

CALLING STRIKES: THE SIXTH CIRCUIT'S INTERPRETATION OF THE PRISON LITIGATION REFORM ACT

Abstract: On May 3, 2021, in *Simons v. Washington*, the United States Court of Appeals for the Sixth Circuit held that a court's non-binding "strike" recommendation under the Prison Litigation Reform Act (PLRA) did not violate the PLRA or Article III of the United States Constitution. Courts agree that binding strikes are impermissible, but disagree on the underlying reasoning. The Sixth Circuit reasoned that the PLRA, which revokes *in forma pauperis* filing from indigent prisoner-litigants after three qualifying dismissals, renders binding strikes impermissible before a prisoner accrues three strikes. By resolving the issue using the PLRA, the Sixth Circuit found the constitutional inquiry unnecessary. This Comment argues that the Sixth Circuit's approach is correct because it aligns with the well-established canon of constitutional avoidance. The Sixth Circuit's approach also narrows the legal issues in a PLRA ruling, thereby communicating familiar legal principles to under-resourced prisoner-litigants.

INTRODUCTION

Baseball and the law are closely intertwined.¹ Judges serve as the umpires of the American legal system, frequently "call[ing] balls and strikes" that bind the litigants in their courtrooms.² Amassing three "strikes" under § 1915(g) of the Prison Litigation Reform Act (PLRA) means that a prisoner loses the opportunity to file suit without prepaying court fees.³ Thus, unlike baseball strikes, PLRA strikes are no game.⁴

¹ See Richard B. Allen, *Lawyers, Law, and Baseball*, 64 A.B.A. J. 1530, 1530 (1978) (discussing the relationship between law and baseball). At least one legal scholar has written about lawyers' leadership in baseball, as well as the frequent litigation stemming from the sport. See *id.* (suggesting that the law-baseball connection is natural because of frequent baseball litigation).

² Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 511 (2002) (characterizing judges as "neutral umpire[s]"). In his confirmation hearing for the United States Supreme Court, then-judge, now Chief Justice John Roberts stated, "I will remember that it's my job to call balls and strikes, and not to pitch or bat." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States Supreme Court). The law-as-baseball metaphor generally stems from the sport's cultural status as America's pastime, but baseball also has an apt connection to three strikes laws. See Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 30–31, 49 (1994) (discussing the history of baseball as a metaphor in law).

³ See 28 U.S.C. § 1915(g) (allowing federal prisoners to file *in forma pauperis* lawsuits unless and until courts dismiss three or more suits as "frivolous, malicious, or [for] fail[ure] to state a

Congress enacted the PLRA to address a proliferation of prisoner litigation.⁵ Although the United States Constitution guarantees access to the courts, exercising this right does not come without cost.⁶ Prisoners may access the legal system, but § 1915(a) of the PLRA only waives prepayment of court fees for parties with a court-granted waiver to proceed *in forma pauperis* (IFP).⁷ To proceed IFP means to initiate a lawsuit without prepaying filing fees.⁸ To reduce the volume of prisoner litigation, § 1915(g) permits courts to count qualifying dismissals of IFP prisoner suits as “strikes” against the litigant.⁹ The PLRA requires that a prisoner pay filing fees upfront if three or more of the prisoner’s federal suits were dismissed on certain qualifying grounds—effectively, striking out—under § 1915(g).¹⁰ After three strikes, an IFP prisoner-litigant loses the IFP

claim”); *In forma pauperis*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining *in forma pauperis* as the process for an impoverished litigant to bypass litigation costs); *Jones v. Bock*, 549 U.S. 199, 224 (2007) (referring to § 1915(g) as the “three strikes rule”). The term “strike” is judicially-created shorthand for § 1915(g) dismissals. *See Patton v. Jefferson Corr. Ctr.*, 136 F.3d 458, 463 n.8 (5th Cir. 1998) (describing the term “strike” as Prison Litigation Reform Act (PLRA) jargon).

⁴ *See* Molly Guptill Manning, *Access Denied: How 28 U.S.C. § 1915(g) Violates the First Amendment Rights of Indigent Prisoners*, 19 SEATTLE J. FOR SOC. JUST. 455, 460 (2021) (discussing the difficult situation prisoners face under § 1915(g)); Samuel B. Reilly, Comment, *Where Is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of the Prison Litigation Reform Act’s “Three Strikes” Rule*, 70 EMORY L.J. 755, 793–94 (2021) (contrasting a lighthearted characterization of the three strikes rule with the serious implications strikes carry for prisoners’ claims under the PLRA). Once a prisoner accrues three strikes, and is thus prohibited from filing IFP, courts cannot later remove strikes from the prisoner’s record. § 1915(g); Manning, *supra*, at 458.

⁵ *See* 141 CONG. REC. 27,042 (1995) (statement of Sen. Robert Dole) (expressing concern that frivolous prisoner lawsuits burden the judiciary’s time, finances, and other resources).

⁶ *See Bounds v. Smith*, 430 U.S. 817, 821 (1977) (recognizing the constitutional right of access to courts), *abrogated on other grounds by Lewis v. Casey*, 518 U.S. 343, 346 (1996); Rebecca Wise, Comment, *Five Proposals to Reduce Taxation of Judicial Resources and Expedite Justice in Pro Se Prisoner Civil Rights Litigation*, 52 U. TOL. L. REV. 671, 679 (2021) (explaining that, unlike non-incarcerated pro se parties, prisoners must pay court fees in full, which can cost hundreds of dollars even with prepayment waived); *Pro se*, BLACK’S LAW DICTIONARY, *supra* note 3 (defining “pro se” as representation without an attorney).

⁷ *See* § 1915(a)(1) (granting courts discretion to decide whether prisoner-litigants may proceed IFP). The term “indigent” refers to an impoverished individual or a person not capable of paying court fees. *Indigent*, BLACK’S LAW DICTIONARY, *supra* note 3.

⁸ *See* Manning, *supra* note 4, at 455 (tracing the history of IFP statutes back to 1892, when Congress decided to waive filing fees for indigent litigants); *Leave to Proceed in forma pauperis*, BLACK’S LAW DICTIONARY *supra* note 3 (defining “leave to proceed *in forma pauperis*” as an allowance for an indigent litigant to file a lawsuit without paying fees).

⁹ *See* § 1915(g) (barring further IFP filings from prisoners with at least three dismissals that were “frivolous, malicious, or fail[ed] to state a claim”); *Patton v. Jefferson Corr. Ctr.*, 136 F.3d 458, 463 n.8 (5th Cir. 1998) (noting that courts use the term “strike” to denote a PLRA dismissal).

