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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether, under the Prison Litigation Reform Act's "three strikes" provision, 28 U.S.C. 1915(g), a district court's dismissal of an action counts as a strike while the dismissal is pending on appeal or before the time for an appeal has run.

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INTEREST OF THE UNITED STATES

This case presents the question whether, under the Prison Litigation Reform Act's "three strikes" provision, 28 U.S.C. 1915(g), a district court's dismissal of an action counts as a strike while the dismissal is pending on appeal or before the time for an appeal has run. The United States has a substantial interest in the resolution of that question. Inmates frequently file suits against the United States, the Bureau of Prisons, or prison officials in actions arising from conditions of confinement in federal correctional institutions. See *Porter* v. *Nussle*, 534 U.S. 516, 524-525 (2002). The United States also has primary responsibility for enforcing several federal laws that protect the civil and constitutional rights of inmates, see, *e.g.*,

Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, which often form the basis for prisoner suits. The United States has participated as *amicus curiae* in prior cases involving the statute's interpretation. See *Woodford* v. *Ngo*, 548 U.S. 81 (2006); *Porter*, *supra*; *Booth* v. *Churner*, 532 U.S. 731 (2001); *Miller* v. *French*, 530 U.S. 327 (2000).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. The federal *in forma pauperis* statute seeks "to ensure that indigent litigants have meaningful access to the federal courts." *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989). At the same time, Congress has recognized the potential for "abusive or captious litigation" from plaintiffs who are not made to bear the financial costs of filing suit. *Ibid.* The *in forma pauperis* provision, now codified at 28 U.S.C. 1915, strikes a balance between those competing objectives.

a. As originally enacted in 1892, the *in forma pauperis* statute permitted any citizen to "commence and prosecute to conclusion" a lawsuit in federal court "without being required to prepay fees or costs, or give security therefor before or after bringing suit." Act of July 20, 1892 (1892 Act), ch. 209, § 1, 27 Stat. 252. To qualify, a litigant was required to file "a statement under oath" attesting to his inability to pay and affirming his belief that "he is entitled to the redress he seeks." *Ibid.* This affidavit requirement, through which an indigent litigant "expose[d] himself 'to the pains of perjury in a case of bad faith,'" served

as "a sanction important in protection of the public" against abuse of the law's benefits. *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 338 (1948) (quoting *Pothier* v. *Rodman*, 261 U.S. 307, 309 (1923)). The statute also included a judicial safeguard, empowering a court to "dismiss any such cause * * * if said court be satisfied that the alleged cause of action is frivolous or malicious." 1892 Act § 4, 27 Stat. 252.

The original statute applied only to proceedings in the trial court. See *Bradford* v. *Southern Ry. Co.*, 195 U.S. 243, 247 (1904). But Congress subsequently amended the statute to include "an appeal to the circuit court of appeals." Act of June 25, 1910, ch. 435, 36 Stat. 866. Later, Congress added a provision precluding *in forma pauperis* status on appeal "if the trial court certifies in writing that [the appeal] is not taken in good faith." Act of June 25, 1948, ch. 646, 62 Stat. 954 (28 U.S.C. 1915(a)(3)).

b. By the mid-1990s, Congress had become concerned about the "sharp rise in prisoner litigation in the federal courts." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006). In 1994, for instance, more than 39,000 lawsuits were filed by inmates in federal courts, "a staggering 15 percent increase over the number filed the previous year." 141 Cong. Rec. 26,553 (1995) (statement of Sen. Hatch). Existing protections had proven ineffective at stopping prisoners from filing frivolous lawsuits, "[t]he crushing burden" of which "ma[de] it difficult for courts to consider meritorious claims." *Ibid.*; see *Jones* v. *Bock*, 549 U.S. 199, 203 (2007) ("The challenge lies in ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit.").

Congress's response to this rising tide of prisoner suits was the Prison Litigation Reform Act of 1995 (PLRA), §§ 801-810, 110 Stat. 1321-66 to 1321-77. The PLRA contains "a variety of reforms designed to filter out the bad claims and facilitate consideration of the good." *Jones*, 549 U.S. at 204; see *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002) ("reduce the quantity and improve the quality of prisoner suits"). Among other things, the PLRA adopted a mandatory administrative exhaustion provision for all prisoner suits. 42 U.S.C. 1997e (2012 & Supp. I 2013). It also imposed an early screening requirement: Even before a responsive pleading has been filed, a district court must review any prisoner complaint "seek[ing] redress from a governmental entity or officer," and must dismiss the complaint or any claim that "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. 1915A(a) and (b); see 42 U.S.C. 1997e(c)(1) (similar). A similar provision, applicable to all *in forma pauperis* suits, requires dismissal "at any time" of an action or appeal that meets one of those criteria. 28 U.S.C. 1915(e)(2)(B).

The PLRA also amended the federal *in forma pauperis* statute itself to require special treatment for prisoner claims. First, unlike other indigent plaintiffs, prisoners are "required to pay the full amount of a filing fee." 28 U.S.C. 1915(b)(1). A prisoner who has any funds must make an initial payment equivalent to 20% of the prisoner's average income or account balance, and must continue to make monthly payments "until the filing fees are paid." 28 U.S.C. 1915(b)(1) and (2). Any costs assessed at the conclusion of the

litigation must be paid in a similar manner. 28 U.S.C. 1915(f)(2). A prisoner's lack of assets and inability to pay the initial partial filing fee, however, may not prevent a prisoner from filing a suit or appeal. 28 U.S.C. 1915(b)(4).

Second, even if a prisoner has been granted permission to proceed *in forma pauperis* in the district court, the prisoner again must apply for permission—and must begin prepaying fees—before filing an appeal. 28 U.S.C. 1915(a)(2) and (b); see 16AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3970 (4th ed. 2008 & Supp. 2014) (Wright & Miller). Other litigants, by contrast, can normally rely on a district court's grant of *in forma pauperis* status as carrying through on appeal "without further authorization." Fed. R. App. P. 24(a)(3).

