No. 17-

In The
Supreme Court of the United States

JASON PARKER,

Petitioner,

v.

MONTGOMERY COUNTY CORRECTIONAL FACILITY/BUSINESS OFFICE MANAGER, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the "three strikes" provision of the federal *in forma pauperis* statute, 28 U.S.C. 1915(g), bars a prisoner from appealing *in forma pauperis* a district court dismissal constituting a third strike.

PARTIES TO THE PROCEEDINGS

Petitioner Jason Parker was the plaintiff in the district court and the appellant in the court of appeals.

Montgomery County Correctional Facility/Business Office Manager, Julio M. Algarin, Nancy T. McFarland, Anthony Bucci, County of Montgomery, and unnamed prison inspectors were defendants in the district court and appellees in the court of appeals.

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INTRODUCTION

This case squarely presents the statutory interpretation question discussed but left unresolved in *Coleman v. Tollefson*: whether the so-called "three strikes" provision of the federal *in forma pauperis* statute "afford[s] a prisoner *in forma pauperis* status with respect to an appeal from a *third* qualifying dismissal" (*i.e.*, a third "strike"). 135 S. Ct. 1759, 1765 (2015). Prior to *Coleman*, eight courts of appeals had addressed to some degree the question presented, with only one barring an *in forma pauperis* appeal of a third strike. In the few years since *Coleman*, two courts of appeals have adhered to

the majority position that section 1915(g) allows for such appeals, while the Third Circuit—the ninth court of appeals to weigh in—has now added its voice to the minority view.

As such, there can be little doubt that the question presented will recur and continue to divide the circuits. And it is a question to which the Solicitor General in *Coleman* offered an unequivocal answer: to read section 1915(g) as barring *in forma pauperis* appeals of a third strike (as does the decision below) would be contrary to the statutory text and the background principles governing appeals against which Congress enacted section 1915(g). This Court should grant certiorari to eliminate the conflict and ensure meaningful access to the courts.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 870 F.3d 144. The district court's opinion (App., *infra*, 29a-35a) is unreported.

JURISDICTION

The court of appeals denied Petitioner's motion to proceed *in forma pauperis* on August 29, 2017, and dismissed the appeal on September 26, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The "three strikes" provision of the federal *in forma pauperis* statute states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the

> prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

STATEMENT OF THE CASE

A. Legal Framework

1. In order "to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States solely because his poverty makes it impossible for him to pay or secure the costs," Congress in 1892 enacted a federal *in forma pauperis* statute. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948) (internal quotation marks omitted). The current iteration of the statute provides that "any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor." 28 U.S.C. § 1915(a)(1).

Since enactment of the Prison Litigation Reform Act of 1995, however, a prisoner has been prohibited from "bring[ing] a civil action or appeal[ing] a judgment in a civil action or proceeding" *in forma pauperis* 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." 28 U.S.C. § 1915(g) ("three strikes" provision). Absent a showing of "imminent danger of serious physical injury," *id.*, such a prisoner must pay the full amount of the ordinary filing fee before proceeding.

2. Three Terms ago, this Court in *Coleman* held that, under section 1915(g), a prisoner who has accrued a third strike by virtue of a qualifying district court dismissal cannot proceed *in forma pauperis* in other subsequently filed actions despite a pending appeal of that third strike. 135 S. Ct. at 1763-1764. The Court found that result to be supported by the rule that a district court judgment ordinarily is given immediate preclusive effect even if appealed; the concern that prisoners could file multiple additional suits while an appeal of the third strike is pending; and the mechanisms that prisoners could use to revive other suits in the event the third strike is reversed. *Id.* at 1764.

Of central relevance here, the Court flagged a "hypothetical" posed by the prisoner—a situation that has in fact occurred numerous times both before and after *Coleman*: "What if this case had involved an attempt to appeal from the trial court's dismissal of his third complaint instead of an attempt to file several additional complaints?" 135 S. Ct. at 1764-1765. According to the prisoner, that scenario demonstrated why the district court dismissal could not count as a third strike until the related appeal had concluded: "he would lose the ability to appeal *in forma pauperis* from that strike itself" and thus be

unfairly "deprive[d] *** of appellate review." *Id.* at 1765.