¹⁰ § 1915(g); *see Simons v. Washington*, 996 F.3d 350, 352 (6th Cir. 2021) (distinguishing the filing requirements of an IFP prisoner from a fee-paying litigant); *see Filing Fee*, BLACK’S LAW DICTIONARY, *supra* note 3 (defining “filing fee” as an initial payment made prior to a court proceeding).

waiver permanently.¹¹ Courts have considered whether prior court-issued strikes bind the court that ultimately decides whether a prisoner may continue to proceed IFP.¹² Although their justifications differ, federal circuit courts agree that premature binding strikes are improper.¹³

In 2021, in *Simons v. Washington*, the United States Court of Appeals for the Sixth Circuit determined that premature binding strikes are impermissible under the PLRA.¹⁴ This Comment evaluates the federal circuit split over why premature binding § 1915(g) strikes are prohibited.¹⁵ Part I of this Comment provides the relevant legal background of the PLRA, the Article III “case or controversy requirement,” and *Simons v. Washington*.¹⁶ Part II describes the differing rationales of the U.S. Courts of Appeals that have found premature binding strikes unlawful.¹⁷ Finally, Part III argues that the Sixth and Seventh Circuits’ reasoning is correct because it aligns with the constitutional avoidance doctrine and provides prisoner-litigants with useful, straightforward PLRA rulings.¹⁸

I. THE LEGAL AND FACTUAL BACKGROUND OF THE PRISON LITIGATION REFORM ACT AND *SIMONS V. WASHINGTON*

In 2021, in *Simons v. Washington*, the United States Court of Appeals for the Sixth Circuit considered whether a court could dismiss a case and issue a strike that binds later courts under 28 U.S.C. § 1915(g).¹⁹ Section A of this Part discusses the history and purpose of the Prison Litigation Reform Act (PLRA).²⁰ Section B reviews the Article III “case or controversy” requirement

¹¹ See § 1915(g) (prohibiting a prisoner from proceeding without paying filing fees after three § 1915(g) dismissals occur); see, e.g., *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 (2020) (stating that the plaintiff lost IFP filing after three strikes).

¹² See *Simons*, 996 F.3d at 352 (holding that binding strikes are improper); *Hill v. Madison Cnty.*, 983 F.3d 904, 906 (7th Cir. 2020) (same); *Dooley v. Wetzel*, 957 F.3d 366, 377 (3d Cir. 2020) (same); *DeLeon v. Doe*, 361 F.3d 93, 95 (2d Cir. 2004) (per curiam) (same); *Snider v. Melindez*, 199 F.3d 108, 115 (2d Cir. 1999) (same).

¹³ Compare *Simons*, 996 F.3d at 354 (holding that binding PLRA strikes are improper under the PLRA, instead of the Constitution), and *Hill*, 983 F.3d at 906 (holding that binding strikes are impermissible because § 1915(g) requires no fewer than three strikes to bind litigants), with *Dooley*, 957 F.3d at 377 (holding that binding strikes are improper because they violate Article III of the Constitution), and *DeLeon*, 361 F.3d at 95 (holding that binding strikes are improper because they present premature legal issues).

¹⁴ 996 F.3d at 354 (holding that strikes do not bind later courts’ decisions under the text of the PLRA); see § 1915(g) (prohibiting IFP filing after a prisoner accrues at least three prior strikes).

¹⁵ See *infra* notes 19–96 and accompanying text.

¹⁶ See *infra* notes 19–48 and accompanying text.

¹⁷ See *infra* notes 49–74 and accompanying text.

¹⁸ See *infra* notes 75–96 and accompanying text.

¹⁹ *Simons v. Washington*, 996 F.3d 350, 352 (6th Cir. 2021); see 28 U.S.C. § 1915(g) (providing that three qualifying “strikes” prevent a litigant from engaging in proceedings IFP).

²⁰ See *infra* notes 23–36 and accompanying text.

and its application to PLRA strikes.²¹ Section C provides the factual and procedural background of *Simons*.²²

A. The Prison Litigation Reform Act

The federal *in forma pauperis* (IFP) statute guarantees access to the legal system for indigent litigants who would otherwise find litigation prohibitively expensive.²³ Codified under 28 U.S.C. § 1915, the IFP statute permits federal courts to waive the requisite court fees for criminal and civil suits when a prisoner files an affidavit disclosing the prisoner's assets and indigent status.²⁴ Otherwise, prisoners must pay in full upfront.²⁵ Initially, the IFP statute did not deter indigent prisoner-litigants from filing aimless claims.²⁶ In 1996, faced with burgeoning prisoner lawsuits, Congress amended the IFP statute with the PLRA to limit such cases.²⁷

²¹ See *infra* notes 37–42 and accompanying text.

²² See *infra* notes 43–48 and accompanying text.

²³ See § 1915(a)(1) (authorizing the waiver of certain legal fees for those who cannot afford legal costs); *Neitzke v. Williams*, 490 U.S. 319, 324, 330 (1989) (explaining that the IFP statute provides indigent persons with the opportunity to bring suit in federal court), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-73 to -1375 (codified at 28 U.S.C. § 1915).

²⁴ See § 1915(a)(1) (allowing waiver of court fee prepayment when a prisoner files the requisite documentation demonstrating indigency). Section 1915(h) defines “prisoner” as a person held in detention for a pending or adjudicated crime or conditional release violations. *Id.* § 1915(h). In the affidavit, the prisoner must “state the nature of the action” and that they believe relief is warranted. *Id.* § 1915(a)(1). The statute further provides that indigency must not proscribe a prisoner from filing suit or an appeal. *Id.* § 1915(b)(4). A court’s decision to waive fees is discretionary. *Id.* § 1915(a)(1); see *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (explaining that, generally, “shall” is mandatory whereas “may” is discretionary).

²⁵ § 1915(b)(1). Litigation costs increased significantly following the PLRA’s passage. See *Wise*, *supra* note 6, at 679 (noting that “the filing fee for a civil rights case” increased from \$120 in 1994 to as much as \$450 in 2021). At the same time, prisoners’ earnings decreased, meaning prisoners have less money to file lawsuits. See *id.* (explaining how the inverse financial relationship between court fees and prisoner earnings makes prisoner lawsuits more difficult to file).

²⁶ See Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 384 (1998) (stating that prisoners previously filed frivolous suits without consequence). In 1987, in *Lumbert v. Illinois Department of Corrections*, Judge Posner emphasized that litigation costs affect not only the parties to a specific suit, but such costs also indirectly impact taxpayers and other litigants. 827 F.2d 257, 259 (7th Cir. 1987).