Third, the PLRA contains what has come to be known as its "three strikes" provision:

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

28 U.S.C. 1915(g). The three grounds for imposing a "strike"—the filing of a federal action or appeal that "is frivolous, malicious, or fails to state a claim upon which relief may be granted"—thus mirror three of the bases for dismissing a prisoner complaint after early screening, see 28 U.S.C. 1915A(b)(1), or for

dismissing any *in forma pauperis* action or appeal, see 28 U.S.C. 1915(e)(2)(B)(i) and (ii).

2. a. Petitioner is an inmate in the Baraga Correctional Facility, a Michigan state prison. Petitioner has filed at least fourteen lawsuits while incarcerated.[1] In December 2010, petitioner filed the lead suit in this case, a civil action under 42 U.S.C. 1983 against respondent Todd Tollefson and five other Baraga employees in their individual capacities. Pet. 5. Petitioner alleged that the defendants, due to their "racial animus and shiftless work habits," had unconstitutionally interfered with his access to the courts by rejecting his grievances and failing to deliver photocopies of his legal filings. *Tollefson* Compl. 2, 11-12.

Petitioner moved the district court for leave to proceed *in forma pauperis*, but the court denied the motion based on the PLRA's three strikes provision. Pet. App. 17a-20a. The court identified three of petitioner's prior suits that had been dismissed for failure to state a claim. *Id.* at 19a (citing *Sweeney*, *Kinnunen*, and *Lentin*). It also noted that petitioner did not qualify for the "imminent danger" exception. *Id.* at 19a-20a. The court accordingly ruled that petitioner

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[1] *Coleman* v. *Lentin*, No. 92-cv-120 (W.D. Mich.); *Coleman* v. *Bouchard*, No. 04-cv-268 (W.D. Mich.); *Coleman* v. *Dahlstrom*, No. 05-cv-30 (W.D. Mich.); *Coleman* v. *Gerth*, No. 05-cv-158 (W.D. Mich.); *Coleman* v. *Kinnunen*, No. 05-cv-256 (W.D. Mich.); *Brown* v. *Granholm*, No. 06-cv-12485 (E.D. Mich.); *Percival* v. *Girard*, No. 08-cv-12374 (E.D. Mich.); *Coleman* v. *Trierweiler*, No. 09-cv-5 (W.D. Mich.); *Coleman* v. *Bowerman*, No. 09-cv-24 (W.D. Mich.); *Coleman* v. *Sweeney*, No. 09-cv-178 (W.D. Mich.); *Coleman* v. *Bowerman*, No. 10-cv-322 (W.D. Mich.); *Coleman* v. *Tollefson*, No. 10-cv-337 (W.D. Mich.); *Coleman* v. *Vroman*, No. 10-cv-354 (W.D. Mich.); *Coleman* v. *Dykehouse*, No. 11-cv-108 (W.D. Mich.).

would not be permitted to file his suit without first paying the entire $350 filing fee. *Id.* at 20a.

Petitioner moved for reconsideration, arguing that the third of the dismissals (*Sweeney*) should not be considered a strike because it was then still on appeal. Pet. App. 23a. The district court denied the motion, noting that "[t]he language of § 1915(g) is clear, and it does not make an exception for a dismissal that has been appealed." *Ibid.* The court also observed that "a judgment of dismissal by a district court is final and should be given full effect." *Ibid.* After petitioner failed to pay the filing fee within the allotted time, the court dismissed his suit. *Id.* at 2a. Petitioner moved the court for leave to proceed *in forma pauperis* on appeal, which was granted. *Ibid.*

On appeal, a divided Sixth Circuit panel affirmed the district court's dismissal of petitioner's complaint. Pet. App. 1a-14a. The majority relied on the plain language of the three strikes provision, which "does not say that [a] dismissal must be final in all of the courts of the United States" in order to count as a PLRA "strike." *Id.* at 4a (citation omitted). The majority also noted that its approach was "consistent with how judgments are treated for purposes of res judicata," because "cases on appeal have preclusive effect until they are reversed or vacated." *Id.* at 5a. Judge Daughtrey dissented, arguing that it would be "more compelling and more fair" to count a district court dismissal as a strike only after the plaintiff has exhausted or waived his appellate rights. *Id.* at 9a.

b. Within months of filing his *Tollefson* complaint, petitioner filed three additional Section 1983 actions in the United States District Court for the Western District of Michigan. Pet. App. 32a (*Bowerman*), *id.*

at 42a (*Dykehouse*); *id.* at 52a (*Vroman*). In each of those actions, petitioner's request for *in forma pauperis* status was rejected based on the three strikes provision. *Id.* at 35a, 45a, 54a. Petitioner failed to pay the filing fee, and his suits were dismissed for want of prosecution. The district court also denied petitioner leave to proceed *in forma pauperis* on appeal. *Id.* at 27a, 37a, 47a.

Petitioner appealed all three dismissals, seeking permission from the Sixth Circuit to proceed *in forma pauperis* on appeal. Pet. App. 26a, 36a, 46a. Relying on its ruling in the *Tollefson* case, the court of appeals denied petitioner's requests. *Id.* at 28a-29a, 38a-39a, 48a-49a. The court ultimately dismissed each appeal for failure to pay the required filing fee. *Id.* at 30a, 40a, 50a.

In March 2011, after petitioner's *Tollefson*, *Bowerman*, *Dykehouse*, and *Vroman* complaints had all already been filed, the Sixth Circuit affirmed in *Sweeney* (his third strike). In a four-page order, the court of appeals concluded "that the district court properly dismissed [petitioner's] complaint." 09-2419 Docket entry No. (Dkt. No.) 36-1, at 2 (Mar. 29, 2011).

