No. 17-779

IN THE
Supreme Court of the United States

JASON PARKER,

Petitioner,

v.

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

Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

SUMMARY OF ARGUMENT

This case presents an important question about the proper interpretation of the "three strikes" provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g). Section 1915(g) denies *in forma pauperis* (IFP) status to those prisoners who have "on 3 or more prior occasions, while incarcerated . . . , brought an action or appeal in a [federal] court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." *Id.* This case raises the important question whether that provision prevents an indigent prisoner from appealing IFP the

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

very dismissal that constitutes the prisoner's "third strike."

As the Petition for a Writ of Certiorari explains, there is an entrenched split on this question in the courts of appeals, Pet. 10-15, and the decision of the court below—holding that an indigent prisoner is precluded from appealing IFP his third qualifying dismissal—is "contrary to the statutory text and the background principles governing appeals against which Congress enacted section 1915(g)," *id.* at 2. The question at the heart of this intractable conflict is also unquestionably important, as it implicates the guarantee of meaningful access to the courts for indigent litigants. *See Neitzke v. Williams*, 490 U.S. 319, 324 (1989) ("The federal *in forma pauperis* statute . . . is designed to ensure that indigent litigants have meaningful access to the federal courts.").

This brief in support of the Petition provides an additional reason why the Petition should be granted: to avoid the serious constitutional question raised by the decision of the court below. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). Interpreting the PLRA to prevent an indigent prisoner from bringing an IFP appeal from a third qualifying dismissal so significantly limits prisoners' ability to access the courts that it raises significant constitutional questions that are best avoided by adopting Petitioner's interpretation of the statute.

When the Framers drafted our enduring national charter, they established the federal judiciary as an independent, co-equal branch of government. Article

III of the new Constitution vested the "judicial power" in the federal courts and broadly extended that power to nine categories of cases and controversies. The Framers recognized that constitutional limitations on government would be meaningless if the American people did not have the ability to vindicate their rights in the federal courts. Article III's grant of broad judicial powers to the federal courts therefore ensured that "the Constitution should be carried into effect, that the laws should be executed, [and] justice equally done to all the community." 4 *The Debates in the Several State Conventions on the Adoption of the Constitution* 160 (Jonathan Elliot ed., 2nd ed. 1836) (Davie) [hereinafter "*Elliot's Debates*"].

Reflecting the Framers' vision, "it is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). In particular, where the government "grant[s] appellate review," it may not "do so in a way that discriminates against some [prisoners] on account of their poverty." *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Moreover, a prisoner's constitutional right to access courts includes the ability to bring civil rights actions "concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

The PLRA's "three strikes" provision raises serious constitutional concerns because it effectively erects a total barrier to legal review for prisoners seeking to vindicate fundamental constitutional rights by requiring them to pay upfront all fees associated with filing their claim. The decision of the court below only exacerbates these serious constitutional concerns: by interpreting section 1915(g) to prevent an indigent prisoner from obtaining IFP status in an appeal of a third strike, the court below

would in many cases "completely bar[] [a prisoner] from obtaining any review at all" of a wrongly dismissed constitutional claim, *Burns v. Ohio*, 360 U.S. 252, 258 (1959). Moreover, this outcome is "more final and disastrous" than an ordinary application of the "three strikes" provision, *id.*, because it prevents an indigent prisoner from appealing a dismissal that—as the prisoner's "third strike"—will forever prevent him from obtaining IFP status to file future constitutional claims in federal court. There is therefore a serious question whether the PLRA, as construed by the court below, comports with the Due Process and Equal Protection Clauses' guarantee of equal access to the courts.

"Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land." *Bridges v. Wixon*, 326 U.S. 135, 166 (1945). *Amicus* urges the Court to grant *certiorari*.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT, CONSISTENT WITH THE RIGHT OF ACCESS TO THE COURTS, THE PRISON LITIGATION REFORM ACT DOES NOT BAR AN INDIGENT PRISONER FROM APPEALING *IN FORMA PAUPERIS* A THIRD QUALIFYING DISMISSAL UNDER THE "THREE STRIKES" PROVISION.

