No. 17-6064

IN THE

United States Court of Appeals for the Tenth Circuit

MARCUS D. WOODSON

Plaintiff-Appellant,

v.

TRACY MCCOLLUM, IN HER INDIVIDUAL CAPACITY, ET AL.,

Defendants-Appellees.

On Appeal from the U.S. District Court for the
Western District of Oklahoma, No. 5:17-CV-00094-D
Judge Timothy D. DeGiusti

REPLY BRIEF OF APPELLANT

Amir H. Ali
Roderick & Solange MacArthur Justice Center
718 7th Street NW
Washington D.C. 20001
P: (202) 869-3434
F: (202) 689-3435
amir.ali@macarthurjustice.org

Counsel for Appellant Marcus D. Woodson

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Defendants do not contest the operation of the plain language and statutory structure in this case: Upon Defendants' election to remove this action to federal court, Mr. Woodson was not responsible for the federal filing fee under 28 U.S.C. § 1914(a), and thus had no occasion to seek IFP status under § 1915. Under the plain terms of § 1915(g)—which is limited to cases in which a prisoner proceeds "under this section"—it has no application to this case. Opening Br. at 10-14. Thus, consistent with the position adopted by the majority of federal district courts across the country, this Court should reverse. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms" (internal quotation marks omitted)).

A minority of federal district courts (including the few relied upon by the district court here) would disconnect § 1915(g) from its text and treat this case as though Mr. Woodson were seeking IFP status, thus requiring him to pay the federal filing fee (notwithstanding that Defendants have already paid the fee) or show imminent danger. Defendants do not attempt to defend this minority position. As explained in Mr. Woodson's opening brief, it conflicts with the text and structure of §§ 1914 and 1915, Opening Br. 10-14, contravenes Congress's intent and basic

notions of federalism, Opening Br. at 14-18, and would render § 1915(g) unconstitutional, Opening Br. at 18-21.

Instead, Defendants' advance a position never adopted by any court. According to Defendants, § 1915(g) operates as some free-standing statutory provision that "places restrictions upon prisoners" who have three strikes under federal law. Appellee Br. at 5. "Because Defendants paid the filing fee upon removal," they argue, § 1915(g) requires dismissal in the absence of imminent danger of serious physical injury. Appellee Br. at 4. Defendants do not even attempt to ground this position in the statutory text or structure—indeed, in quoting § 1915(g), they conveniently omit its first clause, which limits it to "an action or proceeding *under this section*." Appellee Br. at 5. Moreover, their suggestion that § 1915(g) provides some independent basis for dismissal, rather than a limitation on federal IFP status, conflicts with this Circuit's (and every other circuit's) understanding of that subsection. *See, e.g.*, *White v. State of Colo.*, 157 F.3d 1226, 1233 (10th Cir. 1998) ("[b]y its terms, § 1915(g) 'does not prevent a prisoner with three strikes from filing civil actions; it merely prohibits him from enjoying [*in forma pauperis*] status'" (quoting *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997))).

Defendants' approach only exacerbates the problems of the minority position among district courts: Applying § 1915(g) to dismiss actions filed in state court,

pursuant to state legislatures' rules governing state IFP procedures, frustrates Congress's intent to respect the federalist court system. Their approach—which would effectively allow state actors to commit serious constitutional violations and obtain automatic dismissal of the subsequent claims at the cost of a $400 filing fee—would also render § 1915(g) patently unconstitutional.

At bottom, the district court's and Defendants' position seems to be motivated by some impression that, despite the plain terms of the statutory scheme, this is not how Congress would have wanted it to work. Appellee Br. 7; Aplt. App. 22 n.2. As Mr. Woodson and other circuits have explained, the better understanding is that this is "precisely the consequence[] intended by Congress." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 315 (3d Cir. 2001) (en banc). But even if the district court's and Defendants' speculation were correct, it would not be a basis for ignoring the plain language. As Justice Gorsuch recently explained when confronted with similar arguments: "[I]t is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

The Court should apply the plain meaning of §§ 1914 and 1915 and reverse.