SUMMARY OF ARGUMENT

Under the PLRA's three strikes provision, 28 U.S.C. 1915(g), a district court dismissal counts as a strike even while the dismissal is pending appeal or the time for an appeal has not yet run.

A. The three strikes bar goes into effect when a prisoner has, on "3 or more prior occasions," accumulated a qualifying "dismiss[al]" of an action or appeal. 28 U.S.C. 1915(g). Under the plain language of the statute, therefore, each such dismissal is an occasion, and the ban becomes effective upon the third one—

regardless whether it occurred at the trial or appellate stage. There is no indication that Congress intended the ban to become operative at some other, unspecified time, such as when the appellate process has concluded.

This reading, which gives immediate effect to a district court dismissal, is consistent with the ordinary treatment of trial court judgments: Unless they are stayed, such judgments are effective as soon as they are issued—including for purposes of preclusion in separate suits—even if the losing party intends to appeal or has filed an appeal. When Congress wishes to delay the effect of a judgment until completion of the appeals process, by contrast, it says so explicitly. See, *e.g.*, 11 U.S.C. 362(n)(1)(B); 18 U.S.C. 3288; 42 U.S.C. 14132(d)(1)(A) and (C). Indeed, a different PLRA provision, 18 U.S.C. 3626(e)(2), allows certain parties aggrieved by a district court's grant of injunctive relief to delay the judgment's effect while challenging it. The absence of similar language in the three strikes provision specifying a delay for the appellate process is particularly telling. See *Jones* v. *Bock*, 549 U.S. 199, 216 (2007) ("[W]hen Congress meant to depart from the usual procedural requirements, it did so expressly.").

Petitioner proposes an alternate reading of the statute under which a district court dismissal and the appeal from that dismissal are treated as a "single 'occasion,'" such that the ban only goes into effect "when the appeal from the dismissal has run its course." Pet. Br. 19. That reading cannot be squared with the text, which repeatedly makes clear that the trial and appellate stages are distinct. See 28 U.S.C. 1915(a)(2), (a)(3), (b)(1) and (e)(2)(B). The three

strikes provision also treats a qualifying appellate dismissal as an "occasion" in its own right, 28 U.S.C. 1915(g) ("an action *or appeal* * * * that was dismissed" on one of three specified grounds) (emphasis added); a single lawsuit can thus give rise to two strikes if dismissal occurs at both the trial and appellate stages. That would not be possible if petitioner's "single occasion" theory were correct.

B. Practical and constitutional considerations do not justify abandoning a literal interpretation in favor of petitioner's.

Petitioner argues that reading the three strikes provision to include an implicit delay for the appellate process serves the statute's "underlying purposes." Pet. Br. 19. Even if courts were free to deviate from the PLRA's text "on the basis of perceived policy concerns," *Jones*, 549 U.S. at 212, however, petitioner's policy concerns do not justify a departure from the text here.

Without identifying any examples, petitioner hypothesizes that a fourth suit might be foreclosed on the basis of a third strike that is subsequently reversed on appeal. Such a situation is likely to be exceedingly rare. But even in those instances of a third-strike reversal, a prisoner can move under Federal Rule of Civil Procedure 60(b)(5) to reopen any case that has been dismissed on the basis of the now-reversed third strike. Moreover, a suit reopened under Rule 60(b) is "reinstated as of the date it was originally filed," *Jordan* v. *United States*, 694 F.2d 833, 837 (D.C. Cir. 1982), alleviating any statute-of-limitations concerns.

Nor do administrability concerns help petitioner here. Both approaches are easily applied: Under ei-

ther, a third strike can always be relied upon to bar any later-filed suit once the strike has been affirmed on appeal. And *while* the third strike is on appeal, both approaches require a court to monitor the appellate process to determine the status of the third strike.

Petitioner argues that reading the PLRA in this manner would prevent a prisoner from appealing *in forma pauperis* from a district court dismissal that is given immediate effect as his third strike. That is incorrect. The bar only applies on appeal if the appellate court determines that the prisoner has received strikes on three "*prior* occasions," and an earlier stage of the same case is not "prior" in the sense contemplated by the statute. Allowing a prisoner to proceed *in forma pauperis* on appeal from his third strike is also consistent with ordinary practice, under which a district court judgment is not given preclusive effect if circumstances render the judgment unreviewable. There is no need, therefore, to deviate from the text in order to "mitigate the harshness" (Pet. Br. 13) of a literal reading of the statute.

Finally, a literal reading of the statute does not raise constitutional concerns, as petitioner's amicus (but not petitioner) argues. As every appellate court to consider the issue has held, Congress has reasonably and permissibly declined to subsidize the litigation activity of prisoners who abuse the availability of *in forma pauperis* status. And the precise issue here—whether to give immediate effect under the PLRA to a third qualifying dismissal—does not have constitutional implications.

ARGUMENT

A. The PLRA's Plain Language Requires Giving Immediate Effect To A Qualifying Dismissal

The PLRA makes "dismiss[al]" its basic unit of operation. It requires dismissal of certain actions or appeals, 28 U.S.C. 1915(e)(2), and it treats every such dismissal as a strike-triggering "occasion[]," 28 U.S.C. 1915(g). Upon the third occasion—the third qualifying dismissal—the ban goes into effect to prevent a prisoner from proceeding *in forma pauperis* in later-filed suits. Giving immediate effect to a prisoner's third qualifying dismissal accords with the ordinary treatment of trial court judgments, which have effect as soon as they are issued. Petitioner's proposed alternative reading cannot be squared with the statute.

