No. 19-6705

IN THE

Supreme Court of the United States

KEENAN G. WILKINS,

Petitioner,

v.

J. GALVIN, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

Anton Metlitsky
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Bradley N. Garcia
Jeremy Girton
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

David M. Shapiro
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1271
david.shapiro@law.northwestern.edu

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The "three-strikes rule" under the Prison Litigation Reform Act (PLRA) prohibits a prisoner from bringing a civil action or appeal *in forma pauperis* (IFP) if the prisoner had three prior actions or appeals dismissed on enumerated grounds. To count as a strike, the prior action or appeal must have been "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). The question presented here is whether an appeal "dismissed for failure to pay … fees" qualifies as a strike under the PLRA if the court previously characterized the appeal as frivolous in deciding an earlier motion for IFP status.

In the decision below, the Ninth Circuit held that two prior dismissals for failure to pay appellate fees were strikes under the PLRA. Each case had the same procedural history. First, a two-judge panel denied petitioner IFP status after finding that the appeal was frivolous. *See Wilkins v. Cty. of Alameda* (*Wilkins I*), No. 12-16170, Dkt. 7, at *1 (Aug. 6, 2012); *Wilkins v. Cty. of Alameda* (*Wilkins II*), No. 13-17060, Dkt. 7, at *1 (Jan. 13, 2014). But instead of dismissing the appeal, the panel invited petitioner to pay the filing fee to pursue his appeal on the merits. *See Wilkins I*, Dkt. 7, at *1; *Wilkins II*, Dkt. 7, at *2. Then, after petitioner failed to pay the fee, the clerk issued a separate order declaring the appeal "dismissed for failure to pay the docketing/filing fees," citing Ninth Circuit Rule 42-1, which allows dismissal by the clerk if the appellant "fails to … pay the docket fee." *Wilkins I*, Dkt. 8, at *1 (Sept. 12, 2012); *Wilkins II*, Dkt.

10, at *1 (Mar. 17, 2014). Neither order of dismissal made any reference to the prior order denying petitioner IFP status, or to the appeal's purported frivolousness. The Ninth Circuit nonetheless concluded that each of these appeals explicitly "dismissed for failure to pay … fees" qualified as an appeal "dismissed on the grounds that it is frivolous" under Section 1915(g).

That decision cannot be squared with the PLRA's unambiguous text, which focuses solely on "the grounds" for dismissal. A dismissal for failure to pay fees does not fall into one of the PLRA's three enumerated categories of strikes. And a ruling denying IFP status does not "dismiss" the case at all, so its reasoning cannot constitute "the grounds" for dismissal, as the statute requires.

The Ninth Circuit's decision implicates an acknowledged circuit split. The Tenth and D.C. Circuits follow the Ninth Circuit's atextual approach, in conflict with the Sixth and Eleventh Circuits, which follow the statute's plain language. *Compare Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1179 (10th Cir. 2011) (counting such a dismissal as a strike); *Thompson v. DEA*, 492 F.3d 428, 433 (D.C. Cir. 2007) (same), *with Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278 (11th Cir. 2016) (concluding the opposite); *Boles v. Matthews*, 173 F.3d 854, 1999 WL 183472 (6th Cir. 1999) (unpublished table decision) (same).

This Court should grant certiorari to resolve that conflict and reverse.[1]

ARGUMENT

The disagreement in the courts of appeals over the question presented can be resolved simply by applying "what the statute literally says." *Coleman v. Tollefson*, 135 S. Ct. 1759, 1763 (2015). The rule applied by the Ninth, Tenth, and D.C. Circuits conflicts with the plain text of the PLRA. Judge William Pryor's well-reasoned opinion for the Eleventh Circuit in *Daker* (consistent with the Sixth Circuit's unpublished opinion in *Boles*), by contrast, properly holds that a prior appeal dismissed for failure to pay fees simply does not qualify as an appeal "dismissed on the grounds that it is frivolous," even if the court previously denied the prisoner IFP status based on frivolousness.