ARGUMENT

I. Defendants' Position Conflicts With The Plain Language Of § 1915(g) And The Understanding Of Every Federal Circuit.

As explained in Mr. Woodson's opening brief, § 1915(g) has no application to this case based on its plain language and the statutory structure of §§ 1914 and 1915. The operation of those sections is straightforward: Section 1914 assigns the applicable federal filing fee to the party who "institute[ed] [the] civil action, suit or proceeding in [federal district] court." *Id.* § 1914(a). Section 1915 sets forth the terms whereby a party responsible for such fee can avoid prepayment through IFP status. *Id.* § 1915(a)-(b). And the plain language of the federal three-strikes provision, § 1915(g), specifies a circumstance in which a frequent-filer prisoner may not obtain IFP status to avoid prepayment—its effect is expressly limited to "an action or proceeding *under [§ 1915]*." 28 U.S.C. § 1915(g) (emphasis added). *See* Opening Br. 10-14.

The State does not (and could not) contest that, under the plain statutory language and structure, § 1915(g) has no application to this case. It is undisputed that § 1914(a) required Defendants to pay the federal filing fee and they have paid it. It is also undisputed that Mr. Woodson never sought IFP status pursuant to § 1915. He had no occasion to do so because—like any other plaintiff whose state court action is removed—he was not responsible for prepaying any federal filing fee in the first place. Section 1915(g) thus has no application. *See Bailey v. Suey*, No. 2:12-

CV-01954, 2014 WL 3897948, at *3 (D. Nev. Aug. 11, 2014) ("as a consequence of removal, 'there was, and is, no need for plaintiff to seek leave to proceed without prepayment of the filing fee pursuant to Section 1915'" (quoting *Carrea v. California*, No. EDCV 07-1148, 2010 WL 3984832, at *8 (C.D. Cal. Aug. 25, 2010))).

Instead, ignoring the statutory structure and the opening clause of § 1915(g)—which makes clear that the provision is an exception to obtaining IFP status "under [§ 1915]"—Defendants treat § 1915(g) as some free-standing basis to dismiss Mr. Woodson's claim unless he is under imminent danger. Appellee Br. at 4. Defendants do not even attempt to (and could not) ground this position in the language or structure of §§ 1914 and 1915. Indeed, their interpretation of § 1915(g) as providing for an independent basis for dismissal conflicts with this Circuit's (and every other circuit's) understanding of § 1915(g)'s operation. As this Court has previously explained, "[b]y its terms, § 1915(g) 'does not prevent a prisoner with three strikes from filing civil actions; it merely prohibits him from enjoying [*in forma pauperis*] status.'" *White*, 157 F.3d at 1233 (quoting *Carson*, 112 F.3d at 821); *see also Pigg v. F.B.I.*, 106 F.3d 1497, 1497 (10th Cir. 1997) ("Section 1915(g) . . . merely requires the full prepayment of fees where the conditions of the statute are met.").

The Fourth Circuit very recently explained the same:

> Notably, Section 1915(g) is not a basis for dismissing a claim. On the contrary, Section 1915(g) operates only to bar certain specified prisoners from proceeding in forma pauperis. 28 U.S.C. § 1915(g) (barring three-strikers from "bring[ing] a civil action or appeal[ing] a judgment in a civil action or proceeding *under this section*" (emphasis added)); *id.* § 1915 (governing "[p]roceedings in forma pauperis").

Banks v. Hornack, __ F. App'x __, 2017 WL 2788587, *2 n.2 (4th Cir. June 27, 2017); *see also, e.g.*, *Abdul-Akbar*, 239 F.3d at 314 (3d Cir.) (en banc) ("It is important to note that § 1915(g) does not block a prisoner's access to the federal courts. It only denies the prisoner the privilege of filing before he has acquired the necessary filing fee."); *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003) (subsection 1915(g) "only limits when frequent filers can proceed IFP"); *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997) (subsection § 1915(g) "merely affects the ability of prisoners to maintain appeals *in forma pauperis*").

II. Defendants' Position—Not Adopted By Any Court—Only Further Undermines Congress's Federalist Purpose And Renders § 1915(g) Patently Unconstitutional.

Consistent with the plain language and structure of §§ 1914 and 1915, a majority of federal district courts has concluded that § 1915(g) has no application to removed cases. *See, e.g.*, *Abreu v. Kooi*, No. 914-CV-1529, 2016 WL 4702274, at *4 (N.D.N.Y. Aug. 4, 2016) (reviewing conflicting authority, concluding that "there is no statutory basis to dismiss an action commenced in state court and for which the Defendants have paid the filing fee," and that applying § 1915(g) would frustrate

