No. 17-779

In The
Supreme Court of the United States

JASON PARKER,

Petitioner,

v.

MONTGOMERY COUNTY CORRECTIONAL FACILITY, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

Ryan T. Becker
FOX ROTHSCHILD LLP
2000 Market Street
20th Floor
Philadelphia, PA 19103
(215) 299-2000

Pratik A. Shah
Counsel of Record
Z.W. Julius Chen
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4000
pshah@akingump.com

Counsel for Petitioner

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Respondents do not dispute that this case provides an ideal vehicle to resolve the cleanly presented question reserved in *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015). Respondents do not dispute a circuit split on that question. And Respondents do not dispute the exceptional importance of the question to indigent prisoners, whose access to basic appeal rights will be significantly curtailed by the decision below. Instead, the only ground Respondents offer for dodging this Court's review is that the undisputed circuit conflict purportedly needs more time to "mature."

That familiar refrain rings hollow here. In Respondents' own words, in the run-up to *Coleman*, a

"solid majority of circuits" agreed that indigent prisoners (like Petitioner) are entitled to appeal *in forma pauperis* a district court's imposition of a third strike, while one circuit "stood alone" in holding that 28 U.S.C. § 1915(g) barred such relief. That conflict undisputedly survives *Coleman*: the Ninth Circuit, in light of this Court's analysis in *Coleman*, has since reaffirmed the majority view; the Third Circuit disagreed in the decision below and has joined the minority.

In the face of that intractable post-*Coleman* conflict, it blinks reality for Respondents to suggest that, given enough time, the conflict might "resolve." To the extent any other courts of appeals revisit their pre-*Coleman* position and follow the Third Circuit, the conflict would (at best) only become less lopsided in Petitioner's favor than it is now. That is hardly a reason to forego review of this pressing issue in a case that squarely presents it. Nor can the arguments amply aired in the courts of appeals (on both sides of the split) be distilled any further. Because time has already laid bare the need for this Court's review, the petition should be granted.

I. A DIRECT AND UNDISPUTED CIRCUIT SPLIT PERSISTS

1. Respondents attempt to downplay the pre-*Coleman* circuit conflict by arguing (BIO 4-5) that "a solid majority of circuits" had "championed th[e] view" that Petitioner advances here. That is a curious way of defending the Third Circuit's adoption of the minority position. Respondents' assertion that "pre-*Coleman*, the circuits were, in fact, consistent in outcome and nearly unanimous in rationale," BIO 5

(citation omitted), only underscores that the Third Circuit is an outlier.

In reality, the decision below deepens an entrenched circuit conflict warranting this Court's attention. Respondents' disagreement withers in the face of their feeble assertion that, "[p]rior to *Coleman*, there was no *significant* circuit split." BIO 3 (emphasis added); *see* BIO 4 ("Before *Coleman*, There *Effectively* Was No Split[.]") (emphasis added). Respondents ultimately recognize that "[t]he Seventh Circuit stood alone pre-*Coleman* in finding that a district court's 'authorization [of *in forma pauperis* status for an appeal from a third strike dismissal] was contrary to the language of the statute.'" BIO 5 (second alteration in original) (quoting *Robinson v. Powell*, 297 F.3d 540, 541 (7th Cir. 2002)). The Seventh Circuit's practical workaround for granting *in forma pauperis* status cannot obscure its interpretation of section 1915(g), which aligns with the Third Circuit's.[1]

Importantly, *Coleman* did not sweep away the longstanding disagreement among the circuits over whether the assessment of a third strike can be appealed *in forma pauperis*. All agree that *Coleman* expressly left that question "unresolved." BIO 6.

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[1] Notably, the Seventh Circuit's attempted workaround—permitting an appellant "to ask us for leave to proceed in forma pauperis," *Robinson*, 297 F.3d at 541 (citing FED. R. APP. P. 24(a)(5))—was quickly overtaken by an amendment to the Federal Rules. *See* FED. R. APP. P. 24(a)(3) (precluding the courts of appeals beginning in 2002 from granting *in forma pauperis* status if "a statute provides otherwise"); *Henslee v. Keller*, 681 F.3d 538, 542 n.8 (4th Cir. 2012).