1. The three strikes provision, 28 U.S.C. 1915(g), states that "[i]n no event" shall a prisoner "bring a civil action or appeal a judgment in a civil action" *in forma pauperis* "if the prisoner has, on 3 or more prior occasions * * * 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." The statute thus indicates that the strike-triggering event (a qualifying "dismiss[al]") corresponds to the "3 or more prior occasions" that are necessary for the ban to go into effect. The obvious implication is that each such dismissal is an "occasion" that counts towards the prisoner's limit of three.

The PLRA also gives special status to dismissals by directing a court to "dismiss" an *in forma pauperis* litigant's "action or appeal" under specified circumstances—including if the action or appeal "is frivolous or malicious" or "fails to state a claim on which relief

may be granted." 28 U.S.C. 1915(e)(2)(B)(i) and (ii). Those are the same three "ground[s]" that qualify a dismissal as a PLRA strike. 28 U.S.C. 1915(g). The statute thus provides clear instructions for prisoner complaints: An action or appeal must be dismissed if it is frivolous, malicious, or fails to state a claim upon which relief may be granted; and each such dismissal counts as an "occasion" for purposes of the three strikes provision.

Because the ban goes into effect once a prisoner has accumulated "3 or more prior occasions," and because each qualifying dismissal is an occasion, it follows that the third such dismissal triggers the ban (at least insofar as any later-filed suit is concerned, see pp. 25-27, *infra)*. The statute's language provides no reason to believe that the ban should go into effect at some unspecified later time. Congress's emphatic phrasing ("In no event shall") further underscores its intent that the ban should encompass all applications that fall naturally within the statute's plain meaning. Even those circuits that have adopted a contrary rule acknowledge that it runs counter to a literal reading of the provision—although they criticize the reading as "hyper-literal." *Adepegba* v. *Hammons*, 103 F.3d 383, 388 (5th Cir. 1996); see *Ball* v. *Famiglio*, 726 F.3d 448, 465 (3d Cir. 2013) (same), cert. denied, 134 S. Ct. 1547 (2014); *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1099 (9th Cir. 2011) (same).

Petitioner nevertheless argues that the effect of a dismissal should be delayed until the prisoner has appealed or waived his right to do so. Petitioner asserts that the three strikes provision is silent on this issue because it "says nothing explicitly" about whether dismissals are to be given delayed effect. Pet. Br.

17 (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002)). Yet the statute's failure to *rule out* a lag time for the appellate process does not render the statute mute about whether one is required. Cf. *Woodford* v. *Ngo*, 548 U.S. 81, 91 n.2 (2006) (rejecting the argument that the PLRA's exhaustion requirement should be read to contain an implicit exception for constitutional claims). Having chosen one specific method for triggering strikes—namely, a qualifying "dismiss[al]" by a district court or court of appeals—Congress was not required to disclaim all others. See *Jones* v. *Bock*, 549 U.S. 199, 217 (2007) (declining to adopt a "procedural rule [that] lacks a textual basis in the PLRA").[2]

2. Giving immediate effect under the PLRA to qualifying dismissals is also consistent with the ordinary treatment of trial court judgments. Such judgments, unless they are stayed, normally become effective regardless of the losing party's intention to appeal. See Fed. R. Civ. P. 62(a); see also 18A Wright & Miller § 4433, 79-82 (2d ed. 2002) ("[T]he fact that an appeal is pending may not prevent an action to register or enforce the prior judgment."). Trial court rulings are also ordinarily given immediate preclusive effect in later-filed suits, irrespective of any pending or intended appeal. See *id.* § 4433, at 78 ("The bare act of taking an appeal is no more effective to defeat

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[2] In a prior case, the United States filed a brief "largely agree-[ing]" with the position that petitioner takes here regarding whether a district court dismissal counts as a strike pending appeal. Gov't C.A. Br. at 24, *Thompson* v. *DEA*, 492 F.3d 428 (D.C. Cir. 2007). The brief's discussion of the issue was perfunctory and did not contain any textual analysis.

preclusion than a failure to appeal.").[3] As this Court has explained in interpreting another PLRA provision, courts should follow "the usual practice under the Federal Rules" unless the statute provides otherwise. *Jones*, 549 U.S. at 212. In this context, that means affording a district court dismissal full effect unless and until it is overturned on appeal.

When Congress *does* want to give delayed effect to a district court dismissal, by contrast, it does so explicitly. See, *e.g.*, 11 U.S.C. 362(n)(1)(B) (no automatic bankruptcy stay if the debtor "was a debtor in a small business case that *was dismissed* for any reason *by an order that became final*" within a specified period) (emphasis added); 18 U.S.C. 3288 (new criminal charges may be filed "within six calendar months of the date of the dismissal of the indictment or information, or, *in the event of an appeal*, within 60 days of *the date the dismissal of the indictment or information becomes final*") (emphasis added); 42 U.S.C. 14132(d)(1)(A) and (C) (expungement of DNA records based on "a final court order establishing that such charge has been dismissed," but "*a court order is not 'final' if time remains for an appeal*") (emphasis added). Congress's choice not to include any such

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[3] Petitioner argues that the doctrine of claim preclusion "serves a distinct purpose" from the three strikes provision—namely, keeping the "losing party in the initial lawsuit" from getting "another bite at the apple." Pet. Br. 31. Preventing duplicative litigation is indeed a goal of claim preclusion, much as preventing frivolous litigation is a goal of the PLRA. In both cases, that goal is achieved by giving immediate effect to the trial court's judgment, rather than waiting until the losing party has had an opportunity to appeal. Moreover, claim preclusion in later-filed suits is just one of several ways in which a district court judgment is typically given immediate effect.

finality requirement in the three strikes provision is therefore telling.