Congress's intent to allow three-strikes prisoners to file in state court); *Howard v. Braddy*, No. 5:12-CV-404 MTT, 2013 WL 5461680, at *4 (M.D. Ga. Sept. 30, 2013) ("Here, the Plaintiff is not proceeding *in forma pauperis* because the Riverbend Correctional Defendants have paid the filing fee. The clear language of the statute applies solely to actions *in forma pauperis*."); *Jae v. Stickman*, No. CIV.A. 12-1332, 2014 WL 4828877, at *1 n.1 (W.D. Pa. Sept. 29, 2014) ("Defendant . . . paid the filing fee upon removal to this Court; accordingly, Plaintiff is not proceeding *in forma pauperis*, and therefore this case is not subject to dismissal by application of the 'three strikes' provisions of Section 1915(g)"); *Bailey*, 2014 WL 3897948, at *3 (holding that § 1915(g) has no application "where a prisoner files suit in state court and the defendants elect to pay the filing fee and remove the matter to federal court"); *Carrea*, 2010 WL 3984832, at *8 ("the removal of this action rendered plaintiff's Three-Strikes status irrelevant for purposes of the filing fee that otherwise would have been required to be paid in this case"); *Pickett v. Hardy*, No. 09-1116, 2010 WL 4103712, at *3 (C.D. Ill. Oct. 18, 2010) ("since the defendants had paid the filing fee in full, and there was no cause to consider the *in forma pauperis* statute"); *Ransom v. Aguirre*, No. 1:12CV01343, 2013 WL 1338811, at *1 n.1 (E.D. Cal. Apr. 3, 2013) ("Plaintiff was deemed to be a prisoner with three strikes or more and therefore unable to proceed in forma pauperis. 28 U.S.C. § 1915(g). However,

Defendants paid the filing fee upon removal and Plaintiff's status is not relevant to this action.").

A minority of district courts—including the three cited by the district court here—have applied § 1915(g) to actions removed from state court. Those decisions, issued exclusively in *pro se* actions and without analysis of the relevant statutory text, have held that upon removal a plaintiff with three strikes must either pay a federal filing fee (notwithstanding that it had already been paid by the defendants) or show an imminent danger. *See Lynn v. Peltzer*, No. 16-3096-JTM-DJW, 2016 WL 4060272, at *3 (D. Kan. July 29, 2016) (dismissing removed action because plaintiff "has not prepaid the $400 filing fee even though this civil action has been pending in federal court for over three months" or satisfied imminent danger exception); *Riggins v. Corizon Med. Servs.*, No. CIV.A. 12-0578-WS-M, 2012 WL 5471248, at *3 (S.D. Ala. Oct. 19, 2012) (holding, in removed action, that "[t]o avoid this action being precluded by the 'three-strikes' rule, Plaintiff can the pay the $350 filing fee or demonstrate that he is 'under imminent danger of serious of physical injury.'"); *Evans v. Bristol-Myers Squibb Co.*, 2016 WL 3184421, at *3 (D. Kan. June 8, 2016) (dismissing removed action because plaintiff "has not paid any fees associated with this action" or satisfied the imminent danger exception).[1] As

[1] Defendants erroneously describe *Evans* as holding that "[t]he fee had been paid by Defendants, so the only avenue available to Evans to continue was under the imminent danger exception." Appellee Br. at 7. That characterization (which is provided without citation) conflicts with the

explained in Mr. Woodson's opening brief (and Defendants do not contest), in addition to conflicting with the plain language of §§ 1914 and 1915, this minority position contravenes Congress's intent and basic principles of federalism, Opening Br. 14-18, and would render § 1915(g) unconstitutional, Opening Br. at 18-21.

Defendants position—that Mr. Woodson could not pursue his claims *even if he paid an additional federal filing fee* (because Defendants have already paid it) and must show imminent danger—has not been adopted by any court. And, in any case, it only exacerbates the problems discussed in Mr. Woodson's opening brief.

As Mr. Woodson explained (and Defendants do not dispute), it is well established that Congress enacted § 1915(g) with the intent of respecting federalism, by preserving the freedom of state legislatures and courts to keep their doors open through their own procedures and rules governing IFP status. Opening Br. 14-15. Defendants' approach directly undermines that purpose. If it were true that § 1915(g) operated as a basis for dismissing actions removed from state court, any such rules adopted by a state legislature would be rendered a nullity. Any time a prisoner with three strikes under the federal statute availed himself of a state's more generous procedures, the defendant would simply remove and seek dismissal under § 1915(g).