Plus, as the Sixth Circuit's underlying decision and the Solicitor General's position in *Coleman* demonstrate, the rule that a third strike becomes disqualifying immediately *as to separately filed actions* is not inconsistent with a rule permitting *in forma pauperis* appeals from the third strike itself. *See Coleman v. Tollefson*, 733 F.3d 175, 178 (6th Cir. 2013) (holding that a "third strike may be appealed even though it would count as a strike with regard to a fourth or successive suit"); *see* p. 6, *infra* (discussing Solicitor General's position in *Coleman*). To the contrary, as the Ninth Circuit has since concluded, the two rules are completely compatible. Pet. 10-12.

2. The undeniable post-*Coleman* conflict between the Third and Ninth Circuits alone justifies this Court's review. According to Respondents, this Court should ignore that direct conflict because "[w]ith time, other circuits will follow [the Third Circuit]" and the split might "resolve." BIO 4, 16. But that is (hopelessly) wishful thinking. The Ninth Circuit—in a unanimous, precedential decision—has already considered and rejected the argument that *Coleman*'s statutory analysis bars an *in forma pauperis* appeal of a third strike. *Richey v. Dahne*, 807 F.3d 1202, 1209 (9th Cir. 2015); *see* Pet. 10-12. There is no reason whatsoever (nor do Respondents provide one) to believe that the Ninth Circuit will reverse course. Accordingly, the post-*Coleman* conflict can only grow, not shrink, as other courts of appeals encounter the question presented—whether or not they choose to revisit their pre-*Coleman* position.

Respondents' apparent assumption that the Third Circuit's position will become the majority view

is also unwarranted. This Court's reasoning in *Coleman* provides no impetus for the Sixth Circuit, for example, to revisit its holding that an *in forma pauperis* appeal of a third strike is fully consistent with the rule (affirmed by this Court) that such strikes are immediately effective as to separately filed actions. *See* p. 4, *supra*. Similarly, two separate panels of the Tenth Circuit have declined to read *Coleman* as requiring a departure from circuit precedent. Pet. 12-13. Those decisions, albeit unpublished, undercut any suggestion that the Third Circuit's view will inevitably prevail. In fact, with the exception of the Third Circuit, *every* time a court of appeals has confronted and answered the question presented since *Coleman*, it has adhered to the view that a court of appeals may grant *in forma pauperis* status to review the propriety of a third strike.

That is no surprise. As the National Association of Criminal Defense Lawyers (NACDL) points out, the decision below "creates a profound tension" with *Coleman*. NACDL *Amicus* Br. 3. This Court reasoned that there was no great risk of precluding an indigent prisoner from filing a meritorious lawsuit while an appeal of a third strike was pending because, "*where a court of appeals reverses a third strike*," the prisoner would likely retain the ability "to refile his or her lawsuit after the reversal," to "find relief in Federal Rule of Civil Procedure 60(b)," or to "move to reopen his or her interim lawsuits" and "then seek *in forma pauperis* status anew." 135 S. Ct. at 1764 (emphasis added). Absent a meaningful opportunity to appeal a third strike, however, those safeguards would be "wholly illusory." NACDL *Amicus* Br. 8.

3. Respondents contend that "[t]he Solicitor General's position in *Coleman* on the issue now at hand proved to be inconsistent with the reasoning of the eventual decision." BIO 12-13. Not so. The Solicitor General's argument "that 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" was advanced *in full view of* its position—accepted by this Court—that section 1915(g) "does not allow a prisoner to file a *fourth* case during that time." *Coleman*, 135 S. Ct. at 1765; *see id.* at 1763-1765 (noting that "[t]he Solicitor General *** subscrib[es] to our interpretation of the statute"— *i.e.*, the "literal reading" of a "statute [that] repeatedly treats the trial and appellate stages of litigation as distinct"). As the Solicitor General explained, nothing about "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." U.S. *Coleman* Br. 25. The Solicitor General thus *necessarily* had the "benefit" of *Coleman*'s reasoning (BIO 13).

