No. 25-1003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVARIOL MARQUAVIS TAYLOR,

Plaintiff-Appellant,

v.

NURSE STEVENS, C.O. VICKS, ASSISTANT DEPUTY WARDEN JAMES, and DR. FALK,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Michigan, No. 2:24-cv-178
Before the Hon. Ray Kent

PLAINTIFF-APPELLANT DAVARIOL MARQUAVIS TAYLOR'S OPENING BRIEF

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DISCLOSURES OF CORPORATE AFFILIATION AND FINANCIAL INTEREST

Pursuant to Sixth Circuit R. 26.1, Appellant Davariol Marquavis Taylor makes the following disclosures:

Is said party a subsidiary or affiliate of a publicly owned corporation? **No.**

Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Mr. Taylor believes his entitlement to reversal is clear for the reasons described herein, but respectfully submits that a published opinion is warranted to provide district courts needed guidance on the proper operation of the three-strikes rule in the circumstances at issue. Specifically, as explained below, the district court misunderstood this Court's decision in *Pointer v. Wilkinson*, 502 F.3d 369 (6th Cir. 2007), and in doing so reached a conclusion that is flatly inconsistent with this Court's holding in *Crump v. Blue*, 121 F.4th 1108 (6th Cir. 2024)—an error that other district courts in the Circuit have also made, *see, e.g.*, *Taylor v. Jones*, No. 2:24-cv-205, 2025 WL 66008, at *3 (W.D. Mich. Jan. 10, 2025). To the extent oral argument is necessary for this Court to issue a published opinion, effective argument would require only ten minutes and could occur even if no opposition brief is filed. *See, e.g.*, *Crump*, 121 F.4th at 1109 (PLRA appeal argued without opposing counsel); *Finley v. Huss*, 723 F. App'x 294 (6th Cir. 2018) (same); *Conway v. Fayette Cnty. Gov't*, 212 F. App'x 418 (6th Cir. 2007) (per curiam) (same). Any oral argument for Mr. Taylor will be conducted by a junior attorney and supervised by undersigned counsel.

STATEMENT OF JURISDICTION

Appellant Davariol Marquavis Taylor filed this action pursuant to U.S.C. § 1983 in the United States District Court for the Western District of Michigan. The district court had jurisdiction under 28 U.S.C. § 1331. The district court denied Mr. Taylor's motion to proceed *in forma pauperis* (IFP) on December 2, 2024. Opinion, R.4, PageID.13-21; Order Denying Leave to Proceed IFP, R.5, PageID.22. That same day, it issued a final judgment dismissing Mr. Taylor's action. Judgment, R.6, PageID.23. Mr. Taylor filed a timely notice of appeal on December 26, 2024. Notice of Appeal, R.7, PageID.24. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in concluding that Mr. Taylor is a three-strikes litigant under the Prison Litigation Reform Act (PLRA), where the case it deemed his third strike: (1) validly stated several claims that were permitted to proceed to summary judgment; (2) was expressly found to not be subject to dismissal on any of the enumerated grounds that constitute a strike under 28 U.S.C. § 1915(g); and (3) was ultimately dismissed without prejudice at summary judgment solely on the ground that Mr. Taylor had, by failing to respond

to defendants' summary judgment motion, not raised a genuine issue of fact as to whether he had exhausted administrative remedies.

2. Whether the district court correctly abandoned its original assessment that two of Mr. Taylor's other prior cases that were dismissed on sovereign immunity grounds constituted strikes under the PLRA, given that this Court squarely held in *Crump v. Blue*, 121 F.4th 1108 (6th Cir. 2024), that sovereign immunity is not a qualifying ground for a strike under 28 U.S.C. § 1915(g).

STATEMENT OF THE CASE

A. The PLRA's "Three Strikes" Provision

Generally, a party bringing or appealing a civil action must pay the applicable filing fee. 28 U.S.C. § 1914(A). Parties that are unable to pay that fee may request permission to proceed *in forma pauperis* (IFP). 28 U.S.C. § 1915. For non-incarcerated persons, if IFP status is granted, the filing fee is waived. *Id.* § 1915(a).

In 1996, Congress passed the Prison Litigation Reform Act (PLRA), which altered the IFP rules for incarcerated plaintiffs in two key ways. First, unlike for non-incarcerated indigent parties, the filing fee is not waived for incarcerated plaintiffs granted IFP status. Rather, indigent

prisoners must still pay the full filing fee; IFP status merely allows them to do so in installments, rather than all up front. *Id.* § 1915(b).