---

express reasoning of *Evans*. The court expressly stated its belief that it "must apply § 1915(g), as though [the plaintiff] originally filed in this Court" and thus dismissed the plaintiff's suit because he "has not paid any fees associated with this litigation" *or* satisfied the imminent danger requirement. 2016 WL 3184421, at *3. Similar to the district court in this case, the *Evans* court dismissed the case without prejudice so that the plaintiff could "compl[y] with § 1915(g) by paying his federal filing fees." *Id.*

The federal rule would thus effectively govern all actions filed in state court, in contravention of Congress's intent to respect the federalist court system and basic principles of federalism. *See Abdul-Akbar*, 239 F.3d at 315 (the "[p]otentially negative consequences in *federal* courts, as distinguished from *state* courts, are precisely the consequences intended by Congress" (emphasis in original)); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (recognizing the principle that state courts "have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States").

Again, that is precisely what Defendants attempt to do here: Mr. Woodson filed his action in Oklahoma state court, which determined that he should be allowed to pursue his claim under the IFP procedures adopted by the Oklahoma state legislature. Defendants now seek to invoke the federal three-strikes provision as a basis for dismissing the very claims that the Oklahoma legislature and courts sought to allow him to pursue.

Defendants' position would also render § 1915(g) patently unconstitutional. As Mr. Woodson explained (and Defendants do not dispute), multiple circuit courts have expressly relied upon the fact that a prisoner with three strikes "may seek relief in state court" in upholding the constitutionality of § 1915(g)'s limitation on federal IFP status against claims that it unduly restricts a poor person's fundamental right of access to courts. *See Abdul-Akbar*, 239 F.3d at 314-15; *Wilson v. Yaklich*, 148 F.3d

596, 605 (6th Cir. 1998) (prisoner's fundamental right of access to the courts was not infringed upon because he "still had available . . . the opportunity to litigate his federal constitutional causes of action *in forma pauperis* in state court"); *see also White*, 157 F.3d at 1234-35 (expressing agreement with *Wilson*). To interpret § 1915(g) to apply to actions filed in state court would directly undermine this foundation for § 1915(g)'s constitutionality.

Indeed, it is worth appreciating the remarkable nature of Defendants' position. Under their approach, if a three-strikes prisoner suffers serious constitutional violations, but is not in imminent danger, and he seeks relief in state court (in accordance with state procedures), he will have his claims automatically dismissed upon the defendant's unilateral decision to remove to federal court. In other words, a defendant who committed a serious constitutional violation can pay a $400 fee to obtain complete dismissal of any such allegations. That interpretation of § 1915(g) would be an egregious violation of the fundamental right of access to courts "to vindicate 'basic constitutional rights.'" *White*, 157 F.3d at 1233 (quoting *Lewis v. Casey*, 518 U.S. 343, 354 (1996)).

Both the minority position of district courts and Defendants' position here conflict with the statutory text, Congress's purpose, and the Constitution. The Court should apply the plain language of §§ 1914 and 1915, and reverse the decision below.

CONCLUSION

For the foregoing reasons and those stated in Mr. Woodson's opening brief, the Court should reverse and remand for consideration of the merits of Mr. Woodson's claims.

Dated: July 17, 2017 Respectfully submitted,

/s/ Amir H. Ali

Amir H. Ali
Roderick & Solange MacArthur Justice Center
718 7th Street NW
Washington D.C. 20001
P: (202) 869-3434
F: (202) 689-3435
Email: amir.ali@macarthurjustice.org

Counsel for Appellant Marcus D. Woodson

CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) because it contains 2,780 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: July 17, 2017

/s/ Amir H. Ali
Amir H. Ali

Counsel for Appellant Marcus D. Woodson

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

a. all required privacy redactions have been made;

b. the hard copies that have been submitted to the Clerk's Office are exact copies of the ECF filing; and

c. the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender, version 1.247.979.0, last updated July 17, 2017, and according to the program is free of viruses.

Dated: July 17, 2017

/s/ Amir H. Ali
Amir H. Ali

Counsel for Appellant Marcus D. Woodson

CERTIFICATE OF SERVICE

I certify that on July 17, 2017, I filed a true, correct, and complete copy of the foregoing Brief of Appellant with the Court and served it on the following people via the Court's ECF System:

Stefanie Erin Lawson
Office of the Attorney General for the State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
Direct: 405-522-4274
Email: stefanie.lawson@oag.ok.gov

Dated: July 17, 2017

/s/ Amir H. Ali
Amir H. Ali

Counsel for Appellant Marcus D. Woodson