

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. :

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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 PLRA'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. Now what
7 that means --

8 JUSTICE SCALIA: Why do you say that? Where
9 do you get that out of the word "occasion"? I would --
10 I would think "occasion" means at any time prior,
11 whether it's at the court -- whether it's at the
12 district court or the court of appeals. You -- you read
13 it. Why can "occasion" only mean what you suggest? Or
14 mean what you suggest, period?

15 MR. SHANMUGAM: We don't believe that it
16 could only mean what we suggest, which is to say that we
17 don't think that the text precludes an interpretation
18 under which the occasion is coterminous with the act of
19 dismissal. We simply don't think that is the only
20 possible interpretation of the statutory language.

21 For one thing, we think that it is notable
22 that the statute does not provide that a mere affirmance
23 of a district court dismissal qualifies as a distinct
24 strike.

25 So, in other words, in a case in which a

1 district court dismisses on one of the specified grounds
2 and then the court of appeals simply affirms, I think
3 everyone would agree that there is only one strike. And
4 in our view --

5 JUSTICE GINSBURG: Mr. Shanmugam, would you
6 explain that distinction from the court of appeals
7 level? So the district court dismisses for failure to
8 state a claim. It goes up to the court of appeals.
9 When would the court of appeals simply affirm and when
10 would it say "appeal dismissed"?

11 MR. SHANMUGAM: So, Justice Ginsburg, when a
12 district court dismisses for failure to state a claim, I
13 think that the ordinary course would be for a court of
14 appeals to affirm. While the statute refers to
15 dismissals on the ground that the underlying action is
16 frivolous or malicious or fails to state a claim, we
17 think that the failure to state a claim ground really
18 only properly applies on the district court level.

19 To come at it from another direction, the
20 circumstances in which courts of appeals dismiss appeals
21 rather than affirming are circumstances in which the
22 appeal itself is frivolous or malicious. So in a
23 circumstance in which a court of appeals merely affirms,
24 there is no discrete strike at the court of appeals
25 level.

1 And in our view, to get back to Justice
2 Scalia's question, that fact, the fact that a mere
3 affirmance does not count separately, in our view,
4 strongly suggests that the dismissal and the ensuing
5 appeal should be viewed as a single unit. The only
6 circumstance in which a court of appeals action counts
7 as a distinct strike is when the appeal itself is
8 frivolous or malicious --

9 JUSTICE SCALIA: Mr. Shanmugam, I find it as
10 one of the appealing points in your argument that you
11 have a dismissal for frivolousness at the District Court
12 level. It's counted as a third strike, and then that is
13 reversed on appeal. So that, you know, turns out it
14 shouldn't have been the third strike. And I don't know,
15 what do you do in the last case? In the next case he
16 has only two strikes. That is a messy situation. How
17 often does that situation arise? How often is it that a
18 District Court dismisses for frivolousness and is
19 reversed by the Court of Appeals? Do you have any idea?

20 MR. SHANMUGAM: So, more often than you
21 might think, Justice Scalia, and it's for the simple
22 reason --

23 JUSTICE SCALIA: I hope so, because I don't
24 think it happens very often.

25 MR. SHANMUGAM: It is certainly true that

1 there are not a lot of cases, as the Federal government
2 points out, in which a Court of Appeals outright
3 reverses. But I think it's important to emphasize, that
4 a Court of Appeals can also modify a District Court
5 dismissal. And so if, for instance, a Court of Appeals
6 concludes that a District Court erred by determining
7 that the action was frivolous, or malicious, it is not
8 uncommon for a Court of Appeals to say, That
9 determination was incorrect, we're going to remand for a
10 determination about whether or not there was a failure
11 to state a claim. We cite a number of those such cases
12 in our reply brief.

13 CHIEF JUSTICE ROBERTS: In a case such as
14 that, is there anything preventing the Plaintiff from
15 getting a stay of the District Court judgment? The
16 third strike, seeking a stay of the judgment, and if in
17 fact it is because of a failure to state a claim, so has
18 more merit than one of the frivolous ones, I suppose the
19 Court of Appeals could grant a stay, and the problem
20 we're addressing would totally go away.

21 MR. SHANMUGAM: So, neither Respondents, nor
22 the Federal government suggest that that is a
23 permissible solution. We have identified a couple of
24 District Court cases where District Courts have entered
25 stays. I would respectfully submit that the concept of

1 a stay is a little bit counterintuitive in this context.
2 Because, I think what a District Court would essentially
3 be doing is saying that it is staying the grounds on which
4 it disposes of the case.

5 CHIEF JUSTICE ROBERTS: Yeah, but that's a
6 problem that is always presented when you have to ask a
7 District Court to stay its own judgment. But you can
8 also ask the Court of Appeals, right?

9 MR. SHANMUGAM: Right, but you're not really
10 staying the dismissal in that circumstance. What you
11 would really be doing is staying the consequences of the
12 dismissal.

13 CHIEF JUSTICE ROBERTS: No, you just stay the
14 judgment. Because the judgment -- I mean, that's the
15 typical reason you ask for a stay is because the
16 judgment is going to have some very adverse consequences
17 that should be suspended pending appeal.

18 JUSTICE SOTOMAYOR: I'm sorry. I'm a little
19 confused here. There's no judgment to be entered if the
20 prisoner can't file because of the third strike. There
21 is no complaint to stay, and there's no judgment to
22 stay.

23 MR. SHANMUGAM: I think, Justice Sotomayor,
24 if I'm understanding the Chief Justice correctly, that
25 what the Chief Justice is suggesting is that a District

1 Court when it enters the potential third strike it
2 somehow enter a stay of the disposition and what I'm
3 submitting is a little bit counterintuitive about that,
4 is that what the District Court would essentially be
5 doing is entering the dismissal because after all, the
6 dismissal would need to take effect but at the same time
7 saying that in essence the collateral consequences of that
8 dismissal are not immediately going to take effect.

9 CHIEF JUSTICE ROBERTS: The remedy will be
10 stayed in effect, of the third strike.

11 MR. SHANMUGAM: Well, but the only remedy is
12 the disposition of the case and so, again, I think that
13 that is why this idea really hasn't gotten --

14 CHIEF JUSTICE ROBERTS: Are you suggesting
15 that the District Court cannot stay the disposition of
16 the case? Or that a Court of Appeals asked to review it
17 or going to be asked to review it can't stay it?

18 MR. SHANMUGAM: Well, but the only
19 consequence of the case here is the actual act of
20 entering the dismissal. So this is not a circumstance
21 in which, for instance a court affirmatively provides
22 relief, whether it's a monetary judgment or injunctive
23 relief, and then says that that is not going to take
24 effect until the appellate process is complete.

