No. 21-1191

In the Supreme Court of the United States

GABRIEL GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In dismissing petitioner's suit, the district court stated that the dismissal would qualify as a strike under the three-strikes provision of the Prison Litigation Reform Act, 28 U.S.C. 1915(g). The question presented is:

Whether the court of appeals erred when it determined that the district court lacked authority to make a binding determination that its dismissal would qualify as a strike, construed the relevant statement as dicta, and dismissed petitioner's appeal of that dicta for lack of jurisdiction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 23 F.4th 788. The opinion of the district court (Pet. App. 10a-16a) is not published in the Federal Supplement but is available at 2020 WL 4197241.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2022. The petition for a writ of certiorari was filed on February 25, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress enacted the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, Tit. VIII, §§ 801-810, 110 Stat. 1321-66 to 1321-77, to "reduce the quantity and improve the quality of prisoner suits." *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002). Among other

things, Congress created a screening mechanism to weed out meritless prisoner suits against the government, 28 U.S.C. 1915A(a) and (b), and it sought to deter prisoners from filing such suits in the first place through what has come to be known as the three-strikes provision, 28 U.S.C. 1915(g). Except in cases involving "imminent danger of serious physical injury," the three-strikes provision bars a prisoner from filing a suit "*in forma pauperis*"—that is, without paying filing fees—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." *Ibid.*

2. Petitioner, who is incarcerated in a federal correctional facility, filed a pro se complaint raising claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, against the United States. Pet. App. 2a, 12a. After giving petitioner an opportunity to amend his complaint to clarify his claims, D. Ct. Doc. 5, at 2 (Jan. 14, 2020), a magistrate judge recommended that the district court dismiss petitioner's amended complaint for failure to state a claim, in accordance with the PLRA's screening procedures, Pet. App. 12a-16a.

The district court adopted the magistrate judge's recommendation in a brief order dismissing petitioner's amended complaint "without prejudice for failure to state a claim." Pet. App. 10a-11a. The order further stated that "[t]his dismissal counts as a 'strike' within the meaning of 28 U.S.C. § 1915(g)." *Id.* at 11a. That characterization was not repeated in the accompanying judgment, which simply provided that petitioner's

"amended complaint is dismissed without prejudice." App., *infra*, 1a.

3. Petitioner appealed. Pet. App. 2a. He did not challenge the merits of the dismissal, but he asserted that the court of appeals was required to vacate the portion of the district court's order stating that the dismissal qualifies as a strike. Pet. C.A. Br. 6-17. Petitioner explained that the courts of appeals that had confronted the issue had unanimously recognized that the PLRA assigns authority to determine whether a dismissal qualifies as a strike to the district court charged with assessing whether the prisoner is barred from filing a fourth (or later) complaint *in forma pauperis*, rather than to the court that issues the dismissal. *Id.* at 8. Petitioner asserted that the district court had violated Article III by issuing a premature strike determination, and he argued that the only appropriate course was vacatur of the court's statement about the strike. *Id.* at 9-12.

The court of appeals dismissed the appeal for lack of appellate jurisdiction. Pet. App. 1a-6a. The court agreed with petitioner that the district court lacked authority to decide whether its dismissal would qualify as a strike. *Id.* at 4a. Looking to the decisions of its sister circuits and the text of the PLRA, the court determined that "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.'" *Ibid.* (quoting *Simons* v. *Washington*, 996 F.3d 350, 352 (6th Cir. 2021), in turn quoting 28 U.S.C. 1915(g)); see *ibid.* (citing *Hill* v. *Madison Cnty.*, 983 F.3d 904, 906 (7th Cir. 2020)).

The court of appeals disagreed, however, with petitioner's assertion that it was required to vacate the

district court's statement that the dismissal qualifies as a strike. Pet. App. 4a-6a. The court of appeals determined that, because only a later court would be authorized to decide whether the dismissal qualifies as a strike, petitioner "[a]t most * * * has received a warning" and "remains free to argue that the dismissal does *not* count as a strike, regardless of what the district court told him." *Id.* at 4a. Accordingly, the court of appeals held that petitioner "face[d] no certainly impending injury" from the district court's statement, and that it therefore lacked jurisdiction to consider whether the strike call was "correct." *Id.* at 4a-5a (citation, emphasis, and internal quotation marks omitted).