Second, the PLRA created a new so-called "three-strikes provision," which prohibits courts from granting a prisoner IFP status altogether if the prisoner has, "on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal" in a federal court that was "dismissed on the grounds that it [was] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." *Id.* § 1915(g). A case dismissed on one of the three enumerated grounds is often referred to as a "strike." *Crump v. Blue*, 121 F.4th 1108, 1110-11 (6th Cir. 2024). When a prisoner has three "strikes," and thus cannot proceed IFP, he must pay the entire filing fee up front unless the court finds he "is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

Because indigent prisoners do not generally have the means to pay a full filing fee up front, a finding that a prisoner-plaintiff cannot proceed IFP typically results in dismissal of the case.[1] As a practical matter, then,

[1] The current civil filing fee for persons granted IFP status is $350.00, and the current appellate filing fee is $605.00. 28 U.S.C. § 1914(a); United States District Court W.D. Mich. Fee Schedule, https://www.miwd.uscourts.gov/sites/miwd/files/Fee%20Chart.pdf.

the three-strikes provision functions as the "key to the courthouse door," *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1153 (D.C. Cir. 2017), and the accrual of three strikes effectively means that a prisoner-plaintiff "must forgo any future litigation, no matter how meritorious the case or serious the constitutional violation," *Pitts v. South Carolina*, 65 F.4th 141, 148-49 (4th Cir. 2023).

B. Factual Background[2]

In July and August of 2024, correctional officers at Marquette Branch Prison inflicted a course of abuse and harassment upon Davariol Taylor that culminated in a prison doctor sexually assaulting him while he was handcuffed during a teeth cleaning.

The events began on July 20, 2024, when Defendant Correctional Nurse Stevens gave Mr. Taylor and another man incarcerated at the prison, Jirome Banard, the wrong medication. Compl., R.1, PageID.2-3. Mr. Taylor and Mr. Banard had informed Stevens that they had received more medication than normal, which suggested to Mr. Taylor that they

[2] The following facts are alleged in Mr. Taylor's *pro se* complaint, which at this stage must be taken as true and liberally construed in Mr. Taylor's favor. *See Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 585 (6th Cir. 2013).

had been given someone else's medication. *Id.* at PageID.3. But Stevens disregarded their protests, threatening that if they did not take the medication, they would be removed from their normal medications and placed on monthly shots. *Id.* Unfortunately however, after taking the improper medications, Mr. Banard felt that something was wrong, and both he and Mr. Taylor alerted Defendant Officer Vicks to this fact. *Id.* at PageID.4. Nonetheless, Officer Vicks refused to get medical help, stating, "You think I'm going to help you with anything? You suing my boys so you and Banard can die if it's up to me." *Id.* at PageID.4 (cleaned up). Mr. Banard ultimately overdosed and died due to the improper medication. *Id.* at PageID.3-4.

In the weeks afterwards, Mr. Taylor sought to report what had happened and to file a lawsuit against prison staff, but Defendants Officer Vicks and Assistant Deputy Warden James retaliated against him by ripping up his complaint and refusing to investigate any of his grievances, with James stating, "we don't investigate any grievances from or about dead inmates." *Id.* at PageID.2, 4. James also enlisted other staff to retaliate against Mr. Taylor and personally told Mr. Taylor that he had been keeping Prison Rape Elimination Act reports that Mr. Taylor

had filed from being investigated and that he would "make [the retaliation] stop if" Mr. Taylor "stop[s] telling on them." *Id.* at PageID.4.

These events culminated on August 26, 2024, when Defendant Doctor Falk entered the dental room where Mr. Taylor was undergoing a teeth cleaning, pulled out his penis, and forced it into Mr. Taylor's mouth while Mr. Taylor was handcuffed. *Id.* Falk then pulled Mr. Taylor's penis out of his pants and rubbed it. *Id.* Mr. Taylor yelled at Falk to stop, but Falk punched Mr. Taylor in the face and told him to shut up and "do what [Falk] say[s]" if Mr. Taylor wanted to be "left alone." *Id.* Mr. Taylor attempted to report these sexual assaults to Defendant James later that day, but James told Mr. Taylor he needed to "learn to follow suit" and "then [he'll] see we run this boat." *Id.* (cleaned up).