25 JUSTICE SCALIA: It says the dismissal will

1 not take effect. Why can't it say the dismissal -- you
2 know, we think you deserve to be dismissed but we're going
3 to enter a stay so you can go up and see if we were right.

4 MR. SHANMUGAM: Yeah, again, I don't think
5 that there is a lot of precedent for this even in the
6 jurisdictions that have adopted respondents or the
7 Federal government's interpretation. But let me just
8 say one --

9 JUSTICE SOTOMAYOR: I actually don't even
10 -- I hadn't considered this, because we --
11 appellate courts have no jurisdiction until there's a
12 final judgment. There's no 54(b) -- there's no 54(b)
13 standard that would be met and there's no anything
14 standard that would be met.

15 MR. SHANMUGAM: I mean, in essence what you
16 have to do is to prevent the very judgment from becoming
17 a judgment, because of course at the moment --

18 CHIEF JUSTICE ROBERTS: I'm sorry, isn't
19 that what stays do? They suspend the effectiveness of
20 the judgment and by doing so you stay any collateral
21 consequences of it?

22 MR. SHANMUGAM: Well, what they tend
23 to do, Mr. Chief Justice, I think, is to really stay the
24 relief that is being provided until the appellate
25 process runs its course.

1 JUSTICE SOTOMAYOR: The problem here is not
2 that case. The problem here is the next case, if there
3 is one.

4 MR. SHANMUGAM: Well, that is correct. And to
5 get back to Justice Scalia's question, because I just want
6 to make sure that all of the consequences of the various
7 interpretations are on the table. I think that there
8 are actually two sets of pernicious consequences here.
9 The first is the one that you
10 identified here, which I think is a problem both with
11 respondent's and the Federal government's
12 interpretation, which is what to do in a circumstance in
13 which a prisoner is effectively barred as a result of an
14 erroneous third strike, a third strike that is reversed or
15 modified.

16 I think with respondent's
17 interpretation, there is a much more fundamental
18 anomaly, which is this anomaly of precluding appeals of
19 dismissals that count as the third strike. And so again we
20 are not arguing today --

21 JUSTICE GINSBURG: I thought in this case
22 there was no such preclusion. I thought that the Court of
23 Appeals said, yeah, we'll take the appeal on the strike.
24 So that's -- that's -- you can't urge that issue because
25 you prevailed on it.

1 MR. SHANMUGAM: But that is a problem,
2 Justice Ginsburg, that I think inheres in the
3 interpretative question that is before the Court. It is
4 certainly true that petitioner is not in that position.
5 In other words, we're not here trying to get the right
6 to appeal from the third strike dismissal. But I do
7 think that it is a problem that has to be dealt with in
8 construing the statutory provision and it's a problem that
9 has been recognized by every court.

10 JUSTICE SOTOMAYOR: But it has to be dealt
11 with under anybody's interpretation. Once you admitted,
12 which you must, that in one case there can be two
13 strikes, then if there's a second case, a third case, or
14 no, a second case, but a third strike at the District
15 Court level, you still have to face the question of
16 whether there's a right to appeal --

17 MR. SHANMUGAM: But, Justice Sotomayor,
18 under our interpretation, all of these anomalies are
19 dealt with for the simple reason that you wait until the
20 end of the appellate process and even those courts, those
21 two Courts of Appeals that have gone the other way on
22 this issue have recognized this anomaly. It's really
23 only respondents who think that this anomaly is no big
24 deal.

25 Now, there have been various solutions

1 devised to this problem. The Sixth Circuit, the Seventh
2 Circuit and Federal government have all come up with
3 different interpretations of the relevant statutory
4 language in order to address the problem.

5 I want to specifically address the Federal
6 government's proposed interpretation, because no one
7 before this Court is defending the exact reasoning of
8 either the Sixth Circuit or the Seventh Circuit. The
9 Federal government argues that the phrase "prior
10 occasion" should be construed to mean a prior dismissal
11 in a different case. Now, that certainly addresses this
12 anomaly, but we simply don't think that you can get that
13 interpretation out of the phrase "prior occasion." And
14 so while there may be textual ambiguity here,
15 and I would certainly acknowledge as I did to
16 Justice Scalia that the text of the statute does not
17 unambiguously preclude respondent's interpretation, we
18 do believe that it unambiguously precludes the Federal
19 government's interpretation.

20 JUSTICE KENNEDY: Are you saying the
21 government is being illogical or inconsistent, because
22 if strike number 3 is a District Court ruling, the
23 government says, well, there's no bar to your appealing
24 that. There's just a bar for filing a new District
25 Court suit, and you would say that that's just illogical.

1 MR. SHANMUGAM: Well, we think that that is
2 something that Congress could logically have done. We
3 simply don't think there is any footing in the statutory
4 language for that distinction.

5 JUSTICE SOTOMAYOR: If prior occasion means
6 what it means, then there's only two strikes anyway
7 because there was or two prior cases or two prior --

8 MR. SHANMUGAM: Under our interpretation,
9 that is certainly true and, of course, it bears
10 emphasizing that this is the interpretation of the
11 overwhelming majority of lower courts who have considered
12 the issue.

13 JUSTICE SOTOMAYOR: By the way, how many of
14 those courts count the time or rely on the time for
15 cert?

16 MR. SHANMUGAM: You know, I'm not sure that
17 all of the Court of Appeals opinions have expressly
18 dealt with that issue simply because the cases haven't
19 quite been postured in that position. We think that
20 that rule makes sense because that is the ordinary rule
21 that is applied for instance when this Court is
22 construing statutes that expressly require finality on
23 appeal, and that's the Clay versus United States case
24 that I referenced earlier.

25 Of course that time is not likely to be all

1 that extensive particularly in cases in which the
2 petitions plainly lack merit the time to resolution of
3 petitions of that variety is typically relatively short.
4 But my point here is simply that under our
5 interpretation, there really have been no identified
6 problems with administrability and after all --

7 JUSTICE BREYER: Why not? I mean, what they
8 argue is if we take your interpretation, it has to be final
9 to become a strike, all that takes time, and if you have
10 a really real frequent filer during that year, perhaps
11 you will file 38 more cases or maybe a hundred and there
12 will be no way to stop him really. You'll have to pay
13 for the -- you know, I mean, you see the problem.

14 On the other hand, the evil that you're
15 worried about, which is that there is a reversal of a
16 strike on appeal, has happened precisely zero times.
17 Ever. So this sort of undermines the statute. There's
18 not a real need for it, your interpretation, and if
19 there were by the way and it were reversed, he could
20 proceed under Rule 60(b)5. So that's basically their
21 argument. I would like to hear your answer.