The Solicitor General, who supported the Court's holding that a third strike in a separate prior proceeding must be effective pending appeal, disagreed that appellate review of that strike would become unavailable. In his view, "we can and should read the statute to afford a prisoner *in forma pauperis* status with respect to an appeal from a *third* qualifying dismissal—even if it does not allow a prisoner to file a *fourth* case during that time." 135 S. Ct. at 1765. That is because "the statute, in referring to dismissals 'on 3 or more *prior* occasions,' means that a trial court dismissal qualifies as a strike only if it occurred in a prior, *different*, lawsuit." *Id.* (internal citation omitted).

In response, the Court stated that it "need not, and do[es] not, now decide whether the Solicitor General's interpretation (or some other interpretation with the same result) is correct." 135 S. Ct. at 1765. As the prisoner in *Coleman* was "appealing from the denial of *in forma pauperis* status with respect to several separate suits filed after the trial court dismissed his earlier third-strike suit," it was enough to hold that "[w]ith respect to those suits, the earlier dismissals certainly took place on 'prior occasions.'" *Id.* But "[i]f and when the situation *** hypothesize[d] does arise," the Court indicated, "courts can consider the problem in context." *Id.*

As discussed below, the Third Circuit here joined a number of its sister circuits that have

considered the issue in context and perpetuated a circuit split that warrants this Court's intervention.

B. Factual and Procedural History

1. At all times relevant to this case,[1] Petitioner Jason Parker was an indigent inmate at various county and state correctional facilities in Pennsylvania. App., *infra*, 5a & n.2. During that time, Parker accrued three "strikes" under section 1915(g). The first strike resulted from a district court dismissal of a civil action as barred by the applicable statute of limitations, *id.* at 6a; the second strike resulted from a district court dismissal of another civil action as duplicative of the first, *id.* at 7a.[2]

This case concerns Parker's third strike, which arose out of a civil-rights action against the Montgomery County Correctional Facility and certain employees for interfering with access to his account statements. Because Parker (proceeding *in forma pauperis*) ultimately received the account statements, the district court held that Parker could not establish any injury and dismissed the action for failure to state a claim. App., *infra*, 8a; *see also id.* at 7a n.4.

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[1] "[T]he applicability of the three strikes rule is determined as of the date that the notice of appeal is filed." App., *infra*, 10a n.8. Because Parker was a prisoner at the time he filed his notice of appeal, his "subsequent release does not impact [the] discussion of § 1915(g)." *Id.*

[2] The district court dismissal underlying Parker's second strike was also the subject of a consolidated appeal below. The appeal of that strike was voluntarily dismissed, App., *infra*, 8a, 25a, and is not at issue here.

Parker timely appealed the judgment and filed motions to proceed *in forma pauperis* and to have counsel appointed. The Third Circuit, *inter alia*, granted the appointment and directed counsel to address at minimum "the question left unanswered by *Coleman*, 135 S. Ct. at 1765, *i.e.*, 'whether the [*in forma pauperis*] statute affords a prisoner [*in forma pauperis*] status with respect to an appeal from a third qualifying dismissal under § 1915." App., *infra*, 8a-9a.

2. Following briefing and oral argument, the Third Circuit denied Parker's motion to proceed *in forma pauperis* on appeal. In its opinion, the court of appeals first recounted *Coleman*'s holding that a third-strike district court dismissal is effective immediately as to other separately filed suits, notwithstanding an appeal of that strike. It also noted, however, that the Solicitor General had read section 1915(g) to "preserve[]" a prisoner's "ability to appeal the imposition of a third strike." App., *infra*, 10a-13a. Whether the Solicitor General is correct was the "issue squarely before [the court]." *Id.* at 14a.

The court of appeals recognized that the Ninth Circuit had expressly adopted the Solicitor General's view and permitted an *in forma pauperis* appeal of a third strike. App., *infra*, 14a-16a. In addition, the Fourth, Sixth, and Tenth Circuits had backed the same interpretation of section 1915(g) before *Coleman*, and in the case of the Tenth Circuit, continued to do so in post-*Coleman* unpublished opinions. *Id.* at 14a n.10. The court of appeals nonetheless labeled the Ninth Circuit's reasoning "driven" by "perceived unfairness" concerns and,

based on "*Coleman*'s instruction to read the [statutory] language literally," rejected the Ninth Circuit's view. *Id.* at 16a.