As a result of these incidents, Mr. Taylor was left fearful for his life at Marquette Branch Prison, and on August 28, 2024, he signed his lawsuit stating that "[e]very day to this very day" he experienced sexual abuse "from defendants and other staff" and remained in "imminent danger" of "sexual abuse, overdosing, more retaliation, physical injuries, or wors[e]." *Id.* at PageID.5 (cleaned up). Sometime after signing the complaint, Mr. Taylor was transferred to Baraga Correctional Facility,

where, in October 2024, he placed the complaint in the prison mail system. Opinion, R.4, PageID.19-20.

C. Procedural Background

Mr. Taylor sued Nurse Stevens, Dr. Falk, Officer Vicks, and Assistant Deputy Warden James under 42 U.S.C. § 1983, alleging violations of his First, Fourth, Eighth, and Fourteenth Amendment rights. Compl., R.1, PageID.2-4. He moved to proceed IFP, explaining his indigent status—he had limited funds remaining from prior § 1983 settlements, no current prison employment, and no means of obtaining money—and asked the district court to allow him to pay the $350 filing fee in installments. IFP Motion, R.2, at PageID.9-10.

On December 2, 2024—before the defendants were served with Mr. Taylor's complaint—the district court denied Mr. Taylor's IFP motion and dismissed his lawsuit without prejudice to refile and pay the full filing fees.[3] Judgment, R.6, PageID.23; Order Denying Leave to Proceed IFP, R.5, PageID.22. Without touching the merits of the complaint, the district court concluded *sua sponte* that the PLRA's "three-strikes" rule

[3] Mr. Taylor consented to proceed before a magistrate judge. Compl., R.1, PageID.5; *see* 28 U.S.C. § 636(c) (permitting adjudication by a magistrate judge upon consent of the parties).

barred Mr. Taylor from proceeding IFP. Opinion, R.4, PageID.20-21. Specifically, the court identified four of Mr. Taylor's prior cases as potential "strikes," although it did not explain why it deemed them to be so. *Id.* at PageID.17 (citing *Taylor v. Adler*, 1:22-cv-300 (W.D. Mich. July 27, 2022); *Taylor v. Stump*, No. 1:22-cv-530 (W.D. Mich. July 25, 2022); *Taylor v. Martin*, No. 1:22-cv-301 (W.D. Mich. July 1, 2022); and *Taylor v. Yuhas*, No. 1:21-cv-435 (W.D. Mich. Oct. 29, 2021)). The court also observed that Mr. Taylor has had two other cases dismissed under the three-strikes rule. *Id.* (citing *Taylor v. Shafer*, No. 1:22-cv-1074, 2022 WL 17843065, at *2 (W.D. Mich. Dec. 22, 2022) and *Taylor v. Dunn*, No. 1:22-cv-1041, 2022 WL 17261031, at *2 (W.D. Mich. Nov. 29, 2022)).[4] Finally, the court stated that, although it did not "discount the incidents that Plaintiff alleges he experienced," Mr. Taylor's "allegations of past harms" at Marquette Branch Prison were insufficient to establish an "imminent danger of serious physical injury" to qualify for the exception to the three-

[4] In both cases, magistrate judges identified Mr. Taylor's supposed strikes as *Taylor v. Stump*, *Taylor v. Martin*, and *Taylor v. Yuhas*. *See Shafer*, 2022 WL 17843065, at *2; *Dunn*, 2022 WL 17261031, at *2.

strikes rule because he had since been transferred to Baraga Correctional Facility. *Id.* at PageID.17-20.

Mr. Taylor timely appealed the district court's denial of IFP status and dismissal of his lawsuit, Notice of Appeal, R.7, PageID.24, and thereafter retained *pro bono* appellate counsel, who paid his appellate filing fee, Docket Sheet, 2:24-cv-178, 1/24/25 (receipt of filing fee). In response to Mr. Taylor's notice of appeal, the district court issued an order, which it transmitted to this Court, "in aid of the appeal" and "to clarify the three 'strikes' that Plaintiff has accrued for purposes of 28 U.S.C. § 1915(g)." Order in Aid of Appeal, R.11, PageID.43-44; *see also Taylor v. Stevens*, No. 25-1003 (6th Cir.), Dkt. #8 (Jan. 21, 2025) (district court's order entered on this Court's docket). In its post-appeal order, the district court again identified *Taylor v. Martin* and *Taylor v. Yuhas* as strikes, as it had in its original IFP ruling. Order in Aid of Appeal, R.11, PageID.43-44. For Mr. Taylor's third strike, however, the district court now identified a new case it had not mentioned in its original order: *Taylor v. Torok*, No. 1:21-cv-779 (W.D. Mich. Apr. 25, 2023). *Id.* Conversely, the district court's post-appeal order no longer identified as

strikes *Taylor v. Adler* or *Taylor v. Stump*, two cases listed in the court's original IFP ruling. *Id.*

