No. 21-____

IN THE
Supreme Court of the United States

GABRIEL GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Prison Litigation Reform Act provides that a prisoner who seeks an exemption from the federal filing fee based on poverty, commonly known as *in forma pauperis* ("IFP"), will have the request denied if he "has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on" certain qualifying grounds. 28 U.S.C. § 1915(g). Federal courts are in agreement that the interpretation and application of § 1915(g) arises when a prisoner files an action and requests IFP status, at which point district courts engage in a backward-looking analysis of whether the prisoner has three prior dismissals that satisfy all of the statutory requirements, often referred to as three "strikes."

Federal circuits are deeply divided, however, as to whether upon dismissing a prisoner's lawsuit, district courts have the power to contemporaneously proclaim strikes—*i.e.*, that § 1915(g) applies to their dismissal—even though that statutory question is not yet, and may *never* be, presented. Such proclamations are generally issued *sua sponte* without any explanation. And they are frequently incorrect, creating the possibility of misleading *pro se* plaintiffs that this issue—bearing on the key to the courthouse door—has been conclusively resolved. The question presented is:

Whether federal district courts exceed their statutory or Article III power by issuing proclamations that their dismissal "counts as a 'strike' within the meaning of 28 U.S.C. § 1915(g)" even though that question is not presented and, if so, whether such *ultra vires* proclamations are immune from appellate review.

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On Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Gabriel Gonzalez petitions for a writ of certiorari to review the Eighth Circuit's judgment in this case.

OPINIONS BELOW

The Eighth Circuit's published opinion (Pet. App. 1a-9a) is available at 23 F.4th 788. The district court's order (Pet. App. 10a-11a) is unpublished and available at 2020 WL 4197065. The magistrate judge's proposed findings and recommendation (Pet. App. 12a-16a) is unpublished and available at 2020 WL 4197241.

JURISDICTION

The Eighth Circuit entered its opinion on January 12, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the U.S. Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1915(a) provides, in relevant part, that a "court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees."

28 U.S.C. § 1915(g) provides, in relevant part:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a 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 . . .

STATEMENT OF THE CASE

1. Petitioner Gabriel Gonzalez filed a *pro se* action alleging unlawful confiscation of his property by government employees at the Forrest City Low Federal Correctional Institution, under the Federal Tort Claims Act. Pet. App. 2a, 12a.

Pursuant to 28 U.S.C. § 1915A, a magistrate judge screened and recommended dismissal of petitioner's complaint. The magistrate judge reasoned that petitioner's suit was "barred by the United States' sovereign immunity and should be dismissed for lack of subject matter jurisdiction." Pet. App. 13a. The district court agreed petitioner's claim was "barred by sovereign immunity" and dismissed his suit. Pet. App. 10a.

Despite having resolved the entirety of the issues before it, the district court went on to address the separate and unpresented statutory question of whether its dismissal qualifies as a "strike" under the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915(g), which would be of consequence only if petitioner filed a civil action in the future and sought an exemption from the federal filing fee, or *in forma pauperis* ("IFP") status, in that hypothetical action. Pet. App. 11a. The district court proclaimed: "This dismissal counts as a 'strike' within the meaning of 28 U.S.C. § 1915(g)." *Id*. "So ordered." *Id*.

2. On appeal, petitioner did not contest the dismissal of the suit he brought. He argued that the district court exceeded its statutory and Article III jurisdiction by purporting to rule on the unpresented question of whether its dismissal "counts" as a strike under § 1915(g) in the event of a hypothetical future action

and IFP request. Appellant Br. 7-17. Petitioner pointed out that district courts in the Eighth Circuit issue numerous of such *ultra vires* orders to pro se prisoners every month. Appellant Br. 17-18. Petitioner also pointed out that the district court's premature, *sua sponte* interpretation of § 1915(g) was wrong under Eighth Circuit precedent holding that "[d]ismissals based on immunity are not among the types of dismissals listed as strikes in section 1915(g)." Appellant Br. 19-22 (quoting *Castillo-Alvarez v. Krukow*, 768 F.3d 1219, 1220 (8th Cir. 2014)).