²⁷ See generally § 1915 (imposing filing requirements on prisoner-litigants by requiring, *inter alia*, account statements and limiting prepayment waivers); *Jones v. Bock*, 549 U.S. 199, 202 (2007) (explaining that Congress’s intent in passing the PLRA was to reduce the volume of prisoner litigation); Peter Hobart, Comment, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981, 982 (1999) (stating that Congress designed the PLRA to limit baseless detainee lawsuits). According to Kansas Senator Robert Dole, in 1994, prisoners filed over 39,000 lawsuits. 141 CONG. REC. 27,042 (1995) (statement of Sen. Robert Dole). Utah Senator Orrin Hatch stated that inmate litigation, which he suggested is mostly frivolous, increased by 15% from 1993 to 1994. *Id.* (statement of Sen. Orrin Hatch). Then-Senator Joseph Biden of Delaware acknowl-

The PLRA imposes certain requirements for prisoners to file legal claims, thereby discouraging them from initiating unnecessary lawsuits.²⁸ In addition to an affidavit, § 1915(a)(1)–(2) mandates that prisoners file a prison bank account statement, known as a “trust fund account statement,” or its equivalent, to receive a waiver for upfront costs.²⁹ The court may then dismiss the case if a litigant is not indigent; the suit is “frivolous or malicious”; the suit does not state a claim; or the defendant is immune from legal action.³⁰

Especially relevant to this Comment, subsection (g) of the PLRA prohibits prisoners from further IFP filing if three or more of their suits were dismissed as “frivolous,” “malicious,” or for “fail[ure] to state a claim upon which relief may be granted.”³¹ Individual § 1915(g) dismissals prior to a

edged that there was a significant amount of prisoner litigation, but also cited cognizable prisoner claims involving abuse to show that some prisoners face legally redressable harms. *Id.* at 27,044 (statement of Sen. Joseph Biden). Senator Biden expressed concern that the amended PLRA would discourage meritorious claims. *Id.* The bill received bipartisan support and passed the Senate 79-21. 142 CONG. REC. 5,157 (1996) (Roll Vote No. 42).

²⁸ See § 1915(a)–(b), (e)(2), (g) (establishing the requirements to bring suit, such as filing affidavits and financial records); *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (listing the PLRA provisions that limit prisoner litigation, including the three strikes rule for meritless claims, a prohibition on claims for purely emotional injuries, and restrictions on attorney’s fees); *Thompson v. DEA*, 492 F.3d 428, 430 (D.C. Cir. 2007) (listing certain PLRA restrictions, including the exhaustion requirement, vetting process, and limited IFP filing); see also Molly Guptill Manning, *Trouble Counting to Three: Circuit Splits and Confusion in Interpreting the Prison Litigation Reform Act’s ‘Three Strikes Rule,’* 28 U.S.C. § 1915(G), 28 CORNELL J.L. & PUB. POL’Y 207, 212 (2018) (explaining that the goal of the PLRA is to discourage prisoner-litigant filings in the court system).

²⁹ § 1915(a)(1)–(2). The statement must include six months of financial information prior to the filing. *Id.* § 1915(a)(2). Essentially, the trust fund account is a bank account for prisoners to make purchases while incarcerated. See FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., NO. 4500.11, TRUST FUND/DEPOSIT FUND MANUAL 15 (2015), https://www.bop.gov/policy/progstat/4500_011.pdf [<https://perma.cc/KME7-WLGH>] (comparing a prisoner’s trust fund account to a bank account). Prisoners must still pay filing fees for an IFP civil suit or appeal. § 1915(b)(1). Those fees may not surpass the statutory limit set for bringing a civil suit or appealing a criminal or civil suit. *Id.* § 1915(b)(3). The current statutory filing fee for a civil suit is \$350. 28 U.S.C. § 1914(a) (setting the filing fee for any civil legal action, other than a petition for habeas relief).

³⁰ See § 1915(e)(2)(A)–(B)(iii) (stating the grounds for dismissal at any point during litigation).

³¹ *Id.* § 1915(g). The PLRA does not define the categories of dismissal. *Id.*; Manning, *supra* note 28, at 215. In 1989, in *Neitzke v. Williams*, the U.S. Supreme Court determined that, under § 1915(d), a frivolous claim exists “where it lacks an arguable basis either in law or in fact.” 490 U.S. 319, 325 (1989), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-73 to -1375 (codified at 28 U.S.C. § 1915); see also *Suit*, BLACK’S LAW DICTIONARY, *supra* note 3 (defining “frivolous suit” as a lawsuit lacking legal grounds, potentially to disturb or pursue compensation). Further, *Black’s Law Dictionary* defines “malicious” as “[s]ubstantially certain to cause injury.” *Malicious*, BLACK’S LAW DICTIONARY, *supra* note 3; see also Manning, *supra* note 28, at 217 (noting that the Third, Fifth, Eighth, and Ninth Circuits each define malicious differently). A majority of circuit courts incorporate the meaning of “fails to state a claim” from Federal Rule of Civil Procedure 12(b)(6). Manning, *supra* note 28, at 218; see FED. R. CIV. P. 12(b)(6) (outlining the grounds for granting a motion to dismiss, including for “failure to state a claim upon which relief can be granted”). In 2009, in *Ashcroft v. Iqbal*, the Supreme Court elaborated on the requirements to state a claim, explaining that the plaintiff must state a plausible claim from which the court can reasonably

court's decision to prohibit a prisoner from further IFP filing, however, do not bind later courts.³² Moreover, not all dismissals are strikes; a strike accrues only when a suit is dismissed on the grounds identified in § 1915(g).³³ If a prisoner files an IFP suit after three qualifying dismissals, the court must revoke the prisoner's IFP status.³⁴ The PLRA establishes an exception, however, for suits claiming that an impending risk of grave bodily harm exists and requires legal relief.³⁵ In addition to their ability to appeal a revocation of IFP status, litigants may also appeal individual PLRA dismissals.³⁶

B. The Article III Case or Controversy Requirement

Article III of the United States Constitution provides the powers of the federal judiciary.³⁷ It requires that a justiciable lawsuit involve a “[c]ase[]” or “[c]ontrovers[y]” that a court can legally resolve.³⁸ That case or controversy must be “ripe” for a court to rule on the issues presented, meaning that the factual and legal issues are current.³⁹ The mere possibility of an eventual issue

infer that the alleged harm occurred. 556 U.S. 662, 678 (2009). Thus, if a claim does not meet this standard, the plaintiff fails to state a claim for relief. *Id.* at 679.

³² See § 1915(g) (requiring three prior dismissals before effectively prohibiting a prisoner from further IFP filing); *Snider v. Melindez*, 199 F.3d 108, 115 (2d Cir. 1999) (questioning binding strikes' permissibility); Manning, *supra* note 28, at 215–16 (explaining that courts could simplify strikes by noting strikes contemporaneously with dismissals).