The default rule—trial court judgments are given immediate effect unless Congress expressly provides otherwise—is the same in the criminal context, where numerous statutes require enhanced punishment for an offender on the basis of prior convictions. See, *e.g.*, 18 U.S.C. 924(e)(1) (mandatory-minimum sentence for offender with "three previous convictions"); 18 U.S.C. 1864(c) (use of hazardous devices on federal lands); 18 U.S.C. 2251(e) (sexual exploitation of children). These statutes allow enhanced punishment even if the prior convictions have yet to be appealed. See *Deal* v. *United States*, 508 U.S. 129, 134 (1993) (rejecting suggestion that increased penalty was permitted "only for an offense committed after a previous sentence has become final"); see also Sentencing Guidelines § 4A1.2(*l*) ("Prior sentences under appeal are counted [for criminal history purposes] except as expressly provided."); Fed. R. Evid. 609(e) (permitting impeachment of a witness by evidence of a criminal conviction "even if an appeal [of the conviction] is pending"). When Congress wishes to delay a conviction's effect until completion of the appellate process, it says so explicitly. See, *e.g.*, 21 U.S.C. 841(b) (enhanced penalty for drug offenses committed "after a prior conviction for a felony drug offense has become final"); 18 U.S.C. 1028(b)(3)(C) (identification fraud); 18 U.S.C. 1365(f)(2) (consumer-product tampering); 18 U.S.C. 3559(c)(1)(A) (serious violent felonies); see also 28 U.S.C. 2244(d)(1)(A) (statute of limitations for collateral review begins to run on "the date on which the judgment became final by the conclusion of direct

review or the expiration of the time for seeking such review").

Indeed, an especially clear contrast is offered by another PLRA provision that expressly gives delayed effect to certain district court judgments: Under the PLRA's so-called "automatic stay" provision, 18 U.S.C. 3626(e)(2), a district court's grant of prospective relief in a civil action challenging prison conditions is stayed upon the filing of a motion to terminate such relief. See *Miller* v. *French*, 530 U.S. 327, 333-334 (2000). Once the stay is triggered, the "prospective relief under the existing decree is no longer enforceable, and remains unenforceable unless and until the court makes" certain required findings. *Id.* at 348. This automatic stay provision thus contains what the three strikes provision lacks—namely, a direct indication that Congress wanted to depart from normal practice by giving the party aggrieved by the judgment a right to delay its effect while challenging it. See *id.* at 341 (finding "unmistakable" proof of Congress's intent to depart from traditional stay principles). The automatic stay provision further confirms that "when Congress meant to depart from the usual procedural requirements, it did so expressly." *Jones*, 549 U.S. at 216.

3. Petitioner offers an alternate reading of the three strikes provision under which a district court's dismissal does not by itself trigger a strike. Petitioner observes that "a court of appeals' *affirmance* of [a] dismissal does not count as a distinct strike." Pet. Br. 18. From this, petitioner reasons that the "dismissal and the ensuing appeal from that dismissal constitute a single unit—or, in the language of Section 1915(g), a single 'occasion.'" *Id.* at 18-19. Therefore,

he concludes, the strike should not be assessed until the occasion has terminated once "the appeal has completed." *Id.* at 19.

But petitioner's argument is flawed at its second step: The statute makes clear in multiple ways that the trial and appellate stages are to be treated as distinct, not as a single unit. First, a district court may certify, at the conclusion of the trial proceedings, that an appeal would not be "taken in good faith," and if so "[a]n appeal may not be taken in forma pauperis." 28 U.S.C. 1915(a)(3). Second, unlike other litigants, prisoners must seek separate permission to proceed *in forma pauperis* on appeal even if they previously were granted permission in the trial court. See 28 U.S.C. 1915(a)(2) (affidavit of indigency required to "bring a civil action *or appeal a judgment* in a civil action") (emphasis added). Third, prisoner litigants must begin prepaying appellate filing fees prior to filing any appeal, even if trial court fees were prepaid. See 28 U.S.C. 1915(b)(1). Fourth, a court is required to dismiss any "action *or appeal*" that is frivolous, malicious, or fails to state a claim. 28 U.S.C. 1915(e)(2)(B)(i) and (ii) (emphasis added). And finally, under the three strikes provision itself, a qualifying dismissal at either stage constitutes a strike-triggering occasion. See 28 U.S.C. 1915(g) ("brought an action *or appeal* * * * that was dismissed" on one of three specified grounds) (emphasis added). The statute thus repeatedly distinguishes between the trial and appellate stages, establishing separate pre-requisites and consequences for each.

Petitioner's "single occasion" theory contradicts the text in other ways as well. The court of appeals must dismiss an appeal under 28 U.S.C.

1915(e)(2)(B)(i) if it is frivolous or malicious; and when it does so, that appellate dismissal counts as an occasion in its own right. See, *e.g.*, *Cooper* v. *Trevino*, 568 Fed. Appx. 342, 343 (5th Cir. 2014) ("Our dismissal as frivolous of Cooper's appeal counts as a strike pursuant to 28 U.S.C. § 1915(g)."). Moreover, if dismissals occur at both the trial and appellate stages of the same case, then two strikes are assessed. See, *e.g.*, *Toombs* v. *Massingill*, 583 Fed. Appx. 359, 360 (5th Cir. 2014) ("The dismissal of this appeal counts as a strike under 28 U.S.C. § 1915(g), as does the district court's dismissal of the complaint as frivolous."). Petitioner's theory cannot explain how a supposed "single occasion" can give rise to two strikes.

Finally, petitioner suggests (Pet. Br. 25) that a strike does not go into effect until "the time for seeking * * * review from this Court" has elapsed. But the three strikes provision refers only to the trial and appellate stages ("bring a civil action or appeal a judgment"; "brought an action or appeal"). Even if those two separate stages were to be treated as the same "occasion," as petitioner claims, what unmentioned role would this Court's certiorari review play?

