No. 13-1333

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

REPLY BRIEF FOR THE PETITIONER

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In their brief in opposition, respondents do not dispute two propositions central to the determination of whether to grant review. First, respondents do not dispute—and indeed concede—that a circuit conflict exists on the question presented: whether, under the "three strikes" provision of the Prison Litigation Reform Act (PLRA), 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. Second, respondents do not dispute—and again concede—that the question presented implicates prisoners' fundamental right of access to the courts and is thus one of substantial legal and practical importance.

Instead, when all of the rhetorical frippery is stripped away, respondents make only one affirmative argument as to why certiorari should be denied: they assert that further percolation is warranted because the cases in the circuit conflict involve two different factual scenarios. But respondents' assertion is simply irrelevant, because all of the cases in the circuit conflict present the same legal question. And there are compelling reasons why the Court should resolve that question here, rather than allowing the mature conflict in the courts of appeals to persist while waiting for another case that may never reach this level. Because petitioner's cases readily satisfy the criteria for further review, the petition for certiorari should be granted.

1. Respondents concede that a circuit conflict exists on the question of "when a dismissal counts as a strike" for purposes of the PLRA's "three strikes" provision—whether immediately or only after the completion of appellate review. Br. in Opp. 9. That concession is wise, because numerous courts of appeals, including the Sixth Circuit in *Tollefson*, have acknowledged the existence of a conflict on the question. See, *e.g.*, Pet. App. 4a-5a; *id.* at 8a-9a (Daughtrey, J., dissenting); *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).

Despite the widespread recognition of the circuit conflict—and the fact that all twelve of the regional circuits

have now spoken to the issue in some fashion, see Pet. 11-18—respondents contend that the conflict is "much less developed" than meets the eye. Br. in Opp. 9. In respondents' view, that is because the cases in the conflict involve two different factual scenarios: (1) cases, such as these, in which a third "strike" in an unrelated case may bar the filing of a new action *in forma pauperis*, and (2) cases in which a prisoner may be barred from *appealing* his third "strike" *in forma pauperis*. See *id.* at 2. At the risk of stating the obvious, however, the mere fact that the same *legal* question arises in different *factual* contexts is hardly a basis for denying review. And as we will now explain, respondents' factual distinction has played no role in courts' disposition of the question presented. If anything, the distinction underscores the suitability of these cases for resolution of the conflict on that question.

a. The question presented here—whether 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—arises in both of the factual scenarios respondents identify. Regardless of whether the purported third "strike" occurs in an unrelated case or in the same case, the question remains whether a dismissal must be final on appeal in order to count as a "strike." That is the question on which the courts of appeals are deeply and irreconcilably divided. See Pet. 11-18.

The best evidence of the irrelevance of respondents' factual distinction between decisions in the conflict can be found in the decisions themselves. Courts of appeals have addressed the question presented, and decided whether a dismissal must be final to count as a "strike," without limiting their holdings to the particular factual scenario before them. See Pet. App. 4a-5a; *Ball* v. *Fa-*

miglio, 726 F.3d 448, 464-466 (3d Cir. 2013), cert. denied, 134 S. Ct. 1547 (2014); *Silva*, 658 F.3d at 1098-1101; *Thompson*, 492 F.3d at 432-433, 439; *Campbell* v. *Davenport Police Department*, 471 F.3d 952, 952-953 (8th Cir. 2006); *Robinson*, 297 F.3d at 541; *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775, 779-780 (10th Cir. 1999); *Adepegba* v. *Hammons*, 103 F.3d 383, 387-388 (5th Cir. 1996); *Michaud* v. *City of Rochester*, No. 00-1263, 2000 WL 1886289, at *2 n.1 (1st Cir. Dec. 27, 2000).

The Fifth Circuit's decision in *Adepegba* is representative. There, the Fifth Circuit reasoned that a dismissal must be final before it counts as a "strike" because "[a]ny other reading of the statute poses a risk of inadvertently punishing nonculpable conduct." 103 F.3d at 387. As the Fifth Circuit explained, the same risk is present in both of respondents' factual scenarios: under a contrary rule, "an indigent prisoner's fourth claim could expire while his first three dismissals were being reversed on appeal" and "a prisoner's appeal of an erroneous third strike" could also be barred. *Id.* at 387-388. And since the Fifth Circuit's decision in *Adepegba*, as respondents acknowledge (Br. in Opp. 13-14), the courts of appeals have drawn on each other's reasoning without regard to whether a particular court announced its rule in one factual scenario or the other. See, *e.g.*, Pet. App. 4a (citing *Robinson*); *Silva*, 658 F.3d at 1099 (citing *Thompson*, *Campbell*, *Jennings*, and *Adepegba*); *Thompson*, 492 F.3d at 432-433 (citing *Campbell*, *Jennings*, and *Adepegba*).

b. Even if respondents were correct to attach any significance to the distinction between the two factual scenarios in the cases giving rise to the circuit conflict, the factual scenario presented here—where the purported "strike" at issue occurred in an unrelated case—is ac-

tually the more common one. Respondents are simply wrong to assert otherwise. See Br. in Opp. 2, 6, 9, 13, 15.