22 MR. SHANMUGAM: Sure. Well, Justice Breyer,
23 let me start with the problem that we are addressing
24 here. And I would note that it's the two-fold problem.
25 Again, it's the problem of prisoners who are barred as a

1 result of erroneous third strike dismissals, and there
2 are such cases. It's not a null set. Even the Federal
3 government acknowledges that there are at least two
4 reported cases in which that has occurred. And again,
5 we point out that there are cases in which there have
6 been modifications, and those modifications would also
7 be cases where someone under the interpretations on the
8 other side would go from having three strikes to two
9 strikes.

10 But let me address the perceived vices with
11 our position as well. I think really the only vice that
12 has been identified is this supposed floodgates problem
13 that's going to ensue under our interpretation where a
14 prisoner, on the eve of a third strike, is suddenly
15 going to come in with a flurry of lawsuits. I would
16 note at the outset, that that is a potential problem
17 really with any interpretation.

18 In other words, once you set the rules for
19 what constitute three strikes a prisoner -- when the
20 prisoner has two strikes, will have an incentive to come
21 in with a number of different lawsuits. So I don't think
22 that that problem really disappears under any
23 interpretation. But again, that's not a problem that
24 seems to have been borne out.

25 JUSTICE SCALIA: Now, wait. Wait, wait,

1 wait, wait, wait. I mean, what's distinctive about
2 yours is you have to wait for the period of the appeal.
3 You have to -- and, you know, that could take a long
4 time. And you talk about floodgates. The reason this
5 statute exists is because of floodgates, because these
6 prisoners file one -- one frivolous appeal after
7 another.

8 MR. SHANMUGAM: Two points in response to
9 that, Justice Scalia.

10 First of all, even under Respondent's
11 interpretation, where a prisoner has two strikes, a
12 prisoner could come in with a flurry of lawsuits, and it
13 seems to be undisputed that you assess whether or not a
14 prisoner has three strikes at the point at which the
15 prisoner submits the complaint. And so a prisoner could
16 bring a flurry of lawsuits even under that
17 interpretation.

18 But second, and more importantly, I think
19 there's a reason why this problem hasn't borne out in
20 practice, and that is simply by virtue of the other
21 provisions of the PLRA. Even a prisoner who is not
22 subject to the three strikes provision still has to pay
23 the filing fee, albeit in installments, and that filing
24 fee, of course, is substantial. It's now \$400 in the
25 district courts. It's now \$505 in the courts of

1 appeals.

2 JUSTICE GINSBURG: Mr. Shanmugam, why isn't
3 this case just a casebook example of what the danger is?
4 Because this Petitioner, as I understand it, filed not
5 only the petition that's before us, but three more. In
6 what span of time?

7 MR. SHANMUGAM: Over the span of about a
8 year and a half. But I would note that it took my
9 client, who has been in prison in Michigan since 1983,
10 25 years to get to three strikes even under Respondent's
11 interpretation. So I think that this effort to -- to
12 create the impression --

13 JUSTICE KENNEDY: Well, but he's making up
14 for lost time.

15 (Laughter.)

16 MR. SHANMUGAM: Well, he did file four
17 lawsuits. And as a result, he does have to pay the
18 filing fee in installments for each lawsuit, and that's
19 20 percent of his income. And in addition, district
20 courts are not somehow left without tools in the event
21 that those subsequent lawsuits are meritless.

22 JUSTICE KENNEDY: But -- but I don't -- I
23 don't think that your earlier point that when he has two
24 strikes he can file a flurry of suits is relevant.
25 That's -- that's the grace period that the government

1 has given him. The government has granted that with
2 only two strikes, you can proceed. But now we have
3 three, and that's quite different.

4 MR. SHANMUGAM: Well, and of course, that is
5 the question. And the question really is whether
6 Congress, in imposing this sanction, which is a
7 considerable one in which of course applies to
8 meritorious and meritless claims alike, whether Congress
9 would have wanted to attach that consequence before
10 ensuring that a prisoner, in fact, had three valid
11 dismissals for pursuing meritless claims.

12 And, of course, we have a statute here that
13 does not specifically address that issue, and there are
14 plenty of statutes that address that issue in both
15 directions. And we also have no legislative history for
16 those members of the Court who are interested in
17 legislative history that speaks to this issue.

18 And so the real question we would submit is
19 that if the Court agrees with us that the language of
20 the statute is at least ambiguous, which interpretation
21 avoids anomalous consequences and leads to a rule that
22 is easy for lower courts to administer?

23 The great virtue of our interpretation is
24 that once a prisoner has three strikes, the prisoner
25 always has three strikes. You don't have this specter

1 of the possibility that a prisoner could go from having
2 three strikes one day to having two strikes or fewer the
3 next.

4 JUSTICE SOTOMAYOR: Do you know if any of
5 those courts, the majority of the courts except for two,
6 have opted for addressing things your way? And -- and
7 I have a slight leaning towards letting the majority of
8 circuit courts figure out administrative -- the ease of
9 administrative rules. How many of them thought of it as
10 just being easier to do?

11 MR. SHANMUGAM: Well, I think that when you
12 look at the court of appeals' opinions that have gone
13 our way, a number of them have recognized that the text
14 is ambiguous. So they have not just been, as Respondents
15 and the Federal government suggest, somehow disregarding
16 the language of the statute.

17 The Fourth Circuit in the Henslee case
18 specifically relied on the phrase "prior occasion" and
19 said that, "The phrase prior occasion may refer to a
20 single moment or to a continuing event to an appeal
21 independent of the underlying action, or to the
22 continuing claim, inclusive both of the action and of
23 its appeal." And that's, of course, precisely the
24 argument we're making today.

25 But with regard to administrability, I just

1 want to be clear about how this works, because this is
2 obviously a very important practical issue for district
3 courts.

4 Under our interpretation, all that a
5 district court, or for that matter a court of appeals,
6 need do is to look to see whether in a prior case there
7 has been a determination that a prisoner has three
8 strikes. If, in fact, that is so, that is the end of
9 the analysis. And indeed, our understanding is that in
10 many jurisdictions, the district court clerk's offices
11 actually keep lists of people who have been subject to
12 the three strikes prohibition.

13 There's a decision from the Western District
14 of Louisiana that refers to the keeper of the three
15 strikes list, and our understanding is that that is
16 actually a fairly common practice. And, of course,
17 where a prisoner has not previously been subject to the
18 three strikes provision, it will be relatively easy, and
19 it's a familiar task for a district court to make the
20 determination whether a prisoner's prior dismissals are
21 final on appeal.

