No. 19-1387

ORIGINAL

In The
Supreme Court of the United States

WASEEM DAKER,
Petitioner,
v.
THEODORE JACKSON, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

WASEEM DAKER
Petitioner, *pro se*

ID#901373
Valdosta S.P.
P.O. Box 5368
Valdosta, GA 31603

QUESTIONS PRESENTED

The Prison Litigation Reform Act "three-strikes" provision 28 U.S.C. § 1915(g), bars a prisoner from filing a civil action *in forma pauperis* (IFP), if he has had three or more prior actions or appeals dismissed as frivolous, malicious, or for failure to state a claim. Petitioner has three strikes. He filed a civil action in which he claimed violations of his First Amendment rights to free speech, religious exercise, and right of access to the courts, and he moved to proceed IFP. The district court rejected his constitutional challenges to § 1915(g) and dismissed his case. The questions presented are as follows

I. Whether the Prison Litigation Reform Act "three-strikes" provision, 28 U.S.C. § 1915(g), is unconstitutional as applied to deny a prisoner access to courts with which to vindicate First Amendment rights.

II. Whether the Prison Litigation Reform Act "three-strikes" provision, 28 U.S.C. § 1915(g), violates the First Amendment "breathing space" principle.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Carter, [First Name Unknown ("FNU")], Respondent;

Daker, Waseem, Petitioner;

Fraley, A. [FNU], Respondent;

Fulton County, Georgia, Respondent;

Gipson, [FNU], Respondent;

Jackson, Theodore, Respondent;

Saunders, A. [FNU], Respondent;

Sheffield, [FNU], Respondent;

Underwood, A. [FNU], Respondent;

Underwood, [FNU], Respondent.

LIST OF RELATED CASES

Daker v Jackson, No. 1:17-cv-00366, U. S. District Court for the Northern District of Georgia. Judgment entered Mar. 6, 2018.

Daker v Jackson, No. 18-11989, U. S. Court of Appeals for the Eleventh Circuit Judgment entered Nov. 15, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

Appendix:

TABLE OF AUTHORITIES

CASES — Page

STATUTES:

RULES:

OTHER AUTHORITIES:

PETITION FOR A WRIT OF CERTIORARI

Waseem Daker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Daker v. Jackson, et al.*, No. 18-11989.

OPINIONS BELOW

The Opinion of the Court of Appeals is published and reported at *Daker v. Jackson*, 942 F. 3d 1252 (11th.Cir. November 15, 2019.)

JURISDICTION

The Court of Appeals affirmed Petitioner's appeal from the dismissal of Petitioner's Complaint on November 15, 2019. (1) The Court of Appeals denied a petition for rehearing on January 15, 2020. (20) On February 25, 2020, Justice Thomas granted an application for extension of time to file Petition for Writ of Certiorari until June 13, 2020. Application No. 19A945. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This case involves Title 28, United States Code ("U.S.C.) § 1914, which provides in pertinent part:

> (a) The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350, except that on application for a writ of habeas corpus the filing fee shall be $5.
>
> (b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States.

This case involves Title 28, United States Code ("U.S.C.) § 1915(g) of the Prison Litigation Reform Act ("PLRA"), commonly known as the "three-strikes provision, which provides in pertinent part:

> (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.

STATEMENT OF THE CASE

On January 2, 2017, Petitioner Waseem Daker brought this action pursuant to 42 U.S.C. § 1983, in the District Court for the Northern District of Georgia against Respondents Fulton County Sheriff Theodore Jackson, several of his employees, and Fulton County, Georgia, for constitutional violations based on policies in place at the Fulton County Jail ("FCJ"), when he was there in January 2013.

First, Petitioner claims that Defendants ban all hardcover books at FCJ, which denies him his First Amendment right to freedom of speech and to receive information and ideas by denying publications. (Doc.1 at 8-9, 11, ¶¶ 8-15, 27.)

Second, Petitioner claims that Defendants' ban on all hardcover books at FCJ violates his First Amendment right to freedom of religion and to receive religious information and ideas by denying religious publications. (Doc.1 at 9-10, 11, ¶¶ 16-21, 28.)