SUMMARY OF ARGUMENT

The district court erred in deeming Mr. Taylor a three-strikes litigant because none of the cases it identified as potential third strikes—*Torok*, *Adler*, or *Stump*—qualifies as a strike under 28 U.S.C. § 1915(g).

I. *Taylor v. Torok* is not a strike. This Court held in *Crump v. Blue*, 121 F.4th 1108 (6th Cir. 2024), that for an action to qualify as a strike, every claim in the action must have been dismissed on one of the three grounds enumerated in § 1915(g)—*i.e.*, for frivolousness, maliciousness, or failure to state a claim. That well-established rule is dispositive here: although the *Torok* court dismissed some of Mr. Taylor's claims at PLRA screening for failure to state a claim, it determined that he had validly stated several other Eighth Amendment claims, which it allowed to proceed to an attempted mediation, initial discovery, and all the way to summary judgment. Indeed, the *Torok* court later stated expressly on the record that Mr. Taylor's complaint was *not* subject to dismissal on any of the enumerated § 1915(g) grounds, and therefore discouraged defendants from filing a motion to dismiss under Rule 12(b)(6) for that reason. These

circumstances establish unequivocally that *Torok* is not a strike under this Court's binding decision in *Crump*.

In concluding that *Torok* was a strike, the district court cited the fact that the claims that proceeded to summary judgment were ultimately disposed of on PLRA nonexhaustion grounds, apparently relying on this Court's decision in *Pointer v. Wilkinson*, 502 F.3d 369 (6th Cir. 2007). But *Pointer*—the reasoning of which *Crump* called into question as inconsistent with the PLRA's text—does not support deeming *Torok* a strike. In *Pointer*, the Court upheld a strike determination where the dismissing court had, on PLRA screening, dismissed six claims for failing to state a claim and the remaining two claims (which it did not address the merits of) for failure to exhaust. The *Pointer* Court reasoned that it would subvert the PLRA's policy goals to permit a prisoner to insulate a meritless complaint from a strike finding by injecting it with unexhausted claims. *Pointer* made clear, however, that a dismissal would *not* constitute a strike if some of the claims in the action were found to have been validly pled at PLRA screening or on a Rule 12(b)(6) motion and allowed to proceed beyond the pleading stages—which was precisely

the case in *Torok*. Thus, even under *Pointer*'s own reasoning, which *Crump* has since disavowed, *Torok* is not a strike.

II. The district court was right to abandon its strike assessments with respect to *Taylor v. Adler* and *Taylor v. Stump*, because this Court's binding decision in *Crump* makes clear that neither constitutes a PLRA strike. *Taylor v. Adler* is not a strike because it was dismissed entirely on grounds of Eleventh Amendment sovereign immunity. This Court squarely held in *Crump* that dismissals on sovereign immunity grounds do not count as strikes unless the dismissing court makes an express finding of frivolousness or maliciousness. *Crump*, 121 F.4th at 1112-13. No such express finding was made in *Adler*; to the contrary, the dismissing court expressly indicated that it did *not* conclude that any issue Mr. Taylor might raise on appeal would be frivolous.

Taylor v. Stump is also not a strike because, like in *Adler*, *Stump* was dismissed on sovereign immunity grounds without an express finding of frivolousness or maliciousness. While the *Stump* court also went on to consider Mr. Taylor's request to be released to home confinement due to COVID-19 concerns, its disposal of that tack-on request for relief did not render *Stump* a strike. The court denied that

request on the ground that a § 1983 action was an improper vehicle for such a request because it was essentially a mislabeled habeas petition; "mislabeled habeas petition" is not an enumerated § 1915(g) ground. But even if it were, that would at best make *Stump* a mixed dismissal based in part on Eleventh Amendment immunity grounds—the precise circumstance that *Crump* held is *not* a PLRA strike.