If a district court decides a case that is outside its jurisdiction, the court of appeals may "have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (citation omitted). Here, however, the court of appeals held that, although it "lack[ed] jurisdiction" to review the district court's purported strike call, the district court did not act outside its jurisdiction in making its statement about the strike in the first place. Pet. App. 5a. The court of appeals explained that the district court unquestionably had jurisdiction to decide whether to dismiss petitioner's suit for failure to state a claim. *Ibid.* The court reasoned that "[i]f, in making that determination, [the district court] said too much," that did not establish an Article III problem because the statement was best viewed as "an 'unnecessary' and non-binding comment—a statement of dicta, in other words." *Id.* at 5a (citation omitted).

The court of appeals stated, in a footnote, that its approach was in "tension" with *Dooley* v. *Wetzel*, 957 F.3d

366, 376–377 (3d Cir. 2020), *DeLeon* v. *Doe*, 361 F.3d 93, 95 (2d Cir. 2004) (per curiam), and *Hill*, 983 F.3d at 908, and it "disagreed" with those decisions to the extent they suggest that "a prematurely called strike binds anyone," or that premature strike determinations are "ripe" for appellate review. Pet. App. 6a n.3.

Judge Gruender dissented. Pet. App. 6a-8a. In his view, the district court's statement describing the dismissal as a strike was a "a second decision" that the district court lacked jurisdiction to make, and that the court of appeals was required to vacate. *Id.* at 8a.

ARGUMENT

Petitioner renews his contention that, because the district court lacked the authority to decide whether the dismissal of his complaint would qualify as a strike under Section 1915(g), the court of appeals was obligated to vacate the district court's statement characterizing the dismissal as a strike. As petitioner acknowledges (Pet. 8, 14), the court of appeals accepted his contention that the district court lacked authority to make a binding strike determination, agreeing with every other circuit to address the issue. And although the court of appeals declined to vacate the district court's statement about the strike, it did so only because it expressly construed that statement as non-binding dicta that leaves petitioner free to argue to a future court that the dismissal is not a strike, and leaves a future court free to agree. Accordingly, even if petitioner is correct that the court of appeals should have vacated the district court's statement, there is no practical significance to that alleged error; whether vacated or construed as dicta, it is now abundantly clear that the challenged statement does not constrain petitioner or other courts.

Nor is petitioner correct that the Court should grant review because of disagreement in the court of appeals or because the decision below is likely to encourage premature strike pronouncements in other cases. Petitioner exaggerates the scope and consequences of any conflict in the circuits, and the decision below—like every other decision addressing the issue—discourages district courts from purporting to issue binding premature strike determinations by making clear that they lack the authority to do so. The petition for a writ of certiorari should be denied.

1. Under 28 U.S.C. 1915(a)(1), "any court of the United States may authorize the commencement of a[] suit * * * without prepayment of fees or security therefor" where a litigant demonstrates that he "is unable to pay such fees." *Ibid.* The PLRA places an important limit on a court's authority to grant *in forma pauperis* status, providing that "[i]n no event shall a prisoner" file a complaint without paying the fee if he has "on 3 or more prior occasions" filed suits that were "dismissed" as "frivolous, malicious, or [for] fail[ure] to state a claim[,] * * * unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. 1915(g).

Those statutory provisions make clear that strike determinations are made by the court asked to grant *in forma pauperis* status. Section 1915(a) provides that the court in which a complaint is lodged is "authorize[d]" to decide whether the plaintiff may file that complaint *in forma pauperis*. 28 U.S.C. 1915(a)(1). And Section 1915(g) then instructs that court to deny *in forma pauperis* status to any prisoner that has had suits dismissed on specified grounds "on 3 or more prior occasions." 28 U.S.C. 1915(g). The text therefore "calls on" the court considering whether to dispense with the

filing fees "to engage in a backwards-looking inquiry" to decide whether at least three prior suits were dismissed for qualifying reasons. *Simons* v. *Washington*, 996 F.3d 350, 352 (6th Cir. 2021).