According to the court of appeals, Parker was wrong to rely on the Solicitor General's view that "prior occasions" refers to "strikes imposed in prior-filed suits, not to those imposed in an earlier stage in the same suit." App., *infra*, 17a (citation and quotation marks omitted). The court believed that *Coleman*'s treatment of "actions" and "appeals" as "distinct 'occasions' *** leads *** to the inescapable conclusion that the imposition of a third strike in a district court is an 'occasion' that is 'prior' to its appeal, and that § 1915(g) therefore must apply to an appeal from the imposition of a third strike." *Id.* at 18a.

The court of appeals acknowledged "that, as a practical matter," its decision would leave some prisoners "unable to challenge the imposition of a third strike" and therefore "have long-term consequences for that prisoner's ability to bring cases [*in forma pauperis*] going forward." App., *infra*, 20a. But the court took comfort in the fact that, under its case law, "[m]erely requiring a prisoner to pay filing fees in a civil case does not, standing alone, violate that prisoner's right of meaningful access to the courts." *Id.* (citation and quotation marks omitted).

The court of appeals therefore denied Parker appellate *in forma pauperis* status and directed him to pay the full amount of the applicable filing and docketing fees. App., *infra*, 22a. Because Parker did not do so within the specified 14-day period, the court dismissed the appeal. *Id.* at 27a.

REASONS FOR GRANTING THE WRIT

In the decision below, the Third Circuit confronted a question of statutory interpretation—left unresolved in *Coleman*—that has long divided the courts of appeals. In holding that a prisoner may not proceed *in forma pauperis* when appealing a district court's imposition of a "third strike," the Third Circuit acknowledged a direct post-*Coleman* split with the Ninth Circuit and the Solicitor General. The Third Circuit further acknowledged a broader conflict with pre-*Coleman* decisions from the Fourth, Sixth, and Tenth Circuits, to which it could have added statements from the Second, Fifth, and D.C. Circuits that Congress could not have intended to deprive prisoners the ability to appeal *in forma pauperis* a third strike. Such widespread disagreement—which *Coleman* fuels, rather than dispels—calls out for this Court's prompt review.

That the Third Circuit finds itself in the minority of that well-developed circuit conflict is unsurprising. As the weight of authority reflects, section 1915(g) is most naturally read to allow *in forma pauperis* appeal of a third-strike district court dismissal. To hold otherwise would effectively deprive a prisoner of his right to appeal a third strike and give a district court judgment preclusive effect—even if erroneous. Although the Third Circuit reasoned that such a result was dictated by *Coleman*, the Solicitor General (like several courts of appeals) saw no inconsistency between the third-strike rule affirmed by this Court for separately filed cases and the allowance of an *in forma pauperis* appeal of the third strike itself. Because the decision below upsets the balance Congress struck with regard to prisoner

access to courts, as recognized by most courts of appeals to have considered the question (before *and* after *Coleman*), this Court should grant certiorari.

I. A STARK DIVIDE REMAINS OVER THE QUESTION LEFT OPEN IN *COLEMAN*

A. The Third Circuit Acknowledged A Direct Conflict With The Ninth Circuit And The Solicitor General

In holding that a prisoner may not appeal *in forma pauperis* a district court dismissal constituting a third strike, the Third Circuit acknowledged that it could not avoid a "circuit split[]" with at least *Richey v. Dahne*, 807 F.3d 1202 (9th Cir. 2015). App., *infra*, 16a (citation and quotation marks omitted). As here, *Richey* concerned "whether a prisoner is entitled to [*in forma pauperis*] status on appeal from the trial court's dismissal of [a] third complaint instead of [in] an attempt to file several additional complaints." 807 F.3d at 1209 (alterations except first in original) (citation and internal quotation marks omitted). The Ninth Circuit held that "a prisoner is entitled to [*in forma pauperis*] status while appealing his third-strike dismissal." *Id.*

The Ninth Circuit arrived at that conclusion by looking first to the language of section 1915(g). To be sure, the Ninth Circuit reasoned, *Coleman* "stat[ed] that '[l]inguistically speaking, we see nothing about the phrase 'prior occasions' that would transform a dismissal into a dismissal-plus-appellate review." 807 F.3d at 1209 (second alteration in original) (citation and quotation marks omitted). But *Coleman* ultimately "left open the question presented here." *Id.* To answer that question, the Ninth Circuit

"agree[d]" with the Solicitor General's brief in *Coleman* that "[t]he 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." *Id.* (alteration in original) (citation and quotation marks omitted).