I. Contrary to respondents' arguments, *Daker* openly acknowledges the circuit split presented here. 820 F.3d at 1285. The court explained that "[t]wo of our sister circuits have held that" a dismissal for want of prosecution after a prior denial of IFP status due to frivolousness "results in a strike." *Id.* at 1284-85 (citing *Hafed*, 635 F.3d at 1179; *Thompson*, 492 F.3d at 433). But the Eleventh Circuit "respectfully disagree[d]" with the "D.C. and Tenth Circuits." *Id.* at 1285.

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[1] Petitioner presented two other questions in his petition for a writ of certiorari. This reply focuses on the second question presented in that petition.

The Eleventh Circuit disagreed because in its view—and contrary to the positions of the D.C. and Tenth Circuits—"[a] dismissal for want of prosecution, even after the denial of a petition to proceed *in forma pauperis* on the grounds of frivolousness, cannot be a strike" under the PLRA's plain text. *Id.* The court first explained that Section 1915(g)'s enumerated grounds do not include dismissals for want of prosecution or failure to pay fees, so such dismissals do not ordinarily count as strikes. *Id.* at 1283-84 (collecting cases from the Second, Seventh, Ninth, and D.C. Circuits). And although a prior order denying IFP status labeled the appeal at issue frivolous, that did not matter because that order did not dismiss the appeal; the statutory command to assess strikes only for an appeal that "was dismissed on [specific] grounds" requires the reviewing court "to find the order of dismissal and identify the grounds for that order." *Id.* at 1285.

In so holding, the Eleventh Circuit concluded that the "reasoning" of the Tenth and D.C. Circuits was "unpersuasive." *Id.* Those decisions concluded that, in these circumstances, the prior denial of IFP status for frivolousness is the "but for" cause of the subsequent dismissal for failure to pay fees, and therefore the later dismissal counts as a strike. *See Hafed*, 635 F.3d at 1179; *Thompson*, 492 F.3d at 433. Limiting the reviewing court's analysis to the actual grounds stated in the dismissal order, in those courts' view, would be "hypertechnical." *Hafed*, 635 F.3d at 1179 (quoting *Thompson*, 492 F.3d at 433).

This rationale did not move the Eleventh Circuit because "the concept of but-for causation appears nowhere in the text" of the PLRA. *Daker*, 820 F.3d at 1285. "The Act is concerned with the grounds articulated in the order, not the sequence of events that may have 'caused' the dismissal." *Id.* And "[e]ven if but-for causation were somehow relevant," the Eleventh Circuit explained, the but-for cause of the dismissal in a case like this one is the litigant's failure to pay the fee, not the prior order denying IFP status. *Id.* Ultimately, the Eleventh Circuit concluded it was bound to "interpret the statute that Congress enacted, not rewrite [its] text." *Id.* at 1286.

Respondents' efforts to distinguish *Daker* from this case are unpersuasive. *See* BIO 11-12. Although they concede that *Daker* creates a circuit split, BIO 12 n.8, respondents assert that *Daker*'s reasoning rested solely on the fact that the frivolousness determination at issue in that case was made by a single judge deciding an IFP petition, whereas this case involves IFP determinations made by two-judge appellate panels. But *Daker*'s reasoning was that an order denying an IFP petition is "not an order 'dismissing' the action or appeal," no matter how many judges adjudicate it. 820 F.3d at 1265. Here, although two-judge panels decided petitioner's IFP petitions, those panels likewise did not *dismiss* the appeals as frivolous. Maybe they could have, in which case the dismissals would count as strikes. *See* 28 U.S.C. § 1915(e)(2)(B)(i). But instead there was no dismissal for frivolousness at all. There is no serious dispute that petitioner's case would have come out differently in the Eleventh Circuit—which recognizes that "the

concept of but-for causation appears nowhere in the text" of the PLRA, *Daker*, 820 F.3d at 1285—than under the Ninth, Tenth and D.C. Circuits' "but for" causation test.

