1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ANDRE LEE COLEMAN, AKA :

4 ANDRE LEE COLEMAN-BEY, :

5 Petitioner : No. 13-1333

6 v. :

7 TODD TOLLEFSON, ET AL. :

8 - x

9 Washington, D.C.

10 Monday, February 23, 2015

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:06 a.m.

15 APPEARANCES:

16 KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on behalf

17 of Petitioner.

18 AARON D. LINDSTROM, ESQ., Solicitor General, Lansing,

19 Mi.; on behalf of Respondents.

20 ALLON KEDEM, ESQ., Assistant to the Solicitor General,

21 Department of Justice, Washington, D.C.; on behalf of

22 the United States, as amicus curiae, supporting

23 Respondents.

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1 P R O C E E D I N G S
2 (11:06 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 13-1333, Coleman v. Tollefson.
5 Mr. Shanmugam.
6 ORAL ARGUMENT OF KANNON K. SHANMUGAM
7 ON BEHALF OF PETITIONER
8 MR. SHANMUGAM: Thank you, Mr. Chief
9 Justice, and may it please the Court:
10 Under the three strikes provision of the
11 Prison Litigation Reform Act, a prisoner who has three
12 prior dismissals on prior occasions must pay the full
13 filing fee before bringing suit. While the three
14 strikes provision specifies what types of dismissal
15 qualify as strikes, it does not expressly specify when a
16 dismissal counts as a strike.
17 The better view is that a dismissal does not
18 count until it becomes final on appeal. That view is
19 consistent both with the text of the three strikes
20 provision and with the PRA's underlying purposes.
21 JUSTICE GINSBURG: Does that include a
22 petition for cert or is it only the first level appeal?
23 MR. SHANMUGAM: The time for the filing of a
24 petition for cert would count under our view, which is
25 to say that a dismissal would not qualify as a strike

1 until that time is complete.

2 JUSTICE GINSBURG: So until there's a

3 petition filed and it's denied or until the time expires

4 to file the petition.

5 MR. SHANMUGAM: That is correct. And that

6 is a quite familiar rule, Justice Ginsburg. It is the

7 rule that this Court has applied with regard to the

8 running of limitations periods for habeas petitions, for

9 example, in Clay v. United States.

10 JUSTICE SCALIA: Sure, it is. But if -- if

11 that were the case, why -- why would the statute have to

12 refer separately to dismissals for frivolousness by the

13 district court or by the court of appeals? You could

14 just -- it could have just said, if he's had a petition

15 dismissed for frivolousness period, and that would mean

16 it would have to go all the way up.

17 MR. SHANMUGAM: Justice Scalia --

18 JUSTICE SCALIA: It separately says by the

19 district court or by the court of appeals.

20 MR. SHANMUGAM: It is certainly true that a

21 qualifying dismissal by a court of appeals, like a

22 qualifying dismissal by a district court, qualifies as a

23 distinct strike. And so, therefore, a prisoner could

24 get two strikes in a single case. But we would

25 respectfully submit that that really tells us nothing

1 about the separate question of when those dismissals
2 count as strikes.
3 JUSTICE SCALIA: Well, I think on your
4 theory, he wouldn't get two, he'd just get one.
5 MR. SHANMUGAM: No, that is --
6 JUSTICE SCALIA: The -- the dismissal is
7 simply not final until the court of appeals acts, and
8 that's one dismissal.
9 MR. SHANMUGAM: But there would still be two
10 dismissals. And let me explain how our interpretation
11 works, because I think that this is an important --
12 JUSTICE SCALIA: No. I understand what
13 you're saying, but it doesn't make any sense. It
14 doesn't make any sense for Congress to want a finality
15 rule and yet to count it twice.
16 MR. SHANMUGAM: I don't think that there is
17 any inconsistency. And let me explain why that is so.
18 In our view, the critical phrase in the statute is the
19 phrase "prior occasion." And to be sure, an occasion is
20 triggered at the point at which a dismissal is entered.
21 But in our view, the occasion is not complete until the
22 appellate process has run its course.
23 So in a case in which a district court
24 enters a qualifying dismissal, that is to say, a
25 dismissal on the ground that the action is frivolous or

1 malicious or fails to state a claim, the occasion is
2 complete only when the appellate process runs its
3 course. And so, too, when the court of appeals, if it
4 enters a qualifying dismissal on those similar grounds,
5 a separate occasion is initiated by the dismissal and
6 it, too, ends when further review is complete.
7 JUSTICE SCALIA: Why do you say that? Where
8 do you get that out of the word "occasion"? I would --
9 I would think "occasion" means at any time prior,
10 whether it's at the court -- whether it's at the
11 district court or the court of appeals. You -- you read
12 it. Why can "occasion" only mean what you suggest? Or
13 mean what you suggest, period?
14 MR. SHANMUGAM: We don't believe that it
15 could only mean what we suggest, which is to say that we
16 don't think that the text precludes an interpretation
17 under which the occasion is coterminous with the act of
18 dismissal. We simply don't think that is the only
19 possible interpretation of the statutory language.
20 For one thing, we think that it is notable
21 that the statute does not provide that a mere affirmance
22 of a district court dismissal qualifies as a distinct
23 strike.
24 So, in other words, in a case in which a
25 district court dismisses on one of the specified grounds

1 and then the court of appeals simply affirms, I think
2 everyone would agree that there is only one strike. And
3 in our in view --
4 JUSTICE GINSBURG: Mr. Shanmugam, would you
5 explain that distinction from the court of appeals
6 level? So the district court dismisses for failure to
7 state a claim. It goes up to the court of appeals.
8 When would the court of appeals simply affirm and when
9 would it say "appeal dismissed"?
10 MR. SHANMUGAM: So, Justice Ginsburg, when a
11 district court dismisses for failure to state a claim, I
12 think that the ordinary course would be for a court of
13 appeals to affirm. While the statute refers to
14 dismissals on the ground that the underlying action is
15 frivolous or malicious or fails to state a claim, we
16 think that the failure to state a claim ground really
17 only properly applies on the district court level.
18 To come at it from another direction, the
19 circumstances in which courts of appeals dismiss appeals
20 rather than affirming are circumstances in which the
21 appeal itself is frivolous or malicious. So in a
22 circumstance in which a court of appeals merely affirms,
23 there is no discrete strike at the court of appeals
24 level.
25 And in our view, to get back to Justice

1 Scalia's question, that fact, the fact that a mere
2 affirmance does not count separately, in our view,
3 strongly suggests that the dismissal and the ensuing
4 appeal should be viewed as a single unit. The only
5 circumstance in which a court of appeals action counts
6 as a distinct strike is when the appeal itself is
7 frivolous or --
8 JUSTICE SCALIA: Mr. Shanmugam, I find it as
9 one of the appealing points in your argument that you
10 have a dismissal for frivolousness at the District Court
11 level. It's counted as a third strike, and then that is
12 reversed on appeal. So that, you know, turns out it
13 shouldn't have been the third strike. And I don't know,
14 what do you do in the last case? In the next case he
15 has only two strikes. That is a messy situation. How
16 often does that situation arise? How often is it that a
17 District Court dismisses for frivolousness and is
18 reversed by the Court of Appeals? Do you have any idea?
19 MR. SHANMUGAM: So, more often than you
20 might think, Justice Scalia, and for the simple
21 reason --
22 JUSTICE SCALIA: I hope so, because I don't
23 think it happens very often.
24 MR. SHANMUGAM: It is certainly true that
25 there are not a lot of cases, as the Federal government