As petitioner acknowledges (Pet. 8), "[f]ederal courts agree" on that point. Indeed, every court of appeals that has addressed the question has held that Section 1915(g) assigns strike determinations to the district court assessing whether *in forma pauperis* status should be denied, rather than to the courts that issued the prior dismissals. See *Simons*, 996 F.3d at 352 (6th Cir.); *Dooley* v. *Wetzel*, 957 F.3d 366, 376 (3d Cir. 2020); *Hill* v. *Madison Cnty.*, 983 F.3d 904, 906 (7th Cir. 2020); *Fourstar* v. *Garden City Grp., Inc.*, 875 F.3d 1147, 1152 (D.C. Cir. 2017) (Kavanaugh, J.); *DeLeon* v. *Doe*, 361 F.3d 93, 95 (2d Cir. 2004).[1]

That does not mean, however, that the court that issues a dismissal is precluded from saying anything about whether the dismissal might ultimately qualify as a strike. As Chief Judge Sutton has explained, the PLRA "neither requires nor prohibits" such non-

[1] In *Belanus* v. *Clark*, 796 F.3d 1021 (2015), the Ninth Circuit appeared to assume that the district court that dismisses a case may make a binding determination on whether the dismissal counts as a strike. *Id.* at 1028. But the court did not actually decide that question, and it appears that the parties did not brief it. In other decisions, the Ninth Circuit has strongly suggested that, when it does squarely confront the issue, it will adopt the consensus view. See, *e.g.*, *Furnace* v. *Giurbino*, 838 F.3d 1019, 1029 (2016) (declining to decide whether the dismissal of a prisoner's appeal should qualify as a strike under Section 1915(g) because "[t]ypically it is not until a defendant 'challenge[s] a prisoner-plaintiff's [*in forma pauperis*] status' that a backwards-looking inquiry is done to assess" whether his prior dismissals qualify as strikes), cert. denied, 137 S. Ct. 2195 (2017) (quoting *Andrews* v. *King*, 398 F.3d 1113, 1119 n.8 (9th Cir. 2005)) (first set of brackets in original).

binding statements. *Simons*, 996 F.3d at 353. And although Article III's "case-or-controversy requirement bars federal courts from issuing binding legal rulings without a live dispute, it does not prohibit" a district court that is resolving a case within its jurisdiction from including additional statements that "amount[] to dicta." *Ibid.* To the contrary, "[s]uch non-binding statements appear all the time." *Ibid.*

In the specific context of the PLRA's three-strikes provision, such non-binding statements also have "some benefits." *Simons*, 996 F.3d at 353. They warn a litigant that he may need to change his litigation conduct to avoid losing the ability to file *in forma pauperis*. *Ibid.* And they "undoubtedly may help later district courts to identify potential strikes," *Fourstar*, 875 F.3d at 1153, because they offer "guidance about the inmate's litigation history from the informed perspective of someone who has seen the case firsthand," *Simons*, 996 F.3d at 353.

In accordance with those principles, the court of appeals correctly recognized that the district court in this case lacked the authority to make a binding determination that its dismissal would qualify as a strike. Relying on the text of Section 1915(g) and the decisions of its sister circuits, the court explained that "[l]ogically, 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*, 996 F.3d at 352, in turn quoting 28 U.S.C. 1915(g)). The court therefore determined that the district court's statement describing petitioner's dismissal as a strike should be treated as "[a]t most * * * a warning," explaining that any later judge assessing petitioner's entitlement to *in forma pauperis*

status "must still *independently* evaluate" the dismissal, and that petitioner "remains free to argue that the dismissal does *not* count as a strike." *Ibid.* (brackets, citation, and internal quotation marks omitted).

2. Despite acknowledging that "[a]ll parties and courts agree" that the district court lacked authority to decide whether its dismissal of petitioner's complaint qualifies as a strike, Pet. 14, petitioner asserts that this Court should grant the petition for a writ of certiorari because Article III required the court of appeals to vacate the district court's statement rather than construing it as dicta. That contention lacks merit. Because the court of appeals construed the statement as dicta, its decision is consistent with Article III. And even if petitioner were correct that the district court's statement is better read as a decision than as dicta, this Court does not generally grant review to correct a court of appeals' case-specific interpretation of a district court's opinion. There is no reason to depart from that practice here. To the contrary, the court of appeals' asserted error is unlikely to have meaningful consequences; any related disagreement in the court of appeals is exaggerated; and the question presented is of little practical importance.

a. As a threshold matter, petitioner errs in asserting (Pet. 14) that the court of appeals "turn[ed] Article III on its head" by construing the district court's statement about the strike as dicta and then dismissing the appeal for lack of jurisdiction. Petitioner correctly observes (*ibid.*) that Article III "*proscribes* federal courts from issuing advisory opinions." And petitioner is also correct that "when a district court decides a question outside its jurisdiction," the appellate court "ha[s] the authority to vacate the decision—even if the underlying

question" is outside the appellate court's jurisdiction as well. Pet. 16 (citation omitted); see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). But the court of appeals did not disagree with, or act contrary to, either of those principles. It merely construed the district court's description of petitioner's dismissal as an "unnecessary and non-binding comment," and appropriately declined to review such dicta. Pet. App. 5a (citation omitted).