Third, Petitioner claims that, after he left FCJ, Defendants violated his right of access to the courts by refusing to forward his legal mail to him, causing him to not receive a motion to dismiss in his state habeas corpus petition challenging his conviction, resulting in the dismissal of that Petition. (Doc.1 at 10-11, ¶¶ 22-26, 29.)

Petitioner's Complaint was accompanied by a Request to Proceed In Forma Pauperis ("IFP"). (Doc.2.) The magistrate entered an Order and Report and Recommendation ("R&R"), holding that Petitioner had three(3) strikes under the Prison Litigation Reform Act ("PLRA") of 1995 "three strikes" provision, 28 U.S.C. § 1915(g). (Docs. 4, 5.) Petitioner then timely objected to the Magistrate's Order and R&R. (Doc.6, 7, 8.)

On March 16, 2018, the district court adopted the R&R and dismissed the Complaint, holding that Petitioner had three strikes and that § 1915(g) was not unconstitutional. (Docs. 9, 10.) Petitioner timely appealed. (Docs. 12, 13, 15.)

The Eleventh Circuit opinion affirmed the dismissal, holding that Petitioner had three strikes and that § 1915(g) was not unconstitutional.[1] Petitioner unsuccessfully sought rehearing *en banc*, which the Eleventh Circuit denied on January 15, 2020.

REASONS FOR GRANTING THE PETITION

I. Whether the Prison Litigation Reform Act "three-strikes" provision, 28 U.S.C. § 1915(g), is unconstitutional *as applied* to deny a prisoner access to courts with which to vindicate First Amendment rights.

A. The Eleventh Circuit's decision is erroneous.

Some Circuits and circuit judges have voiced a growing concern about the constitutionality of § 1915(g)'s prospective denial of access to indigent prisoners with three strikes. *See, e.g., Thomas v. Holder*, 750 F.3d 899, 909 (D.C.Cir.2014) (Tatel, J., concurring) ("I have grave doubts that the PLRA's three-strikes provision may be constitutionally applied to indigent prisoners who seek access to the courts in order

---

[1] "Alternatively, the district court dismissed the case because it concluded that Daker was not actually indigent." 942 F.3d at 1255 n.1. Although Petitioner challenged this holding on appeal, the Eleventh Circuit did not decide it, holding that "Because we affirm the district court on the three-strikes bar, we need not address the district court's alternative holding." *Id.* Thus, the district court's alternative holding is not before this Court in this Petition.

to bring claims involving fundamental constitutional rights."); *Williams v. Paramo*, 775 F.3d 1182, 1189 (9th.Cir.2015) (noting that "the three-strikes provision raises grave constitutional concerns" (citing *Thomas,* 750 F.3d at 904–09 (Tatel, J., concurring))). As Judge Tatel explained in his concurrence in *Thomas*, § 1915(g) implicates two interrelated lines of constitutional decisions. The first line of cases stems from this Court holding that "filing and similar fees must be waived for indigent litigants who raise certain types of claims." *Thomas*, 750 F.3d at 905 (Tatel, J., concurring) (citing *Griffin v. Illinois*, 351 U.S. 12, 15, 18–19 (1956)). The cases in this first line are grounded in equal protection principles and extend to filings such as appeals of criminal convictions, habeas petitions, and litigation involving certain fundamental interests, such as obtaining a divorce or appealing the termination of parental rights. *Id.* (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 111, 120, 123 (1996); *Griffin*, 351 U.S. at 21–23 (Frankfurter, J., concurring); *Smith v. Bennett*, 365 U.S. 708, 709 (1961); *Boddie v.* Connecticut, 401 U.S. 371, 374 (1971)). The second line of cases addresses the rights of prisoners to access the courts, which extend not only to litigation attacking prisoners' convictions and sentences, but also to civil rights actions that seek to vindicate "basic constitutional rights." Id. at 905–06 (citing *Lewis v. Casey*, 518 U.S. 343, 354–55 (1996); *Wolff v. McDonnell*, 418 U.S. 539, 579–80 (1974)).