1 points out, in which a Court of Appeals outright
2 reverses. But I think it's important to emphasize, that
3 a Court of Appeals can also modify a District Court
4 dismissal. And so if, for instance, a Court of Appeals
5 concludes that a District Court erred by determining
6 that and act was frivolous, or malicious, it is not
7 uncommon for a Court of Appeals to say, That
8 determination was incorrect, we're going to remand for a
9 determination about whether or not there was a failure
10 to state a claim. We cite a number of those such cases
11 in our reply brief.
12 CHIEF JUSTICE ROBERTS: In a case such as
13 that, is there anything preventing the Plaintiff from
14 getting a stay of the District Court judgment? The
15 third strike, seeking a stay of the judgment, and if in
16 fact it is because of a failure to state a claim, so has
17 more merit than one of the frivolous ones, I suppose the
18 Court of Appeals could grant a stay, and the problem
19 we're addressing would totally go away.
20 MR. SHANMUGAM: So, neither Respondents, nor
21 the Federal government suggest that that is a
22 permissible solution. We have identified a couple of
23 District Court cases where District Courts have entered
24 stays. I would respectfully submit that the concept of
25 a stay is a little bit counterintuitive in this context.

1 Because, I think what a District Court would essentially
2 be doing is saying is it's staying the grounds on which
3 it disposes of the case.
4 CHIEF JUSTICE ROBERTS: Yeah, but that's a
5 problem that is always presented when you have to ask a
6 District Court to stay its own judgment. But you can
7 also ask the Court of Appeals, right?
8 MR. SHANMUGAM: Right, but you're not really
9 staying the dismissal in that circumstance. What you
10 would really be doing is staying the consequences of the
11 dismissal.
12 CHIEF JUSTICE ROBERTS: No, you stay the
13 judgment. Because the judgment -- I mean, that's the
14 typical reason you ask for a stay is because the
15 judgment is going to have some very adverse consequences
16 that should be suspended pending appeal.
17 JUSTICE SOTOMAYOR: I'm sorry. I'm a little
18 confused here. There's no judgment to be entered if the
19 prisoner can't file because of the third strike. There
20 is no complaint to stay, and there's no judgment to
21 stay.
22 MR. SHANMUGAM: I think, Justice Sotomayor,
23 if I'm understanding the Chief Justice correctly, that
24 what the Chief Justice is suggesting is that a District
25 Court when it enters the potential third strike mit

1 somehow enter a stay of the disposition and what I'm
2 submitting is a little bit counterintuitive about that,
3 is that what the District Court would essentially be
4 doing is entering the dismissal because after all, the
5 dismissal would need to take effect but at the same time
6 saying that in essence the collateral consequences that
7 have dismissal are not immediately going to take effect.
8 CHIEF JUSTICE ROBERTS: The remedy will be
9 stayed in effect, of the third strike.
10 MR. SHANMUGAM: Well, but the only remedy is
11 the disposition of the case and so, again, I think that
12 that is why this idea really hasn't gotten --
13 CHIEF JUSTICE ROBERTS: Are you suggesting
14 that the District Court cannot stay the disposition of
15 the case? Or that a Court of Appeals has to review it
16 or going to be asked to review it can't stay it?
17 MR. SHANMUGAM: Well, but the only
18 consequence of the case here is the actual act of
19 entering the dismissal. So this is not a circumstance
20 in which, for instance a court affirmatively provides
21 relief, whether it's a monetary judgment or injunctive
22 relief, and then says that that is not going to take
23 effect until the appellate process is complete.
24 JUSTICE SCALIA: It says the dismissal will
25 not take effect. Why can't it say the dismissal -- you

1 know, we think you deserve to be dismissed but we'll
2 enter a stay so you can go up and see if we were right.
3 MR. SHANMUGAM: Yeah, again, I don't think
4 that there is a lot of precedent for this even in the
5 jurisdictions that have adopted respondent's or the
6 Federal government's interpretation. But let me just
7 say one --
8 JUSTICE SOTOMAYOR: I actually don't even
9 think -- I hadn't considered this, because we --
10 appellate courts have no jurisdiction until there's a
11 final judgment. There's no 54(b) -- there's no 54(b)
12 standard that would be met and there's no anything
13 standard that would be met.
14 MR. SHANMUGAM: I mean, in essence what you
15 have to do is to prevent the very judgment from becoming
16 a judgment, because of course at the moment --
17 CHIEF JUSTICE ROBERTS: I'm sorry, isn't
18 that what stays do? They suspend the effectiveness of
19 the judgment and by doing so you stay any collateral
20 consequences of it?
21 MR. SHANMUGAM: Well, I think what they tend
22 to do, Mr. Chief Justice, I think, is to really stay the
23 relief that is being provided until the appellate
24 process runs its course.
25 JUSTICE SOTOMAYOR: The problem here is not

1 that case. The problem here is the next case, if there
2 is one.
3 MR. SHANMUGAM: That is correct. And to get
4 back to Justice Scalia's question, because I just want
5 to make sure that all of the consequences of the various
6 interpretations are on the table. I think that there
7 are actually two sets of pernicious consequences here.
8 The first is the one in which I think you have
9 identified here, which I think is a problem both with
10 respondent's and the Federal government's
11 interpretation, which is what to do in a circumstance in
12 which a prisoner is effectively barred as a result of an
13 erroneous third strike, a third strike reversed or
14 modified.
15 I think that with respondent's
16 interpretation, there is a much more fundamental
17 anomaly, which is this anomaly of precluding appeals of
18 dismissals that count as the third strike. And so we
19 are not arguing today --
20 JUSTICE GINSBURG: I thought in this case
21 there was no such preclusion. I thought the Court of
22 Appeals said, yeah, we'll take the appeal on the strike.
23 So that's -- that's -- you can't urge that issue because
24 you prevailed on it.
25 MR. SHANMUGAM: But that is a problem,

1 Justice Ginsburg, that I think inhere's in the
2 interpretative question that is before the Court. It is
3 certainly true that petitioner is not in that position.
4 In other words, we're not here trying to get the right
5 to appeal for the third strike dismissal. But I do
6 think it is a problem that has to be dealt with in
7 construing the statutory provision and a problem that
8 has been recognized by every court.
9 JUSTICE SOTOMAYOR: But it has to be dealt
10 with under anybody's interpretation. Once you admitted,
11 which you must, that in one case there could be two
12 strikes, then if there's a second case, a third case, or
13 no, a second case, but a third strike at the District
14 Court level, you still have to face the question of
15 whether there's a right to appeal --
16 MR. SHANMUGAM: But, Justice Sotomayor,
17 under our interpretation, all of these anomalies are
18 dealt with for the simple reason you wait until the end
19 of the appellate process and even those courts, those
20 two Courts of Appeals that have gone the other way on
21 this issue have recognized this anomaly. It's really
22 only respondents who think this anomaly is no big deal.
23 Now, there have been various solutions
24 devised to this problem. The Sixth Circuit and Seventh
25 Circuit and Federal government all come up with