In an unpublished decision addressing the same issue, the Sixth Circuit endorsed the same straightforward, textual approach as *Daker*. In *Boles v. Matthews*, 173 F.3d 854, 1999 WL 183472 (6th Cir. 1999) (unpublished table decision),[2] the court confronted an appellate dismissal for failure to pay fees after the district court certified that any appeal would be "frivolous," which prohibited the prisoner from obtaining IFP status on appeal under 28 U.S.C. § 1915(a)(3). *See Boles v. Bradley*, No. 2:93-cv-2939, Dkt. 38, at 12 (W.D. Tenn. Jan. 31, 1995). Like the Eleventh Circuit, the Sixth Circuit rejected the argument that the prior appellate dismissal should count as a strike based on the prior frivolousness finding. The dismissal order, the court explained, did not make "any reference to the nature of the underlying action or appeal as frivolous, malicious, or one that fails to state a claim for relief." 1999 WL 183472, at *2. Under the plain language of the PLRA, that does not count as a strike.

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[2] Unpublished decisions in the Sixth Circuit may be cited and considered by subsequent panels "for their persuasive value." *United States v. Keith*, 559 F.3d 499, 505 (6th Cir. 2009). Accordingly, "when there is no published decision on point," the Sixth Circuit typically follows a well-reasoned unpublished decision. *Hood v. Keller*, 229 F. App'x 393, 398 n.5 (6th Cir. 2007) (quotation omitted). For an example, see *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007).

Daker and *Boles* cannot be reconciled with the decision below or with *Hafed* and *Thompson*. This Court's intervention is necessary to resolve this acknowledged split of authority over the meaning of an important federal statute.

II. The opinions in *Daker* and *Boles* are also correct. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985).

Here, the statute allows a strike to be assessed only if the prior action or appeal "was 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). As then-Judge Kavanaugh has explained, that means "a case counts as a strike only if all of the claims were dismissed on grounds enumerated in the PLRA." *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1151 (D.C. Cir. 2017) (Kavanaugh, J.). And the "grounds" for a dismissal are what the dismissing court cites as "[t]he reason" for dismissing the case—i.e., whatever the dismissal order "relies on for validity." Black's Law Dictionary (11th ed. 2019). An order by the clerk dismissing an appeal for failure to pay fees under a circuit's local rules is not a dismissal on the grounds of frivolousness, regardless of what happened earlier in the case. After all, a failure to pay required fees can—and usually will—trigger dismissal even if the litigant had never sought IFP status in the first place. Thus, even under the Tenth and D.C. Circuit's reasoning, the

earlier IFP ruling is neither the dismissal's but-for cause nor its "grounds"—the failure to pay fees is.

Respondents argue for something akin to the approach that this Court applies in habeas decisions when determining "whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact" for purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA). *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018). When the state court's decision is silent as to its reasoning, this Court has instructed federal courts to "look through" to the last related decision providing a rationale and presume that the unexplained decision adopted the same reasoning. *Id.* at 1192.

However appropriate that approach may be under the differently worded AEDPA statute, it is directly contrary to the text of the PLRA, which asks whether the prior appeal "was dismissed on" one of three specified grounds. And even setting aside that fundamental textual difference, the AEDPA-type approach would not justify the result reached below. Here, the last decision of the prior court *does* state the rationale for dismissal—failure to pay fees—so there is no reason to look further back into the case's procedural history to determine what other factors may have also contributed to the dismissal. The reviewing court's role is therefore "straightforward"; it must "simply review[] the specific reasons given by the [prior] court" for its dismissal and see if those align with one of the PLRA's enumerated grounds. *Id.*; *see Daker*, 820 F.3d at 1285.

Moreover, adopting respondents' atextual "look-through" approach would invite an administrative nightmare. Already, reviewing courts must sift through old orders of dismissal to determine if they meet any of the PLRA's enumerated grounds. It would be completely unworkable to require courts to *also* search through all the other earlier orders in each case—even when the final order of dismissal plainly states its grounds—and decide whether any of those orders were the "real" cause of the later dismissal. Such an approach "runs counter to the PLRA's goals in that it will inevitably lead to more, and perhaps unnecessary, litigation on whether or not a particular dismissal constitutes a strike." *Byrd v. Shannon*, 715 F.3d 117, 126 (3d Cir. 2013).

III. Respondents argue that the Court should not grant certiorari because the question presented is unlikely to recur, petitioner's underlying constitutional claim "is likely meritless," and petitioner "has recently accrued two more PLRA strikes." BIO 12-13. None of these contentions supports denying certiorari.