Although the Government had not yet been served or appeared in the district court, it voluntarily appeared on appeal to brief the question presented. The Government did not dispute that the district court's strike declaration was entirely distinct from the merits of whether to dismiss petitioner's action or that the question was not presented. The Government argued that because a future court could disregard the strike declaration, it should be recharacterized as "in effect . . . obiter dicta." Gov't Appellee Br. 7-8, 13-15. The Government's response did not dispute that the strike proclamation was wrong because the dismissal did not in fact count as a strike under § 1915(g).

2a. In a split decision, the Eighth Circuit held that circuit courts "lack jurisdiction on appeal" to review or correct premature pronouncements of strikes against *pro se* prisoners. Pet. App. 2a.

The majority agreed with petitioner that the statutory question of whether a particular dismissal satisfies the text of § 1915(g) is not presented unless and until the prisoner chooses to file a future civil action and seeks IFP status in that future action. The majority observed that under the PLRA's text "only the

'fourth or later' judge can determine whether a prisoner is trying to 'bring a civil action' after having already done so on 'three or more prior occasions.'" Pet. App. 4a.

The majority reasoned, however, that the advisory nature of the district court's opinion insulated it from appellate review. Because the district court had answered a question that was not presented, the correct approach was to simply recast it as "a warning." *Id.* Petitioner would then "remain[] free to argue that the dismissal does *not* count as a strike, regardless of what the district court told him." *Id.*

It follows, the majority reasoned, that the federal circuits "lack jurisdiction on appeal" to correct district court orders declaring a "strike" against a *pro se* prisoner, even when that question is not presented and that declaration is incorrect. Pet. App. 5a. Because the determination pertains to a contingent future event, the issue of "whether the called strike was *correct* is not fit for judicial decision." *Id.* The court thus declined to consider petitioner's argument that the strike order was wrong.

The majority recognized that its decision conflicted with decisions of the Second, Third, and Seventh Circuits, stating that it "disagree[d]" with their analysis of the question. *See* Pet. App. 6a n.3 (citing *Dooley v. Wetzel*, 957 F.3d 366, 376-77 (3d Cir. 2020); *Deleon v. Doe*, 361 F.3d 93, 95 (2d Cir. 2004); *Hill v. Madison Cnty.*, 983 F.3d 904, 906 (7th Cir. 2020)).

Under the majority's opinion, district courts across the Eighth Circuit that have dismissed a *pro se* plaintiff's action are free to issue orders purporting to conclusively assess strikes against the plaintiff, which

would very reasonably be interpreted as pushing the federal courthouse doors one-third shut or, in the case of a plaintiff with two prior strikes, as permanently closing the federal courthouse doors. Even when such orders are incorrect, no jurisdiction lies to correct them.

2b. Judge Gruender dissented. He agreed with the majority that "the question whether the dismissal of [petitioner's] complaint counts as a strike under 28 U.S.C. § 1915(g) is unripe for adjudication." Pet. App. 6a. But in his view, the district court's ruling on that question in its order was not impervious to appellate review. Rather, he observed: "When a district court decides a question outside its jurisdiction, we have the authority to vacate the decision—even if the underlying question lies outside our jurisdiction too." Pet. App. 6a-7a. And this is so even if the district court's decision "'would have no effect on subsequent litigation.'" Pet. App. 7a (quoting *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 334-35 & n.7 (1980)).