A. The Question Presented Implicates the Constitution's Guarantee of Meaningful Access to the Courts To Present Constitutional Claims.

This case presents an important question about the right of access to the courts—a right derived from

the Founders' establishment of a federal judiciary in order to ensure that all persons can pursue fundamental constitutional claims in federal court.

Article III of the U.S. Constitution provides that "[t]he judicial Power of the United States[] shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1, cl. 1. The Constitution's establishment of the judiciary as an independent, co-equal branch of government was a direct response to the infirmities of the Articles of Confederation, which had created a single branch of the federal government—"the United States, in Congress assembled," Arts. of Confed. art. III—and no independent court system. *See* Akhil Reed Amar, *Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (noting that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). As a result, the federal government could not enforce its laws, prompting Alexander Hamilton to observe that a "most palpable defect of the existing Confederation is the total want of a SANCTION to its laws." *The Federalist No. 21*, at 138 (Hamilton) (Clinton Rossiter ed., 1961); *see The Federalist No. 22*, at 150 (Hamilton) (explaining that "[l]aws are a dead letter without courts to expound and define their true meaning and operation").

When the Framers gathered in Philadelphia to draft the new national charter, they recognized that "there ought always to be a constitutional method of giving efficacy to constitutional provisions." *The Federalist No. 80*, at 475 (Hamilton). They debated at length what that method ought to be and ultimately concluded that federal courts should be given the power to enforce the Constitution's guarantees and

ensure the supremacy of federal law in adjudicating cases that come before them. *See generally* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required by Article III Courts*, 98 Colum. L. Rev. 696, 705-73 (1998); Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1346-55 (2001).

To ensure that the federal courts would be up to this task, the Framers provided for an expansive federal judicial power vested in an independent judiciary. *See generally* U.S. Const. art. III (establishing independent judiciary whose members "shall hold their Offices during good Behavior"). Indeed, after the other possible methods of ensuring state compliance with federal law were rejected,[2] the Convention substantially expanded the federal judicial power. First, the Convention approved the power of Congress to appoint lower federal courts, recognizing that "[i]nferior tribunals are essential to render the authority of the Natl. Legislature effectual." 2 *The Records of the Federal Convention of 1787*, at 46 (Max Farrand ed., 1911). The Convention also expanded the jurisdiction of the federal courts, making explicit in the text that the "jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony." *Id.* at 39. It subsequently further expanded their jurisdiction, giving them the power to hear cases aris-

[2] The Framers also considered, but rejected, a federal negative on state laws to be exercised by Congress and the use of executive power to coerce states' compliance with federal law. *See* Liebman & Ryan, *supra*, at 705-73.

ing under "this Constitution" as well as federal laws. *Id.* at 430.

In the debates about the Constitution's ratification, Federalists and Anti-Federalists alike agreed that Article III conferred broad, substantial powers on the federal courts. Indeed, the Anti-Federalists bitterly attacked the new federal judiciary, claiming that the Supreme Court would be "exalted above all other power in the government," Brutus XV (Mar. 20, 1788), *reprinted in The Anti-Federalists: Selected Writings and Speeches* 476 (Bruce Frohnen ed., 1999), and would have "more power than any court under heaven," 3 *Elliot's Debates* 564 (Grayson); *id.* at 523 (George Mason) (the grant of power to the federal courts was "the most extensive jurisdiction").

The Framers rejected these concerns, recognizing that constitutional limitations on government would be meaningless if individuals did not have recourse to federal courts to vindicate their rights. *See, e.g.*, 3 *Elliot's Debates* 554 (statement of John Marshall at Virginia ratifying convention) ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection."). Indeed, the existence of the federal courts to vindicate constitutional rights was a powerful argument in favor of the adoption of the Bill of Rights: in March 1789, Thomas Jefferson wrote to James Madison that an "argument[] in favor of a declaration of rights" that carried "great weight with [him]" was the "legal check which it puts into the hands of the judiciary." 12 *The Papers of James Madison* 13 (William T. Hutchinson et al. eds., 1961). As Madison explained in proposing the Bill of Rights that June, "[i]f the [Bill of Rights] are incorporated into the constitution, independent tribunals of justice

will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 Annals of Cong. 457 (1789) (Joseph Gales ed., 1790).