³³ See § 1915(g) (providing only three qualifying grounds for dismissal: dismissal for filing a frivolous suit, filing maliciously, or failing to state a claim); *Snider*, 199 F.3d at 115 (stating the only qualifying grounds provided by § 1915(g)).

³⁴ See § 1915(g) (prohibiting IFP filing upon a finding of three prior qualifying dismissals); *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020) (explaining that three previous qualifying dismissals prevent a prisoner from bringing an action IFP).

³⁵ See § 1915(g) (allowing prisoners to proceed IFP where they successfully claim that they are subject to dangerous conditions, necessitating immediate filing); Manning, *supra* note 28, at 210 n.17 (noting that most circuits require prisoners to plead a risk of grave bodily harm to avoid paying filing fees under the exception). This exception allows IFP prisoners to seek relief in severe circumstances. See *Asemani v. U.S. Citizenship & Immigr. Servs.*, 797 F.3d 1069, 1072 (D.C. Cir. 2015) (holding that the exception is constitutional because it affords prisoners court access when faced with imminent danger).

³⁶ See *Hill v. Madison Cnty.*, 983 F.3d 904, 908 (7th Cir. 2020) (noting that a litigant may appeal whenever they endure a legal harm and that a strike may induce such harm); see also *Wallace v. Baldwin*, 895 F.3d 481, 484 (7th Cir. 2018) (noting the plaintiff's appeal of the district court's denial of IFP status).

³⁷ U.S. CONST. art. III; see *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938 (2015) (stating the purpose of Article III and the powers of the judiciary).

³⁸ U.S. CONST. art. III, § 2; see *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (stating the Article III requirement that a litigant bring a cognizable case or controversy for which a court can provide relief); see *Justiciability*, BLACK'S LAW DICTIONARY, *supra* note 3 (defining “justiciability” as the characteristic of being fit or appropriate for legal judgment); see *Case-or-controversy Requirement*, BLACK'S LAW DICTIONARY, *supra* note 3 (defining the “case-or-controversy requirement” as the constitutional demand that a concrete dispute exist to bring suit properly in federal court).

³⁹ See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (explaining that the Constitution requires a dispute to be real and current in order for federal courts to adjudicate it); *Ripeness*,

does not create a ripe legal dispute.⁴⁰ Moreover, long-standing precedent interpreting the case or controversy requirement prohibits courts from issuing advisory opinions, which are opinions giving general legal analysis outside of the issues before a court.⁴¹ Ultimately, federal courts may only answer legal questions within the scope of their Article III powers.⁴²

C. *The Factual and Procedural History of Simons v. Washington*

The plaintiff in *Simons*, Joshua Simons, was a detainee at Bellamy Creek Correctional Facility in Ionia, Michigan.⁴³ When he broke a window at the facility, prison officials withdrew funds from his prisoner trust account to pay for the repairs.⁴⁴ Simons subsequently filed a pro se complaint against the Michigan Department of Corrections, alleging that the withdrawal of money contra-

BLACK'S LAW DICTIONARY, *supra* note 3 (defining "ripeness" as the point at which a case is ready for a court to render a decision).

⁴⁰ See *Dooley v. Wetzel*, 957 F.3d 366, 377 (3d Cir. 2020) (stating the requirement that courts address current issues, without giving opinions on issues not before the court); see also *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 579 (1985) (stating that Article III ripeness requires a "a concrete case or controversy" (citing *The Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138–39 (1974))).

⁴¹ See *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (emphasizing that common-law precedent and Article III prohibit advisory opinions); Martin H. Redish, *Constitutional Remedies as Constitutional Law*, 62 B.C. L. REV. 1865, 1874 (2021) (noting the longstanding prohibition on advisory opinions); *Opinion*, BLACK'S LAW DICTIONARY, *supra* note 3 (defining "advisory opinion" as an unconstitutional non-binding legal analysis that a court issues). Courts steadfastly prohibit advisory opinions in constitutional jurisprudence. See, e.g., *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) (collecting cases); *Ass'n of Car Wash Owners Inc. v. City of New York*, 911 F.3d 74, 85 (2d Cir. 2018) (explaining the long history of the prohibition on advisory opinions). This prohibition comes from the courts' constitutional role in adjudicating adversarial proceedings, not issuing general legal principles. Redish, *supra* at 1874 n.35 (citing 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488–89 (Henry P. Johnston ed., 1891)). ⁴² See U.S. CONST. art. III, § 2 (outlining the powers of federal courts); *Flast*, 392 U.S. at 97 (stating that the Constitution prescribes courts' specific powers and corresponding checks on those powers).

⁴² See U.S. CONST. art. III, § 2 (outlining the powers of federal courts); *Flast*, 392 U.S. at 97 (stating that the Constitution prescribes courts' specific powers and corresponding checks on those powers).

⁴³ *Simons v. Washington*, 996 F.3d 350, 351 (6th Cir. 2021). Simons's charges included, *inter alia*, attempted weapons possession as a prisoner, firearm possession as a felon, drug possession, and second-degree home invasion. *Biographical Information: Joshua David Simons*, MICH. DEP'T OF CORR., <https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=707478> <https://perma.cc/F683-KXTA>].

⁴⁴ *Simons*, 996 F.3d at 351–52. While detained, the plaintiff received approximately fifty dollars every month from his friends and family. *Id.* at 351. They deposited the money into an account for him to use in the prison store. *Id.* Because the cost of the broken window exceeded the funds in the plaintiff's account, the Michigan Department of Corrections pronounced him indigent. *Simons v. Washington*, No. 20-cv-170, 2020 WL 1861871, at *1 (W.D. Mich. Apr. 14, 2020), *aff'd*, 996 F.3d 350 (6th Cir. 2021).

vened state and federal law.⁴⁵ The U.S. District Court for the Western District of Michigan granted him IFP status but dismissed his suit for failure to state a claim.⁴⁶ The court decided that the dismissal constituted a § 1915(g) strike.⁴⁷ Simons appealed the court's issuance of a strike to the Sixth Circuit.⁴⁸

II. THE CIRCUIT SPLIT ON INTERPRETING § 1915(G) OF THE PRISON LITIGATION REFORM ACT

Several federal circuit courts have evaluated whether Article III of the United States Constitution bars binding strikes.⁴⁹ In 2004, in *DeLeon v. Doe*, the United States Court of Appeals for the Second Circuit found that binding strikes issued under 28 U.S.C. § 1915(g) are not ripe for adjudication.⁵⁰ In 2020, in *Dooley v. Wetzel*, the U.S. Court of Appeals for the Third Circuit agreed with the Second Circuit and held that the Constitution prohibits binding strikes.⁵¹ Later that year, in *Hill v. Madison County*, the U.S. Court of Appeals for the Seventh Circuit held that the PLRA, not Article III, prohibits such strikes.⁵² Section A of this Part discusses the Second and Third Circuits' constitutional analysis.⁵³ Section B addresses the Sixth and Seventh Circuits' statutory approach to the issue.⁵⁴

⁴⁵ *Simons*, 996 F.3d at 352; see *Simons*, 2020 WL 1861871, at *1–2 (alleging claims against the Michigan Department of Corrections); see *Pro se*, BLACK'S LAW DICTIONARY, *supra* note 3 (defining “pro se” as representation without an attorney). Simons alleged due process, equal protection, Fair Debt Collection Practices Act, and state law claims. *Simons*, 2020 WL 1861871, at *2.