On the merits, Respondents do little more than parrot the Third Circuit's disagreement with the Solicitor General. In doing so, Respondents skip over pertinent portions of the Solicitor General's textual analysis. *See, e.g.*, U.S. *Coleman* Br. 25-26 (explaining that treating a district court dismissal as an "occasion" for one purpose but not another is not "at war with itself" because "from the perspective of the court of appeals—deciding whether to grant *in forma pauperis* status on an appeal from the third strike—[a dismissal] is not a '*prior* occasion'"). Worse still, Respondents completely ignore the Solicitor

General's additional explanation as to why his "reading is consistent with common practice, in which a litigant is permitted an appeal as of right from any adverse district court ruling that is final," and "with the typical res judicata and collateral estoppel consequences of a district court judgment," *id.* at 26-27—considerations that informed this Court's analysis in *Coleman*, *see* Pet. 16-17.

In passing, Respondents critique the Solicitor General's argument that the phrase "prior occasions" in section 1915(g) must refer to "prior-filed suits" in order to have meaning. U.S. *Coleman* Br. 25-26. To Respondents, "'[p]rior' sets a temporal parameter, referring only to strikes accrued earlier in time than the notice of appeal.'" BIO 15 (quoting Pet. App. 19a). But the statute separately accomplishes that objective by tying *in forma pauperis* status to the "bring[ing]" of an appeal. 28 U.S.C. § 1915(g). Because under that language *in forma pauperis* status is assessed at the time of filing, "*prior* occasion" must be doing something more, *i.e.*, referring to a prior-filed suit.

II. THIS CASE IS AN UNDISPUTEDLY CLEAN VEHICLE FOR RESOLVING A RECURRING QUESTION OF IMPORTANCE

Apart from the fact that further deliberation of the question presented among the courts of appeals would serve no purpose, several compelling reasons counsel granting review in this case.

1. Respondents do not dispute that "[t]his case is a clean vehicle for resolving" the question presented. Pet. 19. Their silence is unsurprising.

The facts here are as straightforward as can be: Petitioner, who qualified as an indigent prisoner, seeks to overturn a third strike *in forma pauperis* on appeal. The arguments on both sides are fully preserved, well ventilated, and squarely addressed in the Third Circuit's precedential decision below. Indeed, the Third Circuit focused *exclusively* on the section 1915(g) issue (without reaching the merits of the underlying appeal). Pet. App. 21a-22a.

2. The controversy over allowing *in forma pauperis* appeals of third strikes is a recurring one. Given that nine courts of appeals have addressed the issue, and continue to do so in the wake of *Coleman*, there can be no doubt that the circuit conflict persists. Pet. 10-15. Indeed, Respondents have identified yet another recent decision raising the question presented. BIO 9.

3. Respondents do not contest the exceptional importance of the question presented. Pet. 18. For good reason: As *amici* urge, "[t]he question at the heart of this intractable conflict is *** unquestionably important, as it implicates the guarantee of meaningful access to the courts for indigent litigants." Constitutional Accountability Center (CAC) *Amicus* Br. 2, 8-11; *see* NACDL *Amicus* Br. 9-10. Because "[f]or the vast majority of our Nation's prisoners, accessing the courts is all but impossible without *in forma pauperis* status[,] [p]reventing prisoners from appealing *in forma pauperis* third strike dismissals *** is tantamount to denying them *any* appellate review." NACDL *Amicus* Br. 2-4, 6-7. Accordingly, under the decision below, a substantial number of indigent prisoners face the risk of being forever foreclosed from obtaining *in forma pauperis*

status because of an erroneous (yet unreviewed) third strike. *See* CAC *Amicus* Br. 3-4, 12-13; NACDL *Amicus* Br. 10-12.

That risk is not just hypothetical. "[E]rrors in assessing strikes under section 1915(g) are not hard to find." NACDL *Amicus* Br. 12-16 (collecting cases). In light of that reality, the need for immediate review is "acute." NACDL *Amicus* Br. 3. This Court should decide sooner rather than later whether Congress made the extraordinary decision to "freeze out meritorious claims" and "ossify district court errors." *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996).

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For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

Ryan T. Becker
FOX ROTHSCHILD LLP

Pratik A. Shah
Counsel of Record
Z.W. Julius Chen
AKIN GUMP STRAUSS
HAUER & FELD LLP

Counsel for Petitioner

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