No. 21-1191

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

REPLY IN SUPPORT OF CERTIORARI

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The Government does not dispute that five circuits are in conflict over the question presented. Instead, it downplays "the extent and importance of the conflict." BIO 11. To do so, the Government takes the position that there is no meaningful difference between declaring that premature strike orders are "not a proper part of the judicial function," *Deleon v. Doe*, 361 F.3d 93, 95 (2d Cir. 2004), and excusing the practice as mere *dicta*—a routine and acceptable part of judicial decisionmaking. That betrays common sense. It is also divorced from reality: District courts in circuits that have declared premature strikes unconstitutional have stopped issuing them. Meanwhile, district courts in circuits that have excused the practice as *dicta* have continued it—indeed, they issue new premature strike orders to *pro se* litigants nearly every day.

The Government appears to concede that the practice of issuing premature strikes is harmful. *See* BIO 14 (admitting petitioner is "undoubtedly correct" that courts should be "discouraged" from prematurely pronouncing strikes). It does not contest that these judicial pronouncements are frequently wrong. Nor does the Government dispute that *pro se* litigants would reasonably interpret these orders to mean what they say. That should be earsplitting: the Government all but concedes that these judicial pronouncements are misinforming litigants to believe they have nearly or fully surrendered their "key to the courthouse door." *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1153 (D.C. Cir. 2017) (Kavanaugh, J.).

The Government's assertion that the question presented is "of minimal practical significance," BIO 13, is hard to take seriously for many reasons, including its own litigation decisions in this case. That included the extraordinary step of voluntarily submitting to jurisdiction and entering an appearance as an unserved party on appeal just to brief this question and advocate for the outcome it received below.

The Government does not suggest there could be any better vehicle to resolve the circuit conflict. And it does not dispute that *only* this Court can resolve it.

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

The Government does not dispute that circuits are in conflict over whether the practice of prematurely pronouncing strikes under § 1915(g) outstrips Article III or can be excused as *dicta*.

The BIO concedes that the Second and Third Circuits have instructed their district courts that issuing

premature strike orders "is not a proper part of the judicial function." Pet. 9-10 (quoting *Deleon*, 361 F.3d at 95); *Dooley v. Wetzel*, 957 F.3d 366, 376-77 (3d Cir. 2020) (instructing district courts that they may not "prospectively—at the time of dismissal—label a dismissal a 'strike' for purposes of future litigation" because doing so "would run afoul of Article III's case or controversy requirement").

The Seventh Circuit has also concluded that district courts lack authority to issue premature strikes, but grounded that decision in statutory terms and limited vacatur to circumstances in which the pronouncement of a strike is included in the formal judgment. Pet. 10-11 (discussing *Hill v. Madison Cnty.*, 983 F.3d 904, 906 (7th Cir. 2020)). Unlike the decision below, the Seventh Circuit holds that premature strikes in opinions *are* appealable—even if "dicta"—because they aggrieve litigants by "draw[ing] a future judge's attention" to the dismissal and they risk "induc[ing]" wrongful denial of IFP status. *Hill*, 983 F.3d at 908.[1]

The Sixth and Eighth Circuits have, like other circuits, recognized that the statutory text of § 1915(g) reserves binding determination of whether a strike has accrued "for the court in the fourth or later proceeding." *Simons v. Washington*, 996 F.3d 350, 352 (6th Cir. 2021); Pet. App. 4a. According to those two

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[1] The Government contends that if this Court were to endorse Judge Easterbrook's view that vacatur is appropriate only when a strike issuance is part of the formal judgment, 983 F.3d at 906, then the Government would prevail here. But as the BIO itself acknowledges, that at best shifts the Seventh Circuit to the Government's side of the conflict, *see* BIO 12 & n.2—it does nothing to minimize the *existence* of the conflict.

circuits, however, the fact that binding determination is reserved for a later court means that the premature pronouncement of a strike simply "amounts to dicta," something that happens "all the time." *Simons*, 996 F.3d at 353. Or, as the majority opinion below put it, when district courts say "too much" by pronouncing a strike upon dismissal, then the pronouncement is just "a statement of dicta," *i.e.*, "something that courts do from time to time." Pet. App. 5a. Under this approach, appellate courts also have "no basis" to correct erroneous strike pronouncements issued to litigants by their district courts. *Simons*, 996 F.3d at 354; Pet. App. 5a (concluding that "whether the called strike was *correct* is not fit for" appellate review).