Judge Tatel noted that "the Supreme Court has unequivocally held that waiver of filing fees is *in some cases constitutionally required*," (emphasis supplied) and explained that several circuits "have left open the possibility that a prisoner might bring a successful as-

applied challenge to the PLRA's three-strikes provision." *Thomas*, 750 F.3d at 907, 908 (Tatel, J., concurring). Indeed, Judge Tatel specifically cited the Eleventh Circuit decision in *Rivera v. Allin*, 144 F.3d 719, 724 n.9 (11th.Cir.1998) as an example of where this possibility remains open, explaining that although *Rivera* "rejected a claim that the three-strikes provision impeded the right to access the courts, it did so only after observing that the plaintiff's 'well-pled allegations... plainly advance no cognizable fundamental interest.'" *Id.* at 908 (quoting *Rivera*, 144 F.3d at 724).

Other Circuits have similarly circumscribed their rejection of as-applied challenges to § 1915(g) to cases "where a fundamental interest is not at stake." *Rodriguez v. Cook*, 169 F.3d 1176, 1180 (9th.Cir.1999); *White v. State of Colorado*, 157 F.3d 1226, 1233-34 (10th.Cir.1998); *Carson v. Johnson*, 112 F.3d 818, 821 (5th.Cir.1997).

Here, the Eleventh Circuit agreed that to § 1915(g) cannot justify denial of IFP in cases involving fundamental interests. However, it held that the First Amendment freedoms of speech, religion, and court access *are not fundamental interests*:

> Our case law indicates there may be situations in which waiver of the filing fee is constitutionally required for a three-strikes litigant, if a fundamental interest is involved. *See Miller v. Donald*, 541 F.3d 1091, 1096 (11th.Cir.2008) (stating when fundamental

> interests are at stake, the litigant's inability to pay a fee cannot be a barrier to his access to the courts); *Rivera*, 144 F.3d at 724. *Daker alleges a ban on hardcover books and the failure to forward legal mail violated his rights to freedom of speech, religion, and access to the courts. While these are certainly constitutional rights, they do not fit into one of the types of fundamental interests recognized in Rivera: state controls and intrusions on family relationships or danger of serious bodily injury. See Rivera*, 144 F.3d at 724. Accordingly, these are not the types of fundamental interests that would warrant waiver of the filing fee irrespective of Daker's status as a three-strikes litigant.

942 F.3d at 1258-59 (Emphasis supplied). This holding is erroneous and conflicts with this Court's precedents, regarding fundamental rights in general and the freedoms of speech, religion, and court access in particular.

B. The Eleventh Circuit opinion, holding that Petitioner's First Amendment rights at

issue—including freedom of speech, religion, and access to the courts—are not fundamental interests conflicts with this Court's prior decisions regarding fundamental rights.

This Court's Rule 10(c) provides that one factor this Court considers in deciding whether to grant certiorari is whether "United States court of appeals has decided... has decided an important federal question in a way that conflicts with relevant decisions of this Court." That standard is met here.

1. The Eleventh Circuit opinion conflicts with this Court's prior decisions regarding fundamental rights in general.

While the Eleventh Circuit held that fundamental interests implicated included "state controls or intrusions on family relationships," 942 F.3d at 1258 (citing *Rivera*, 144 F.3d at 724), this Court has never indicated that fundamental interests were limited to "state controls or intrusions on family relationships," To the contrary, this Court has held that fundamental interests include most of the rights set forth in the Bill of Rights, including the First Amendment.

This Court has held First Amendment rights constitutes a fundamental substantive due process right—one "of basic importance in our society" and "sheltered by the Fourteenth Amendment." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citing to a series of cases that analyze marriage rights to determine they meet the standard of a Fourteenth Amendment "fundamental" due process right). Like the parental rights

at issue in *M.L.B.*, Petitioner's *Bounds* claim is so "deeply rooted in this Nation's history" and "fundamental to *our scheme* of ordered liberty" as to be sheltered by substantive due process protections. *McDonald v. City of Chicago*, 561 U.S. 742, 767-70 (2010) (citations omitted) (regarding the Second Amendment as a sufficiently "fundamental" right to be similarly "incorporated in the concept of due process"); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (internal quotation marks omitted) (holding the prohibition against double jeopardy was incorporated into due process because the prohibition was "fundamental to the American scheme of justice"). *See also Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (noting that fundamental rights are grounded in "solid recognition of the basic values that underlie our society").