⁴⁶ See *Simons*, 996 F.3d at 352 (noting the lower court's dismissal); *Simons*, 2020 WL 1861871, at *6 (holding that the plaintiff failed to state a claim).

⁴⁷ See *Simons*, 996 F.3d at 354 (noting that the lower court counted the dismissal as a strike).

⁴⁸ See *id.* at 352 (stating that the plaintiff appealed).

⁴⁹ See, e.g., *Snider v. Melindez*, 199 F.3d 108, 115 (2d Cir. 1999) (questioning, without deciding, the propriety of binding § 1915(g) strikes); *DeLeon v. Doe*, 361 F.3d 93, 95 (2d Cir. 2004) (per curiam) (holding that binding strikes are improper). In 1999, in *Snider v. Melindez*, the U.S. Court of Appeals for the Second Circuit questioned the permissibility of binding § 1915(g) strikes. 199 F.3d at 115. It suggested that early strikes may not be permissible because they potentially violate judges' obligation to decide current issues. *Id.* In 2004, in *DeLeon v. Doe*, the Second Circuit relied heavily on *Snider* to find binding strikes improper, implying that such strikes violate the Constitution. See 361 F.3d at 95 (quoting *Snider*, 199 F.3d at 115) (requiring determination of strikes, in accordance with *Snider*, when the issue is properly before the court).

⁵⁰ See 361 F.3d at 95 (reserving strike determinations for a later court to avoid erroneous strikes).

⁵¹ See 957 F.3d 366, 377 (3d Cir. 2020) (concluding that § 1915(g) bars premature strikes to avoid violating the Article III case or controversy requirement).

⁵² See 983 F.3d 904, 906 (7th Cir. 2020) (holding that premature binding strikes are impermissible because § 1915(g) does not bind litigants until three or more strikes occur); *Dooley*, 957 F.3d at 377 (ruling that binding strikes violate Article III); *DeLeon*, 362 F.3d at 95 (concluding that premature binding strikes are unripe).

⁵³ See *infra* notes 55–62 and accompanying text.

⁵⁴ See *infra* notes 63–74 and accompanying text.

A. The Constitutional Approach

In 2004, in *DeLeon*, the Second Circuit held that premature binding strikes are impermissible under Article III.⁵⁵ The district court issued a strike against the plaintiff, Isidoro DeLeon, on the grounds that he failed to state a cognizable claim of constitutional violations against prison mailroom staff.⁵⁶ Vacating the strike, the Second Circuit reasoned that courts should not distribute binding strikes individually because doing so addresses the litigant's future IFP status, an issue not yet before the court.⁵⁷ According to the Second Circuit, ruling on IFP status when it is not a ripe issue constitutes an advisory opinion, and therefore violates the Constitution's case or controversy requirement.⁵⁸

Subsequently, in 2020, in *Dooley*, the Third Circuit also decided that premature binding strikes are unripe issues until addressed by a fourth or later court.⁵⁹ The lower court found that the plaintiff, Casey Dooley, brought a frivolous suit and failed to state a claim, resulting in a § 1915(g) strike.⁶⁰ On appeal, however, the Third Circuit reasoned that premature strikes endanger defendants' interests and make mistaken strikes more likely.⁶¹ According to the

⁵⁵ See 361 F.3d at 95 (requiring strikes when suitable for judicial resolution).

⁵⁶ *Id.* at 94. In *DeLeon*, the prisoner-plaintiff alleged that prison mailroom employees infringed upon his First and Fourteenth Amendment rights by delaying and providing incorrect mailings. *Id.* at 94. The lower court dismissed the claims and rendered a strike. *Id.* The Second Circuit affirmed the dismissal but vacated the strike. *Id.* at 95–96.

⁵⁷ See *DeLeon*, 361 F.3d at 95 (vacating the strike and holding that courts cannot issue binding strikes because they are unripe). The Second Circuit emphasized that courts should still state the rationale behind the dismissal to guide future courts. *Id.*

⁵⁸ See U.S. CONST. art. III, § 2 (requiring a case or controversy for federal courts to adjudicate); *DeLeon*, 361 F.3d at 95 (reserving § 1915(g) evaluations for a later court and relying on *Snider* in reasoning (citing *Snider v. Melindez*, 199 F.3d 108, 115 (2d Cir. 1999))).

⁵⁹ 957 F.3d 366, 377 (3d Cir. 2020). In *Dooley*, the plaintiff, Casey Dooley, filed a deliberate indifference claim against Pennsylvania Department of Corrections (DOC) officials for failure to classify his mental health status properly. *Id.* at 369, 372. Following a criminal trial in which the jury found Dooley “guilty but mentally ill” on each count, the DOC should have classified and treated him as a “D roster” inmate. *Id.* at 370. That status would have provided Dooley with the most mental health treatment accessible. *Id.* When the DOC allegedly failed to provide those resources, Dooley proceeded through a formal grievance-filing process. *Id.* at 370–71. He then brought suit, pro se, which the DOC removed to federal court. *Id.* at 372. A magistrate judge recommended a qualifying 28 U.S.C. § 1915(g) dismissal and a corresponding strike. *Id.* at 372–73; see § 1915(g). Both parties formally objected to the magistrate judge's action, but the magistrate overruled them. *Dooley*, 957 F.3d at 373. After the district court dismissed Dooley's claim and issued a strike, Dooley appealed to the Third Circuit. *Id.* at 369–70.

⁶⁰ *Dooley*, 957 F.3d at 373 (recounting the lower court's order, which issued a strike because the suit was frivolous and failed to state a claim); see § 1915(g) (listing failure to state a claim as one of three potential grounds for issuing a strike).

⁶¹ *Dooley*, 957 F.3d at 377. The plaintiff's dismissal did not constitute a § 1915(g) strike because he did not initiate suit in federal court; rather the defendant removed the case from state court, and so § 1915(g) did not apply. *Id.* at 377 n.9; see § 1915(g) (applying explicitly to claims initiated in federal courts). The Third Circuit then held that the lower court should have granted the plaintiff leave to amend. *Dooley*, 957 F.3d at 377.

