 2010). And contrary to respondents' assertion (Br. 40), materials for litigation, such as writing materials, photocopies, and postage, are not free in Michigan prisons. See Policy Directive 05.03.116, at 1 (¶ F), 3 (¶ M) (Oct. 17, 2014); Policy Directive 05.03.118, at 2 (¶ H) (Sept. 14, 2009). Prisoners thus cannot simply "buckle down"; if they are denied *in forma pauperis* status, they will effectively be barred from bringing suit.[3]

4. Ultimately, respondents and the United States agree that resolution of the question presented here affects only a small subset of cases. See Br. in Opp. 4, 6-7; U.S. Br. 21-23. And numerous other restrictions imposed by the PLRA—including, *inter alia*, the requirement for installment payments of the filing fee and the screening mechanisms for meritless claims and appeals, see 28 U.S.C. 1915(a)(3), (b), 1915A—ensure that federal courts are able to control their dockets and efficiently dispose of meritless cases. See Profs. Br. 13-19. While petitioner's interpretation of Section 1915(g) has been the law in seven federal circuits (and seemingly the law in three others), neither respondents nor the United States identifies any problems stemming from that approach.

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[3] Nor is it realistic for respondents to suggest that a prisoner need only "borrow from a lawyer." Br. 50. Given the economic realities of prisoner litigation, the vast majority of prisoners are unable to obtain a lawyer. See Profs. Br. 17-18.

Instead, respondents and the United States are left to argue that their interpretations are consistent with Congress's purpose of curtailing prisoner litigation. See Resp. Br. 5-6; U.S. Br. 3. But no legislation pursues its purpose, much less such a broad one, at all costs.[4] The majority interpretation comports with Congress's more precisely stated purpose of filtering out *meritless* prisoner litigation; courts have had no difficulty administering it; and it avoids the unjust and anomalous results that necessarily flow from any contrary interpretation.

Neither respondents nor the United States offers a compelling reason for this Court to disagree with the overwhelming majority of the courts of appeals and to upset their well-established practice of treating dismissals as strikes only when they have become final on appeal. The Sixth Circuit's decision is an outlier whose reasoning neither respondents nor the United States defends. This Court should adopt the majority interpretation and reverse the Sixth Circuit's judgments, thereby enabling petitioner to proceed *in forma pauperis* on remand in the district court.

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[4] In any event, other provisions of the PLRA have substantially reduced the volume of prisoner litigation. See NACDL Br. 17-18; Profs. Br. 10-13.

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

Respectfully submitted.

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