In *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), this Court held that the substantive component of the Due Process Clause protects those rights that are "fundamental," that is, rights that are "implicit in the concept of ordered liberty," This Court has deemed that most—but not all—of the rights enumerated in the Bill of Rights are fundamental; certain unenumerated rights (for instance, the penumbral right of privacy) also merit protection. *see Planned Parenthood v. Casey*, 505 U.S. 833, ___, 112 S.Ct. 2791, 2807, 120 L.Ed.2d 674 (1992). The Eleventh Circuit opinion below has the anomalous effect of elevating unenumerated rights, for example, the right to an abortion, over those rights specifically enumerated in the Bill of Rights, specifically free speech, religious exercise, and the right to petition government for redress of grievances.

Fundamental rights are those rights that are protected by the substantive component of the Due Process Clause against "certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights*, 503 U.S. 115, ___, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)). That includes First Amendment rights.

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court noted two different sorts of "freedom of association" that are protected by the United States Constitution, both of which are fundamental interests:

> Our decisions have referred to constitutionally protected `freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another

> set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion.

Id., at 617-618. *See also City of Dallas v. Stanglin*, 490 U.S. 19, 23-25 (1989)).

All three rights Petitioner has raised here—freedom of speech, religion, and right of access to courts—are enumerated in the Bill of Rights and thus are fundamental. Furthermore, "state controls or intrusions on family relationships" are not enumerated in the Bill of Rights, but are instead included in the "certain unenumerated rights" recognized by *Casey*. Thus, the Eleventh Circuit opinion has the anomalous effect of elevating *unenumerated* rights over *enumerated* rights in the protections they deserve.

2. The Eleventh Circuit opinion conflicts with this Court's prior decisions regarding the right of access to the being courts a fundamental right.

Petitioner's Complaint claimed that, after he left FCJ, Defendants violated his right of access to the courts by refusing to forward his legal mail to him, causing him to not receive a motion to dismiss in his state habeas corpus petition challenging his conviction, resulting in the dismissal of that Petition. (Doc.1 at 10-11, ¶¶ 22-26, 29.)

The right of access to the courts is grounded in part in the First Amendment Petition Clause. In *Christopher v. Harbury*, 536 U.S. 403, 412-15, 415 n.12 (2002), this Court recognized that the constitutional basis for claims attempting to vindicate the right of access to courts is grounded in Article IV, the First Amendment, the Fifth Amendment, and the Fourteenth Amendment (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)).

Indeed, the right of court-access is the most important right, since it protects one's other rights. In *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992), *superseded by statute on other grounds*, this Court held, "Because a prisoner is ordinarily divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because preservative of all rights.'" (*quoting Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *Adams v. Carlson*, 488 F.2d 619, 630 (7th.Cir.1973) ("[A]n inmate's right of unfettered access to the courts is as fundamental a right as any other he may hold. All other rights of an inmate are illusory without it....").

The right of access to the courts constitutes a fundamental substantive due process right—one "of basic importance in our society" and "sheltered by the Fourteenth Amendment." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citing to a series of cases that analyze marriage rights to determine they meet the standard of a Fourteenth Amendment "fundamental" due process right).

In *Bounds v. Smith,* 430 U.S. 817, 827, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), this Court held: "As this Court has 'constantly emphasized,' habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." (*quoting Johnson v. Avery*, 393 U.S. 483, 485 (1969); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (finding "no reasonable distinction" in the constitutional importance of "habeas and civil rights actions" in evaluating prisoners' right to judicial access).). Thus, *Bounds* held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* At 828. *See also Griffin v. Illinois*, 351 U.S. 12, 24-25 (1956) (States must supply indigent defendants with a free trial transcript if necessary for their criminal appeal); *Ex parte Hull*, 312 U.S. 546, 548-549 (1941) (holding that a state could not prohibit prisoners from filing habeas petitions that a "legal investigator" for the state's parole board had found "[im]properly drawn"). It is inconsistent with *Bounds* to hold, on one hand, that government must provide prisoners assistance to challenge their convictions, sentences, and conditions of confinement, but then to hold, on the other hand, that government may impose filing fees that prisoners might not be able to pay—and also deny them IFP status—with which to challenge convictions, sentences, and conditions of confinement. That contradiction is the result of the Eleventh Circuit decision.