Thus, because none of the cases the district court identified constitute valid third strikes, the district court erred in denying Mr. Taylor IFP status and dismissing his case. This Court should reverse.

STANDARD OF REVIEW

Questions of law under the PLRA are subject to *de novo* review. *Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 584 (6th Cir. 2013). What constitutes a strike under § 1915(g) is a question of law appellate courts review *de novo*. *See, e.g.*, *Cotton v. Noeth*, 96 F.4th 249, 255 (2d Cir. 2024); *Wallace v. Baldwin*, 895 F.3d 481, 483 (7th Cir. 2018); *see also Taylor v. First Med. Mgmt.*, 508 F. App'x 488, 491 (6th Cir. 2012) (stating that, while "[n]o published decision of this circuit" has held that *de novo* review applies to strike determinations, this Court's unpublished decisions have, "as does published authority in other circuits" (collecting

cases from eight circuits)); *Crump v. Blue*, 121 F.4th 1108, 1110-14 (6th Cir. 2024) (implicitly reviewing *de novo* PLRA strike determinations).

ARGUMENT

Mr. Taylor does not dispute that the district court properly designated *Taylor v. Martin*, No. 1:22-CV-301, 2022 WL 2383693 (W.D. Mich. July 1, 2022), and *Taylor v. Yuhas,* No. 1:21-cv-435, 2021 WL 5027591 (W.D. Mich. Oct. 29, 2021), as strikes. Mr. Taylor also agrees with the district court's apparent abandonment of its initial strike assessment with respect to *Taylor v. Stump*, No. 1:22-cv-530, 2022 WL 2913992 (W.D. Mich. July 25, 2022), and *Taylor v. Adler*, 1:22-cv-300, 2022 WL 2965476 (W.D. Mich. July 27, 2022). *See* Order in Aid of Appeal, R.11, PageID.43-44. As explained below, neither case constitutes a PLRA strike under this Court's binding decision in *Crump v. Blue*, 121 F.4th 1108, 1110-14 (6th Cir. 2024). *See infra* pp. 27-33.

However, the district court erred in its "clarifying" order by identifying *Taylor v. Torok*, No. 1:21-cv-779, 2023 WL 3070892 (W.D. Mich. Apr. 25, 2023), as a strike. *See* Order in Aid of Appeal, R.11, PageID.43-44. As explained below, *Torok* was not a strike because only some of Mr. Taylor's claims were dismissed on an enumerated § 1915(g)

ground, while others were deemed to have been validly pled and allowed to proceed. Indeed, the *Torok* court expressly concluded that Mr. Taylor's entire complaint was *not* "subject to dismissal" on the ground that it was "frivolous, malicious, [or] fail[ed] to state a claim upon which relief can be granted." *Torok*, No. 1:21-cv-779 (Case Mgmt. Ord., R.44, PageID.316). It was not until summary judgment that those validly-pled claims were disposed of on the ground that Mr. Taylor failed to raise a genuine issue of fact as to PLRA exhaustion. Thus, because *Torok* is not a strike, and because Mr. Taylor did not have any other strikes beyond *Martin* and *Yuhas*, the district court erred in deeming him a three-strikes litigant and dismissing his case on that basis.[5] This Court should reverse.

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[5] Counsel has reviewed Mr. Taylor's prior litigation and has found no additional strikes. In addition to the cases discussed here, at the time of filing his complaint, Mr. Taylor had filed eight other lawsuits in the Western and Eastern Districts of Michigan, but only three of those had been dismissed, and none on grounds enumerated within § 1915(g). Specifically, three of his cases settled. *See* Report Following Early Prisoner Mediation, *Taylor v. Davis*, 1:21-cv-276 (W.D. Mich. Mar. 16, 2022); Report Following Early Prisoner Mediation, *Taylor v. Burton*, 1:22-cv-508 (W.D. Mich. Sept. 15, 2023); Report Following Early Prisoner Mediation, *Taylor v. Battle*, 1:22-cv-509 (W.D. Mich. Jul. 13, 2023). In three other cases, the court dismissed for failure to pay the filing fee. *See Taylor v. Purdom*, 3:22-cv-10824 (E.D. Mich. Oct. 24, 2022); *Taylor v. Bean*, 2:22-cv-10857 (E.D. Mich. Jan 30, 2023); *Taylor v. Remarize*, 1:23-cv-11757 (E.D. Mich. Oct 19, 2023). And finally, two of Mr. Taylor's cases