Third Circuit, because § 1915(g) requires three prior dismissals, a court issuing binding strikes any earlier provides an opinion without a case or controversy.⁶²

B. The Statutory Approach

In 2020, in *Hill*, the Seventh Circuit held that premature binding strikes violate § 1915(g) without addressing the constitutional issue.⁶³ After having his First Amendment claims against the warden and municipality dismissed, the plaintiff, Hubert Hill, appealed the strike notation in the dismissal.⁶⁴ The plaintiff argued that the decision was an unconstitutional advisory opinion.⁶⁵ The Seventh Circuit, however, decided the issue on a statutory basis, stating that the constitutional rationale was inaccurate.⁶⁶ In its analysis, the Seventh Circuit relied on *New York City Transit Authority v. Beazer*, which discussed the “last resort rule.”⁶⁷ The last resort rule is the principle that courts should default to statutory reasoning to decide legal issues and avoid unnecessarily deciding constitutional questions.⁶⁸ Applying this constitutional canon, the Seventh Circuit reasoned that because § 1915(g) does not allow courts to re-

⁶² See *Dooley*, 957 F.3d at 377 (finding that premature strikes contravene Article III). Unlike the Second Circuit in *DeLeon*, the Third Circuit in *Dooley* relied on both statutory and constitutional reasoning to conclude that premature strikes are prohibited. Compare *DeLeon*, 361 F.3d at 95 (relying on analysis of the judicial role to prohibit strikes), and *Snider*, 199 F.3d at 115 (suggesting that premature strikes may be advisory opinions), with *Dooley*, 957 F.3d at 376–77 (reasoning that § 1915(g) violates the Constitution if it permits premature strikes).

⁶³ 983 F.3d 904, 906 (7th Cir. 2020); see § 1915(g) (prohibiting further IFP filing after courts dismiss three or more of a prisoner’s IFP suits). The court decided that the judge’s non-binding statements regarding strikes were proper. *Hill*, 983 F.3d at 906.

⁶⁴ See *Hill*, 983 F.3d at 905 (stating that the plaintiff sued the warden and county for First Amendment violations). The defendants removed the case to federal court. *Id.* The lower court dismissed the suit, but allowed the plaintiff to amend his complaint to state a claim properly. *Id.* The plaintiff “did not amend his complaint [and] the judge dismissed the suit with prejudice.” *Id.*

⁶⁵ *Id.* at 906. The plaintiff also argued that the claim originated in state court and so the district court erred in issuing a strike beyond the PLRA’s scope. *Id.*; see § 1915(g) (applying specifically to claims brought in federal court).

⁶⁶ See *Hill*, 983 F.3d at 906 (reasoning that the constitutional approach is incorrect because the compulsory strike prohibition is statutory language).

⁶⁷ See *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979) (stating that courts should not engage constitutional issues when other grounds can resolve a question).

⁶⁸ See Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994) (referring to the principle of courts defaulting to non-constitutional grounds before reaching constitutional issues as the “last resort rule”); ANDREW NOLAN, CONG. RSCH. SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 15 (2014), <https://crsreports.congress.gov/product/pdf/R/R43706/3> [<https://perma.cc/TQX8-JXX5>] (describing the last resort rule as the principle that courts should not address constitutional issues unless required to do so (citing *Bond v. United States*, 572 U.S. 844, 855 (2014))). The canon of constitutional avoidance consists of many rules, including the last resort rule, condensed into a single doctrine. See Gunnar P. Seaquist, *The Constitutional Avoidance Canon of Statutory Construction*, 71 ADVOCATE: TEX. ST. BAR LITIG. REP. 25, 25 (2015) (stating that the doctrine contains a variety of rules).

voke IFP status until three strikes occur, premature strikes are improper under § 1915(g).⁶⁹

In 2021, in *Simons v. Washington*, the U.S. Court of Appeals for the Sixth Circuit also held that § 1915(g) prohibits binding strikes and thus it too avoided Article III concerns.⁷⁰ The Sixth Circuit held that a court may only issue a binding § 1915(g) strike after courts dismiss at least three of the litigant's prior suits on qualifying grounds.⁷¹ Relying on the PLRA instead of Article III, the Sixth Circuit expressly agreed with the Seventh Circuit's decision in *Hill*.⁷² Because the PLRA's text only prohibits further IFP filing after three or more strikes occur, the statutory reasoning settles the issue.⁷³ The Sixth Circuit affirmed the lower court's judgment because the strike was merely dicta and was, therefore, not binding.⁷⁴

III. THE SIXTH AND SEVENTH CIRCUITS' INTERPRETATION IS CORRECT BECAUSE IT ADHERES TO THE CONSTITUTIONAL AVOIDANCE CANON AND EFFECTIVELY INFORMS PRISONER-LITIGANTS

The United States Court of Appeals for the Second, Third, Sixth, and Seventh Circuits all agree that premature binding § 1915(g) strikes are improv-

⁶⁹ *Hill*, 983 F.3d at 906; *see* § 1915(g). Although § 1915(g) did not ultimately apply to the plaintiff in *Hill*, the court nonetheless stated that it was appropriate for courts to advise litigants on their strikes. *Hill*, 983 F.3d at 906. Even the plaintiff acknowledged that Article III permits strike notations in judicial opinions. *Id.* Including such a notation in an opinion, the Seventh Circuit held, merely helps future courts and litigants more efficiently tally strikes. *Id.* at 906–07.

⁷⁰ *See* 996 F.3d 350, 354 (6th Cir. 2021) (distinguishing its statutory reasoning from the Second and Third Circuits' constitutional rationale); *see* § 1915(g) (requiring courts to tally § 1915(g) dismissals after three or more dismissals occur). *Compare Hill*, 983 F.3d at 906 (stating, without label, the doctrine of constitutional avoidance), with *Simons*, 996 F.3d at 354 (stating that the PLRA, not the Constitution, prohibits premature strikes).

⁷¹ *Simons*, 996 F.3d at 352 (noting that the PLRA does not contemplate a loss of IFP status until at least three qualifying dismissals occur); *see* § 1915(g) (requiring that at least three dismissals occur before a court can revoke an inmate's IFP status). According to the Sixth Circuit, a court only decides whether the litigant's prior strikes prohibit further IFP filing after three or more prior § 1915(g) dismissals. *See Simons*, 996 F.3d at 352, 353 (quoting *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1149 (D.C. Cir. 2017)) (discussing the role of the third or later court, which determines when § 1915(g) becomes effective). The Sixth Circuit also considered whether § 1915(g) or Article III allowed courts merely to recommend a strike to a future court considering a prisoner-litigant's IFP filing. *Simons*, 996 F.3d at 353; *see* U.S. CONST. art. III, § 2 (prohibiting advisory opinions); § 1915(g) (requiring three prior dismissals before a court revokes a prisoner's IFP status). The Sixth Circuit found that the PLRA "neither requires nor prohibits" non-binding strike recommendations, but reasoned that such recommendations help guide litigants' and courts' decision-making. *Simons*, 996 F.3d at 353; *see* § 1915(g) (remaining silent on non-binding strikes). The Sixth Circuit then held that non-binding strikes do not violate the Constitution because they are dicta. *Simons*, 996 F.3d at 353.