22 Under Respondent's and the Federal
23 government's interpretations by contrast, there is no
24 such ease of application because a court will not be
25 able to be sure that a prisoner, in fact, has three

1 strikes even if the prisoner has previously been barred.
2 And under either of the interpretations on the other
3 side, you will have to figure out what to do in a
4 situation in which a third strike dismissal has been
5 reversed or even modified.

6 Now, the Federal government --

7 JUSTICE SCALIA: Again -- again, that's a
8 big problem depending upon how frequent that is. If
9 it's once in a blue moon, you know, it's no big deal.

10 MR. SHANMUGAM: Well, everyone before this
11 Court agrees that we're not exactly dealing with a large
12 set of cases to begin with. And the question presented
13 in this case is not going to affect a large number of
14 cases in the aggregate. Though I would note that the
15 issue has arisen in virtually every single one of the
16 courts of appeals.

17 My point is simply that you're dealing with
18 a somewhat larger number of cases than the Federal
19 government would suggest. When the Federal government
20 says look, we've only been able to identify two cases
21 where there have been outright reversals. And to the
22 extent that the Federal government in its brief points
23 to the reversal rate in civil actions by prisoners, the
24 Federal government accurately represents that that rate
25 is about 4 percent. I think it's important to emphasize

1 the fact that the overall reversal rate in the Federal
2 courts of appeals is only 7 percent. And so it isn't as
3 if the prisoner rate is, you know, somehow orders of
4 magnitude lower. And of course --

5 JUSTICE ALITO: Well, I would think that the
6 -- I would think the situation that we should be concerned
7 about is the situation in which the dismissal, which is
8 initially counted as the third strike, ultimately
9 results in some relief for the prisoner. And I don't
10 know that there's even one of those.

11 MR. SHANMUGAM: Well, but, of course, under
12 the statute, the dismissal no longer qualifies even if
13 the prisoner doesn't obtain relief. And I think
14 everyone agrees that if there is either a reversal or
15 vacatur of the dismissal or a modification to eliminate
16 the grounds specified in the statute, that the dismissal
17 no longer has any effect. And those cases, I would
18 respectfully submit, are somewhat more common than my
19 friends on the other side would have you believe.

20 And I would like to reserve the balance of
21 my time for rebuttal.

22 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

23 Mr. Lindstrom.

24 ORAL ARGUMENT OF MR. AARON D. LINDSTROM

25 ON BEHALF OF RESPONDENTS

1 MR. LINDSTROM: Mr. Chief Justice, and may
2 it please the Court:

3 The plain language of Section 1915(g)
4 identifies when a strike occurs. It occurs when an
5 action or appeal was dismissed. The phrase "action was
6 dismissed" has an everyday meaning and the ordinary
7 meaning of "action was dismissed" does not. Action was
8 dismissed and affirmed.

9 JUSTICE KAGAN: Mr. Lindstrom, I -- I
10 understand that argument, and it seems to me a very
11 natural reading of the statute. But the -- I'm troubled
12 by the scenario where it's dismissed and then it's
13 reversed, not for these practical reasons that people
14 have been talking about. But it seems to me that if you
15 were really reading the statute that way, that that
16 would count as a strike, too, and that that strike would
17 not go away even when it was reversed.

18 And so I'm wondering whether the statute is
19 actually a little bit more ambiguous than -- than you
20 are suggesting, because at the very least, I mean,
21 everybody agrees that you have to make an exception for
22 that case, and it seems to me that on your reading of
23 the statute, that case would be included. A strike
24 would be a strike even if it's reversed.

25 MR. LINDSTROM: No, Justice Kagan, we think

1 the ordinary rules that apply to judgments apply. When
2 Congress passed this statute, they weren't trying to
3 change the ordinary rules of how judgments are applied.
4 The ordinary rules in district court judgments matter
5 until they're reversed. That's the ordinary rule in the
6 res judicata context and in every other context.

7 JUSTICE KAGAN: Yes, but that's something --
8 you're now appealing to some default principle that
9 exists outside of the statutory text. I can't find any
10 basis in the statutory text for that result.

11 I mean, it's -- there have been three or
12 more prior occasions in which either an action or an
13 appeal has been dismissed. Now, one of those dismissals
14 was later reversed, but it was dismissed. And so on
15 your reading, we -- we really, you know, it's -- it's --
16 your reading is kind of -- this is the natural reading,
17 but we're not going to -- we're not going to apply the
18 natural reading in a case where it obviously doesn't
19 fit.

20 MR. LINDSTROM: I think we're assuming that
21 Congress is drafting against the ordinary background
22 rules, and there's an ordinary meaning of what's
23 dismissed, and that's what my colleague is changing --
24 is challenging.

25 JUSTICE SOTOMAYOR: The problem with the

1 ordinary rule is that it really doesn't apply completely
2 until the next case. It applies in that case, but it
3 doesn't apply in the next case.

4 MR. LINDSTROM: If you mean it doesn't
5 apply, I guess I'm not sure what you're saying.

6 JUSTICE SOTOMAYOR: Meaning let's talk about
7 res judicata or collateral estoppel. If it's res
8 judicata, it's the two parties. So that -- that's that
9 case, essentially.

10 MR. LINDSTROM: Yes, Your Honor.

11 JUSTICE SOTOMAYOR: If it's collateral
12 estoppel, it could be until a third party. But I think
13 that that third party would be entitled to a stay of his
14 or her action pending the adjudication of the main
15 action.

16 MR. LINDSTROM: But we do know that Congress
17 did want to cut off IFP status in the same case in at
18 least some instances. If you look at
19 Section 1915(a)(3), that specifically says that an
20 appeal may not be taken in forma pauperis status if the
21 trial court certifies in writing that it was not taken
22 in good faith. That's not -- that's setting aside the
23 three strikes rule entirely. That could happen in any
24 given case. And that shows that Congress specifically
25 wanted to cut off IFP status on appeal in at least some

1 cases.

2 JUSTICE SOTOMAYOR: Except that the --
3 there's still a right to ask the court of appeals for a
4 COA, and so there is an appellate process of sorts.

5 MR. LINDSTROM: There -- there would be, and
6 that's correct. But in terms of what the background
7 rules are, I think the ordinary rule of the background
8 interpretation would be you start with the plain
9 language. Congress expects you to look at the word "was
10 dismissed," figure out what that means.