Petitioner does not contend that courts of appeals are obliged to review and correct district-court dicta. Instead, he asserts (Pet. 15) that "no reasonable person" would construe the district court's statement in this case "as dicta," rather than as a purportedly binding determination that the dismissal qualifies as a strike. But even if petitioner is correct that—absent appellate intervention—the district court's opinion would most naturally be read as a binding strike call, there is no danger of that now because the court of appeals has issued a published decision holding otherwise. That decision plainly states that a future court must "*independently* evaluate" the dismissal, and that petitioner "remains free to argue that the dismissal does *not* count as a strike, regardless of what the district court told him." Pet. App. 4a (citation and internal quotation marks omitted).

It is unclear what more petitioner would have gained had the court of appeals adopted his favored approach and vacated the statement about the strike as an improper advisory opinion. That is particularly so because, as Chief Judge Sutton explained in *Simons*, neither the PLRA nor Article III would have prevented the district court from rephrasing the relevant statement as a non-binding recommendation or warning. 994

F.3d at 353; see p. 7-8, *supra*. Indeed, in petitioner's letter alerting the court of appeals to the *Simons* decision, petitioner appeared to embrace the position that a district court does "not exceed its authority" where it makes "only a 'non-binding recommendation.'" C.A. Doc. 5,075,929, at 1 (Sept. 13, 2021) (quoting *Simons*, 996 F.3d at 353). The court of appeals has now authoritatively construed the district court as issuing just such a non-binding statement, and petitioner's disagreement with that case-specific interpretation of the district court's opinion does not warrant this Court's review.

b. Petitioner asserts (Pet. 8-13) that this Court should grant certiorari to resolve a purported disagreement in the circuits on the question presented. But petitioner exaggerates the extent and importance of the conflict. And, significantly, he cites no decision from any court doing what he asked the Eighth Circuit to do here: entertain an appeal that did not seek to alter the district court's judgment in any way, but only to vacate a strike-call in a district court's order.

According to petitioner, "[t]he Sixth and Eighth Circuits hold that district courts within their circuits are free to issue premature strike proclamations," Pet. 12, while the Second, Third, and Seventh Circuits hold that such pronouncements are "advisory opinion[s] that exceed[] a district court's authority," Pet. 9. But, as explained, see p. 7, *supra*—and as petitioner himself elsewhere admits (Pet. 8)—every court of appeals to consider the issue agrees that a district court issuing a dismissal exceeds its authority when it purports to issue a binding strike determination. What petitioner appears to mean, then, is that the circuits disagree about whether a court of appeals should vacate a premature strike call, as the Second Circuit did in *DeLeon*, 361

F.3d at 95, or whether it should construe the premature call as dicta, as the Sixth Circuit did in *Simons* and the Eighth Circuit did here.

Even then, any disagreement is less dramatic than petitioner—and the decision below, see Pet. App. 6a n.3—suggest. Petitioner contends (Pet. 9) that the Third Circuit has held that Article III requires vacatur when a district court issues a premature strike determination. But in *Dooley*, the court did not address the appropriate remedy when a district court appropriately dismisses a case and then makes a premature strike call because the Third Circuit found that the underlying dismissal was itself in error, such that the entire judgment had to be vacated. 957 F.3d 377-378.

In *Hill*, the Seventh Circuit held that the district court "exceeded its statutory authority" when it included a premature strike determination in its *judgment*, but the Seventh Circuit also held that similarly definitive language in the accompanying opinion "was proper" because it was not "legally binding," and instead provided "notice" to the litigant and guidance to any later court making the definitive strike call. 983 F.3d at 906-907. In this case, the district court did not include any strike language in its judgment, see pp. 2-3, *supra*; rather, it merely described the dismissal as a strike in the accompanying decision, a course of action the Seventh Circuit approved.[2]

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[2] The language in the district court's opinion in *Hill* was materially identical to the language in the district court's order in this case. See *Hill* v. *Madison Cnty.*, No. 19-cv-555, 2019 WL 6878981, at *2 (S.D. Ill. Dec. 17, 2019) ("The dismissal shall also count as one of Plaintiff's three allotted 'strikes' within the meaning of 28 U.S.C. § 1915(g)."). The Seventh Circuit made clear that it would have

Finally, the Second Circuit in *DeLeon* did "vacate th[e] aspect of the judgment" reflecting what the court construed as a binding strike call. 361 F.3d at 95. But the court did not suggest that district courts lack authority to offer their views on the subject in non-binding dicta. Any disagreement between *DeLeon* and the decision below thus turns more on how to characterize the respective district courts' statements than on the applicable Article III principles.