⁷² *See Simons*, 996 F.3d at 354 (stating agreement with Seventh Circuit); *Hill*, 983 F.3d at 906 (explicitly relying on the PLRA, not the Constitution, to conclude that binding strikes are improper).

⁷³ *See Simons*, 996 F.3d at 354 (agreeing with the Seventh Circuit that § 1915(g) prohibits binding strikes until the litigant has three or more cases dismissed under § 1915(g)).

⁷⁴ *See id.* (holding that courts may issue strikes so long as they are dicta).

er.⁷⁵ The Sixth and Seventh Circuits' approach, however, is more constitutionally appropriate.⁷⁶ By resolving the issue of binding strikes under the PLRA, instead of the United States Constitution, the Sixth and Seventh Circuits adhere to the canon of constitutional avoidance.⁷⁷

The constitutional avoidance doctrine allows courts both to uphold the legislature's intent and interpret the Constitution as needed.⁷⁸ The canon involves a number of rules and principles, but mainly turns on whether a court can resolve an issue of potential constitutional implications on other grounds to avoid needlessly addressing major constitutional questions.⁷⁹ From this doctrine emerged the last resort rule.⁸⁰

The last resort rule remains valid but has been subject to significant criticism because invoking it potentially ignores important constitutional questions.⁸¹ As applied to § 1915(g), however, the rule allows courts to adhere to

⁷⁵ See *Simons v. Washington*, 996 F.3d 350, 353–54 (6th Cir. 2021) (finding that binding PLRA strikes are improper when issued prior to three § 1915(g) dismissals); *Hill v. Madison Cnty.*, 983 F.3d 904, 906 (7th Cir. 2020) (same); *Dooley v. Wetzel*, 957 F.3d 366, 377 (3d Cir. 2020) (same); *DeLeon v. Doe*, 361 F.3d 93, 95 (2d Cir. 2004) (per curiam) (same).

⁷⁶ See *Hill*, 983 F.3d at 906 (resolving the issue on statutory grounds); *Simons*, 996 F.3d at 354 (same); *Cnty. Ct. of Ulster Cnty. v. Allen*, 442 U.S. 140, 154 (1979) (stating courts' competing obligations both to resolve and avoid constitutional issues).

⁷⁷ See *Simons*, 996 F.3d at 352 (utilizing the statutory provision to decide the issue of § 1915(g) strikes); *Hill*, 983 F.3d at 906 (settling the PLRA strike issue on statutory grounds); Kloppenberg, *supra* note 68, at 1004 n.1 (describing the canon of constitutional avoidance as deliberate judicial aversion to constitutional questions when other resolutions exist).

⁷⁸ See generally Seaquist, *supra* note 68, at 26 (providing the historical and legal background of the constitutional avoidance doctrine). The doctrine is closely correlated with Justice Brandeis's concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (listing the constitutional avoidance principles the Supreme Court developed, including the last resort rule); Seaquist, *supra* note 68, at 26 (first citing *Ashwander*, 297 U.S. at 341–56 (Brandeis, J., concurring); and then citing *NOLAN*, *supra* note 68, at 8). Avoidance principles are well-established in American constitutional jurisprudence. See Kloppenberg, *supra* note 68, at 1004 (stating that principle extends back to the Marshall Court).

⁷⁹ See Seaquist, *supra* note 68, at 26 (suggesting that the key issues in the canon are whether the Court may resolve a potential constitutional issue on alternative bases, and, when a statute's lawfulness is questionable, whether a valid interpretation of the statute exists). The canon has both a broad view and a narrow view. Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 334 (2015), <https://harvardlawreview.org/2015/06/avoiding-constitutional-questions-versus-avoiding-unconstitutionality/> [<https://perma.cc/K64D-5GGR>]. The broad view, relevant for this Comment, encourages courts to avoid answering difficult constitutional issues when possible. *Id.* In 1989, in *Gomez v. United States*, the Supreme Court characterized this avoidance doctrine as accepted practice. See 490 U.S. 858, 864 (1989) (stating that bypassing constitutional issues is “settled policy”).

⁸⁰ See *NOLAN*, *supra* note 68, at 15 (discussing the shared origin of the last resort rule and the canon of constitutional avoidance).

⁸¹ See Kloppenberg, *supra* note 68, at 1065 (arguing that courts “should not use the last resort rule to avoid a constitutional issue”); Seaquist, *supra* note 68, at 27 (noting that the avoidance doctrine may bypass meritorious issues); Michael L. Wells, *The “Order-of-Battle” in Constitutional Litigation*, 60 SMU L. REV. 1539, 1552 (2007) (suggesting that the meaning of “necessary” constitutional issues is unclear).

Congress's intent without engaging in excessive judicial activism, facilitating the separation of powers.⁸² The last resort rule forces courts to defer to congressional intent, avoiding judicial speculation and overreach.⁸³ Even some of the last resort rule's harshest critics acknowledge the usefulness of avoidance in lower courts.⁸⁴

Both the Second and Third Circuits held that premature binding strikes are impermissible.⁸⁵ As the Seventh Circuit noted in *Hill*, however, the PLRA provides a solution: § 1915(g) is dormant until three improper legal filings occur.⁸⁶ The Third Circuit acknowledged that § 1915(g)'s text, to be effective, requires three qualifying dismissals.⁸⁷ PLRA suits are common in federal court, and the disagreement among the courts is limited to their reasoning, not their holdings.⁸⁸ Both rationales bar binding strikes, but by strictly following Congress's text, the Sixth and Seventh Circuits' reasoning avoids excessive constitutional inquiry on a frequently-litigated issue.⁸⁹

As an added benefit, resolving questions of binding § 1915(g) strikes on statutory grounds allows courts to issue narrow rulings for litigants who are—if subject to § 1915(g)—prisoners, often pro se.⁹⁰ Pro se prisoner-litigants lack

⁸² See Kloppenberg, *supra* note 68, at 1048 (calling separation of powers the strongest benefit of the last resort rule); Wells, *supra* note 81, at 1550 (listing the benefits of the last resort rule, including curbing judicial activism); *Judicial Activism*, BLACK'S LAW DICTIONARY, *supra* note 3 (defining "judicial activism" as the idea that judges decide cases on policy grounds instead of legal precedent). The rule is meant to bypass needless constitutional questions. Wells, *supra* note 81, at 1552.