1 different interpretations of the relevant statutory
2 language in order to address the problem.
3 I want to specifically address the Federal
4 government's proposed interpretation, because no one
5 before this Court is defending the exact reasoning of
6 either the Sixth Circuit or the Seventh Circuit. The
7 Federal government argues that the phrase "prior
8 occasion" should be construed to mean a prior dismissal
9 in a different case. Now, that certainly addresses this
10 anomaly, but we simply don't think that you can get that
11 interpretation out of the phrase "prior occasion." And
12 so while there may certainly be textual ambiguity here,
13 and I would certainly acknowledge as I did to
14 Justice Scalia that the text of the statute does not
15 unambiguously preclude respondent's interpretation, we
16 do believe it unambiguously precludes the Federal
17 government.
18 JUSTICE KENNEDY: Are you saying the
19 government is being illogical or inconsistent, because
20 if strike number 3 is a District Court ruling, the
21 government says, well, there's no bar to your appealing
22 that. There's just a bar for filing a new District
23 Court suit, and you would say that's just illogical.
24 MR. SHANMUGAM: Well, we think that that is
25 something that Congress could logically have done. We

1 simply don't think there is any footing in the statutory
2 language for that distinction.
3 JUSTICE SOTOMAYOR: If it means what it
4 means, then there's only two strikes anyway because
5 there was or two prior cases or two prior --
6 MR. SHANMUGAM: Under our interpretation,
7 that is certainly true and, of course, it bears
8 emphasizing this is the interpretation of the
9 overwhelming majority of lower courts.
10 JUSTICE SOTOMAYOR: By the way, how many of
11 those courts count the time or rely on the time for
12 cert?
13 MR. SHANMUGAM: You know, I'm not sure that
14 all of the Court of Appeals opinions have expressly
15 dealt with that issue simply because the cases haven't
16 quite been postured in that position. We think that
17 that rule makes sense because that is the ordinary rule
18 that is applied for instance when this Court is
19 construing statutes that expressly require finality on
20 appeal, that's the Clay versus United States case I
21 referenced earlier.
22 Of course that time is not likely to be all
23 that extensive particularly in cases in which the
24 petitions plainly lack merit the time to resolution of
25 petitions of that variety is typically relatively short.

1 But my point here is simply that under our
2 interpretation, there really have been no identified
3 problems with administrability and after all --
4 JUSTICE BREYER: Why not? I mean, what they
5 argue is if we take your interpretation, has to be final
6 to become a strike, all that takes time, and if you have
7 a really real frequent filer during that year, perhaps
8 you will file 38 more cases or maybe a hundred and there
9 will be no way to stop you really. You'll have to pay
10 for -- you know, I mean, you see the problem.
11 On the other hand, the evil that you're
12 worried about, which is that there is a reversal of a
13 strike on appeal, has happened precisely zero times.
14 Ever. So this sort of undermines the statute. There's
15 not a real need for it, your interpretation, and if
16 there were by the way and it were reversed, he could
17 proceed under Rule 60(b)5. So that's basically their
18 argument. I would like to hear your answer.
19 MR. SHANMUGAM: Sure. Well, Justice Breyer,
20 let me start with the problem that we are addressing
21 here. And I would note that it's the two-fold problem.
22 Again, it's the problem of prisoners who are barred as a
23 result of erroneous third strike dismissals, and there
24 are such cases. It's not a null set. Even the Federal
25 government acknowledges that there are at least two

1 reported cases in which that has occurred. And again,
2 we point out that there are cases in which there have
3 been modifications, and those modifications would also
4 be cases where someone under the interpretations on the
5 other side would go from having three strikes to two
6 strikes.
7 But let me address the perceived vices with
8 our position as well. I think really the only vice that
9 has been identified is this supposed floodgates problem
10 that's going to ensue under our interpretation where a
11 prisoner, on the eve of a third strike, is suddenly
12 going to come in with a flurry of lawsuits. I would
13 note at the outset, that that is a potential problem
14 really with any interpretation.
15 In other words, once you set the rules for
16 what constitute three strikes a prisoner -- when the
17 prisoner has two strikes, will have an incentive to come
18 in with a number of different lawsuits. I don't think
19 that that problem really disappears under any
20 interpretation. But again, that's not a problem that
21 seems to have been borne out.
22 JUSTICE SCALIA: Now, wait. Wait, wait,
23 wait, wait, wait. I mean, what's distinctive about
24 yours is you have to wait for the period of the appeal.
25 You have to -- and, you know, that could take a long

1 time. And you talk about floodgates. The reason this
2 statute exists is because of floodgates, because these
3 prisoners file one -- one frivolous appeal after
4 another.
5 MR. SHANMUGAM: Two points in response to
6 that, Justice Scalia.
7 First of all, even under Respondent's
8 interpretation, where a prisoner has two strikes, a
9 prisoner could come in with a flurry of lawsuits, and it
10 seems to be undisputed that you assess whether or not a
11 prisoner has three strikes at the point at which the
12 prisoner submits the complaint. And so a prisoner could
13 bring a flurry of lawsuits even under that
14 interpretation.
15 But second, and more importantly, I think
16 there's a reason why this problem hasn't borne out in
17 practice, and that is simply by virtue of the other
18 provisions of the PLRA. Even a prisoner who is not
19 subject to the three strikes provision still has to pay
20 the filing fee, albeit in installments, and that filing
21 fee, of course, is substantial. It's now $400 in the
22 district courts. It's now $505 in the courts of
23 appeals.
24 JUSTICE GINSBURG: Mr. Shanmugan, why isn't
25 this case just a casebook example of what the danger is?

1 Because this Petitioner, as I understand it, filed not
2 only the petition that's before us, but three more. In
3 what span of time?
4 MR. SHANMUGAM: Over the span of about a
5 year and a half. But I would note that it took my
6 client, who has been in prison in Michigan since 1983,
7 25 years to get to three strikes even under Respondent's
8 interpretation. So I think that this effort to -- to
9 create the impression --
10 JUSTICE KENNEDY: Well, but he's making up
11 for lost time.
12 (Laughter.)
13 MR. SHANMUGAM: Well, he did file four
14 lawsuits. And as a result, he does have to pay the
15 filing fee in installments for each lawsuit, and that's
16 20 percent of his income. And in addition, district
17 courts are not somehow left without tools in the event
18 that those subsequent lawsuits are meritless.
19 JUSTICE KENNEDY: But -- but I don't -- I
20 don't think that your earlier point that when he has two
21 strikes he can file a flurry of suits is relevant.
22 That's -- that's the grace period that the government
23 has given him. The government has granted that with
24 only two strikes, you can proceed. But now we have
25 three, and that's quite different.