First, respondents argue that the question presented is unlikely to arise with great frequency because—according to respondents—the "typical approach" is for courts to dismiss claims as frivolous rather than deny a prisoner IFP status and then separately dismiss for failure to pay fees. BIO 13. The fact that five courts of appeals have ruled on the question presented would by itself demonstrate that the issue recurs with sufficient frequency to create unwarranted and unjustified disparities among the circuits. Further, although dismissals for failure to

pay fees are exceedingly unlikely to be reported—the *Wilkins I* and *II* orders, for example, do not appear in any searchable electronic database—there are, in fact, several reported cases involving the same sequence of events, suggesting that the actual number of such orders is much larger. *See Thomas v. Yates*, 2012 WL 2520924, at *4 (E.D. Cal. June 27, 2012) (explicitly endorsing the D.C. and Tenth Circuit rule, and collecting three prior federal district court cases doing the same).[3] Indeed, a sampling of available dockets in prisoner appeals indicates the practice is in fact quite widespread, and therefore that the question whether a dismissal for failure to pay fees in such a situation constitutes a PLRA strike has and will arise with regularity.[4]

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[3] *See also Williams v. Young*, 2015 WL 12697741, at *1 (9th Cir. Sept. 18, 2015) (materially identical to *Wilkins I* and *Wilkins II*); *Robinson v. Powell*, 297 F.3d 540, 541 (7th Cir. 2002) (similar); *Austin v. Marsh*, 919 F.2d 140 (6th Cir. 1990) (similar); *Oswald v. Mich. Sup. Ct.*, 920 F.2d 933 (6th Cir. 1990) (similar); *Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997) ("In instances in which we uphold the trial court's determination that the appeal is not taken in good faith and the prisoner persists in taking an appeal on the merits, payment of the full appellate filing fees and costs, less what has already been collected, must be made within 30 days or the appeal will be dismissed for want of prosecution.").

[4] *See, e.g.*, *Garcia v. United States*, No. 16-15733, Dkt. 14 (9th Cir. Aug. 24, 2016); *Pianka v. United States*, No. 15-17423, Dkt. 6 (9th Cir. Mar. 8, 2016); *Hill v. United States*, No. 15-35913, Dkt. 4 (9th Cir. Mar. 8, 2016); *Pinson v. Davis*, Nos. 12-1213, 12-1214, 12-1215, 12-1363 (10th Cir. Jan 31, 2013); *Rushing v. Warden*, No. 12-10016 (11th Cir. June 6, 2012); *Nunez v. Warden*, No. 12-10079 (11th Cir. May 24, 2012); *Williams v.*

The IFP statute ensures that prisoners have meaningful access to the federal courts, and therefore that our legal system lives up to its commitment of "guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law." *Jones v. Bock*, 549 U.S. 199, 203 (2007). This frequently recurring question regarding the statute's interpretation warrants this Court's review.

Second, the merits of petitioner's underlying claim have no bearing on whether he was properly denied IFP status based on three prior strikes, and so pose no obstacle to this Court's resolution of the conflict in the courts of appeals over the question presented. The Ninth Circuit did not reach the merits of petitioner's constitutional claim, resolving his appeal purely on its review of the district court's IFP ruling.

Third, respondents are simply incorrect that petitioner would have any difficulty on remand due to additional strikes incurred subsequent to the filing of the underlying appeal. *See* BIO 13. As respondents tacitly acknowledge in the very same paragraph, strikes that accrue after the filing of the notice of appeal do not count toward the three-strike limit; the PLRA prohibits a prisoner from "bring[ing]" an action or appeal only when he has accrued three "prior" strikes. *Millhouse v. Heath*, 866 F.3d 152, 154 (3d Cir. 2017); *see Coleman*, 135 S. Ct. at 1765 (explaining that the rule applies to a prisoner who seeks to bring a lawsuit after "accumulat[ing] three prior qualifying dismissals").

Warden, No. 12-10015 (11th Cir. May 21, 2012); *Pearce v. Obama*, No. 12-15039, Dkt. 4 (9th Cir. Feb. 17, 2012).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Anton Metlitsky
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Bradley N. Garcia
Jeremy Girton
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

David M. Shapiro
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1271
david.shapiro@
law.northwestern.edu

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