11 They would also expect you to apply the
12 ordinary rules that apply to judgments, and the ordinary
13 rule is that district court judgments matter. They have
14 a legal effect immediately. You can see this from
15 trivial matters, like when interest starts to accrue,
16 and also through very significant matters, such as a
17 criminal conviction. If somebody is a convicted of a
18 criminal -- of a crime in Federal court, they get to go
19 to jail, even though they're pending in --

20 JUSTICE SOTOMAYOR: Right. Answer -- answer
21 Judge -- Judge Easterbrook's point, that there is no way
22 to revive a subsequently filed case that was dismissed
23 because of a third strike. Judge Easterbrook, and I
24 think there's some force to his logic, says with this --
25 this three-strike situation, when the next case comes to

1 the court of -- to a district court, district court
2 never files the complaint. There was nothing dismissed
3 that can be revived. There was no judgment entered.

4 MR. LINDSTROM: That wouldn't have barred any
5 of the four lawsuits that Mr. Coleman could have brought
6 in this case, because he could have brought all four of
7 his lawsuits in State court. He could have filed each
8 one of these in State court. So there is recourse,
9 interpreting the statute according to the plain
10 language.

11 JUSTICE SOTOMAYOR: But -- but there's no
12 remedy for the fact that subsequent lawsuits that
13 were -- that were filed based on the erroneous third
14 strike would have been turned back without the filing of
15 a complaint.

16 MR. LINDSTROM: In other words, it was never
17 filed, so there was nothing to relate back, at which
18 point --

19 JUSTICE SOTOMAYOR: And nothing -- or to
20 file a 60(b).

21 MR. LINDSTROM: But, again, it -- there's an
22 easy way for a prisoner to get around that, and the
23 prisoner could have done that by -- once he's got three
24 strikes and the last one is on appeal, he has to make
25 the decision: Should I file my next four cases that I'm

1 going to file -- should I file them in Federal court, or
2 should I file them in State court? And this statute is
3 saying you shouldn't file them in Federal court.

4 I think -- I'm not sure if I fully answered
5 your point about reversal, but I think that's the
6 ordinary background rule. Again, even though a prisoner
7 would be convicted, they still go to jail even though
8 there's the possibility that a reversal might happen. And
9 the ordinary rule is that a reversal is something that
10 is if it had never occurred.

11 You can see that in the -- as some examples
12 cited in the Federal government's brief about
13 sentencing, if you have a conviction that is then
14 reversed, it can no longer be used to enhance a later
15 conviction. There's double jeopardy context, where if a
16 conviction is reversed, then it's as if it never
17 happened, which is why in *Ball v. United States*, this
18 Court said you can retry the person.

19 So the plain language, both in the "was
20 dismissed" language and the action or appeal, they
21 show that Congress is talking about the filing fees,
22 that the context of this statute, I think, is really
23 helpful. It's about filing fees.

24 When you enter the district court, you have
25 to pay a filing fee to file a complaint. And then on

1 appeal, you have to pay a filing fee so you can file
2 your notice of appeal.

3 So what Congress is doing is saying, these
4 are the two events we're talking about, and if you have
5 brought an action that was dismissed or brought an
6 appeal that was dismissed, that lines up with these two
7 stages of litigation. It was trying to separate them
8 out and treat them differently because Congress was
9 trying to deter not just frivolous actions, but also
10 frivolous appeals. It includes language, "action or
11 appeal," in the statute.

12 JUSTICE BREYER: What does it cost to file
13 an appeal?

14 MR. LINDSTROM: In the Federal courts, it
15 costs \$505.

16 JUSTICE BREYER: Sorry?

17 MR. LINDSTROM: \$505, Your Honor. In State
18 courts it's less. So you'd have are that option, and
19 you also have the IFP status option in State courts as
20 well.

21 JUSTICE SOTOMAYOR: Sort of an interesting
22 question, basically admitting that in terms of your
23 time, the suits would still remain because they could
24 file in State court?

25 MR. LINDSTROM: Yes, I think they could file

1 in State court. That's what the plain language of the
2 statute, it doesn't say anything about -- to preclude
3 State court. And there's other outlets as well that
4 would --

5 JUSTICE GINSBURG: Do states have similar
6 rules?

7 MR. LINDSTROM: States do have similar
8 rules. And Mr. Coleman has not run afoul, as far as
9 we can tell and as far as he has reported in the
10 complaints that he filed, which are all in the joint
11 appendix. He hasn't filed anything in State court. So
12 this would not have precluded him from filing all four
13 of his lawsuits in this verycase.

14 JUSTICE KAGAN: You know, I guess what
15 I'm not quite sure about in your answer to my question,
16 Mr. Lindstrom, is, if I understand you right, and tell
17 me if I don't, you're basically saying that we look to
18 these background principles and we decide that a strike
19 doesn't happen if something is reversed on appeal, so a
20 strike is kind of dependent on what happens on appeal.
21 But when you say that, aren't you kind of giving up your
22 best argument? I mean, aren't you then admitting that
23 the notion of a strike encompasses what happens on
24 appeal and encompasses finality on appeal?

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

1 think Congress is looking at the filing fee stages. It
2 was looking at the fact that you're going to file a fee
3 at the district court level and at the appellate court
4 level. So the statute clearly draws a distinction
5 between the two and wants them to be treated separately
6 so that if you get the IFP status in the district court,
7 that's one thing.

8 Getting IFP status in the Federal court is
9 another thing because what's going on here is Congress
10 is granting a subsidy to prisoners to allow them to
11 pursue further litigation, and Congress simply drew a
12 line in the statute saying, We'll subsidize a certain
13 number of these -- of IFP appeals and actions before we
14 cut it off.

15 There's other statutes that also show that
16 if Congress wants to delay the legal effect of a
17 district court judgment, it knows how to do it.
18 Section 2244 which we cite in brief good example of
19 this. It was passed by the same Congress that was
20 considering the Prison Litigation Reform Act. It was
21 considering it at about the same time throughout the
22 1995-1996 time period. Congress was voting on both
23 parts. And in Section 2244, it said something doesn't
24 count, doesn't have a legal effect with respect to a
25 statute of limitations until it's final by the

1 conclusion of direct review or the expiration of the
2 time preceding such review.

3 So the exact same Congress threw out the
4 words that was dismissed, knew how to write a different
5 rule and didn't do it here. And that's very telling,
6 especially given how they were enacted within two days
7 of each other.

8 So this Court itself has stopped in forma
9 pauperis status appeals, so some of the concerns that
10 are being raised are the fact that district court
11 decisions could be ossified errors. They could be
12 depriving people of meritorious claims. But that
13 concern would be worse with respect to petitions that
14 are filed in this Court because if this Court cuts
15 somebody off and says you can't

16 file any more petitions, as it does under
17 the Martin case. Then after that, there's a much
18 greater case of ossification because those decisions may
19 be precedential.