1 MR. SHANMUGAM: Well, and of course, that is
2 the question. And the question really is whether
3 Congress, in imposing this sanction, which is a
4 considerable one in which of course applies to
5 meritorious and meritless claims alike, whether Congress
6 would have wanted to attach that consequence before
7 ensuring that a prisoner, in fact, had three valid
8 dismissals for pursuing meritless claims.
9 And, of course, we have a statute here that
10 does not specifically address that issue, and there are
11 plenty of statutes that address that issue in both
12 directions. And we also have no legislative history for
13 those members of the Court who are interested in
14 legislative history that speaks to this issue.
15 And so the real question we would submit is
16 that if the Court agrees with us that the language of
17 the statute is at least ambiguous, which interpretation
18 avoids anomalous consequences and leads to a rule that
19 is easy for lower courts to administer?
20 The great virtue of our interpretation is
21 that once a prisoner has three strikes, the prisoner
22 always has three strikes. You don't have this specter
23 of the possibility that a prisoner could go from having
24 three strikes one day to having two strikes or fewer the
25 next.

1 JUSTICE SOTOMAYOR: Do you know if any of
2 those courts, the majority of the courts except for two,
3 have outfit for addressing things your way? And -- and
4 I have a slight leaning towards letting the majority of
5 circuit courts figure out administrative -- the ease of
6 administrative rules. How many of them thought of it as
7 just being easier to do?
8 MR. SHANMUGAM: Well, I think that when you
9 look at the court of appeals' opinions that have gone
10 our way, a number of them have recognized the text is
11 ambiguous. So they have not just been, as Respondents
12 of the Federal government suggest, somehow disregarding
13 the language of the statute.
14 The Fourth Circuit in the Henslee case
15 specifically relied on the phrase "prior occasion" and
16 said that, "The phrase prior occasion may refer to a
17 single moment or to a continuing event to an appeal
18 independent of the underlying action, or to the
19 continuing claim, inclusive both of the action and of
20 its appeal." And that's, of course, precisely the
21 argument we're making today.
22 But with regard to administrability, I just
23 want to be clear about how this works, because this is
24 obviously a very important practical issue for district
25 courts.

1 Under our interpretation, all that a
2 district court, or for that matter a court of appeals,
3 need do is to look to see whether in a prior case there
4 has been a determination that a prisoner has three
5 strikes. If, in fact, that is so, that is the end of
6 the analysis. And indeed, our understanding is that in
7 many jurisdictions, the district court clerk's offices
8 actually keep lists of people who have been subject to
9 the three strikes prohibition.
10 There's a decision from the Western District
11 of Louisiana that refers to the keeper of the three
12 strikes list, and our understanding is that that is
13 actually a fairly common practice. And, of course,
14 where a prisoner has not previously been subject to the
15 three strikes provision, it will be relatively easy, and
16 it's a familiar task for a district court to make the
17 determination whether a prisoner's prior dismissals are
18 final on appeal.
19 Under Respondent's and the Federal
20 government's interpretations by contrast, there is no
21 such ease of application because a court will not be
22 able to be sure that a prisoner, in fact, has three
23 strikes even if the prisoner has previously been barred.
24 And under either of the interpretations on the other
25 side, you will have to figure out what to do in a

1 situation in which a third strike dismissal has been
2 reversed or even modified.
3 Now, the Federal government --
4 JUSTICE SCALIA: Again -- again, that's a
5 big problem depending upon how frequent that is. If
6 it's once in a blue moon, you know, it's no big deal.
7 MR. SHANMUGAM: Well, everyone before this
8 Court agrees that we're not exactly dealing with a large
9 set of cases to begin with. And the question presented
10 in this case is not going to affect a large number of
11 cases in the aggregate. Though I would note that the
12 issue has arisen in virtually every single one of the
13 courts of appeals.
14 My point is simply that you're dealing with
15 a somewhat larger number of cases than the Federal
16 government would suggest. When the Federal government
17 says look, we've only been able to identify two cases
18 where there have been outright reversals. And to the
19 extent that the Federal government in its brief points
20 to the reversal rate in civil actions by prisoners, the
21 Federal government accurately represents that that rate
22 is about 4 percent. I think it's important to emphasize
23 the fact that the overall reversal rate in the Federal
24 courts of appeals is only 7 percent. And so it isn't as
25 if the prisoner rate is, you know, somehow orders of

1 magnitude lower. And of course --

2 JUSTICE ALITO: Well, I would think that the

3 -- I would think the situation that we should concerned

4 about is the situation in which the dismissal, which is

5 initially counted as the third strike, ultimately

6 results in some relief for the prisoner. And I don't

7 know that there's even one of those.

8 MR. SHANMUGAM: Well, but, of course, under

9 the statute, the dismissal no longer qualifies even if

10 the prisoner doesn't obtain relief. And I think

11 everyone agrees that if there is either a reversal or

12 vacatur of the dismissal or a modification to eliminate

13 the grounds specified in the statute, that the dismissal

14 no longer has any effect. And those cases, I would

15 respectfully submit, are somewhat more common than my

16 friends on the other side would have you believe.

17 And I would like to reserve the balance of

18 my time for rebuttal.

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

20 Mr. Lindstrom.

21 ORAL ARGUMENT OF MR. AARON D. LINDSTROM

22 ON BEHALF OF RESPONDENTS

23 MR. LINDSTROM: Mr. Chief Justice, and may

24 it please the Court:

25 The plain language of Section 1915(g)

1 identifies when a strike occurs. It occurs when an
2 action or appeal was dismissed. The phrase "action was
3 dismissed" has an everyday meaning and the ordinary
4 meaning of "action was dismissed" does not. Action was
5 dismissed and affirmed.
6 JUSTICE KAGAN: Mr. Lindstrom, I -- I
7 understand that argument, and it seems to me a very
8 natural reading of the statute. But the -- I'm troubled
9 by the scenario where it's dismissed and then it's
10 reversed, not for these practical reasons people that
11 have been talking about. But it seems to me that if you
12 were really reading the statute that way, that that
13 would count as a strike, too, and that that strike would
14 not go away even when it was reversed.
15 And so I'm wondering whether the statute is
16 actually a little bit more ambiguous than -- than you
17 are suggesting, because at the very least, I mean,
18 everybody agrees that you have to make an exception for
19 that case, and it seems to me that on your reading of
20 the statute, that case would be included. A strike
21 would be a strike even if it's reversed.
22 MR. LINDSTROM: No, Justice Kagan, we think
23 the ordinary rules that apply to judgments apply. When
24 Congress passed this statute, they weren't trying to
25 change the ordinary rules of how judgments are applied.

1 The ordinary rules in district court judgments matter
2 until they're reversed. That's the ordinary rule in the
3 res judicata context and in every other context.
4 JUSTICE KAGAN: Yes, but that's something --
5 you're now appealing to some default principle that
6 exists outside of the statutory text. I can't find any
7 basis in the statutory text for that result.
8 I mean, it's -- there have been three or
9 more prior occasions in which either an action or an
10 appeal has been dismissed. Now, one of those dismissals
11 was later reversed, but it was dismissed. And so on
12 your reading, we -- we really, you know, it's -- it's --
13 your reading is kind of -- this is the natural reading,
14 but we're not going to -- we're not going to apply the
15 natural reading in a case where it obviously doesn't
16 fit.
17 MR. LINDSTROM: I think we're assuming that
18 Congress is drafting against the ordinary background
19 rules, and there's an ordinary meaning of what's
20 dismissed, and that's what my colleague is changing --
21 is challenging.
22 JUSTICE SOTOMAYOR: The problem with the
23 ordinary rule is that it really doesn't apply completely
24 until the next case. It applies in that case, but it
25 doesn't apply in the next case.