2. Unable to dispute that the circuits are in conflict, the Government focuses on downplaying the "extent and importance" of it. BIO 11. To do so, the Government must take the position that there is no meaningful difference between a court of appeals instructing its district courts that the practice of announcing premature strikes is "not a proper part of the judicial function," *Deleon*, 361 F.3d at 95; *Dooley*, 957 F.3d at 377, and a court of appeals excusing that practice as mere dicta that is impervious to appellate review, Pet. App. 5a. According to the Government, the Sixth and Eighth Circuits "*did* correct the district court's alleged error" and "made clear" their district courts "lacked the authority to decide whether the dismissal counts as a strike." BIO 14, 15 (emphasis in original). This makes no sense. It is also demonstrably false and divorced from the reality of what is happening on a near daily basis within these circuits.

To begin with, this argument requires the Government to mischaracterize the Sixth and Eighth Circuit

opinions. Neither of those courts said that the district court committed an "error" or "lacked [] authority" to prematurely pronounce a strike. Quite the contrary: both circuits expressly excused premature pronouncements as dicta. To be sure, both courts recognized that *the statutory text* of § 1915(g) reserves binding determination of a strike for a later court and therefore a district court cannot "bind a later court with its strike determination." *Simons*, 996 F.3d at 352-53; Pet. App. 3a-4a. But they used that premise to hold that a district court's premature and unqualified pronouncement of a strike "amounts to dicta." *Simons*, 996 F.3d at 353. In other words, *accepting that the statutory text assigns binding determination to a future court*, one side of the conflict declares it beyond the judicial function to prematurely pronounce strikes, while the other side excuses the same practice as mere dicta.

The BIO's repeat sleight of hand is to pretend that the "alleged error" here is whether the district court's premature strike order is binding or a future court can exercise independent judgment. BIO 15; *see also* BIO 6, 8, 11, 13. That is evasive—everyone agrees the statute calls for an independent judgment. The "alleged error" is an Article III court's issuance of an order that unqualifiedly proclaims its dismissal "counts as a strike within the meaning of § 1915(g)"—a question that is not and may never be presented—*irrespective of whether that pronouncement ultimately binds a future court*. It is that exercise of judicial power that some courts have excused and others have declared unconstitutional. And it is that exercise of judicial power from which all of the significant (and conceded) harms flow. *See infra* Part II.

The idea that excusing a judicial pronouncement as mere dicta is materially the same as declaring it beyond the limits of Article III is absurd. Dicta is, by its nature, an acceptable and everyday part of judicial decisionmaking. Although the Government tries to shy away from that, the Sixth and Eighth Circuits did not. As the Sixth Circuit put it, the premature pronouncement of a strike was dicta, something that occurs "all the time." *Simons*, 996 F.3d at 353. In the Eighth Circuit majority's words, premature strikes are no different from the dicta "courts do from time to time." Pet. App. 5a. That is a far cry from saying that this exercise of judicial power violates Article III of the Constitution.

3. Unsatisfied by common sense, the Government says "empirical support" is required to appreciate the distinction between excusing this practice as "dicta" and declaring it unconstitutional. BIO 14. But the real-world implications of the circuit conflict confirm exactly what one would expect.