According to Judge Gruender, "the only decision that Article III empowered the district court to make was how to dispose of [petitioner's] complaint." Pet. App. 8a. And it was inappropriate to recast the district court's mandatory language into a mere warning, so as to deprive the court of appellate jurisdiction. As Judge Gruender explained, there was "no way to read [the district court's order] as anything other than a second decision: a pronouncement that purports to settle whether the 'dismissal counts as a "strike" within the meaning of 28 U.S.C. § 1915(g).'" *Id.*

Relying on cases from the Second and Third Circuits, Judge Gruender would have held that district

courts in the Eighth Circuit may not prematurely pronounce strikes and that, if they do, appellate jurisdiction exists "to vacate the district court's order and remand with instructions to replace it with an order that does not purport to settle whether the dismissal counts as a strike." Pet. App. 7a (citing *Dooley v. Wetzel*, 957 F.3d 366, 377-78 (3d Cir. 2020); *Deleon v. Doe*, 361 F.3d 93, 95 (2d Cir. 2004)).

REASONS FOR GRANTING THE PETITION

The federal IFP statute provides that a person may seek an exemption to the federal filing fee on the basis of their poverty. *See* 28 U.S.C. § 1915(a)(1). Under the PLRA, a prisoner who files an action will be denied IFP status under this section if he "has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a 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.* § 1915(g).

For incarcerated people, the vast majority of whom are in poverty, this "three strikes" provision governs "the key to the courthouse door." *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1153 (D.C. Cir. 2017) (Kavanaugh, J.). Its application to any particular dismissal requires consideration of the text's various prerequisites, including whether the plaintiff was a "prisoner" within the statutory definition, whether he had brought "a civil action," whether the prior action was filed in "a court of the United States," and whether the prior action was "dismissed on" one of the enumerated grounds. Federal circuits have an extensive body of caselaw interpreting these terms, which has not infrequently given rise to conflicts needing this Court's intervention. *See, e.g.*, *Lomax v. Ortiz-Marquez*, 140 S.

Ct. 1721, 1724 & n.3 (2020); *see also id*. n.2; *Coleman v. Tollefson*, 135 S. Ct. 1759, 1763-64 (2015).

Federal courts agree that the PLRA's text assigns the application of § 1915(g) to the district court considering whether to grant a prisoner's request for IFP status upon the filing of a new "action or appeal." As the majority opinion below put it: "only the 'fourth or later' judge can determine whether a prisoner is trying to 'bring a civil action' after having already done so on 'three or more prior occasions.'" Pet. App. 4a (quoting *Simons v. Washington*, 996 F.3d 350, 352 (6th Cir. 2021)). The prisoner may be denied IFP status "only if the later district court *independently* determines" that the prisoner had three prior cases dismissed on qualifying grounds. *Fourstar*, 875 F.3d at 1153.

Circuits are deeply divided, however, over whether district courts exceed their statutory and/or constitutional power by pronouncing strikes before the question is presented. The majority opinion below conflicts with bedrock federal procedure, and its error carries great significance to *pro se* litigants who will continue to receive *ultra vires* court orders that are frequently incorrect and may cause them to forgo recourse for a serious civil rights violation, whether it be rape, assault, or the denial of medical care. This case squarely presents the question, and the Court should grant certiorari to resolve it.

I. The Circuits Are In Acknowledged Conflict On The Question Presented.

A. The Second, Third, and Seventh Circuits have all held that the premature pronouncement of a strike

under § 1915(g) is an advisory opinion that exceeds a district court's authority.

In *Dooley v. Wetzel*, 957 F.3d 366 (3d Cir. 2020), the Third Circuit considered precisely the question here: "whether the PLRA allows District Courts to prospectively—at the time of dismissal—label a dismissal a 'strike' for purposes of future litigation." *Id.* at 376. Like the majority and dissent below, the Third Circuit observed that the PLRA's text "contemplates a prisoner who attempts to bring a suit after having had three prior suits dismissed" and "thus envisions a determination at the time of the subsequent suit." *Id.* at 377. Accordingly, like the majority and dissent here, the Third Circuit concluded that "[a]t the time of the dismissal of [the plaintiff's] action, the question of whether that dismissal constituted a strike under § 1915(g) was premature." *Id.* "It had no immediate consequence because [the plaintiff] may never again seek to file a lawsuit" and was thus "not ripe for adjudication unless or until he seeks to file a fourth suit in forma pauperis." *Id.*

Consistent with Judge Gruender's dissent below, the Third Circuit held that the premature proclamation of a strike "would run afoul of Article III's case and controversy requirement" and, accordingly, district courts in the Third Circuit "lack[] the authority to prospectively label the dismissal a strike under the PLRA." *Id.*; *see also id.* ("We therefore hold that the District Court lacked the authority, at the time of dismissal, to declare that the dismissal constituted a 'strike' for purposes of § 1915(g).").