1 MR. LINDSTROM: If you mean it doesn't
2 apply, I guess I'm not sure what you're saying.
3 JUSTICE SOTOMAYOR: Meaning let's talk about
4 res judicata or collateral estoppel. If it's res
5 judicata, it's the two parties. So that -- that's that
6 case, essentially.
7 MR. LINDSTROM: Yes, Your Honor.
8 JUSTICE SOTOMAYOR: If it's collateral
9 estoppel, it could be until a third party. But I think
10 that that third party would be entitled to a stay of his
11 or her action pending the adjudication of the main
12 action.
13 MR. LINDSTROM: But we do know that Congress
14 did want to cut off IFP status in the same case in at
15 least some instances. If you look at
16 Section 1915(a)(3), that specifically says that an
17 appeal may not be taken in forma pauperis status if the
18 trial court certifies in writing that it was not taken
19 in good faith. That's not -- that's setting aside the
20 three strikes rule entirely. That could happen in any
21 given case. And that shows that Congress specifically
22 wanted to cut off IFP status on appeal in at least some
23 cases.
24 JUSTICE SOTOMAYOR: Except that the --
25 there's still a right to ask the court of appeals for a

1 COA, and so there is an appellate process of sorts.
2 MR. LINDSTROM: There -- there would be, and
3 that's correct. But in terms of what the background
4 rules are, I think the ordinary rule of the background
5 interpretation would be you start with the plain
6 language. Congress expects you to look at the word "was
7 dismissed," figure out what that means.
8 They would also expect you to apply the
9 ordinary rules that apply to judgments, and the ordinary
10 rule is that district court judgments matter. They have
11 a legal effect immediately. You can see this from
12 trivial matters, like when interest starts to accrue,
13 and also through very significant matters, such as a
14 criminal conviction. If somebody is a convicted of a
15 criminal -- of a crime in Federal court, they get to go
16 to jail, even though they're pending in --
17 JUSTICE SOTOMAYOR: Right. Answer -- answer
18 Judge -- Judge Easterbrook's point, that there is no way
19 to revive a subsequently filed case that was dismissed
20 because of a third strike. Judge Easterbrook, and I
21 think there's some force to his logic, says with this --
22 this three-strike situation, when the next case comes to
23 the court of -- to a district court, district court
24 never files the complaint. There was nothing dismissed
25 that can be revived. There was no judgment entered.

1 MR. LINDSTROM: That wouldn't have fired any
2 of the four lawsuits that Mr. Coleman could have brought
3 in this case, because he could have brought all four of
4 his lawsuits in State court. He could have filed each
5 one of these in State court. So there is recourse,
6 interpreting the statute according to the plain
7 language.
8 JUSTICE SOTOMAYOR: But -- but there's no
9 remedy for the fact that subsequent lawsuits that
10 were -- that were filed based on the erroneous third
11 strike would have been turned back without the filing of
12 a complaint.
13 MR. LINDSTROM: In other words, it was never
14 filed, so there was nothing to relate back, at which
15 point --
16 JUSTICE SOTOMAYOR: And nothing -- or to
17 file a 60(b).
18 MR. LINDSTROM: But, again, it -- there's an
19 easy way for a prisoner to get around that, and the
20 prisoner could have done that by -- once he's got three
21 strikes and the last one is on appeal, he has to make
22 the decision: Should I file my next four cases that I'm
23 going to file -- should I file them in Federal court, or
24 should I file them in State court? And this statute is
25 saying you shouldn't file them in Federal court.

1 I think -- I'm not sure if I fully answered
2 your point about reversal, but I think that's the
3 ordinary background rule. Again, even though a prisoner
4 would be convicted, they still go to jail even though
5 there's the possibility the reversal might happen. And
6 the ordinary rule is that a reversal is something that
7 is if it had never occurred.
8 You can see that in the -- as some examples
9 cited in the Federal government's brief about
10 sentencing, if you have a conviction that is then
11 reversed, it can no longer be used to enhance a later
12 conviction. There's double jeopardy context, where if a
13 conviction is reversed, then it's as if it never
14 happened, which is why in Ball v. United States, this
15 Court said you can retry the person.
16 So the plain language, both in the "was
17 dismissed" language and the action or appeal, they
18 showed that Congress is talking about the filing fees,
19 that the context of this statute, I think, is really
20 helpful. It's about filing fees.
21 When you enter the district court, you have
22 to pay a filing fee to file a complaint. And then on
23 appeal, you have to pay a filing fee so you can file
24 your notice of appeal.
25 So what Congress is doing is saying, these

1 are the two events we're talking about, and if you have
2 brought an action that was dismissed or brought an
3 appeal that was dismissed, that lines up with these two
4 stages of litigation. It was trying to separate them
5 out and treat them differently because Congress was
6 trying to deter not just frivolous actions, but also
7 frivolous appeals. It includes language, "action or
8 appeal," in the statute.
9 JUSTICE BREYER: What does it cost to file
10 an appeal?
11 MR. LINDSTROM: In the Federal courts, it
12 costs $505.
13 JUSTICE BREYER: Sorry?
14 MR. LINDSTROM: $505, Your Honor. In State
15 courts it's less. So you'd have are that option, and
16 you also have the IFP status option in State courts as
17 well.
18 JUSTICE SOTOMAYOR: Sort of an interesting
19 question, basically admitting that in terms of your
20 time, the suits would still remain because they could
21 file in State court?
22 MR. LINDSTROM: Yes, I think they could file
23 in State court. That's what the plain language of the
24 statute, it doesn't say anything about -- to preclude
25 State court. And there's other outlets as well that

1 would --

2 JUSTICE GINSBURG: Do states have similar

3 rules?

4 MR. LINDSTROM: States do have similar

5 rules. And Mr. Coleman has not run to file, as far as

6 we can tell and as far as he has reported in the

7 complaints that he filed, which are all in the joint

8 appendix. He hasn't filed anything in State court. So

9 this would not have precluded him from filing all four

10 of his lawsuits in the superior case.

11 JUSTICE KAGAN: You know, and this is what

12 I'm not quite sure about in your answer to my question,

13 Mr. Lindstrom, is, if I understand you right, and tell

14 me if I don't, you're basically saying that we look to

15 these background principles and we decide that a strike

16 doesn't happen if something is reversed on appeal, so a

17 strike is kind of dependent on what happens on appeal.

18 But when you say that, aren't you kind of giving up your

19 best argument? I mean, aren't you then admitting that

20 the notion of a strike encompasses what happens on

21 appeal and encompasses finality on appeal?