In the roughly one year since the Sixth Circuit issued *Simons*, its district courts have issued at least *159* new premature strike orders to *pro se* litigants, using the exact same unqualified pronouncement.[2] In other words, if the Second and Third Circuits are correct, district courts in the Sixth Circuit alone are outstripping Article III *every second or third day*. Lest that not be enough to show that excusing premature strikes as "dicta" neither put district courts "on notice"

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[2] Calculated using the following Westlaw search string among Sixth Circuit district courts: ("This is a dismissal #as described by" /s (PLRA OR 1915(g))). Given that many district court orders are not included on Westlaw, the total number may be even larger.

nor "discouraged" the practice, BIO 6, 13, 14, the number of premature strike orders *increased* after the Sixth Circuit's decision, up to 125% of what it was in the year before *Simons*. And district courts in the Eighth Circuit have already entered about *twenty* more premature strike orders to indigent prisoners just since the decision below.[3]

How many premature strike orders have district courts in the Second and Third Circuits issued over the past year? *Zero*.[4]

This is common sense: district courts heed the rule of their respective circuit court. That includes the difference between having a practice declared unconstitutional and having it excused as something that occurs "all the time." *Simons*, 996 F.3d at 353; Pet. App. 5a.[5]

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[3] Calculated using the following Westlaw search string, which captures the permutations used to pronounce strikes: ("this dismissal" OR "this action") /s ((counts constitutes) OR ((shall will should) /1 (count constitute qualify "be counted" "be considered"))) /s strike /p (PLRA 1915).

[4] Calculated using both search strings in nn. 2-3.

[5] For the sake of completeness, district courts in the Seventh Circuit's heed their circuit's rule too: they regularly pronounce that dismissals "shall count" as strikes in orders, but not in the formal judgment. *E.g.*, *Wesley v. Tazewell Cnty. States Att'y*, No. 22-CV-1073-JBM, 2022 WL 1240852, at *1 (C.D. Ill. Apr. 27, 2022); *see also Henderson v. Wall*, No. 20-1455, 2021 WL 5102915, at *2 (7th Cir. Nov. 3, 2021) (continuing to enforce this line).

II. The Question Presented Is Important.

The Government's assertion that the question presented is "of little practical importance," BIO 9, is not credible.

The BIO is willing to acknowledge that sound implementation of § 1915(g) is "important," at least insofar as the provision acts as a "limit on a court's authority to grant *in forma pauperis* status." BIO 6. What that leaves out, of course, is that for the millions of people in state and federal custody across the country, § 1915(g) regulates "the key to the courthouse door." *Fourstar*, 875 F.3d at 1153 (Kavanaugh, J.).

The Government appears to concede that for those millions of people, the premature pronouncement of strikes is deeply problematic—in the Government's words, petitioner is "undoubtedly correct" that district courts should be "discouraged" from prematurely proclaiming strikes. BIO 14. The Government does not contest that these pronouncements—appended to dismissal orders *sua sponte*, without briefing, and without any analysis of the complex statutory issues posed by § 1915(g)—are frequently wrong. Pet. 16-19. Indeed, the Government does not contest that every one of the recent strike pronouncements listed on pages 17-19 of the petition was wrong (and that list involves just one potential error). And it does not contest that this misinforms litigants, the vast majority of whom are *pro se*, as to their ability to access the courts. Pet. 19. As to these people who are misinformed that they are nearly or even fully "BARRED" from being heard by a federal court, Pet. 18-19, the Government has nothing to say.

Nor does the Government contest the magnitude of Article III infringements implicated by the conflict. To be sure, the BIO says that there is no Article III problem if the majority opinion below was correct to excuse strike pronouncements as dicta. BIO 9-10. But that just begs the question subject to conflict. If the Second Circuit, Third Circuit, and dissent below are correct, then district courts in the Sixth and Eighth Circuits, and several other jurisdictions (*see supra* pp. 6-7; Pet. 17-19), are routinely—indeed, on a near-daily basis—exceeding their constitutional authority.