The Second Circuit has similarly instructed its district courts that premature adjudication of whether their own dismissals qualify as strikes "is not a proper

part of the judicial function." *Deleon v. Doe*, 361 F.3d 93, 95 (2d Cir. 2004) (quoting *Snider v. Melindez*, 199 F.3d 108, 115 (2d Cir.1999)). Like all its sibling circuits, the Second Circuit observed that whether a dismissal counts as a strike is not presented "until a defendant in a prisoner's lawsuit raises the contention that the prisoner's suit or appeal may not be maintained in forma pauperis pursuant to 28 U.S.C. § 1915." *Id.* Thus, "[l]itigation over the issue at an earlier juncture would involve the courts in disputes that might never have any practical consequence." *Id.*

The Second Circuit thus held that "it was error" for the district court to issue a "'one strike' order" against the plaintiff. *Id.* "Accordingly," the Second Circuit instructed, "district courts should not issue these strikes one by one, in their orders of judgment, as they dispose of suits that may ultimately—upon determination at the appropriate time—qualify as strikes under the terms of § 1915(g)." *Id.* The Second Circuit thus vacated that aspect of the district court's order. *Id.*

The Seventh Circuit has similarly recognized that a district court's premature proclamation of a strike under § 1915(g) "is an advisory opinion because § 1915(g) commits to a later tribunal the toting up of 'strikes' in earlier suits and appeals." *Hill v. Madison Cty., Illinois*, 983 F.3d 904, 906 (7th Cir. 2020) (citing *Wallace v. Baldwin*, 895 F.3d 481, 485 (7th Cir. 2018); *Lucien v. Jockisch*, 133 F.3d 464, 469 n.8 (7th Cir. 1998)). Accordingly, the Seventh Circuit holds that a district court pronouncing such a strike has "exceeded the authority granted by statute." *Id.* The Seventh Circuit grounded its conclusion in terms of statutory authority, rather than Article III, on the reasoning

that a district court "would have had authority" to proclaim a strike if § 1915(g) "had included one more sentence" authorizing courts to do so. *Id*. Furthermore, according to the Seventh Circuit, whether a district court exceeds its statutory authority turns on whether the strike declaration is included in the court's formal judgment, on the reasoning that judgments "are legally binding" and judicial opinions "are just explanations." *Id*. at 906.

The Seventh Circuit rejected the argument that premature strike pronouncements could be shrugged off as "dicta and hence not appealable." *Id*. at 908. The court explained that such extraneous orders could be considered dicta only "in the sense that they are not *binding* in future litigation." *Id*. However, "they still aggrieve [the plaintiff] because they draw a future judge's attention to this suit and may induce the judge to deny forma pauperis status wrongly" and "[a] strike notice causes such an injury whether or not it is conclusive." *Id*. The Seventh Circuit held that "[a]ppeal is proper when a litigant suffers a legal injury from a decision" and, accordingly, "[b]y disapproving that notice, [the court] relieve[d] [the plaintiff] of a potential obstacle to a future suit." *Id*.[1]

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[1] Although the D.C. Circuit has not squarely reviewed the propriety of contemporaneous strikes, it has expressed strong disapproval of the practice. As then-Judge Kavanaugh put it: "If Congress wanted district courts to contemporaneously label dismissals as strikes or wanted those labels to bind later district courts, Congress could have said so in the PLRA. Congress said no such thing." *Fourstar*, 875 F.3d at 1153. Indeed, the D.C. Circuit recognized that the practice of contemporaneous strike calls carries the potential for "haphazard and inequitable" consequences and

B. The Sixth and Eighth Circuits hold that district courts within their circuits are free to issue premature strike proclamations. These circuits hold that when district courts issue orders that purport to conclusively assess strikes, that declaration should be recharacterized as dicta. As a consequence, this practice is not susceptible to appellate jurisdiction, and federal circuits lack jurisdiction to correct wrong interpretations of § 1915(g).