Of the nine courts of appeals to have squarely resolved the question presented, four did so in cases where the purported "strike" at issue occurred in an unrelated case. See Pet. App. 4a; *Ball*, 726 F.3d at 465-466; *Silva*, 658 F.3d at 1100; *Campbell*, 471 F.3d at 952. A fifth did so in a case presenting *both* factual scenarios. See *Jennings*, 175 F.3d at 779; but see Br. in Opp. 12-13 (erroneously stating that *Jennings* involved only an appeal of a third "strike"). And a sixth did so in a case where it is unclear which factual scenario was at issue. See *Michaud*, 2000 WL 1886289, at *2 n.1; but see Br. in Opp. 13 (simply assuming that *Michaud* involved an appeal of a third "strike").

Only three courts of appeals resolved the question presented in cases that involved only an appeal of a third "strike." See *Thompson*, 492 F.3d at 432; *Robinson*, 297 F.3d at 541; *Adepegba*, 103 F.3d at 387. Even as to those courts, one went on to address both factual scenarios. See *Adepegba*, 103 F.3d at 387-388; p. 4, *supra*. And courts in each of those circuits have applied the same rule to cases where the purported third "strike" occurred in an unrelated case. See *Davis* v. *Kyle*, 318 Fed. Appx. 269, 269-270 (5th Cir. 2009); *Akers* v. *Watts*, 589 F. Supp. 2d 12, 15 n.5 (D.D.C. 2008); *Bond* v. *Aguinaldo*, 228 F. Supp. 2d 918, 919 & n.1 (N.D. Ill. 2002).

Respondents are incorrect, therefore, when they wishfully assert that the question presented here concerns "only a small and narrow category of cases" addressed by "[v]ery few" courts. Br. in Opp. 4, 13. Even assuming that respondents' distinction between the two factual scenarios actually matters, but see pp. 3-4, *supra*, the factual scenario underlying petitioner's cases is the more representative one in the circuit conflict. And in

fact, the courts of appeals are divided on the question presented in each scenario, with the Sixth Circuit disagreeing with four other courts of appeals to have decided the question in this scenario, and the Seventh Circuit disagreeing with three courts of appeals to have decided the question in the supposedly more common scenario. Respondents' factual distinction is therefore nothing more than an effort to pick away at the edges of a conceded circuit conflict.[1]

c. If anything, respondents' factual distinction affirmatively illustrates why these cases would be an ideal vehicle for resolution of the question presented. Where, unlike here, a dismissal is potentially being counted as a "strike" on appeal in the same case, the resolution of the question presented would not necessarily be outcome-dispositive: there would be an additional question whether treating such a dismissal as a "strike" would violate the discrete statutory requirement that the prisoner have brought the action or appeal giving rise to the "strike" on a "prior occasion[]." 28 U.S.C. 1915(g). In *Tollefson*, the Sixth Circuit raised the possibility that treating such a dismissal as a strike would violate the "prior occasion[]" requirement, see Pet. App. 6a, and at least one other court of appeals has so held, see *Henslee*,

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[1] In discussing *Silva*, *supra*, respondents imply (Br. in Opp. 14) that there is a meaningful distinction between cases involving a court of appeals' review of the district court's denial of *in forma pauperis* status, on the one hand, and a court of appeals' determination of *in forma pauperis* status to proceed with an appeal, on the other. But it is hard to see why that distinction would matter, because Section 1915(g) applies in both situations (and a court of appeals reviews de novo a district court's determination of whether a dismissal constitutes a "strike"). In any event, both situations are presented by these cases. See Pet. 5-6, 9.

681 F.3d at 543 & n.11. That additional question, however, is not presented by cases involving the factual scenario presented here: *i.e.*, cases where the purported third "strike" occurred in an unrelated case. See Pet. App. 6a. If anything, therefore, it would be preferable for the Court to resolve the question presented in this factual scenario, rather than in the more complex and less common scenario identified by respondents.[2]

At bottom, respondents' argument for further percolation boils down to a simple disagreement with the reasoning of the vast majority of courts of appeals to have considered the question presented. Compare Br. in Opp. 9 (conceding that, "[u]nder the majority rule, a dismissal does not count as a strike until a litigant's appellate rights have been exhausted or waived") with *id.* at 15

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[2] Respondents imply that, in either factual scenario, adopting petitioners' interpretation would require the Court to consider an additional question: *viz.*, "how far into the appellate process a litigant must go until the dismissal may be counted as a strike." Br. in Opp. 15. But courts adopting petitioner's interpretation have consistently held that a dismissal becomes final, and thus counts as a "strike," when the prisoner has exhausted or forfeited appellate review (including review in this Court). See, *e.g.*, *Silva*, 658 F.3d at 1100 & n.6; *Hafed* v. *Federal Bureau of Prisons*, 635 F.3d 1172, 1176 (10th Cir. 2011); *Adepegba*, 103 F.3d at 388.