I. Mr. Taylor Does Not Have Three Strikes Because *Taylor v. Torok* Is Not A Strike.

A. *Torok* Procedural Background.

In *Torok*, Mr. Taylor sued seven correctional and medical staff at Ionia Correctional Facility, alleging various Eighth Amendment, procedural due process, access-to-court, and First Amendment retaliation claims. *Torok*, No. 1:21-cv-779 (Compl., R.1, PageID.4-9). A magistrate judge screened Mr. Taylor's complaint pursuant to 28 U.S.C. § 1915(A), and dismissed *sua sponte* his procedural due process, access-to-court, and retaliation claims, as well as certain Eighth Amendment claims concerning deprivation of meals and exercise and inadequate hygienic care, for failure to state a claim. *Taylor v. Torok*, No. 1:21-cv-779, 2021 WL 6143635, at *1 (W.D. Mich. Dec. 30, 2021) ("*Torok I*"). However, the judge found that Mr. Taylor had "alleged sufficient facts to state Eighth Amendment claims" of excessive force, failure to protect,

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remained ongoing when he filed his complaint, and in one of them he was represented by counsel. *See Taylor v. Purdom*, 1:22-cv-10178 (E.D. Mich. Feb. 27, 2025) (ultimately granting Defendants' motion for summary judgment); *Taylor v. Bush*, 2:24-cv-105 (W.D. Mich.) (ongoing at time of filing complaint). Mr. Taylor was also named as a plaintiff in *Parsons v. Paige*, 5:24-cv-10247 (E.D. Mich.), but he was terminated after being added to the case in error.

and denial of medical care against four of the defendants, and allowed those claims to proceed. *Id.* at *10. The magistrate judge then referred the case for early mediation, which "was attempted" but did not result in settlement. *Torok*, No. 1:21-cv-779 (Report Following Early Prisoner Mediation, R.18, PageID.149).

Over the next several months, the defendants demanded a jury trial, filed an answer to Mr. Taylor's complaint, and initiated discovery on Mr. Taylor's remaining claims. *Torok*, No. 1:21-cv-779 (MDOC Defendants' Jury Trial Demand, R.31, PageID.213; Defendant Torok's Answer & Jury Trial Demand, R.35, PageID.281, 286; Deposition Notices, R.37-39, PageID.298-307). Particularly relevant here, the magistrate judge issued a case management order in which he "discourage[d] the filing of motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)," explaining that he had screened Mr. Taylor's complaint under the PLRA "to determine whether it is frivolous, malicious, or fails to state a claim on which relief can be granted" and had specifically determined that "the complaint is not subject to dismissal for any of" those enumerated PLRA grounds. *Torok*, No. 1:21-cv-779 (Case Mgmt. Ord., R.44, PageID.316).

Eventually, the defendants filed separate motions for summary judgment, each solely on the basis that Mr. Taylor had failed to exhaust his administrative remedies under the PLRA.[6] *Torok*, No. 1:21-cv-779 (MDOC Defendants' Br. in Support of Motion for Summary Judgment, R.34, PageID.231-32; Defendant Torok's Br. in Support of Motion for Summary Judgment, R.48, PageID.339). Specifically, they asserted that the prison had a three-step grievance process; that, although Mr. Taylor had filed multiple relevant grievances, he had not named one of the defendants in any of them; that he had only pursued two grievances to Step III; and that neither of those grievances had been considered on the merits because of technical defects at Step I. *Torok*, No. 1:21-cv-779 (MDOC Defendants' Br. in Support of Motion for Summary Judgment, R.34, PageID.231-32; Defendant Torok's Br. in Support of Motion for Summary Judgment, R.48, PageID.341-42). Mr. Taylor did not file a response. *Taylor v. Torok*, No. 1:21-cv-779, 2023 WL 2384999, at *4 (W.D. Mich. Mar. 7, 2023) ("*Torok II*").

[6] The district court permitted the defendants to bifurcate their request for summary judgment and file a summary judgment motion based solely on exhaustion grounds while discovery was ongoing, while saving their summary judgment motion on the merits until after discovery. *Torok*, No. 1:21-cv-779 (Case Mgmt. Ord., R.44, PageID.317).