In *Lewis v. Casey* 518 U.S. 343, 355, 116 SC 2174, 135 L.Ed.2d 606 (1996), this Court clarified the scope of the right of court access under *Bounds*:

> *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

Thus, under *Bounds* and *Lewis*, to the extent § 1915(g) prevents a prisoner from challenging his conviction, sentence, or conditions of confinement, it is unconstitutional. To the extent it impairs other litigating capacity—such as shareholder derivative actions to slip-and-fall claims—it is perfectly constitutional.

Indeed, this Court has found that even a $4 filing fee may be excessive when, as applied, it would deny judicial access to prisoners who cannot afford

that payment. *Smith v. Bennett*, 365 U.S. 708, 709, 714 (1961); *see also Ross v. Moffitt*, 417 U.S. 600, 611-12 (1974) (requiring "indigents have an adequate opportunity to present their claims fairly").

Petitioner's allegations that prison officials have refused to forward his legal mail to him, resulting in the dismissal of his state habeas corpus petition, falls within the scope of the right to court access guaranteed under *Bounds* and *Lewis*, and thus asserts a fundamental interest that allows him to proceed IFP on his underlying complaint before the district court. Thus, § 1915(g) cannot withstand *strict scrutiny* as applied to Petitioner's case.

3. The Eleventh Circuit opinion conflicts with this Court's prior decisions regarding freedom of speech being a fundamental right.

Petitioner claims that Defendants ban all hardcover books at FCJ, violating his First Amendment right to freedom of speech and to receive information and ideas by denying publications. (Doc.1 at 8-9, 11, ¶¶ 8-15, 27.) Such a claim plainly implicates First Amendment rights. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas.").

In *United States v. Kras*, 409 U.S. 434, 446 (1973), this Court upheld the application of filing fee requirements on an indigent bankrupt applicant by contrasting the right to bankruptcy—which did not constitute a fundamental interest to justify a fee

waiver—with "speech" or other "fundamental" First Amendment rights

> Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated. *See Shapiro v. Thompson*, 394 U. S. 618, 638 (1969).

(Emphasis supplied.)

In *Janus v. American Federation of State*, 585 U.S. ___, 138 SC 2448, 2460, 201 L.Ed.2d 924 (2018), this Court recognized the right of free speech as fundamental. "Fundamental free speech rights are at stake." Id. Significantly, this Court held that "States with agency-fee laws have abridged fundamental free speech rights." 138 SC at 2486 n.28.

Similarly, the filing fee provision of § 1914, coupled with the denial of IFP under § 1915(g), functions as an "agency-fee law[s] [that] abridge[s] fundamental free speech rights." 138 SC at 2486 n.28.

Moreover, this Court has held that they must be provided with the means at least "to challenge the conditions of their confinement." *Lewis v. Casey*, 518

U.S. 343, 355 (1996). Petitioner's free-speech claims here fall within that scope.

4. The Eleventh Circuit opinion conflicts with this Court's prior decisions regarding freedom of religion being a fundamental right.

Petitioner's Complaint also claimed that Defendants' ban on all hardcover books at FCJ violates his First Amendment right to freedom of religion and to receive religious information and ideas by denying religious publications. *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979) ("[S]entenced prisoners enjoy freedom of speech and religion...."). Petitioner's religious exercise claims here fall within the scope of court access guaranteed under *Bounds* and *Lewis*.

C. The Eleventh Circuit's Interpretation Of Section 1915(g) Raises Serious Constitutional Questions of great public importance.

The *permanent* restrictions on court access imposed by section 1915(g) directly implicate the constitutional rights recognized by these two lines of precedent. "[N]ot only does the three-strikes provision require prisoners to pay all filing fees upfront, but it applies even to claims involving fundamental constitutional rights. If prisoners have no ability to pay these fees then . . . they face a 'total barrier' to bringing their claims." *Thomas*, 750 F.3d at 906-907 (Tatel, J., concurring) (discussing the constitutional concerns raised by section 1915(g)). The only exception is if "the prisoner is under imminent danger of serious physical in-

jury," 28 U.S.C. § 1915(g), which offers no help to prisoners seeking to vindicate fundamental constitutional rights that are not connected to safety, such as free speech or religious exercise, *see, e.g., Holt v. Hobbs*, 135 S.Ct. 853 (2015).