In *Simons v. Washington*, 996 F.3d 350 (6th Cir. 2021), as here, the district court dismissed the plaintiff's action on screening. Upon doing so, the district court went on to announce: "This is a dismissal as described by 28 U.S.C. § 1915(g)." *Simons v. Washington*, No. 1:20-CV-170, 2020 WL 1861871, at *6 (W.D. Mich. Apr. 14, 2020). Or, as the Sixth Circuit summarized, "[h]aving conducted the required screening of Simons's claims, the district court addressed whether the dismissal would count as a 'strike' under 28 U.S.C. § 1915(g)" and then "ruled that it counted." *Id.* at 352.

Like all other courts, the Sixth Circuit recognized that this statutory question would not be presented unless and until a later action in which the plaintiff seeks IFP status: "§ 1915(g) calls on a fourth (or at least later) court that has before it a civil action brought by the prisoner to engage in a backwards-looking inquiry." *Id.* "The statute reserves that binding determination for the court in the fourth or later proceeding." *Id.*

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approvingly observed that "the Second Circuit has instructed district courts in that circuit not to contemporaneously label cases as strikes in the first place." *Id.*

Unlike the circuits above, however, the Sixth Circuit concluded that because the district court answered a question that was not presented, the order's mandatory language should be "cast as a warning" or "non-binding strike recommendation." *Id.* at 353. Recharacterized in that way, the district court's additional step of proclaiming a strike against the plaintiff should be considered "dicta" and thus did not run afoul of Article III. *Id.* Moreover, once a strike determination is recharacterized as dicta, federal circuit courts have "no basis" for considering whether these strike proclamations issued to *pro se* prisoners are right or wrong in their interpretation of § 1915(g). *Id.*

The Sixth Circuit recognized that other circuits had "traveled different paths" on this question. *Id.* at 353. According to the Sixth Circuit, however, allowing its district courts to continue to issue *sua sponte* strike proclamations to *pro se* prisoners effectively reached "the same bottom line" as the circuits that preclude their district courts from doing so. *Id.*

As set forth above, the Eighth Circuit majority endorsed the same move and applied it to petitioner's case. The majority recast the district court's conclusive language as a "non-binding comment" or "statement of dicta," thereby permitting district courts within the Eighth Circuit to issue such proclamations and rendering the correctness of such strike announcements unreviewable on appeal. Pet. App. 5a. The majority expressly recognized that its position was "in tension with" and required it to "disagree with" the Second, Third, and Seventh Circuits. Pet. App. at 6a n.2.

II. The Decision Below Is Manifestly Wrong.

The majority opinion below conflicts with this Court's precedent and basic principles of federal court adjudication.

All parties and courts agree that the legal question the district court purported to conclusively answer—whether its dismissal of petitioner's action "counts as a 'strike' within the meaning of 28 U.S.C. § 1915(g)," Pet. App. 11a—was not presented. As the majority and dissent below agreed, "the question whether the dismissal of [petitioner's] complaint counts as a strike under 28 U.S.C. § 1915(g) is unripe for adjudication." Pet. App. 6a (Gruender, J., dissenting).

The majority's solution was to recharacterize the district court's conclusive language as a "non-binding comment" or "statement of dicta," and therefore beyond the scope of appellate review. Pet. App. 5a. That is wrong for multiple reasons.