That interpretation, the Ninth Circuit further explained, was in keeping with "'the way in which the law ordinarily treats trial courts judgments.'" 807 F.3d at 1209 (quoting *Coleman*, 135 S. Ct. at 1764). In particular, "[w]hile judgments are immediately preclusive as to successive suits, they are certainly not preclusive to the panel on appeal." *Id.* (internal citation omitted). As such, "[d]enying [*in forma pauperis*] review of a district court's third strike dismissal would prevent [courts] from performing [their] 'appellate function' and would 'freeze out meritorious claims or ossify district court errors.'" *Id.* (quoting *Henslee v. Keller*, 681 F.3d 538, 543 (4th Cir. 2012)).

In addition, the Ninth Circuit observed that the policy considerations underlying the *Coleman* decision would not surface in an *in forma pauperis* appeal of a third-strike district court dismissal. Although the prisoner in *Coleman* could revive his fourth lawsuit *in forma pauperis* if his third strike were reversed on appeal, that safety valve "would be of no consolation if a prisoner could not appeal the erroneously-issued third strike *in forma pauperis*." 807 F.3d at 1209. On the flipside, the concern that a prisoner might "file many frivolous lawsuits while [a] third strike dismissal was pending on appeal" would "not [be] implicated *** , as the prisoner [would]

retain[] [*in forma pauperis*] status only for the appeal of th[e] third strike." *Id.*

The Third Circuit expressly rejected the Ninth Circuit's conclusion. App., *infra*, 14a-16a ("[W]e must respectfully reject the view espoused by the Ninth Circuit."). And the Third Circuit made explicit its disagreement with the Solicitor General. *Id.* at 17a-18a. Accordingly, there can be no dispute that the decision below is in irreconcilable conflict with not only the interpretation of section 1915(g) adopted by the Ninth Circuit, but also with the Solicitor General's considered view.

B. The Decision Below Perpetuates A Circuit Conflict That Predates And Survives *Coleman*

Notably, the Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits had addressed the question presented to varying degrees and were split even before *Coleman*. The Ninth and Tenth Circuits have already indicated since *Coleman* that their positions remain unchanged. That longstanding and persistent conflict, which the Third Circuit brushed aside in a footnote, App., *infra*, 14a n.10, underscores the need for this Court's review.

1. As described in the Third Circuit's opinion, the Tenth Circuit two decades ago reversed a district court order denying permission to appeal *in forma pauperis* from a third strike. *See Pigg v. F.B.I.*, 106 F.3d 1497, 1497-1498 (10th Cir. 1997) (per curiam). In the few years since *Coleman*, two separate panels of the Tenth Circuit have confirmed (albeit in unpublished opinions) that *Pigg* is still good law. In *Burnett v. Miller*, the court refused to "read *Coleman*

to prevent *** consideration of the propriety of [a third predicate] strike." 631 F. App'x 591, 604 (10th Cir. 2015) (Tymkovich, O'Brien, & Gorsuch, JJ.). In *Dawson v. Coffman*, the court aligned itself with the Ninth Circuit. *See* 651 F. App'x 840, 842 n.2 (10th Cir. 2016) (Lucero, Matheson, & Bacharach, JJ.) (citing *Richey* as holding "that the appeal of a third dismissal should not count as a 'prior occasion'").

The Fourth Circuit came to the same conclusion in *Henslee*, in which the prisoner "moved to proceed *in forma pauperis* *** on appeal, despite the fact that the district court's dismissal of the underlying claim was [his] third" strike. 681 F.3d at 543; *see* App., *infra*, 14a n.10 ("We note that the Fourth Circuit, following *Pigg*, adopted the *Richey*-like view of 'prior occasion' in *Henslee*[.]"). In addition to the Tenth Circuit's decision in *Pigg*, the Fourth Circuit drew upon statements from the Fifth and D.C. Circuits addressing the same factual situation, and agreed that where "a third strike dismissal is appealed, counting the underlying dismissal as a strike would 'effectively eliminate our appellate function'" and "'freeze out meritorious claims or ossify district court errors.'" *Henslee*, 681 F.3d at 543 (quoting *Thompson v. DEA*, 492 F.3d 428, 433 (D.C. Cir. 2007); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996)).[3]

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[3] To be clear, *Thompson* and *Adepegba* concerned when a strike becomes final (*i.e.*, akin to *Coleman*). But in answering that question, they specifically addressed whether it would make sense to prohibit an *in forma pauperis* appeal of an underlying third strike in the district court and eschewed that result. *See Thompson*, 492 F.3d at 432 ("Had Congress intended *** [the] unusual result" of "effectively eliminat[ing] [the court