22 MR. LINDSTROM: We don't think it does. I

23 think Congress is looking at the filing fee stages. It

24 was looking at the fact that you're going to file a fee

25 at the district court level and at the appellate court

1 level. So the statute clearly draws a distinction
2 between the two and wants them to be treated separately
3 so that if you get the IFP status in the district court,
4 that's one thing.
5 Getting IFP status in the Federal court is
6 another thing because what's going on here is Congress
7 is granting a subsidy to prisoners to allow them to
8 pursue further litigation, and Congress simply drew a
9 line in the statute saying, We'll subsidize a certain
10 number of these -- of IFP appeals and actions before we
11 cut it off.
12 There's other statutes that also show that
13 if Congress wants to delay the legal effect of a
14 district court judgment, it knows how to do it.
15 Section 2244 which we cite in brief good example of
16 this. It was passed by the same Congress that was
17 considering the Prison Litigation Reform Act. It was
18 considering it at about the same time throughout the
19 1995-1996 time period. Congress was voting on both
20 parts. And in Section 2244, it said something doesn't
21 count, doesn't have a legal effect with respect to a
22 statute of limitations until it's final by the
23 conclusion of direct review or the expiration of the
24 time preceding such review.
25 So the exact same Congress threw out the

1 words that was dismissed, knew how to write a different
2 rule and didn't do it here. And that's very telling,
3 especially given how they were enacted within two days
4 of each other.
5 So this Court itself has stopped in forma
6 pauperis status appeals, so some of the concerns that
7 are being raised are the fact that district court
8 decisions could be ossified errors. They could be
9 depriving people of meritorious claims. But that
10 concern would be worse with respect to petitions that
11 are filed in this Court because if this Court cuts
12 somebody off and says you can't any more.
13 File any more petitions, as it does under
14 the Martin case. Then after that, there's a much
15 greater case of ossification because those decisions may
16 be precedential.
17 So I think that our reading is consistent
18 with what Congress is trying to do, which is to look at
19 the great bulk of the cases and say 95, 96, some high
20 percentage of cases, those are going to be cases where
21 the original strike was affirmed, and so it's a very
22 remote possibility. If the language were completely
23 ambiguous, then you would still have to figure out which
24 one is closest to Congress' intent, and Congress' intent
25 would be to address the 95-plus percent of cases, rather

1 than the case where my colleague admits there are not a
2 lot of them and hasn't really cited very many.
3 JUSTICE ALITO: This is a question I
4 probably should have asked petitioner, but what do you
5 understand his -- what do you understand him to mean
6 when he says it has to be final on appeal?
7 Suppose that there is an appeal pending in
8 one of the prior strike cases, but it's perfectly clear
9 that the notice of appeal in that instance was filed
10 woefully out of time. Would that be final on appeal?
11 MR. LINDSTROM: I think it would -- I assume
12 his answer would be to look at, once the notice of -- I
13 think he would say the end of the expiration of time is
14 when the court would look at it. So if it was filed
15 late, the expectation would be if it's filed out of
16 time, because you're looking at the time period for
17 view, that time period has passed and it's final, I
18 guess subject to reopening if there's a way to get
19 around that. It would be jurisdictional. So I don't
20 know how you would get around it.
21 JUSTICE KENNEDY: Under your position, I
22 suppose we don't have to ask about certiorari, pending
23 whether or not that --
24 MR. LINDSTROM: Yes, Your Honor.
25 JUSTICE KENNEDY: You can say that that's

1 the petitioner's problem, not yours.

2 MR. LINDSTROM: I think that's right. I

3 don't think I need to address that.

4 JUSTICE BREYER: What do you think about the

5 government's argument about the third? You imagine he

6 has -- the prisoner has filed one, dismissed as

7 frivolous; appeal, the dismissal affirmed. That's one.

8 Now he does it again. That's two. And he does it a

9 third time. District court dismissed. And he says, I

10 want to appeal that, and I don't want to pay the $500,

11 505. The government has to say -- could say, sorry, you

12 have to pay the 505. That's the third, because he's a

13 separate. Then he says, but it says, "on a prior

14 occasion," and this is the same occasion. And therefore

15 he doesn't have to pay the 500. What's your view of

16 that?

17 MR. LINDSTROM: I think that that reading

18 takes the word "prior" and changes it from meaning

19 "before" to meaning "before or after in a separately

20 filed suit." So I think it's going too far with what

21 the word "prior" could possibly mean.

22 That "occasions" -- I mean, the whole point

23 of the statute is to identify what occasions are going

24 to give rise to a strike. And those occasions are when

25 an action was dismissed, which is a district court

1 event, or when the appeal was dismissed.

2 JUSTICE KENNEDY: What about -- it seems to

3 me the government does give away too much in that

4 position. The only question is whether that undercuts

5 this whole argument. It gives a little bonus for the

6 appeal of the -- if strike number three is the district

7 court, the government doesn't count the appeal, as I

8 understand it. It counts -- obviously it counts in a

9 later district court suit, but not here.

10 MR. LINDSTROM: Yes, Your Honor. Can I

11 actually be quick to point out that they agree with our

12 interpretation of the facts of this case, where he had

13 three strikes and then he filed -- it's about the

14 subsequent actions.

15 JUSTICE SOTOMAYOR: Why use the word

16 "occasion" at all? Meaning: What meaning do you give

17 to that word? Why didn't they just say "three

18 dismissals"?

19 MR. LINDSTROM: I think the statute -- I

20 think "occasions" is just kind of a way of framing the

21 long clause that follows after it.

22 JUSTICE SOTOMAYOR: It seems to me you could

23 have just said, if a prisoner has three dismissals,

24 then -- three prior dismissals; not three prior

25 occasions, three prior dismissals -- he can't get IFP

1 thereafter.

2 MR. LINDSTROM: I don't think that would

3 change the outcome in this case, because that language

4 still would remain. His action was dismissed -- or

5 appeal. It was dismissed. So the language that draws a

6 distinction between the court of -- the district court

7 level and the appellate court level would still be

8 there. I mean, "occasions" is just identifying those

9 two, what those two occasions are.

10 JUSTICE ALITO: What about the fact that

11 this provision refers to a prior occasion on which an

12 action was dismissed? If you put "prior" and "action"

13 together, isn't there the suggestion that we're talking

14 about an action that is different from the action that

15 is before the court of appeals in what is arguably the

16 third strike?

17 MR. LINDSTROM: That word would also carry

18 through to prior appeal, apparently. I think the "prior

19 occasions" is simply talking about the fact that that is

20 an action that happened before. I don't think that that

21 word would have to modify both. It doesn't make sense

22 to modify "prior appeal" as well in a way that is

23 distinguished from the appeal in this case. In both

24 events you'd be talking about anything that goes before

25 it.