First, that turns Article III on its head. As the majority sees it, the fact that the district court purported to resolve a legal issue that was not presented meant that its answer to the unpresented question was dicta and therefore immune from appellate review. *See* Pet. App. 4a (explaining that the statutory question is not presented and reasoning from there that petitioner "[a]t most . . . received a warning" which "has jurisdictional consequences"). But Article III's case and controversy requirement *proscribes* federal courts from issuing advisory opinions on legal issues that are not presented; it does not say that advisory opinions are to be shrugged off as dicta that is insulated from correction.

The majority opinion lacks any limiting principle. Under its rationale, any *ultra vires* pronouncement by a federal district court would be just dicta and therefore impervious to correction on appeal. Consider a district court that dismisses a tort action brought by Company A, resolving the entire dispute before it. Under the majority opinion, the court would be free to go on to conclusively pronounce that Company A has committed any number of statutory legal violations that were not at issue in the lawsuit and would never be absent a future action. That these pronouncements meet the very definition of an advisory opinion would not render them reversible, but would render them acceptable practice and even immune to correction by federal circuit courts.

Moreover, as Judge Gruender explained, the majority's conclusion required it to construe the district court's order in a way that no reasonable person would read it (let alone a *pro se* litigant). As he observed: "the district court did not merely warn [petitioner] that a future court might count the dismissal as a strike. Instead, it stated: 'This dismissal counts as a "strike" within the meaning of 28 U.S.C. § 1915(g).'" Pet. App. 8a (Gruender, J., dissenting). It makes little sense to describe this as dicta—language meant to "explain a decision" by "clarifying or providing context for it"—because the district court's strike proclamation played no part in the explanation for dismissing petitioner's case. *Id.* As Judge Gruender put it, the district court's pronouncement that its dismissal "counts" as a strike was "neither explanatory nor constitutive of a decision on an actual case or controversy, but was instead a decision on a question unripe for adjudication." Pet. App. 8a-9a.

It is a bedrock principle of federal court adjudication that "when a district court decides a question outside its jurisdiction, [appellate courts] have the authority to vacate the decision—even if the underlying question lies outside [the appellate court's] jurisdiction too." Pet. App. 6a-7a (Gruender, J., dissenting) (citing *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21-22 (1994)). For instance, when this Court concluded that the lower courts addressed an unripe issue in *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803 (2003), it did not simply cast their analyses as dicta beyond this Court's appellate jurisdiction. Consistent with Article III, this Court "vacate[d] the judgment of the Court of Appeals insofar as it addressed the" unripe issue. *Id.* at 812. To do otherwise would grant federal district courts free reign to issue orders that exceed their constitutional authority without the possibility of correction.[2]

III. The Question Presented Is Important.

The question presented implicates a frequently recurring issue that is of immense practical importance to *pro se* prisoners and bears on the limits of federal court power.

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[2] Nor does the fact that petitioner could successfully challenge the strike determination in a future action deprive the order of finality for the purposes of this appeal. That, too, would violate basic norms of federal adjudication. "The mere fact that an order is intrinsically subject to defeat by later independent proceedings or motion to vacate does not deprive it of finality." 15B Wright & Miller, Fed. Prac. & Proc. Juris. § 3915.3 (2d ed.). Rather, "[f]inality may be found even though the order is so ineffective as to run afoul of the Article III ban on advisory opinions; any other rule would prevent courts of appeals from correcting erroneous rendition of an advisory opinion." *Id.* (footnote omitted).