20 So I think that our reading is consistent
21 with what Congress is trying to do, which is to look at
22 the great bulk of the cases and say 95, 96, some high
23 percentage of cases, those are going to be cases where
24 the original strike was affirmed, and so it's a very
25 remote possibility. If the language were completely

1 ambiguous, then you would still have to figure out which
2 one is closest to Congress' intent, and Congress' intent
3 would be to address the 95-plus percentage of cases, rather
4 than the case where my colleague admits there are not a
5 lot of them and hasn't really cited very many of them.

6 JUSTICE ALITO: This is a question I
7 probably should have asked petitioner, but what do you
8 understand his -- what do you understand him to mean
9 when he says it has to be final on appeal?

10 Suppose that there is an appeal pending in
11 one of the prior strike cases, but it's perfectly clear
12 that the notice of appeal in that instance was filed
13 woefully out of time. Would that be final on appeal?

14 MR. LINDSTROM: I think it would -- I assume
15 his answer would be to look at, once the notice of -- I
16 think he would say the end of the expiration of time is
17 when the court would look at it. So if it was filed
18 late, the expectation would be if it's filed out of
19 time, because you're looking at the time period for
20 review, that time period has passed and it's final, I
21 guess subject to reopening if there's a way to get
22 around that. It would be jurisdictional. So I don't
23 know how you would get around it.

24 JUSTICE KENNEDY: Under your position, I
25 suppose we don't have to ask about certiorari, pending

1 whether or not that --

2 MR. LINDSTROM: Yes, Your Honor.

3 JUSTICE KENNEDY: You can say that that's
4 the petitioner's problem, not yours.

5 MR. LINDSTROM: I think that's right. I
6 don't think I need to address that.

7 JUSTICE BREYER: What do you think about the
8 government's argument about the third? You imagine he
9 has -- the prisoner has filed one, dismissed as
10 frivolous; appeal, the dismissal affirmed. That's one.
11 Now he does it again. That's two. And he does it a
12 third time. District court dismissed. And he says, I
13 want to appeal that, and I don't want to pay the \$500,
14 505. And the government has to say -- could say, sorry,
15 you have to pay the 505. That's the third, because he's
16 a separate. Then he says, but it says, "on a prior
17 occasion," and this is the same occasion. And therefore
18 he doesn't have to pay the 500. What's your view of
19 that?

20 MR. LINDSTROM: I think that that reading
21 takes the word "prior" and changes it from meaning
22 "before" to meaning "before or after in a separately
23 filed suit." So I think it's going too far with what
24 the word "prior" could possibly mean.

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

1 of the statute is to identify what occasions are going
2 to give rise to a strike. And those occasions are when
3 an action was dismissed, which is a district court
4 event, or when the appeal was dismissed.

5 JUSTICE KENNEDY: It seems to
6 me the government does give away too much in that
7 position. The only question is whether that undercuts
8 this whole argument. It gives a little bonus for the
9 appeal of the -- if strike number three is the district
10 court, the government doesn't count the appeal, as I
11 understand it. It counts -- obviously it counts in a
12 later district court suit, but not here.

13 MR. LINDSTROM: Yes, Your Honor. And I
14 should be quick to point out that they agree with our
15 interpretation of the facts of this case, where he had
16 three strikes and then he filed -- it's about the
17 subsequent actions.

18 JUSTICE SOTOMAYOR: Why use the word
19 "occasion" at all? Meaning: What meaning do you give
20 to that word? Why didn't they just say "three
21 dismissals"?

22 MR. LINDSTROM: I think the statute -- I
23 think "occasions" is just kind of a way of framing the
24 long clause that follows after it.

25 JUSTICE SOTOMAYOR: It seems to me you could

1 have just said, if a prisoner has three dismissals,
2 then -- three prior dismissals; not three prior
3 occasions, three prior dismissals -- he can't get IFP
4 thereafter.

5 MR. LINDSTROM: I don't think that would
6 change the outcome in this case, because that language
7 still would remain. His action was dismissed -- or
8 appeal. It was dismissed. So the language that draws a
9 distinction between the court of -- the district court
10 level and the appellate court level would still be
11 there. I mean, "occasions" is just identifying those
12 two, what those two occasions are.

13 JUSTICE ALITO: What about the fact that
14 this provision refers to a prior occasion on which an
15 action was dismissed? If you put "prior" and "action"
16 together, isn't there the suggestion that you're talking
17 about an action that is different from the action that
18 is before the court of appeals in what is arguably the
19 third strike?

20 MR. LINDSTROM: That word would also carry
21 through to prior appeal, apparently. I think the "prior
22 occasions" is simply talking about the fact that it is
23 an action that happened before. I don't think that that
24 word would have to modify both. It doesn't make sense
25 that it would modify "prior appeal" as well in a way that

1 is distinguished from the appeal in this case. In both
2 events you'd be talking about anything that goes before
3 it.

4 If there are no further questions, I will
5 yield the time to my colleague from the federal
6 government.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Kedem.

9 ORAL ARGUMENT OF ALLON KEDEM
10 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
11 SUPPORTING RESPONDENTS

12 MR. KEDEM: Mr. Chief Justice, and may it
13 please the Court:

14 If I could start with the issue of finality
15 and the normal background principles, the argument that
16 petitioner makes, and this is echoed by the argument
17 that he makes in pages 9 to 10 of his reply brief, is
18 that sometimes Congress specifies that finality is
19 required and sometimes it specifies that finality is not
20 required, and so we can draw no negative inference from
21 the fact that Congress was silent here.

22 But if you look at the example of the
23 statute in which Congress specified non-finality that he
24 gives, it's actually not a statute at all. It's a
25 Federal rule of evidence. Moreover, petitioner

1 identifies no instance in which Congress has a statute
2 in which it is silent about whether or not you require
3 finality, like subsection G, and yet finality was
4 implicitly read to be required; in other words, no
5 instance in which a finality requirement was inferred
6 rather than expressed. And even if you think that
7 sometimes finality might be able to be inferred,
8 Section 1915 is an especially bad candidate, because it
9 distinguishes so repeatedly and so sharply between the
10 trial and appellate stages.

11 And that brings me to petitioner's single
12 occasion theory, articulated most clearly in pages 18 to
13 19 of his opening brief. It's the idea that a trial
14 court dismissal plus the appeal from that dismissal
15 constitute a single ongoing occasion. And if Congress
16 had that in mind, presumably it would have used some
17 sort of process-oriented language.