In sum, petitioner's "single occasion" theory cannot be reconciled with the statutory text. To be sure, petitioner *is* correct that "a court of appeals' *affirmance* of [a] dismissal does not count as a distinct strike." Pet. Br. 18. But that is so under the plain text of the statute—because an affirmance is not a "dismissal" and therefore not an "occasion"—not because the trial and appellate stages constitute the same occasion.

B. Practical And Constitutional Considerations Do Not Justify Deviating From A Textual Approach

Petitioner argues that "considerations of workability and administrability" counsel against giving immediate effect to a district court dismissal. Pet. Br. 21. As a primary matter, this Court has cautioned that when interpreting the PLRA, "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Jones*, 549 U.S. at 212. In any event, contrary to petitioner's arguments, following the statute's text does not create "unavoidable problems." Pet. Br. 21. In fact, it serves the PLRA's dual purposes—preventing abuse by repeat filers and facilitating consideration of valid claims—better than petitioner's alternative approach.

1. Petitioner notes that giving immediate effect to a district court dismissal means that "a later reversal on appeal could cause a prisoner to *lose* a strike: that is, to go from three strikes to two." Pet Br. 22. While the third strike is on appeal, petitioner argues, the prisoner would be barred from filing a new suit *in forma pauperis*, and the statute of limitations could potentially run on that new suit before the third strike is reversed. *Id.* at 22-23. Petitioner contrasts this "fluid approach to strike counting" with his own proposed alternative, in which a district court dismissal only ripens into a strike once it becomes final after appeal. *Id.* at 21-22. He suggests this approach is necessary to avoid "a risk of inadvertently punishing nonculpabale conduct, contrary to Congress's purposes in enacting the PLRA." *Id.* at 20 (citation and quotation marks omitted).

Petitioner's concerns are unpersuasive. First, despite petitioner's suggestion, there is nothing anomalous about giving legal consequence to a district court judgment pending appeal. Indeed, that is the norm in both the civil and criminal contexts, in which such judgments are given effect unless and until they are stayed or overturned. See 16A Wright & Miller § 3954, at 585-586 (3d ed. 2008) ("The taking of an appeal does not by itself suspend the operation or execution of a district-court judgment or order during the pendency of the appeal."); see also pp. 14-17, *supra*. Nor is it unusual for adjustments to occur in a later-filed suit if a prior judgment on which it is based has been reversed or vacated on appeal. For instance, a criminal defendant may typically move for resentencing if his sentence was enhanced on the basis of a prior conviction that is subsequently overturned. See *Johnson* v. *United States*, 544 U.S. 295, 302-303 (2005). A similar process occurs in the res judicata and collateral estoppel contexts, where a litigant can move for relief if "an earlier judgment upon which the present judgment is based has been reversed or otherwise vacated." 11 Wright & Miller § 2863, at 451 (3d ed. 2012); see 18A Wright & Miller § 4433, at 88 (2d ed. 2002) ("[A] second judgment based upon the preclusive effects of the first judgment should not stand if the first judgment is reversed.") (citing cases). What petitioner calls a "fluid approach" and a "dynamic approach," Pet. Br. 22, is in actuality just the conventional approach.

Second, the precise scenario that petitioner envisions will rarely if ever arise. It depends on the prisoner's third strike being reversed on appeal. That, however, is likely to be a rare event. The appellate

reversal rate in prisoner-filed civil suits is less than 4%[4]; and although separate statistics are not available for prisoners who have received multiple strikes, there is no reason to expect the reversal rate to be higher for repeat filers. Indeed, neither petitioner nor his amici have identified *any* instance in which a third strike was reversed on appeal, and our independent research confirms that reversals in such circumstances are rare.[5] And a third-strike reversal is not enough: The prisoner must also intend to file a *fourth* suit—one that does not qualify for the "imminent danger" exception—while the third strike is on appeal but before it is overturned. For the prisoner to

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[4] See Admin. Office of the U.S. Courts, *Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2013*, at 1 (Sept. 2013) http://www.uscourts.gov/uscourts/Statistics/ JudicialBusiness/2013/appendices/B05Sep13.pdf.

[5] The United States has been able to find only two instances of a third-strike reversal, only one of which was based on an error by the district court. See *Henslee* v. *Keller*, 481 Fed. Appx. 842, 843 (4th Cir. 2012) (vacating district court dismissal as moot in light of prisoner's transfer to another prison); *King* v. *Federal Bureau of Prisons*, 415 F.3d 634, 639 (7th Cir. 2005) (finding dismissal improper as to one of two defendants). Examples of third-strike affirmances, by contrast, are plentiful. See, *e.g.*, *Childs* v. *Miller*, 713 F.3d 1262 (10th Cir. 2013); *McLean* v. *United States*, 566 F.3d 391 (4th Cir. 2009); *Vaughan* v. *Watts*, 305 Fed. Appx. 958 (4th Cir. 2009); *Cason* v. *Weeks*, 285 Fed. Appx. 75 (4th Cir. 2008); *Smith* v. *Cowman*, 208 Fed. Appx. 687 (10th Cir. 2006); *Ring* v. *Knecht*, 130 Fed. Appx. 51 (7th Cir. 2005), cert. denied, 546 U.S. 1184 (2006); *Kalinowski* v. *Bond*, 358 F.3d 978 (7th Cir.), cert. denied, 542 U.S. 907 (2004); *Boles* v. *Matthews*, 173 F.3d 854 (6th Cir. 1999) (Tbl.); see also *Orr* v. *Clements*, 688 F.3d 463, 464 (8th Cir. 2012) (denying *in forma pauperis* status on the basis of a prior third-strike affirmance); *Owens-El* v. *United States*, 49 Fed. Appx. 247, 249 (10th Cir. 2002) (same); *Allen* v. *Brown*, 166 F.3d 339 (5th Cir. 1998) (Tbl.) (same).

have suffered prejudice, moreover, the statute of limitations on the fourth action must have run in the interim. The stars are unlikely to align that way very frequently.