The *Torok* court granted both of the defendants' motions for summary judgment in separate (but substantially similar) opinions. *Id.*; *Taylor v. Torok*, No. 1:21-cv-779, 2023 WL 3070892, at *3 (W.D. Mich. Apr. 25, 2023) ("*Torok III*"). It found that Mr. Taylor, having failed to file a response, had "failed to refute or call into question" defendants' assertions and thus "failed to present any evidence otherwise demonstrating that there exists a genuine factual dispute on the question whether he properly exhausted his administrative remedies." *Torok II*, 2023 WL 2384999, at *4; *Torok III*, 2023 WL 3070892, at *3. Having so concluded, the court dismissed the remainder of Mr. Taylor's claims without prejudice. *Torok II*, 2023 WL 2384999, at *4; *Torok III*, 2023 WL 3070892, at *3.

B. *Torok* is not a strike because only some of Mr. Taylor's claims were dismissed on an enumerated § 1915(g) ground, while others were deemed to have been validly pled and allowed to proceed to summary judgment.

In *Crump v. v. Blue*, 121 F.4th 1108 (6th Cir. 2024), this Court held that it is "well established" that, for a dismissal to qualify as a strike, "all claims in a complaint, not just some of them" must be dismissed on one of § 1915(g)'s three enumerated grounds—*i.e.*, as frivolous, malicious, or failing to state a claim. *Id.* at 1111, 1114. That is because, as this Court

explained, § 1915(g)'s language "notably, refers to 'action[s] or appeal[s],' not claims." *Id.* at 1111. Thus, *Crump* held, an "action" is "'dismissed on the grounds that it is frivolous, malicious, or fails to state a claim' only when *all* of its claims are dismissed on those grounds." *Id.* (emphasis added) (quoting § 1915(g)).

Crump is dispositive of the question here, for in *Torok*, only some of Mr. Taylor's claims were dismissed on a qualifying ground. At PLRA screening, the *Torok* court dismissed Mr. Taylor's procedural due process, access-to-court, and retaliation claims, as well as certain Eighth Amendment claims, for failure to state a claim. *Torok I*, 2021 WL 6143635, at *4-7, 10. However, the *Torok* court permitted several other of his Eighth Amendment claims to proceed, finding that he "alleged sufficient facts to state Eighth Amendment claims" of excessive force, failure to protect, and denial of medical care against several defendants. *Id.* at *10. Indeed, the *Torok* court later stated expressly that it had determined that Mr. Taylor's complaint was "not subject to dismissal" on the grounds that it was "frivolous, malicious, [or] fail[ed] to state a claim upon which relief can be granted," and thus "discourage[d]" the defendants from filing a motion to dismiss under Rule 12(b)(6). *Torok*,

No. 1:21-cv-779 (Case Mgmt. Ord., R.44, PageID.316). And it permitted Mr. Taylor's validly-pled Eighth Amendment claims to progress to an attempted mediation, through the start of discovery, and to a summary judgment motion before ultimately determining that he failed to raise a genuine issue as to PLRA exhaustion. Thus, because Mr. Taylor's entire "action" was not dismissed for failure to state a claim, but only select claims, *Torok* does not qualify as a strike under this Court's binding decision in *Crump*. 121 F.4th at 1111.

In concluding otherwise, the district court, in its post-appeal order, cited the fact that the claims that proceeded to summary judgment were ultimately dismissed on PLRA exhaustion grounds, apparently relying on this Court's decision in *Pointer v. Wilkinson*, 502 F.3d 369 (6th Cir. 2007), to conclude that that fact rendered *Torok* a strike. Order in Aid of Appeal, R.11, PageID.44. But *Pointer*—a case *Crump* cast serious doubt on, *see infra* p. 24 & n.8—does not support that conclusion, as *Pointer* is factually inapposite to *Torok* and by its own reasoning makes clear that *Torok* is not a strike.

Pointer concerned a *pro se* prisoner for whom the dismissing court had *sua sponte* dismissed an entire action at screening after determining

that six of the claims he brought failed to state a claim and his remaining two claims he had failed to exhaust—but without making an assessment as to the merits of the unexhausted claims. *Pointer*, 502 F.3d at 376-77. In that circumstance, this Court assessed a strike against Pointer based on the reasoning in *Clemons v. Young*, 240 F. Supp. 2d 639 (E.D. Mich. 2003), which this Court found "compelling." *Pointer*, 502 F.3d at 372-73. As *Pointer* explained, *Clemons* had held that if some of the claims in an action "were found to have merit," the action would *not* constitute a strike. *Id.* at 372 (quoting *Clemons*, 240 F. Supp. 2d at 641). But where several claims were "dismissed as frivolous, and there was no finding that any of the other claims arguably had any merit," the inclusion of unexhausted claims could not "excuse" the otherwise meritless complaint. *Id.* at 372-73 (discussing *Clemons*, 240 F. Supp. 2d at 641-42).