18 JUSTICE GINSBURG: Isn't that what the court
19 of appeals held here?

20 MR. KEDEM: Pardon?

21 JUSTICE GINSBURG: The court of appeals said
22 you do get the appeal from the third strike.

23 MR. KEDEM: Yes, the court of appeals said,
24 we believe incorrectly, that the appeal from the third
25 strike is the same occasion.

1 JUSTICE GINSBURG: But is that before us?
2 You -- I thought that this appeal is about the fourth
3 case, and that you haven't -- you haven't contested the
4 court of appeals' holding that you do get an appeal from
5 the third strike.

6 MR. KEDEM: We don't believe that's directly
7 at issue and we can talk about it if the Justices are
8 interested in that. But the question as to how to read
9 "occasion" and whether it encompasses just the trial or
10 the appellate stage, or both of them at the same time,
11 is very much at issue in this case. And we believe that
12 you could end up with overlapping occasions, not only
13 the trial court dismissal, but on appeal, also a
14 separate appellate dismissal, which, as Petitioner
15 concedes, is an occasion in its own right.

16 JUSTICE BREYER: But that's -- that's the --
17 why I asked the question on page 25 of your brief; you
18 say the bar goes into effect if the prisoners received
19 strikes on three or more prior occasions.

20 Now you say a prior occasion is not the
21 district court dismissal in this third case. That's not
22 a prior occasion. But when you look at the earlier two
23 strikes, you don't consider it as a whole. So we
24 consider this one as a whole, but we don't consider the
25 others as a whole. That's why I asked the question.

1 MR. KEDEM: The question, Justice Breyer, is
2 whether the prior occasions that might prevent you from
3 appealing a civil action includes that very action, the
4 one you're trying to appeal.

5 JUSTICE BREYER: No, it doesn't -- yes, it
6 does. Because the dismissal of -- by the district court
7 of this lawsuit after it's done is a prior occasion.
8 The present occasion is your appeal of that dismissal to
9 the court of appeals.

10 MR. KEDEM: Justice Breyer, it's important
11 to consider the posture you're in when you're making
12 that choice.

13 JUSTICE BREYER: I'm not saying it's good
14 policy or anything. I'm just saying it's hard for me to
15 see how you can say the one and not the other.

16 MR. KEDEM: Because at the time that you're
17 making the decision, a new occasion hasn't started. You
18 have to decide whether the prisoner is allowed to file
19 the IFP appeal.

20 JUSTICE BREYER: Good. And when we're in
21 the second one, when you file the appeal from the first
22 one, the new occasion hadn't started. So we're still in
23 the middle of the occasion.

24 MR. KEDEM: No. Justice Breyer, the prior
25 occasion has concluded. It concluded with the issuance

1 of the judgment of dismissal. Let me provide an analogy
2 that, hopefully, can articulate our position.

3 Imagine that a school had a policy that said
4 in no event shall a student retake a test if on three or
5 more prior occasions that student had taken and failed a
6 test. Now, I suppose you could read that policy to say
7 that the very test you want to retake is a prior
8 occasion that might prevent you from retaking it.

9 JUSTICE BREYER: I'm going to fail this test
10 because --

11 (Laughter.)

12 MR. KEDEM: We don't think that's the
13 natural reading. And moreover, in order to give
14 independent content to the word "prior," it can't simply
15 mean before the very decision when you're making the IFP
16 determination. Because, of course, you're only taking a
17 count of strikes that are prior in that sense. You're
18 not going to take a count of strikes that haven't yet
19 happened.

20 JUSTICE SOTOMAYOR: Was it your brief that
21 said there were very few cases -- you found only two
22 published cases?

23 MR. KEDEM: Only two cases, and that
24 includes cases that are not published.

25 JUSTICE SOTOMAYOR: That's what my question

1 was, okay.

2 MR. KEDEM: And, of course, it's important
3 to emphasize, we're not just talking about the problem
4 of a third strike reversal. In order for Petitioner's
5 concerns to come about, you need a -- a prisoner who
6 wants to file a fourth suit, one that doesn't qualify
7 for the imminent danger exception and there has to be
8 some risk of the statute of limitations running in that
9 fourth suit while the third one is on appeal.

10 Presumably, that's going to be
11 extraordinarily rare, if it ever happens. And even if
12 it does, we believe in that instance, Rule 60(b)(5)
13 would allow you appropriate relief.

14 JUSTICE SOTOMAYOR: Then answer Judge
15 Easterbook's point, which is, when the fourth case comes
16 in, the court is just not granting IFP. It's not
17 dismissing the case, it's just not filing it at all.
18 It's just saying to you, I won't commence the
19 litigation, I won't accept it without you paying IFP.

20 MR. KEDEM: Well, what usually happens is
21 what happened in this very case; namely, that the court
22 says, I'm not granting you IFP status and I'm going to
23 dismiss your case if you don't pay the filing fee. And
24 so you could file Rule 60(b)(5) motion to have that
25 reopened. Because Rule 60(b)(5) applies whenever a

1 litigant seeks to reopen a case that was dismissed on
2 the -- or where the case was based on a prior judgment
3 that was reversed or vacated, which would seem to apply
4 here.

5 CHIEF JUSTICE ROBERTS: Do you -- do you
6 have to file -- pay a filing fee to go with a 60(b)
7 motion? Is that a separate proceeding?

8 MR. KEDEM: My understanding is that there's
9 a circuit split as to whether if you're denied IFP
10 status, you nevertheless are still on the hook for the
11 filing fee.

12 CHIEF JUSTICE ROBERTS: Well, that would
13 really make your position complicated.

14 MR. KEDEM: Your Honor, I think if you are a
15 prisoner who's three strikes barred and you still want
16 to file a fourth suit, there might be some consequence;
17 namely, that you might be on the hook if that third
18 strike is ultimately affirmed, as most third strikes
19 are.

20 I'd like to address also the point that
21 Petitioner makes that his position is much more easily
22 administered. Because I actually think the inquiry is
23 basically the same on either approach. It's true that
24 if you only know that the prisoner is three strikes
25 barred, then you can rely on that under Petitioner's

1 approach.

2 But that's not normally what happens. What
3 normally happens is what happened in this very case.
4 Namely, the trial court lists the prior dismissals, plus
5 what it knows about what happened to those dismissals on
6 appeal, and it makes an IFP determination.

7 And under either approach, the inquiry is as
8 follows: For any appellate dismissal or a trial court
9 dismissal that was affirmed on appeal, you can always
10 rely on that going forward. And for any trial court
11 dismissal where you don't know what happened on appeal,
12 you simply have to check the appellate docket, something
13 that, as Petitioner points out, courts are already very
14 familiar with. So under either approach, essentially
15 the inquiry is entirely the same.