Upon dismissing prisoner actions, district courts in the Sixth and Eighth Circuits routinely go on to pronounce strikes, *sua sponte* and without any reasoning. These pronouncements are frequently based on mistaken interpretations of § 1915(g) and thereby misinform *pro se* litigants. Consider one example. As then-Judge Kavanaugh observed, "the statute as written" does not ascribe a strike where the dismissing court declined to exercise supplemental jurisdiction over state law claims. *Fourstar*, 875 F.3d at 1151-52. Yet, even focusing only on that particular limitation, district courts across the Sixth and Eighth Circuits regularly pronounce incorrect strikes. *See, e.g.*, *Cole v. Smith*, No. 2:22-CV-3, 2022 WL 472959, at *4 (W.D. Mich. Feb. 16, 2022); *McDride v. Doe*, No. 4:21-CV-00042, 2021 WL 4243466, at *4 (E.D. Ark. Aug. 3, 2021); *Wade v. Stephens*, No. 1:21-CV-728, 2022 WL 368649, at *4 (W.D. Mich. Feb. 8, 2022); *Solis v. WellPath Med.*, No. 3:21-CV-53, 2021 WL 1895898, at *2 (E.D. Ark. Apr. 13, 2021), *report and recommendation adopted*, 2021 WL 1893026 (E.D. Ark. May 11, 2021); *Reese v. West*, No. 1:21-CV-492, 2022 WL 325403, at *7 (W.D. Mich. Feb. 3, 2022); *Johnson v. Summit Food Serv.*, No. 4:21-CV-04016, 2021 WL 1268285, at *5 (D.S.D. Apr. 6, 2021); *McGee v. Dawdy*, No. 1:21-CV-1017, 2022 WL 325405, at *6 (W.D. Mich. Feb. 3, 2022); *Yates v. Holloway*, No. 5:18-CV-05246, 2019 WL 406156, at *4 (W.D. Ark. Jan. 31, 2019); *Logan v. Michigan Dep't of Corr.*, No. 1:21-CV-791, 2022 WL 325404, at *12 (W.D. Mich. Feb. 3, 2022); *McPeek v. Unknown Sioux City DEA Officers*, No. C17-4011, 2017 WL 1502809, at *7 (N.D. Iowa Apr. 25, 2017); *Evans v. Rauman*, No. 2:21-CV-244, 2022 WL 304554, at *6 (W.D. Mich. Feb. 2, 2022); *Herndon v. Sices*, No. 1:21-CV-966, 2022 WL 304540, at *7 (W.D. Mich. Feb.

2, 2022). In each of these cases, courts pronounced a strike against a *pro se* litigant without any explanation and, on top of that, it was wrong.

Indeed, every case in the circuit conflict appears to have also arisen in the context of a strike pronouncement that was not only premature, but wrong. *See Dooley*, 957 F.3d at 377 n. 9; *Hill*, 983 F.3d at 907-08; *Simons*, 996 F.3d at 352 (recognizing that the district court's dismissal "declined to exercise supplemental jurisdiction over [the plaintiff's] state law claims"); *see supra* at p. 4 (explaining that the Government's brief below did not dispute that the district court's strike declaration was wrong).

Even courts in circuits that have never addressed their authority to prematurely announce strikes regularly announce wrong strikes, too.[3] And some courts go so far as to issue premature—and incorrect—pronouncements that a third strike has "BARRED" the *pro se* litigant from obtaining IFP status in a future action. *See e.g.*, *Ibenyenwa v. Wells*, No. 21-40241, 2022 WL 413941, at *2 (5th Cir. Feb. 10, 2022) (issuing order that *pro se* plaintiff is "is BARRED" from

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[3] *See, e.g.*, *Medina v. Krueger*, No. CV 21-087, 2021 WL 5999027, at *4 (D. Mont. Dec. 20, 2021) (announcing a strike even though the court declined to exercise supplemental jurisdiction over state law claims); *Allen v. Barton*, No. CV 20-890, 2022 WL 323963, at *1 (M.D. La. Feb. 2, 2022) (same); *Collins v. LeBlanc*, No. CV 21-257, 2022 WL 391492, at *1 (M.D. La. Feb. 8, 2022) (same); *Akers v. Conover*, No. CV 21-0066, 2021 WL 5298880, at *8 (D. Mont. Nov. 15, 2021) (same); *Stouffer v. Sharp*, No. CIV 20-239, 2021 WL 5759298, at *4 (E.D. Okla. Dec. 3, 2021) (same).

federal court, relying on a district court order that declined to exercise supplemental jurisdiction over certain claims); *Taylor v. LeBlanc*, 851 F. App'x 502, 503 (5th Cir. 2021) (same, relying on two dismissals that were not strikes).