In short, Article III's grant of broad judicial powers to the federal courts ensured that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 *Elliot's Debates* 160 (Davie). The American people recognized that "[t]hese ends can only be accomplished by a general, paramount judiciary." *Id.*; *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

B. Interpreting the PLRA To Prevent a Prisoner from Appealing a Third Qualifying Dismissal *In Forma Pauperis* Raises Serious Constitutional Questions.

1. As just discussed, the Framers believed that broad access to the courts was essential to protecting individual liberty and ensuring compliance with the nation's laws. Reflecting the Framers' belief that a strong federal judiciary is essential to the protection of individual liberties, this Court has long ensured that indigent prisoners have full access to the courts—including appellate courts—to raise fundamental constitutional claims.

"It is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds,* 430 U.S. at 821. This doctrine is based on the Constitution's guarantee of "equal jus-

tice for poor and rich, weak and powerful alike." *Griffin*, 351 U.S. at 16; *see Bounds*, 430 U.S. at 822 ("[I]nmate access to the courts [must be] adequate, effective, and meaningful."). This right includes access to the courts for indigent prisoners who cannot afford the costs of litigation. As this Court has explained, "a State can no more discriminate on account of poverty than on account of religion, race, or color," because "the ability to pay costs in advance bears no rational relationship to" the validity of a legal claim. *Griffin*, 351 U.S. at 17-18.

The principle of equal access for indigent prisoners applies as robustly at the appellate stage. "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." *Id.* at 18. Therefore, though there may be "no obligation to provide appellate review" under the Constitution, if a State or the federal government "provide[s] such an avenue," it may not "'bolt the door to equal justice' to indigent" litigants asserting fundamental constitutional rights. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (quoting *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring in judgment)); *see Douglas v. California*, 372 U.S. 353, 357 (1963) ("[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.").

For that reason, in *Griffin v. Illinois*, a plurality of this Court held that under the Equal Protection and Due Process Clauses indigent defendants must be "afford[ed] adequate and effective appellate review" and could not be required to pay a fee for tran-

scripts needed to appeal their convictions. *Griffin*, 351 U.S. at 20. *Griffin*'s "principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way." *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971). This Court subsequently extended that principle to the habeas context, holding that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961). Although habeas corpus is "a civil action for procedural purposes, it does not follow that its availability in testing the State's right to detain an indigent prisoner may be subject to the payment of a filing fee." *Id.* at 712 (citation omitted).

In addition to criminal appeals and habeas actions, an indigent prisoner also has a right to access courts to bring civil rights actions and appeals asserting constitutional claims. After all, the "right of access to the courts . . . assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff*, 418 U.S. at 579. For that reason, there is "no reasonable distinction between" habeas and civil rights actions, and the right of court access includes all litigation related to "basic constitutional rights." *Id.*; *see City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) ("[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights."). In short, although the Constitution "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims," it does require that they be pro-

vided "[t]he tools . . . [they] need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Lewis v. Casey*, 518 U.S. 343, 355 (1996).

2. The "three strikes" provision of the PLRA denies indigent prisoners IFP status once they have on three "prior occasions" had an "action or appeal" dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). Notably, the provision acts as a total bar to bringing IFP claims in federal court even if the three prior strikes raised non-frivolous and non-malicious—albeit unsuccessful—claims. *See Neitzke*, 490 U.S. at 329 ("[A] finding of a failure to state a claim does not invariably mean that the claim is without arguable merit."). "Even a new, nonfrivolous claim submitted in good faith would not be heard if [a prisoner] could not meet the filing fee and cash deposit." *In re Green*, 669 F.2d 779, 786 (D.C. Cir. 1981). And while this blanket prohibition includes an exception for when "the prisoner is under imminent danger of serious physical injury," 28 U.S.C. § 1915(g), it still freezes out fundamental constitutional claims like "free speech, religious liberty, [and the] right to refuse medical treatment," *Thomas v. Holder*, 750 F.3d 899, 907 (D.C. Cir. 2014) (Tatel, J., concurring). The provision therefore makes the ability of prisoners to have their fundamental constitutional claims heard in court after three strikes "wholly contingent on one's ability to pay," *M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996).