Even in those rare cases, the prisoner is not without recourse: Pursuant to Federal Rule of Civil Procedure 60(b)(5), the prisoner may move to reopen any case that has been dismissed on the basis of the now-reversed third strike. Rule 60(b)(5) allows a district court to relieve a party from a final judgment, order, or proceeding that is "based on an earlier judgment that has been reversed or vacated." See *Livera* v. *First Nat'l State Bank*, 879 F.2d 1186, 1190 (3d Cir.), cert. denied, 493 U.S. 937 (1989). Once granted, a motion under Rule 60(b)(5) reinstates the case as if the earlier judgment had never been rendered. See 11 Wright & Miller § 2863 n.9 (3d ed. 2012 & Supp. 2014) (citing cases); see also 47 Am. Jur. 2d *Judgments* § 714 (2006 & Supp. 2014). Moreover, a case reopened under Rule 60(b) is "reinstated as of the date it was originally filed." *Jordan* v. *United States*, 694 F.2d 833, 837 (D.C. Cir. 1982). Therefore, any fourth suit that was dismissed on the basis of a third strike can be reinstated as of its original filing date if the third strike is ultimately reversed on appeal. For that reason, petitioner is wrong to worry that "[i]n the time that it takes the court of appeals to act [on the appeal of a third strike], the limitations period could run on any claims in the fourth suit." Pet. Br. 22-23. The "pernicious consequences" that petitioner envisions (Pet. Br. 22) need not come to pass.

Finally, petitioner ignores the much more common flip-side of his hypothetical: third strikes that are *affirmed* on appeal. In such cases, petitioner's ap-

proach would allow a prisoner to file additional suits *in forma pauperis* while his third strike is pending appeal, even though the third strike was properly issued. Here, for instance, petitioner filed four complaints (*Tollefson*, *Bowerman*, *Dykehouse*, and *Vroman*) while his third dismissal (*Sweeney*) was on appeal. The Sixth Circuit ultimately affirmed the district court's dismissal in *Sweeney*, concluding "that the district court properly dismissed [petitioner's] complaint." Dkt. No. 36-1, at 2. But under petitioner's approach, that would make no difference; he would nevertheless be eligible for *in forma pauperis* status in the four later-filed suits—his eleventh, twelfth, thirteenth, and fourteenth suits overall—including on appeal. There is every reason to think that petitioner's actual litigation history would have troubled Congress more than the uncommon scenario that he hypothesizes.

2. Petitioner asserts that following the text of the three strikes provision would introduce "needless complexity and uncertainty" into the processing of prisoner litigation. Pet. Br. 23. If a strike is reversed on appeal, he argues, a court would be forced to reexamine any case in which *in forma pauperis* status had been denied on the basis of the now-reversed strike. Under his proposed alternative, by contrast, once a strike is imposed, it can be relied upon in all later-filed cases. *Id.* at 23-24.

Petitioner greatly overstates the practical benefits of his interpretation. Under either approach, a third strike can always be relied upon to bar any later-filed suit once the strike has been affirmed on appeal. And *while* the third strike is pending appeal, both approaches will require the district court to monitor the

appeals process: Under petitioner's approach, a district court faced with a fourth suit will have to check the appellate status of the third strike, which becomes effective only once the appeal is complete. Under a literal approach to the statute, a district court will conduct the same inquiry, with the third strike taking effect unless it has been reversed. A straightforward inquiry into the appellate status of the third strike is thus necessary under either approach. As petitioner points out (Pet. Br. 25), evaluating the finality of a prior judgment is a task with which district courts are already quite familiar.

3. Petitioner argues that a literal approach to the PLRA's three strikes provision is "troubling" because it "would effectively preclude a prisoner from appealing a dismissal that would count as a third strike." Pet. Br. 26. If such a dismissal is given immediate effect as the prisoner's third strike, petitioner claims, then the bar would go into effect, and an *in forma pauperis* appeal of that very strike would be forbidden. See *ibid.* Petitioner urges this Court to not to endorse such an "anomal[ous]" result absent Congress's "unambiguous intention to limit appeals from all third qualifying dismissals." *Id.* at 27.

Petitioner is mistaken that following a literal approach to the three strikes provision would prevent a prisoner from receiving *in forma pauperis* status on appeal of a third strike. The bar goes into effect if the prisoner has received strikes "on 3 or more *prior occasions*." 28 U.S.C. 1915(g) (emphasis added). The phrase "prior occasions" is most sensibly read as referring to strikes imposed in prior-filed suits, not to those imposed in an earlier stage of the same suit. Indeed, it is hard to see what other function the word

"prior" might serve: Because "the number of strikes [is] assessed [as of] the date on which a prisoner files his complaint" or his appeal, Pet. Br. 35, the strikes will *always* be "prior" in the sense of preceding the decision whether to grant *in forma pauperis* status. Reading the phrase "prior occasions" to refer to earlier-filed suits is therefore necessary to give meaning to the word "prior." See *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) ("[W]e must give effect, if possible, to every clause and word of a statute.") (citation and quotation marks omitted).