Of course, the fact that section 1915(g) restricts prisoners' right of court access does not, on its own, mean that the law is unconstitutional. Both Congress and the courts have a legitimate interest in protecting federal dockets from abusive and frivolous litigation, which plainly justifies certain restrictions on IFP status. Indeed, even before section 1915(g), federal courts attempting to control overly litigious and abusive litigants sometimes entered prospective injunctions restricting further IFP filings.[2] In these cases, however, courts carefully tailored their prospective injunctions to bar future IFP filings only to the extent needed "to carry out [their] constitutional functions against the threat of onerous, multiplicitous, and baseless litigation." *Safir v. U.S. Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986) (citation omitted); *see also Martin v. D.C. Court of Appeals*, 506 U.S. 1, 3-4 (1992) (*per curiam*); *Abdul-Akbar v. Watson*, 901 F.2d 329, 332 (3d Cir. 1990); *In re Tyler*, 839 F.2d 1290, 1294 (8th Cir. 1988) (*per curiam*); *In re Green*, 669 F.2d 779, 786 (D.C. Cir. 1981) (*per curiam*). Significantly, they cannot deny prisoners the means at least "to challenge the conditions of their confinement." *Lewis*, 518 U.S. 343, 355.

---

[2] *See* Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May Be Effective, But Is It Constitutional?*, 70 Temp. L. Rev. 471, 482-489 (1997) (collecting cases).

"Hard cases make bad law." Petitioner concedes that he is litigious, but denies that he is vexatious. Litigious prisoners may burden the courts, but that is a burden that courts must bear in order to safeguard fundamental rights for both prisoners and non-prisoners alike. However, in order to uphold the denial of IFP status to him here, the Eleventh Circuit had to downplay the importance of each of the three rights asserted here—freedom of speech, religion, and right of access to courts—thus setting a bad precedent not just for him, or even for prisoners, but for everyone else as well. Because these rights are of exceptional importance, this Court should grant the writ.

II. Whether the Prison Litigation Reform Act "three-strikes" provision, 28 U.S.C. § 1915(g), violates the First Amendment "breathing space" principle.

A. The Eleventh Circuit opinion conflicts with this Court's prior decisions regarding fundamental rights.

The right of access to the courts "is part of the right to petition protected by the First Amendment." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 92 SC 609 (1972). As such, it is "generally subject to the same constitutional analysis" as is the right to free speech. *Wayte v. U.S.*, 470 U.S. 598, 610 n.11, 105 SC 1524 (1985). Indeed, this Court has simply stated that advocacy in litigation is speech. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542-43, 121 SC 1043 (2001). Because § 1915(g) addresses the conduct of litigation in court and not the internal operations of prisons, it is governed by the same First Amendment standards, as are other "free world" free

speech claims. *Thornburgh v. Abbott*, 490 U.S. 401, 403, 109 SC 1874 (1989) (distinguishing between regulations of material sent into prison and material sent out of prison for purposes of First Amendment). This body of law requires that restrictions on expression be narrowly tailored to the problem they are supposed to solve. *NAACP v. Button*, 371 U.S. 415, 438, 83 SC 328 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") Applying this principle, this Court has said that public officials could not recover damages for defamation unless the statements they sued about were knowingly false or made with reckless disregard for their truth; the First Amendment requires "breathing space," and a margin for error is required for inadvertently false speech, or true speech will be deterred. *New York Times Co. v. Sullivan*, 376 U.S. 254, 272, 84 SC 710 (1964); *see also BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 531, 122 SC 2390, 2399 (2002) ("'The First Amendment requires that we protect some falsehood in order to protect speech that matters.'... It is at least consistent with these 'breathing space' principles that we have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own." (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, 342, 94 SC 2997, 3007–08 (1974))). This principle has been applied in cases where the government has sought to impose sanctions for litigation because it allegedly violates antitrust law, *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511, 92 SC 609 (1972) (applying rule in antitrust context), or labor law. *Bill Johnson's Rests, Inc. v. NLRB*, 461 U.S. 731, 741, 103 SC 2161 (1983) (applying rule in labor context). This Court has said that sanctions may not

be imposed against persons who bring litigation unless the litigation is both objectively and subjectively without basis. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61, 113 SC 1920 (1993) (requiring both subjective and objective intent).