⁸³ See Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 186 (describing deference to congressional intent as the Supreme Court's usual justification for the rule). The Second Circuit has also previously endorsed the rule. See *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 52 (2d Cir. 1980) (stating that courts should decide cases using authorities inferior to the Constitution where possible).

⁸⁴ See Kloppenberg, *supra* note 68, at 1034 (imploiring lower courts to exercise avoidance while recommending that the Supreme Court handle constitutional inquiries).

⁸⁵ See *Dooley v. Wetzel*, 957 F.3d 366, 377 (3d Cir. 2020) (holding that premature strikes violate Article III); *DeLeon v. Doe*, 361 F.3d 93, 95 (2d Cir. 2004) (per curiam) (same).

⁸⁶ See 28 U.S.C. § 1915(g) (allowing courts to revoke a litigant's IFP status after three or more PLRA dismissals occur); *Hill v. Madison Cnty.*, 983 F.3d 904, 906 (7th Cir. 2020) (rejecting constitutional analysis because of the available statutory resolution).

⁸⁷ See *Dooley*, 957 F.3d at 377 (noting that the statutory language specifically anticipates the requisite dismissals).

⁸⁸ See *Simons v. Washington*, 996 F.3d 350, 353–54 (6th Cir. 2021) (discussing the circuits' disagreement on reasoning); *Kuzinski*, *supra* note 26, at 363 (stating that many prisoners bring suit IFP).

⁸⁹ See *Simons*, 996 F.3d at 353–54 (explaining that different circuits employ different reasoning but reach the same conclusion); *Hill*, 983 F.3d at 906 (reasoning on statutory grounds); *Sequist*, *supra* note 68, at 27 (advocating against using the last resort rule where it would avoid invalidating an unconstitutional statute, but encouraging careful use of the rule).

⁹⁰ See § 1915(g) (providing the three strikes rule); Bloom & Hershkoff, *supra* note 2, at 479 (noting that the "majority of . . . pro se filings are by prisoners"). Simplifying the legal process supports pro se litigants generally. See Denise S. Owens, *The Reality of Pro Se Representation*, 82 MISS. L.J. SUPRA 147, 147 (2013) (analogizing proceeding pro se to playing a game without knowing the rules), available at <https://doczz.net/doc/6455992/the-reality-of-pro-se-representation--judge-denise-s.-owens>

the resources of their non-incarcerated counterparts.⁹¹ When coupled with systemic and personal challenges, the PLRA makes filing exceptionally challenging for prisoner-litigants.⁹² Courts using the case or controversy requirement to decide whether binding strikes are permissible unnecessarily complicate issues that § 1915(g) already resolves.⁹³

To ensure meaningful access to the court system for prisoner-litigants, courts should issue clear and straightforward § 1915(g) rulings, particularly given prisoner-litigants' limited number of IFP filings.⁹⁴ By utilizing only § 1915(g) to resolve legal issues concerning PLRA strikes, courts avoid addressing abstract issues of constitutionality, thereby allowing litigants to apportion their resources more effectively toward a narrower set of legal issues.⁹⁵ Pro se IFP litigants then need only comprehend § 1915(g), instead of complex questions of justiciability.⁹⁶

[<https://perma.cc/679M-QZXJ>]; see also John C. Sheldon, *Thinking Outside the Box About Pro-Se Litigation*, 23 ME. BAR J. 90, 91 (2008) (arguing in favor of simplifying the legal process for pro se litigants).

⁹¹ See Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 277–79 (2010) (outlining the obstacles that prisoners face, including a lack of legal advice, information, and trainings); Manning, *supra* note 4, at 458 (noting that prisoners, often under-resourced, may accrue strikes rapidly). Beyond lacking access to information and representation, prisoners tend to have lower rates of literacy and education completion. See Robbins, *supra*, at 279–80 (stating that 41% of incarcerated people in the United States “did not finish high school”).

⁹² See § 1915(g) (prohibiting prisoners' IFP filing after three or more qualifying dismissals); Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1207 (2020) (referring to PLRA requirements as confusing).

⁹³ See *Hill*, 983 F.3d at 906 (discussing how non-binding strikes issued pursuant to § 1915(g) provide litigants with notice and opportunity to plan their claims); Bloom & Hershkoff, *supra* note 2, at 483 (discussing the difficult nature of federal pro se litigation “given the complexity of the issues and the importance of the constitutional values”); Owens, *supra* note 90, at 159 (discussing the unique procedural and legal obstacles litigants face when proceeding pro se). *Hill* emphasized that it was not necessary to use constitutional reasoning when statutory reasoning settled the issue of binding strikes. 983 F.3d at 906.

⁹⁴ See § 1915(g) (providing three grounds for dismissal); Bloom & Hershkoff, *supra* note 2, at 483 (stating pro se litigants' difficulties in the legal process). In bringing suit, pro se litigants will likely need to evaluate difficult laws, but will lack legal assistance in doing so. Bloom & Hershkoff, *supra* note 2, at 483.

⁹⁵ See Bloom & Hershkoff, *supra* note 2, at 514 (stating that “managerial judging” is a modern norm); Hasen, *supra* note 83, at 182, 186, 213 (discussing avoidance of “difficult” constitutional issues). But see Kloppenberg, *supra* note 68, at 1034 (lamenting the last resort rule's inefficiencies).

⁹⁶ See Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 97, 121 (2007) (explaining how clear explanations help pro se litigants as well as the public); *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (stating the fluidity of justiciability as a concept with unclear borders). Of course, judges must be unbiased. See Gray, *supra*, at 99 (referencing judges' codes of conduct). This useful byproduct of statutory reasoning, however, is still a boon to pro se litigants. See *id.* at 121 (stating that explaining rulings to pro se litigants does not vitiate impartiality).

CONCLUSION

In 2021, in *Simons v. Washington*, the United States Court of Appeals for the Sixth Circuit held that the PLRA prohibits premature binding strikes issued pursuant to dismissals under 28 U.S.C. § 1915(g). The U.S. Court of Appeals for the Second, Third, Sixth, and Seventh Circuits agree that premature binding strikes are impermissible, but on different grounds. The Sixth and Seventh Circuits' approach is correct because it harmonizes with the constitutional avoidance doctrine. By avoiding constitutional issues, and relying on statutory language, the Sixth Circuit defers to the legislature and eschews major constitutional inquiries. Inadvertently, this approach also confines legal issues to one statute, providing consistency that may help pro se prisoner-litigants. Instead of unnecessarily defaulting to Article III, other circuits should utilize this reasoning when evaluating lower courts' strikes to better accord with established constitutional canons.

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