1 If there are no further questions, I will
2 yield the time to my colleague.
3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Kedem.
5 ORAL ARGUMENT OF ALLON KEDEM
6 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
7 SUPPORTING RESPONDENTS
8 MR. KEDEM: Mr. Chief Justice, and may it
9 please the Court:
10 If I could start with the issue of finality
11 and the normal background principles, the argument that
12 petitioner makes, and this is echoed by the argument
13 that he makes in pages 9 to 10 of his reply brief, is
14 that sometimes Congress specifies that finality is
15 required and sometimes it specifies that finality is not
16 required, and so we can draw no negative inference from
17 the fact that Congress was silent here.
18 But if you look at the example of the
19 statute in which Congress specified non-finality that he
20 gives, it's actually not a statute at all. It's a
21 Federal rule of evidence. Moreover, petitioner
22 identifies no instance in which Congress has a statute
23 in which it is silent about whether or not you require
24 finality, like subsection G, and yet finality was
25 implicitly read to be required; in other words, no

1 instance in which a finality requirement was inferred
2 rather than expressed. And even if you think that
3 sometimes finality might be able to be inferred,
4 Section 1915 is an especially bad candidate, because it
5 distinguishes so repeatedly and so sharply between the
6 trial and appellate stages.
7 And that brings me to petitioner's single
8 occasion theory, articulated most clearly in pages 18 to
9 19 of his opening brief. It's the idea that a trial
10 court dismissal plus the appeal from that dismissal
11 constitute a single ongoing occasion. And if Congress
12 had that in mind, presumably it would have used some
13 sort of process-oriented language.
14 JUSTICE GINSBURG: Isn't that what the court
15 of appeals held here?
16 MR. KEDEM: Pardon?
17 JUSTICE GINSBURG: The court of appeals said
18 you do get the appeal from the third strike.
19 MR. KEDEM: Yes, the court of appeals said,
20 we believe incorrectly, that the appeal from the third
21 strike is the same occasion.
22 JUSTICE GINSBURG: But is that before us?
23 You -- I thought that this appeal is about the fourth
24 case, and that you haven't -- you haven't contested the
25 court of appeals' holding that you do get an appeal from

1 the third strike.

2 MR. KEDEM: We don't believe that's directly

3 at issue and we can talk about it if the Justices are

4 interested in that. But the question as to how to read

5 "occasion" and whether it encompasses just the trial or

6 the appellate stage, or both of them at the same time,

7 is very much at issue in this case. And we believe that

8 you could end up with overlapping occasions, not only

9 the trial court dismissal, but on appeal, also a

10 separate appellate dismissal, which, as Petitioner

11 concedes, is an occasion in its own right.

12 JUSTICE BREYER: But that's -- that's the --

13 why I asked the question on page 25 of your brief; you

14 say the bar goes into effect if the prisoners received

15 strikes on three or more prior occasions.

16 Now you say a prior occasion is not the

17 district court dismissal in this third case. That's not

18 a prior occasion. But when you look at the earlier two

19 strikes, you don't consider it as a whole. Do we

20 consider this one as a whole, but we don't consider the

21 others as a whole. That's why I asked the question.

22 MR. KEDEM: The question, Justice Breyer, is

23 whether the prior occasions that might prevent you from

24 appealing a civil action includes that very action, the

25 one you're trying to appeal.

1 JUSTICE BREYER: No, it doesn't -- yes, it
2 does. Because the dismissal of -- by the district court
3 of this lawsuit after it's done is a prior occasion.
4 The present occasion is your appeal of that dismissal to
5 the court of appeals.
6 MR. KEDEM: Justice Breyer, it's important
7 to consider the posture you're in when you're making
8 that choice.
9 JUSTICE BREYER: I'm not saying it's good
10 policy or anything. I'm just saying it's hard for me to
11 see how you can say the one and not the other.
12 MR. KEDEM: Because at the time you're
13 making the decision, a new occasion hasn't started. You
14 have to decide whether the prisoner is allowed to file
15 the IFP appeal.
16 JUSTICE BREYER: Good. And when we're in
17 the second one, when you file the appeal from the first
18 one, the new occasion hadn't started. So we're still in
19 the middle of the occasion.
20 MR. KEDEM: No. Justice Breyer, the prior
21 occasion has concluded. It concluded with the issuance
22 of the judgment of dismissal. Let me provide an analogy
23 that, hopefully, can articulate our position.
24 Imagine that a school had a policy that said
25 in no event shall a student retake a test if on three or

1 more prior occasions that student had taken and failed a
2 test. Now, I suppose you could read that policy to say
3 that the very test you want to retake is a prior
4 occasion that might prevent you from retaking it.
5 JUSTICE BREYER: I'm going to fail this test
6 because --
7 (Laughter.)
8 MR. KEDEM: We don't think that's the
9 natural reading. And moreover, in order to give
10 independent content to the word "prior," it can't simply
11 mean before the very decision when you're making the IFP
12 determination. Because, of course, you're only taking a
13 count of strikes that are prior in that sense. You're
14 not going to take a count of strikes that haven't yet
15 happened.
16 JUSTICE SOTOMAYOR: Was it your brief that
17 said there were very few cases -- you found only two
18 published cases?
19 MR. KEDEM: Only two cases, and that
20 includes cases that are not published.
21 JUSTICE SOTOMAYOR: That's what my question
22 was, okay.
23 MR. KEDEM: And, of course, it's important
24 to emphasize, we're not just talking about the problem
25 of a third strike reversal. In order for Petitioner's

1 concerns to come about, you need a -- a prisoner who
2 wants to file a fourth suit, one that doesn't qualify
3 for the imminent danger exception and there has to be
4 some risk of the statute of limitations running in that
5 fourth suit while the third one is on appeal.
6 Presumably, that's going to be
7 extraordinarily rare, if it ever happens. And even if
8 it does, we believe in that instance, Rule 60(b)(5)
9 would allow you appropriate relief.
10 JUSTICE SOTOMAYOR: Then answer Judge
11 Easterbook's point, which is, when the fourth case comes
12 in, the court is just not granting IFP. It's not
13 dismissing the case, it's just not filing it at all.
14 It's just saying to you, I won't commence the
15 litigation, I won't accept it without you paying IFP.
16 MR. KEDEM: Well, what usually happens is
17 what happened in this very case; namely, that the court
18 says, I'm not granting you IFP status and I'm going to
19 dismiss your case if you don't pay the filing fee. And
20 so you could file Rule 60(b)(5) motion to have that
21 reopened. Because Rule 60(b)(5) applies whenever a
22 litigant seeks to reopen a case that was dismissed on
23 the -- or where the case was based on a prior judgment
24 that was reversed or vacated, which would seem to apply
25 here.