Petitioner argues that this reading is "at war with itself," because it treats a district court's dismissal of a third suit as an "occasion" for one purpose (precluding a fourth suit) but not for another purpose (preventing the appeal of the third strike). Pet. Br. 29. That is incorrect. The district court's dismissal is an "occasion" for both purposes. But from the perspective of the court of appeals—deciding whether to grant *in forma pauperis* status on an appeal from the third strike—it is not a "*prior* occasion." For that reason, the bar does not prevent the court of appeals from granting *in forma pauperis* status on appeal of the third strike, although it would apply in any later-filed suit.[6]

This reading is consistent with common practice, in which a litigant is permitted an appeal as of right from

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[6] Petitioner is correct to reject the Sixth Circuit's view that the district court's dismissal of a third strike is "the *same* occasion" as an appeal from that strike. Pet. Br. 28 (quoting Pet. App. 6a). The district court's dismissal and the subsequent appeal are distinct occasions; but from the appellate court's perspective, the district court's dismissal is not a "prior occasion" in the sense contemplated by the statute.

any adverse district court ruling that is final. See 28 U.S.C. 1291; Fed. R. App. P. 3. It is also consistent with the typical res judicata and collateral estoppel consequences of a district court judgment. Of course, a district court's ruling has no preclusive effect in an appeal from that ruling. But it also normally has no preclusive effect on *other* civil suits absent an opportunity for appeal by the losing party—that is, as a general matter, "preclusion should not attach when circumstances cut off appeal of an otherwise reviewable order." 18A Wright & Miller § 4433, at 104 (2d ed. 2002); see *id.* § 4433, at 101 (noting "well-settled circumstances in which preclusion is defeated because rulings of a sort that ordinarily are reviewable [on appeal] cannot be reviewed in a particular setting"). Thus, "the usual practice," *Jones*, 549 U.S. at 212, is to give a district court ruling immediate preclusive effect as to all separately filed suits, but to require the availability of appellate review for that ruling itself. The three strikes provision can sensibly be read as conforming to those background principles by interpreting "prior occasions" as referring to strikes imposed in prior-filed suits, not in earlier stages of the same suit.[7]

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[7] The Seventh Circuit adopted an alternative interpretation under which the three strikes provision does bar a prisoner's *in forma pauperis* appeal of a third strike. *Robinson* v. *Powell*, 297 F.3d 540, 541 (2002). The court suggested, however, that a prisoner wishing to appeal the third strike could nevertheless seek leave to proceed *in forma pauperis* on appeal under Federal Rule of Appellate Procedure 24(a)(5). In ruling on the Rule 24(a)(5) motion, the court of appeals would determine if "the district court might have erred in dismissing [the prisoner's] complaint"; if so, the court of appeals "would permit him to proceed in forma pauperis" on appeal. *Robinson*, 297 F.3d at 541. Petitioner correctly

4. Finally, petitioner's amicus (but not petitioner) argues that reading the PLRA's three strikes provision to give immediate effect to a district court dismissal would raise "serious constitutional concerns." Constitutional Accountability Ctr. Amicus Br. 11. That argument is without merit. Prisoners undoubtedly "have a constitutional right of access to the courts," *Bounds* v. *Smith*, 430 U.S. 817, 821 (1977), and prisoner suits may serve to vindicate important constitutional interests, see, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 715-717 (2005). It does not follow, however, that prisoners must be relieved of the costs of filing suit without regard to their prior litigation misconduct. See *Shieh* v. *Kakita*, 517 U.S. 343, 343 (1996) (per curiam) (barring *in forma pauperis* filings prospectively because the petitioner "has abused this Court's certiorari process"); *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (per curiam) (similar). The PLRA's three strikes provision embodies Congress's view that federal courts should "devote [their] limited resources to the claims of [prisoners] who have not abused" the privilege of *in forma pauperis* status. *Shieh*, 517 U.S. at 344. That view is both reasonable and permissible.

Unsurprisingly, every appellate court to address the issue has held that the three strikes provision does not infringe a prisoner's constitutional right of access to the courts. See *Polanco* v. *Hopkins*, 510 F.3d 152 (2d Cir. 2007); *Abdul-Akbar* v. *McKelvie*, 239 F.3d 307

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notes (Pet. Br. 33) that the Seventh Circuit's proposal is flatly inconsistent with the PLRA. It would also require a court of appeals to reach the merits of the prisoner's suit in ruling on the Rule 24(a)(5) motion—a result that is neither sensible nor contemplated by the rule itself.

(3d Cir.) (en banc), cert. denied, 533 U.S. 953 (2001); *Carson* v. *Johnson*, 112 F.3d 818 (5th Cir. 1997); *Wilson* v. *Yaklich*, 148 F.3d 596 (6th Cir. 1998), cert. denied, 525 U.S. 1139 (1999); *Lewis* v. *Sullivan*, 279 F.3d 526 (7th Cir. 2002); *Higgins* v. *Carpenter*, 258 F.3d 797 (8th Cir. 2001), cert. denied, 535 U.S. 1040 (2002); *Rodriquez* v. *Cook*, 169 F.3d 1176 (9th Cir. 1999); *White* v. *Colorado*, 157 F.3d 1226 (10th Cir. 1998), cert. denied, 526 U.S. 1008 (1999); *Rivera* v. *Allin*, 144 F.3d 719 (11th Cir.), cert. dismissed, 524 U.S. 978 (1998).[8] And the precise question at issue here—whether a prisoner with three qualifying strikes may nevertheless file a fourth suit *in forma pauperis* while the third strike is pending appeal—is even further afield of any constitutional concerns.

[8] Two courts of appeals have left open whether a prisoner may raise an as-applied challenge to the three strikes provision where its operation would imperil the prisoner's fundamental constitutional rights. See *Rodriguez*, 169 F.3d at 1180; *Carson*, 112 F.3d at 821. Petitioner has not raised such a challenge.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1915 provides:

Proceedings in forma pauperis

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prose- or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist,

collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the great-of—

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or

criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636 (b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the

costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) 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.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

2. 28 U.S.C. 1915A provides:

Screening

(a) SCREENING.—The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) GROUNDS FOR DISMISSAL.—On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

(c) DEFINITION.—As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.