In any event, any disagreement in the circuits regarding the approach a court of appeals should take when confronted with a premature strike determination appears to be of minimal practical significance. Because every court of appeals to consider the question has held that a district court exceeds its authority when it purports to decide whether a dismissal qualifies as a strike, district courts should be on notice that they cannot issue binding strike calls, and may only issue non-binding recommendations or warnings. And when faced with district courts that arguably purported to make binding strike calls, the Second, Third, Sixth, Seventh, and Eighth Circuits all entered decisions holding that those calls lacked binding effect. The only difference is that some of those decisions took the form of dismissals for lack of appellate jurisdiction, while others took the form of orders vacating the challenged statement or portion of the judgment. The courts have thus "reached the same bottom line," even if they have "sometimes traveled different paths." *Simons*, 996 F.3d at 353.

c. Petitioner asserts (Pet. 17-19) that the question presented is nonetheless important because *Simons*

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approved the inclusion of such a statement in the opinion, but for the court of appeals' conclusion that the dismissal did not in fact qualify as a strike. *Hill*, 983 F.3d at 908.

and the decision below purportedly encourage district courts in the Sixth and Eighth Circuits to issue strike calls phrased as binding determinations, rather than as recommendations or warnings. Petitioner is undoubtedly correct that district courts should be discouraged from phrasing non-binding statements about strikes in a way that might mislead or confuse prisoners litigating under the PLRA, many of whom are acting *pro se*.

Petitioner errs, however, in contending that *Simons* and the decision below endorse or even permit district courts to issue premature, yet purportedly definitive, strike calls. To the contrary, both decisions squarely hold that "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*, 966 F.3d at 352, in turn quoting 28 U.S.C. 1915(g)). A district court confronted with that language cannot reasonably assert that it is empowered to continue to issue purportedly binding strike determinations in its orders of dismissal.

Further, petitioner offers no meaningful empirical support for the assertion that district courts in the Sixth and Eighth Circuits will be more likely to issue improper strike calls than courts in other circuits. Petitioner cites (Pet. 17) a series of premature strike calls from district courts in the Sixth and Eighth Circuits. But he provides no indication that the overall frequency of premature calls is higher in those circuits than in the Second, Third, and Seventh Circuits, which he describes as having more favorable precedents. In addition, *Simons* and the decision below—which made clear to district courts in the Sixth and Eighth Circuits that they lack authority to issue binding strike calls—were decided in 2021 and 2022, respectively. All of petitioner's

examples from the Eighth Circuit predate the decision below. And although his examples from the Sixth Circuit postdate that court's decision in *Simons*, all of them come from a single district court (the Western District of Michigan).

Petitioner also briefly suggests (Pet. 15; see Pet. 19-20) that review of the question presented is important because, under the court of appeals' approach, "any *ultra vires* pronouncement by a federal district court" could be construed as dicta and thereby rendered "impervious to correction on appeal." Petitioner overlooks, however, that the court of appeals *did* correct the district court's alleged error in this case because it squarely determined that the district court lacked the authority to decide whether the dismissal counts as a strike. And there is nothing unusual about an appellate court declining to review district-court dicta; appellate courts, after all, "review[] judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). It is petitioner's favored approach that would disrupt settled practice by inviting litigants to lodge appeals every time they believe that an unfavorable statement in a district court opinion goes beyond the question presented.

Finally, petitioner incorrectly suggests (Pet. 20-21) that the approach in *Simons* and the decision below undermines the separation of powers by "usurp[ing] the regime that Congress enacted." Petitioner acknowledges (Pet. 20) that "all"—including the court of appeals below—"agree" that, under the regime Congress enacted, a district court that dismisses a complaint may not issue a binding determination as to whether the dismissal qualifies as a strike. In determining that the district court's purported strike call in this case was "non-

binding" the court did nothing to undermine that scheme. Pet. App. 5a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2022

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

No. 4:19-cv-881-DPM

GABRIEL GONZALEZ REG. #30515-112, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: July 21, 2020

JUDGMENT

Gonzalez's amended complaint is dismissed without prejudice.

/s/ D.P. MARSHALL Jr.
D.P. MARSHALL JR.
United States District Judge
[21 July 2020]