Applied to § 1915(g), the "breathing space" principle would mean that prisoners could only be sanctioned for lawsuits that were not only objectively without merit, but were also known by the plaintiff to be meritless, or were intentional abuses of the judicial system. § 1915(g) sweeps far more broadly than that. It imposes a penalty on lay persons proceeding pro se, which in some cases results in barring them from court, for honest mistakes of law as well as for abuses of the legal system. Such a system risks deterring prisoners for filing meritorious claims, just as an overbroad law of defamation could deter true speech about public officials. § 1915(g) is therefore unconstitutional unless it is interpreted consistently with the "breathing space" principle, i.e., by limiting its application to malicious actions, or those that are clearly intentional abuses of the judicial system, as opposed to honest mistakes. *Abdul-Akbar v. Watson*, 901 F.2d 329, 334 (3rd.Cir.1990) ("one who makes an honest mistake about the facts or the current state of the law may not be sanctioned.").

There were no findings of maliciousness or subjective bad faith in any of the cases cited as strikes against Petitioner. Thus, under the "breathing space" principle, they may <u>not</u> be counted as strikes against Petitioner. Otherwise, the PLRA three strikes provision, §1915(g), is unconstitutional and violates the "breathing space" principle of the First Amendment.

In rejecting this claim, the Eleventh Circuit held that, "Because there is no First Amendment right to access the courts for free, it follows that there is also no First Amendment right to speak in the courts for free and the "breathing space" principle is inapplicable." 942 F.3d at 1258. This is erroneous because, as shown above, whether "there is no First Amendment right to access the courts for free" turns on whether the action involves fundamental interests or not.

The Eleventh Circuit held that, "Moreover, the concern that justifies the "breathing space" principle—the desire to prevent a chilling effect on speech and thereby promote public debate—is not implicated by a rule that determines whether an individual has to pay a filing fee in order to bring a lawsuit." 942 F.3d at 1258. In doing so, the Eleventh Circuit imported a line of reasoning from cases involving the First Amendment right to assemble peaceably, effectively making a comparison between a court filing fee and a fee to obtain a permit for a parade or other form of assembly. However, even applying this reasoning, the Eleventh Circuit decision below is erroneous because requiring fees for First Amendment activity is only constitutionally permissible when there are alternative means of expression available. Such an analysis makes no sense as applied to a court filing fee, because there are no adequate alternatives to filing a court action to exercise one's right of court access to petition the government for redress of grievances. Thus, the Eleventh Circuit decision here is erroneous.

B. There is a Circuit split on the related question of whether the First Amendment requires fee waivers for indigents for First Amendment activity.

There is a split between the Circuits regarding whether the Constitution requires fee waivers for indigents for First Amendment activity. The Eleventh and Third Circuits have held that the Constitution does requires such fee waivers. *Cent. Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523-24 (11th Cir.1985); *Nationalist Movement v. City of York*, 481 F.3d 178, 183-86 (3d Cir. 2007). On the other hand, the First, Sixth, and Tenth Circuits have held that fee waivers are not required where there are ample alternatives to exercising the First Amendment rights. *Sullivan v. City of Augusta*, 511 F.3d 16, 41-45 (1st Cir. 2007); *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1137 (6th Cir. 1991); *iMatter Utah v. Njord*, 774 F.3d 1258, 1264 (10th.Cir.2014). However, even under this approach, § 1915(g) is unconstitutional as applied to cases bringing claims implicating First Amendment rights because a three-striker who is indigent has no alternatives available for bringing his First Amendment claims.

C. The issue presented is of exceptional public importance.

The issue of whether the Constitution mandates a waiver for indigents for court filing fees depends on the nature of the court action itself. Again, in order to uphold the denial of IFP status to him here, the Eleventh Circuit had to downplay the importance of each of the three rights asserted here—freedom of speech, religion, and right of access to courts—thus setting a bad precedent not just for him, or even for prisoners, but for everyone else as well. Because these rights are of exceptional importance, this Court should grant the writ.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully Submitted,

WASEEM DAKER, *pro se*
Petitioner, *pro se*

ID#901373
Valdosta S.P.
P.O. Box 5368
Valdosta, GA 31603