The Government's representation that this case is unimportant is also not credible given its own actions in this case. As the BIO observes, the district court dismissed this case on screening, before the Government was served. *See* BIO 2; Pet. 3; 28 U.S.C. § 1915A. What the BIO omits is that the Government then voluntarily submitted to jurisdiction and entered an appearance as an unserved party on appeal solely to brief this issue. That is virtually unheard of on appeal following screening and certainly not consistent with the Government's effort to downplay the issue's importance.

III. This Is A Perfect Vehicle.

The Government does not suggest there could be any better vehicle to resolve the conflict.

The best the BIO offers is that petitioner, an indigent prisoner, should be satisfied with the ability to collaterally attack the existing strike order against him in the future by using the majority opinion's dismissal of his appeal, rather than seeking vacatur of the district court's order now. BIO 10. But that assertion could be made in response to every case seeking

review of the question presented. It effectively argues that this Court has no role to play in resolving the divergent opinions of whether premature strikes are acceptable or off-limits for the federal judiciary. To the contrary, it is precisely this Court's responsibility to police the boundaries of Article III, which means resolving whether premature strike calls are consistent with it or not.

This is also the type of problem for which the injuries and practical difficulties get worse over time. As courts continue to issue orders declaring strikes to indigent litigants, there is no effective way to undo the damage. Serious constitutional violations that go unremedied—even *unheard*—out of reliance on those orders accumulate. Statutes of limitations cannot be unwound without great disruption. The arguments on both sides of this issue have been fully aired and the Court should decide it.

IV. The Decision Below Is Manifestly Wrong.

When it reaches the merits, the Government runs away from defending the decision below on its own terms. The strongest defense it musters is that district courts should not be precluded from letting litigants know that the dismissal "*might ultimately qualify* as a strike." BIO 7 (emphasis added).

That, of course, is not what happened. The district court issued a judicial order to a *pro se* litigant stating unqualifiedly: "This dismissal counts as a 'strike' within the meaning of 28 U.S.C. § 1915(g)." Pet. App. 11a. That is what the majority opinion excused and rendered unreviewable. To borrow Judge Gruender's words, there is "no way to read this as anything other than . . . a pronouncement that purports to settle

whether the 'dismissal counts as a "strike" within the meaning of 28 U.S.C. § 1915(g).'" Pet. App. 8a.

The rest of the Government's position on the merits is gobbledygook. In places, the Government's defense is internally inconsistent. For instance, at one point, the Government suggests that strike orders like the one have "'benefits'" to litigants and courts. BIO 8 (quoting *Simons*, 996 F.3d at 353). Yet later the Government says district courts should "undoubtedly" be "discouraged" from issuing them. BIO 14. Which is it?

And the BIO seems to say that this is all just a matter of remedial discretion. According to the Government, when confronted with a district court's resolution of an unripe issue, the court of appeals *did* "ha[ve] the authority to vacate the decision" as other circuits have done, but was not "obligated to"; instead, it opted to construe the decision as dicta and therefore "appropriately declined to review" it. BIO 5, 9-10. Come again? This idea that federal courts of appeal have some unelaborated discretion to either (i) recognize the bounds of a district court's authority; or (ii) choose to overlook those bounds and surrender their appellate jurisdiction has no legal support anywhere. Tellingly, the Government cites none.

The correct, simple, and even bedrock approach is the one advocated in Judge Gruender's dissent. "[T]he only decision that Article III empowered the district court to make was how to dispose of [petitioner's] complaint." Pet. App. 8a. The district court's pronouncement of a strike was not "dicta" because it was "neither explanatory nor constitutive" of the decision before the court. *Id*. It "was instead a decision on a question unripe for adjudication." *Id*. Because the order

"exceeded the district court's subject-matter jurisdiction," the correct result was to vacate it and the court of appeals had jurisdiction to do so "even if the underlying question lies outside [its] jurisdiction too." Pet. App. 7a, 8a-9a. The Government does not offer a single critique of the dissent's analysis.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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