For these reasons, numerous federal judges have expressed "grave doubts that the PLRA's three-strikes provision may be constitutionally applied to indigent prisoners who seek access to the courts in order to bring claims involving fundamental constitu-

tional rights." *Thomas*, 750 F.3d at 909 (Tatel, J., concurring); *see Abdul-Akbar v. McKelvie*, 239 F.3d 307, 319 (3d Cir. 2001) (en banc) (Mansmann, J., dissenting) (The "three strikes" provision "bar[s] the doors of our courts against a disfavored group—indigent prisoners who have resorted unsuccessfully to civil litigation—even with respect to meritorious litigation that may be their sole means of vindicating a fundamental right."); *Wilson v. Yaklich*, 148 F.3d 596, 606 (6th Cir. 1998) ("To the extent that any provisions of 28 U.S.C. § 1915(g) restrict the right to have arguably meritorious claims reviewed, those provisions could be deemed unconstitutional."); *Lyon v. Krol*, 127 F.3d 763, 766-67 (8th Cir. 1997) (Heaney, J., dissenting) (similar).

This Court has not addressed the constitutionality of the "three strikes" provision, and it need not do so in this case. But against that backdrop, it is significant that the decision of the court below imposes an even more stringent barrier on prisoners' ability to vindicate their fundamental rights in court. Reading section 1915(g), as the court below did, to prevent an indigent prisoner from obtaining IFP status to appeal a third qualifying dismissal would "completely bar[] the petitioner from obtaining any review at all" of a third dismissal, *Burns*, 360 U.S. at 258, thus "'bolt[ing] the door to equal justice' to indigent" prisoners, *Halbert*, 545 U.S. at 610 (quoting *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring in judgment)). Shutting off any appellate review for prisoners who cannot afford to pay filing fees would mean a prisoner "could not appeal [an] erroneously-issued third strike IFP." *Richey v. Dahne*, 807 F.3d 1202, 1209 (9th Cir. 2015). This would have the effect of "freez[ing] out meritorious claims [and] ossify[ing] district court errors." *Henslee v. Keller*, 681 F.3d 538, 543 (4th Cir.

2012) (quoting *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996)); *see M.L.B.*, 519 U.S. at 129 (Kennedy, J., concurring in the judgment) ("[G]iven the existing appellate structure . . . , the realities of the litigation process, and the fundamental interests at stake . . . , the State may not erect a bar in the form of transcript and filing costs beyond this petitioner's means.").

Moreover, this district court dismissal—which might never be reviewed on appeal—will forever preclude the prisoner from filing most future constitutional claims IFP. Given these stakes, there is a serious question whether construing the PLRA to preclude an indigent defendant from filing an IFP appeal of a third-strike dismissal, as the court below did, is constitutional under the Due Process and Equal Protection Clauses. *Cf. Thomas*, 750 F.3d at 908 (Tatel, J., concurring) (noting that "several Courts of Appeals have left open the possibility that a prisoner might bring a successful as-applied challenge to the PLRA's three-strikes provision").

These serious constitutional concerns should inform the statutory interpretation of the PLRA's "three strikes" provision. As this Court has repeatedly recognized, "[n]o court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830). Regardless of whether the PLRA's "three strikes" provision is facially constitutional, the interpretation adopted by the court below raises particularly serious constitutional concerns. These concerns—and the underlying constitutional values they reflect—present an additional reason why the PLRA should not be interpreted to prevent an indigent prisoner from appealing

IFP a third-strike dismissal. This Court should grant *certiorari* and reverse the decision of the court below.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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