1 CHIEF JUSTICE ROBERTS: Do you -- do you
2 have to file -- pay a filing fee to go with a 60(b)
3 motion? Is that a separate proceeding?
4 MR. KEDEM: My understanding is that there's
5 a circuit split as to whether if you're denied IFP
6 status, you nevertheless are still on the hook for the
7 filing fee.
8 CHIEF JUSTICE ROBERTS: Well, that would
9 really make your position complicated.
10 MR. KEDEM: Your Honor, I think if you are a
11 prisoner who's three strikes barred and you still want
12 to file a fourth suit, there might be some consequence;
13 namely, that you might be on the hook if that third
14 strike is ultimately affirmed, as most third strikes
15 are.
16 I'd like to address also the point that
17 Petitioner makes that his position is much more easily
18 administered. Because I actually think the inquiry is
19 basically the same on either approach. It's true that
20 if you only know that the prisoner is three strikes
21 barred, then you can rely on that under Petitioner's
22 approach.
23 But that's not normally what happens. What
24 normally happens is what happened in this very case.
25 Namely, the trial court lists the prior dismissals, plus

1 what it knows about what happened to those dismissals on
2 appeal, and it makes an IFP determination.
3 And under either approach, the inquiry is as
4 follows: For any appellate dismissal or a trial court
5 dismissal that was affirmed on appeal, you can always
6 rely on that going forward. And for any trial court
7 dismissal where you don't know what happened on appeal,
8 you simply have to check the appellate docket, something
9 that, as Petitioner points out, courts are already very
10 familiar with. So under either approach, essentially
11 the inquiry is entirely the same.
12 And finally, Your Honor, if you are simply
13 not convinced by the textual arguments and you just want
14 to know what makes practical sense, you should go with
15 the approach that works in the vast majority of cases.
16 And in the vast majority of cases, what happens is what
17 happened in this very case. You have a third strike
18 that was ultimately affirmed on appeal.
19 Under Petitioner's approach, notwithstanding
20 that affirmance, even though the Sixth Circuit said that
21 strike was properly administered, he would nevertheless
22 be permitted to proceed IFP in those four additional
23 suits that he filed. Under our approach, he would not,
24 because the third -- he would not because he was three
25 strikes barred. But if the third strike had been

1 reversed rather than affirmed, he could have gone back
2 to the trial court and asked for relief under Rule
3 60(b)(5).
4 JUSTICE KAGAN: And just to be clear,
5 Mr. Kedem, if we say, you know, we're not buying this
6 prior occasion thing, does your -- does the rest of your
7 position stay your position?
8 MR. KEDEM: It does. I think you would end
9 up with Respondent's position. But one additional point
10 on prior occasions. Although Petitioner disagrees with
11 our reading of the phrase "prior occasions," he does
12 agree with us that if Congress meant "prior occasions"
13 to include an appeal -- to applying the situation from
14 an appeal of a third strike, it would have said so
15 explicitly. So if you simply go with that background
16 understanding, you would still end up with our position.
17 Thank you.
18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Mr. Shanmugam, you have four minutes left.
20 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM
21 ON BEHALF OF PETITIONER
22 MR. SHANMUGAM: Thank you, Mr. Chief
23 Justice:
24 Justice Kennedy asked Mr. Lindstrom whether
25 the inconsistency between Respondent's position and the

1 Federal government's position undercuts the whole
2 argument here, and we would respectfully say that it
3 does. Let me start with Respondent's interpretation.
4 I don't think that I could put the problem
5 with that interpretation better than the Federal
6 government itself does in its brief where it suggests
7 that "an interpretation, which precludes even an appeal
8 from the very dismissal that counts as a third strike,
9 would be inconsistent with both common practice, in
10 which a litigant is permitted an appeal as of right,
11 from any adverse district court ruling that is final."
12 One would expect Congress to have spoken
13 more clearly if that had been Congress's intention. And
14 while in Section 1915(a)(3), Congress specified certain
15 circumstances under which an IFP appeal is not
16 permitted, it conspicuously did not bar IFP appeals from
17 third strike dismissals.
18 Now, Respondents attempt to mitigate the
19 harsh consequences of their position. Wisely, they do
20 not make the argument that they did in their brief that
21 a prisoner need only, quote, "buckle down" in order to
22 earn the $505 filing fee in order to pursue an appeal.
23 All I heard Respondents suggest was, well, a prisoner
24 can refile in State courts. But as Mr. Lindstrom wisely
25 acknowledged, because Michigan itself has such a

1 provision, many States following the PLRA adopted three
2 strike provisions of their own. And so, I would
3 respectfully submit that that provides cold comfort.
4 Let me turn to the Federal government's
5 interpretation.
6 JUSTICE SCALIA: Including strikes in
7 Federal courts?
8 MR. SHANMUGAM: Some States do. I'm frankly
9 not sure what the practice is in Michigan, but I know
10 that many States count dismissals in both sets of courts
11 toward the three strikes.
12 Let me start with -- let me address the
13 Federal government's interpretation very briefly. I
14 think it is telling that my friend, Mr. Kedem, did not
15 start with the government's interpretation of the phrase
16 "prior occasion." He instead started with background
17 principles. And that is, I would respectfully submit,
18 for the simple reason that you simply cannot get this
19 different suit distinction out of the phrase "prior
20 occasion." It would lead to the odd result, as Justice
21 Breyer highlighted in his colloquy with Mr. Kedem, that
22 a prior dismissal could count as a prior occasion in
23 some circumstances, but not in others.
24 Let me address the question of background
25 principles because that was such the focus of Mr.

1 Kedem's argument. We would respectfully submit that
2 principles differ in the law whether as a matter of
3 statute or whether as a matter of background principles.
4 Congress can be explicit in both directions and,
5 obviously, here Congress was silent. I think in terms
6 of nonstatutory background principles, frankly, the
7 primary principle on which the Federal government relies
8 in its brief is the principle of claim preclusion. And
9 it is certainly true that in some jurisdictions,
10 consequences attach immediately upon judgment. That's
11 not the rule in others. In California and Texas,
12 consequences don't attach until the judgment becomes
13 final on appeal.
14 But that doctrine serves a quite different
15 purpose. The whole point of attaching consequences
16 immediately is precisely to ensure that a losing party
17 does not get a second bite at the apple. Here, by
18 contrast, you're talking about a provision that applies
19 consequences in other lawsuits, however unrelated and
20 however meritorious. And that just underscores, in our
21 view, the point that there are different policy
22 justifications that may require attaching consequences
23 to a judgment immediately or that may require attaching
24 consequences only when a judgment becomes final on
25 appeal.

1 At bottom, recognizing that there is some
2 ambiguity here, given the fact that you have three
3 parties here who are offering different interpretations,
4 none of which lines up with the interpretation of the
5 court of appeals below. We would respectfully submit
6 that considerations of workability and administrability
7 ought to be paramount when construing a statute that
8 governs the processing of Federal lawsuits. Our rule
9 has been the rule --
10 JUSTICE ALITO: In that connection, before
11 your time runs out, can a case be final on -- can a case
12 be final on appeal if there is a -- an appeal pending
13 but the notice of appeal is untimely?
14 MR. SHANMUGAM: We believe that in that
15 circumstance, it probably would be until the Court of
16 Appeals disposes of the case, because the Court of
17 Appeals would, typically, eventually dismiss the appeal
18 as untimely. But these are issues that lower courts
19 deal with all the time and not just in the context of
20 our interpretation of the three strikes provision.
21 JUSTICE ALITO: So a prisoner could at least
22 temporarily put some of these strikes in abeyance by
23 filing untimely notices of appeal.
24 MR. SHANMUGAM: And I suppose that a court,
25 if a court believed that that was a serious problem,

1 could construe the finality rule differently. Our
2 submission is simply that our rule has been the rule in
3 the overwhelming majority of lower courts and there's no
4 evidence that lower courts have had any difficulty. The
5 interpretations on the other side are solutions in
6 search of a problem. Thank you.
7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
8 Case is submitted.
9 (Whereupon, at 12:01 p.m., the case in the
10 above-entitled matter was submitted.)
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