In a related vein, respondents note (Br. in Opp. 15) that, as to two of the four cases that are the subject of this petition, the district court revoked *in forma pauperis* status after the dismissal that would have counted as the third "strike" was affirmed on appeal. As Judge Daughtrey explained in her dissent below, however, the salient question is whether the dismissal was final as of the date the underlying action was filed. Pet. App. 12a-13a. Should this Court grant review and adopt petitioner's interpretation, moreover, the Court could readily leave any question concerning the statute's application to those two cases for the lower courts to resolve on remand.

(arguing for "further development in the lower courts, so that courts can apply the actual language of [28 U.S.C.] 1915(g)"). But it is implausible that *seven* courts of appeals would overrule their precedent to adopt the Sixth and Seventh Circuits' interpretation and eliminate the circuit conflict—particularly because the three other regional courts of appeals have suggested that they would follow the majority rule. The deeply entrenched conflict on the question presented warrants the Court's review, and these cases afford the Court an ideal vehicle in which to resolve that conflict.

2. Respondents' remaining points require little by way of reply.

a. On the importance of the question presented, respondents concede that "[t]he underlying fundamental right involved in th[ese] case[s] is access to the courts." Br. in Opp. 4. And they acknowledge that Congress's goal in enacting this provision of the PLRA was to "creat[e] more consistency in how courts applied the *in forma pauperis* statute" to grant or deny that access. *Id.* at 5.

Respondents nevertheless contend (Br. in Opp. 6-7) that these cases do not implicate those interests, on the ground that the dismissal that would have counted as petitioner's third "strike" was eventually affirmed on appeal. But that contention completely misses the point. By erroneously counting the dismissal as a "strike," even though the appeal was still pending at the time petitioner filed his new actions, the district court "potentially bar[red] the filing of meritorious claims." Pet. App. 10a (Daughtrey, J., dissenting). Regardless of whether the dismissal that would have counted as the third "strike" was later affirmed, petitioner was entitled to proceed *in forma pauperis* on the claims in *these cases*—which were

all filed at a time when petitioner had only two valid "strikes" against him.

For much the same reason, it is wholly illogical for respondents to argue that petitioner has not demonstrated that he has been "prevented from bringing a *meritorious* action." Br. in Opp. 8 (emphasis added). By virtue of its reading of the "three strikes" provision, the Sixth Circuit has foreclosed petitioner from obtaining consideration of the claims in these cases on the merits—making it is impossible to know whether his claims, or those of other prisoners in similar situations, would ultimately be successful.

Finally as to the importance of the question presented, respondents assert that the question arises "infrequently," seemingly based on the parochial view that "it took over 17 years after the [PLRA] was enacted before the Sixth Circuit decided the issue in a published decision." Br. in Opp. 2. As petitioner has amply demonstrated, however, the question presented has arisen often in courts nationwide; indeed, this is the rare case in which all twelve of the regional circuits have now spoken to the question in some fashion. See Pet. 11-18 (citing cases). And while the question presented has arisen often in the lower courts, opportunities for this Court to resolve it have not. See Pet. 21. Respondents do not cite even a single previous petition for certiorari that has raised the question presented, nor are we aware of any. If the Court denies review in these cases, therefore, it is far from clear when, if ever, the Court would have another opportunity to address the question presented and resolve the circuit conflict.

b. Perhaps recognizing that these cases are a compelling candidate for the Court's review, respondents preview their argument on the merits. See Br. in Opp. 16-17. For present purposes, it should suffice to note

that the conflicting views of the courts of appeals concerning the interpretation of Section 1915(g) underscore the need for this Court's review. But respondents' contention that "the plain language of [Section] 1915(g) imposes no * * * finality requirement," *id.* at 16, warrants a brief response here.

As the vast majority of courts of appeals to have considered the issue have recognized, the text of Section 1915(g) is ambiguous on the question presented: it "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; see, *e.g.*, *Ball*, 726 F.3d at 464. Those courts have persuasively explained that the ambiguous statutory language should be interpreted to count only final dismissals as "strikes," because to do otherwise would "pose[] a risk of inadvertently punishing nonculpable conduct." *Adepegba*, 103 F.3d at 387. And the mere fact that a court of appeals' dismissal of an *appeal* may count as an additional "strike" under Section 1915(g), see Br. in Opp. 16-17, in no way indicates that Congress intended to penalize prisoners immediately for a district court's dismissal that is under appellate review and may be reversed. Indeed, the history of the statute, which reflects Congress's intention "only to penalize litigation that is truly frivolous, not to freeze out meritorious claims or ossify district court errors," strongly suggests the opposite. *Adepegba*, 103 F.3d at 388.

Ultimately, however, the debate about the merits of the Sixth Circuit's interpretation is for another day. There can be no debate that the Sixth Circuit's decision deepens a widely recognized conflict on an undeniably important and recurring question. The Court should grant the petition for certiorari and resolve the conflict on the proper interpretation of the PLRA's "three strikes" provision.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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