Those decisions (and others) surfaced once again in the Sixth Circuit's *Coleman* decision. [4] Although the Sixth Circuit ultimately concluded that an appealed third-strike district court dismissal takes effect immediately as to separately filed actions (*i.e.*, the rule affirmed by this Court), it rejected the suggestion that "treating an appealed dismissal as a strike would preclude that very appeal." 733 F.3d at 178. Based on the plain language of section 1915(g)—specifically, the words "prior occasions"—the Sixth Circuit reasoned that such an appeal must be permitted. *Id.* ("A third strike that is on appeal is not a *prior* occasion for the purposes of that appeal, because it is the *same* occasion."); *see* App., *infra*, 14a n.10 (describing Sixth Circuit's affirmed decision in *Coleman* as "adopt[ing] the *Richey*-like view of 'prior occasion'").

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of appeals'] appellate function" with respect to "those narrow set of cases in which the third strike is appealed," then Congress "would have clearly said so."); *Adepegba*, 103 F.3d at 388 ("A hyper-literal reading of the statute might also bar a prisoner's appeal of an erroneous third strike, since the appeal would follow three prior dismissals."). Those on-point statements continue to have force. *See Richey*, 807 F.3d at 1209 (quoting passage from *Henslee* that relies on *Thompson* and *Adepegba*).

[4] The Sixth Circuit referenced the Ninth Circuit's decision in *Silva v. Di Vittorio*, which deemed it an "unusual result" if "prisoners' third strikes are not reviewable." 658 F.3d 1090, 1099 n.5 (9th Cir. 2011). The Sixth Circuit further observed that the Second Circuit (also in the *Coleman* context) had "suggest[ed] that denying an appeal of a third strike would be an illogical result." *Coleman v. Tollefson*, 733 F.3d 175, 178 (6th Cir. 2013) (citing *Chavis v. Chappius*, 618 F.3d 162, 169 (2d Cir. 2010)).

2. By comparison, the Third Circuit can count on its side of the ledger only the Seventh Circuit's (pre-*Coleman*) opinion in *Robinson v. Powell*, 297 F.3d 540 (7th Cir. 2002). Once again, the court there confronted whether to permit an *in forma pauperis* appeal from a third strike dismissal in the district court. *See id.* at 541 ("Robinson had already received two of his permitted strikes when he filed the present suit, which the district court dismissed for failure to state a claim. That was strike number three. Nevertheless the judge authorized him to appeal in forma pauperis."). But unlike the Second, Fourth, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits, the Seventh Circuit found "[t]hat authorization [to be] contrary to the language of the statute." *Id.*

As the Seventh Circuit accepted, that holding could not be reconciled with the decisions of its sister circuits. *See Robinson*, 297 F.3d at 541. Since then, all other courts of appeals—except the Third Circuit below—have rejected the Seventh Circuit's approach, including after *Coleman*.

II. THE DECISION BELOW IS INCORRECT

Beyond reaffirming the continued existence of a post-*Coleman* circuit conflict, the Third Circuit's decision reached an incorrect result. Nothing in the text of section 1915(g) deprives a prisoner who accrues a third strike in the district court of the ability to proceed *in forma pauperis* in challenging that strike. The statutory bar operates only where a prisoner has received strikes "on 3 or more *prior occasions*." 28 U.S.C. § 1915(g) (emphasis added). A "prior occasion[]" is most naturally read to refer to a strike imposed in prior-filed suits, not to a strike

imposed in an earlier stage of the suit from which the appeal is taken. That interpretation "also is supported by the way in which the law ordinarily treats trial court judgments," *Coleman*, 135 S. Ct. at 1764, *viz.*, as subject to an appeal as of right, 28 U.S.C. § 1291, and preclusive as to other suits only if an appeal is available, *see* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4433 (2d ed. 2002) ("[P]reclusion should not attach when circumstances cut off appeal of an otherwise reviewable order."). Several courts of appeals agree. *See* pp. 10-14, *supra*.