These haphazard orders are concerning given that, for the vast majority of incarcerated people, the three-strikes provision controls "the key to the courthouse door." *Fourstar*, 875 F.3d at 1153 (Kavanaugh, J.). Thus, even a single strike "carries great significance." *Dooley*, 957 F.3d at 377. As Judge Callahan aptly described: "as every baseball batter knows, taking a first strike changes your approach to the next pitch." *Belanus v. Clark*, 796 F.3d 1021, 1028 (9th Cir. 2015). Thus, each strike poses a "concrete harm" that "will inevitably influence [the prisoner's] determinations to seek judicial review in a federal court on any number of issues that may arise during his sentence." *Id.*

Moreover, the vast majority of these prisoners act *pro se*. *See* Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, 28 CORR. L. REP. 69, 80 (2017) (recognizing that 93% of prisoner civil rights cases proceed *pro se*). When such litigants receive a judicial order pronouncing a strike, they would be reasonable to assume the order means what it says, and not that the order should be shrugged off as non-binding dicta. The haphazard announcement of strikes can accordingly cause a prisoner who suffers a serious rights violation—be it rape, assault, denial of medical care, or otherwise—to conclude that he should not or cannot seek relief.

If the Second and Third Circuits are correct, this is all happening beyond the confines of Article III. Arti-

cle III restricts federal courts to "Cases" and "Controversies," and precludes them from issuing advisory opinions—"advance expressions of legal judgment which remain unfocused because they are not pressed before the court." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). The judiciary is responsible for self-policing that boundary and, when lower courts are divided on the proper scope of their constitutional power, it is up to this Court to restore the constitutional balance. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501 (2006) (explaining that "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists").

The circuit conflict also implicates important separation of powers concerns, with one side allowing federal courts to usurp the regime that Congress enacted. As then-Judge Kavanaugh put it: "If Congress wanted district courts to contemporaneously label dismissals as strikes or wanted those labels to bind later district courts, Congress could have said so in the PLRA." *Fourstar*, 875 F.3d at 1153. Yet, "Congress said no such thing." *Id*. Rather, as all agree, Congress enacted a regime in which "only the 'fourth or later' judge determines" whether a dismissal counts as a strike. Pet. App. 4a. By allowing courts to freely opine on the question before it is presented and to issue "haphazard or erroneous determinations to which subsequent courts might defer," *Dooley*, 957 F.3d at 377, the Sixth and Eighth Circuits trample the scheme that Congress designed. Under that scheme, the fourth court considers the question "at a moment when it carries immediate significance," with the benefit of briefing, and "[t]he possibility for error regarding this important issue is greatly reduced." *Id*. In this way, as

then-Judge Kavanaugh observed, the Second and Third Circuit's rule avoids "a haphazard and inequitable system" and "confusion." *Fourstar*, 875 F.3d at 1153; *see also Deleon*, 361 F.3d at 95 n.1 (observing that allowing courts to opine on strikes "at a time when the ruling has no immediate consequences may . . . lead district courts to undertake such classifications carelessly, and with inadequate explanation of why a given dismissal falls into one category and not the other").

IV. This Is A Perfect Vehicle.

The question presented was the sole issue considered and resolved below. Indeed, the majority and dissent expressly divided on that question, with the majority explicitly disavowing one side of the split, Pet. App. 6a n.2, and the dissent countersigning that side, Pet. App. 7a.

Accordingly, today, district courts in states like Arkansas and Michigan exercise free—unreviewable—reign to prematurely pronounce strikes, while *pro se* litigants in states such as New York and Pennsylvania are protected from this harmful practice. The arguments in favor of both regimes have been fully aired. Only this Court can resolve the conflict.

CONCLUSION

The Court should grant certiorari.

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