16 And finally, Your Honor, if you are simply
17 not convinced by the textual arguments and you just want
18 to know what makes practical sense, you should go with
19 the approach that works in the vast majority of cases.
20 And in the vast majority of cases, what happens is what
21 happened in this very case. You have a third strike
22 that was ultimately affirmed on appeal.

23 Under Petitioner's approach, notwithstanding
24 that affirmance, even though the Sixth Circuit said that
25 strike was properly administered, he would nevertheless

1 be permitted to proceed IFP in those four additional
2 suits that he filed. Under our approach, he would not,
3 because the third -- he would not because he was three
4 strikes barred. But if the third strike had been
5 reversed rather than affirmed, he could have gone back
6 to the trial court and asked for relief under Rule
7 60(b) (5).

8 JUSTICE KAGAN: And just to be clear,
9 Mr. Kedem, if we say, you know, we're not buying this
10 prior occasion thing, does your -- does the rest of your
11 position stay your position?

12 MR. KEDEM: It does. I think you would end
13 up with Respondent's position. But one additional point
14 on prior occasions. Although Petitioner disagrees with
15 our reading of the phrase "prior occasions," he does
16 agree with us that if Congress meant "prior occasions"
17 to include an appeal -- to applying the situation from
18 an appeal of a third strike, it would have said so
19 explicitly. So if you simply go with that background
20 understanding, you would still end up with our position.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Mr. Shanmugam, you have four minutes left.

24 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

25 ON BEHALF OF PETITIONER

1 MR. SHANMUGAM: Thank you, Mr. Chief
2 Justice:

3 Justice Kennedy asked Mr. Lindstrom whether
4 the inconsistency between Respondent's position and the
5 Federal government's position undercuts the whole
6 argument here, and we would respectfully submit that it
7 does. Let me start with Respondent's interpretation.

8 I don't think that I could put the problem
9 with that interpretation better than the Federal
10 government itself does in its brief where it suggests
11 that "an interpretation, which precludes even an appeal
12 from the very dismissal that counts as a third strike,
13 would be inconsistent with quote, "common practice, in
14 which a litigant is permitted an appeal as of right,
15 from any adverse district court ruling that is final."

16 One would expect Congress to have spoken
17 more clearly if that had been Congress's intention. And
18 while in Section 1915(a)(3), Congress specified certain
19 circumstances under which an IFP appeal is not
20 permitted, it conspicuously did not bar IFP appeals from
21 third strike dismissals.

22 Now, Respondents attempt to mitigate the
23 harsh consequences of their position. Wisely, they do
24 not make the argument that they did in their brief that
25 a prisoner need only, quote, "buckle down" in order to

1 earn the \$505 filing fee in order to pursue an appeal.
2 All I heard Respondents suggest was, well, a prisoner
3 can refile in State courts. But as Mr. Lindstrom wisely
4 acknowledged, because Michigan itself has such a
5 provision, many States following the PLRA adopted three
6 strike provisions of their own. And so, I would
7 respectfully submit that that provides cold comfort.

8 Let me turn to the Federal government's
9 interpretation.

10 JUSTICE SCALIA: Including strikes in
11 Federal courts?

12 MR. SHANMUGAM: Some States do. I'm frankly
13 not sure what the practice is in Michigan, but I know
14 that many States count dismissals in both sets of courts
15 toward the three strikes.

16 Let me start with -- let me address the
17 Federal government's interpretation very briefly. I
18 think it is telling that my friend, Mr. Kedem, did not
19 start with the government's interpretation of the phrase
20 "prior occasion." He instead started with background
21 principles. And that is, I would respectfully submit,
22 for the simple reason that you simply cannot get this
23 different suit distinction out of the phrase "prior
24 occasion." It would lead to the odd result, as Justice
25 Breyer highlighted in his colloquy with Mr. Kedem, that

1 a prior dismissal could count as a prior occasion in
2 some circumstances, but not in others.

3 Let me address the question of background
4 principles because that was such the focus of Mr.
5 Kedem's argument. We would respectfully submit that
6 principles differ in the law whether as a matter of
7 statute or whether as a matter of background principles.
8 Congress can be explicit in both directions and,
9 obviously, here Congress was silent. I think in terms
10 of nonstatutory background principles, frankly, the
11 primary principle on which the Federal government relies
12 in its brief is the principle of claim preclusion. And
13 it is certainly true that in some jurisdictions,
14 consequences attach immediately upon judgment. That's
15 not the rule in others. In California and Texas,
16 consequences don't attach until the judgment becomes
17 final on appeal.

18 But that doctrine serves a quite different
19 purpose. The whole point of attaching consequences
20 immediately is precisely to ensure that a losing party
21 does not get a second bite at the apple. Here, by
22 contrast, you're talking about a provision that applies
23 consequences in other lawsuits, however unrelated and
24 however meritorious. And that just underscores, in our
25 view, the point that there are different policy

1 justifications that may require attaching consequences
2 to a judgment immediately or that may require attaching
3 consequences only when a judgment becomes final on
4 appeal.

5 At bottom, recognizing that there is some
6 ambiguity here, given the fact that you have three
7 parties here who are offering different interpretations,
8 none of which lines up with the interpretation of the
9 court of appeals below. We would respectfully submit
10 that considerations of workability and administrability
11 ought to be paramount when construing a statute that
12 governs the processing of Federal lawsuits. Our rule
13 has been the rule --

14 JUSTICE ALITO: Before
15 your time runs out, can a case be final on -- can a case
16 be final on appeal if there is a -- an appeal pending
17 but the notice of appeal is untimely?

18 MR. SHANMUGAM: We believe that in that
19 circumstance, it probably would be until the Court of
20 Appeals disposes of the case, because the Court of
21 Appeals would, typically, eventually dismiss the appeal
22 as untimely. But these are issues that lower courts
23 deal with all the time and not just in the context of
24 our interpretation of the three strikes provision.

25 JUSTICE ALITO: So a prisoner could at least

1 temporarily put some of these strikes in abeyance by
2 filing untimely notices of appeal.

3 MR. SHANMUGAM: And I suppose that a court,
4 if a court believed that that was a serious problem,
5 could construe the finality rule differently. Our
6 submission is simply that our rule has been the rule in
7 the overwhelming majority of lower courts and there's no
8 evidence that lower courts have had any difficulty. The
9 interpretations on the other side are solutions in
10 search of a problem. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
12 Case is submitted.

13 (Whereupon, at 12:01 p.m., the case in the
14 above-entitled matter was submitted.)

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