If it were otherwise, the word "prior" would serve no function and could be deleted from the statute without substantive effect. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (rejecting interpretation that "runs afoul of the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute") (citation and internal quotation marks omitted). "Because the number of strikes [is] assessed [as of] the date on which a prisoner files his complaint or his appeal, the strikes will *always* be 'prior' in the sense of preceding the decision whether to grant *in forma pauperis* status." Brief for the United States as Amicus Curiae Supporting Respondents at 26, *Coleman*, 135 S. Ct. 1759 (No. 13-1333) ("U.S. *Coleman* Br.") (alterations in original) (internal citation and quotation marks omitted). Accordingly, contrary to the Third Circuit (App., *infra*, 19a), "[r]eading the phrase 'prior occasions' to refer to earlier-filed suits is *** necessary to give meaning to the word 'prior.'" U.S. *Coleman* Br. 26.

According to the Third Circuit, *Coleman*'s textual analysis all but preordained the opposite result. *See* App., *infra*, 16a-18a. But *Coleman* itself acknowledges divergent views. The Solicitor General "subscrib[ed] to [this Court's] interpretation of the statute" with regard to when a strike becomes final, but also "sa[id] that [the Court] can and should read the statute to afford a prisoner *in forma pauperis* status with respect to an appeal from a *third* qualifying dismissal—even if it does not allow a prisoner to file a *fourth* case during that time." 135 S. Ct. at 1765; *see* U.S. *Coleman* Br. 11, 25-27. Likewise, the Sixth Circuit's decision in *Coleman* (affirmed by this Court) concluded that "the third strike may be appealed even though it would count as a strike with regard to a fourth or successive suit." 733 F.3d at 178.

Lastly, in reserving the "hypothetical" question now squarely presented here, this Court explained that resolution was better left to courts "consider[ing] th[at] problem in context." *Coleman*, 135 S. Ct. at 1764-1765. Such context includes (i) "the way in which the law ordinarily treats trial court judgments"; (ii) the fact that the Third Circuit's rule "would prevent courts of appeals from performing their 'appellate function' by 'freez[ing] out meritorious claims or ossify[ing] district court errors'"; and (iii) the reality that its "decision *** means that some prisoners will be unable to challenge the imposition of a third strike, even though a wrongly imposed third strike would have long-term consequences for that prisoner's ability to bring cases [*in forma pauperis*] going forward." App., *infra*, 15a, 20a (alterations in original) (citations

omitted). The Third Circuit all but closed its eyes to those "concern[s]," reasoning that its "duty" was simply "to give effect to the plain language of the statute." *Id.* at 20a. But where (as here) the statutory text lends itself to a more sensible reading, that duty does not countenance ignoring whether Congress would have "intended such a peculiar system." *Id.* at 15a (citation and quotation marks omitted); *see Coleman*, 135 S. Ct. at 1764 (considering whether interpretation accords with "the way in which the law ordinarily treats trial court judgments" and "the statute's purpose").

III. THE QUESTION PRESENTED IS AN IMPORTANT AND RECURRING ONE

Whether section 1915(g) bars a prisoner from appealing *in forma pauperis* a district court dismissal that counts as a third strike is a question of exceptional importance. That question implicates a prisoner's fundamental right—"established beyond doubt"—of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821 (1977). Indeed, the federal *in forma pauperis* statute exists precisely "to ensure that indigent litigants have meaningful access to the federal courts." *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016) (citation and quotation marks omitted). In view of those significant considerations, it is no surprise that this Court has granted certiorari time and again to resolve disputes over the proper

interpretation of the federal *in forma pauperis* statute.[5]

This Court should do so once again. This case is a clean vehicle for resolving a question reserved by this Court, and there is no reason to await another. The question presented is not new and has been addressed (inconsistently) in as many as nine courts of appeals; the Third, Ninth and Tenth Circuits' comprehensive opinions confirm that two possible interpretations of section 1915(g) remain even after *Coleman*; and the Solicitor General has already staked out a position. Further percolation would therefore serve no meaningful purpose.

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[5] *E.g.*, *Bruce*, 136 S. Ct. 627 (calculation of monthly installment payments when multiple fees are owed); *Coleman*, 135 S. Ct. 1759 (timing of effectiveness of third strike); *Jones v. Bock*, 549 U.S. 199 (2007) (judicial screening rules); *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194 (1993) (meaning of "person"); *Denton v. Hernandez*, 504 U.S. 25 (1992) (standard for factual frivolousness and appellate review); *Neitzke v. Williams*, 490 U.S. 319 (1989) (standard for legal frivolousness); *Mallard v. United States Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296 (1989) (attorney appointment).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 27, 2017