Critically, *Pointer* did *not* conclude that failure to exhaust is *itself* a § 1915(g) ground, such that a complaint "solely dismissed for failure to exhaust" would constitute a strike.[7] *Id.* at 375. Rather, *Pointer* was

[7] Indeed, any such holding would contradict the plain language of § 1915(g), as numerous circuits have held. *See, e.g.*, *Green v. Young*, 454 F.3d 405, 409 (4th Cir. 2006) (because a "dismissal for failure to exhaust is not listed in § 1915(g)," it would be "improper for [a court] to read it

concerned only with the circumstance in which a prisoner-plaintiff includes some unexhausted claims (the merits of which are unclear) in an otherwise meritless complaint, and the entire complaint is dismissed at PLRA screening or after a motion to dismiss under Rule 12(b)(6). *Id.* at 377. *Pointer* reasoned that § 1915(g)'s "purpose" was to ensure that "meritless filing[s] will be deemed a strike," and it feared that "purpose" would "be subverted" if *pro se* prisoners could "escape imposition of a strike" by "adding unexhausted claims to a complaint that otherwise does not state a claim." *Id.* at 374.

In *Crump*, this Court cast serious doubt on *Pointer*'s legal underpinnings, noting that there is "no good ground to extend [*Pointer*] beyond its holding" because it is "not clear" that its purposive reading "respects the language of the [PLRA]," and that it has "not fared well in the other circuits." *Crump*, 121 F.4th at 1113-14.[8] Regardless, even

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into the statute"); *Owens v. Isaac*, 487 F.3d 561, 563 (8th Cir. 2007) (dismissal for nonexhaustion "is not a strike under section 1915(g)"); *Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999) (same).

[8] As this Court recently emphasized, the "policies underlying" the PLRA play little to no part when interpreting the PLRA because the "best evidence of purpose is the statutory text," not the court's "speculations." *Heard v. Strange*, 127 F.4th 630, 636 (6th Cir. 2025) (cleaned up); *see also Jones v. Bock*, 549 U.S. 199, 212 (2007) (admonishing courts not to add

accepting *Pointer* on its own terms and reasoning, *Torok* is not a strike. In *Torok*, unlike in *Pointer*, some of Mr. Taylor's claims "*were* found to have merit or to state a claim." *Pointer*, 502 F.3d at 374 (emphasis added). At screening, the *Torok* court held that Mr. Taylor had validly stated Eighth Amendment excessive force, failure to protect, and denial of medical care claims against four of the defendants, *Torok I,* 2021 WL 6143635, at *10, and later it stated expressly that his complaint was "not subject to dismissal" on any § 1915(g) ground and even "discourage[d]" defendants from filing a Rule 12(b)(6) motion for that very reason, *Torok*, No. 1:21-cv-779 (Case Mgmt. Ord., R.44, PageID.316).

Moreover, unlike in *Pointer*, the *Torok* court did not find Mr. Taylor's validly-pled claims unexhausted "on PLRA *sua sponte* review" or a Rule 12(b)(6) motion. *Pointer*, 502 F.3d at 377 (explaining that its holding applied only to actions dismissed at PLRA screening or on a Rule 12(b)(6) motion and would not apply to dismissals "by some other procedural mechanism, such as a Rule 12(b)(1) motion or a motion for

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requirements not found in the PLRA's text based on "perceived policy concerns"). Unsurprisingly then, "[i]n *Pointer*'s 17-year tenure" this Court has "relied on [the decision] just twice" when faced with mixed dismissals based in part on grounds not enumerated in § 1915(g), both instances in unpublished decisions. *Crump*, 121 F.4th at 1114.

summary judgment" (cleaned up)). Rather, the *Torok* court did not reach the PLRA exhaustion question until summary judgment, and even then ruled against Mr. Taylor not on the ground that his *complaint* was somehow deficient but on the ground that, by failing to respond to defendants' summary judgment motion, he had not established a "genuine factual dispute" as to whether the grievances he submitted were procedurally defective as defendants claimed. *See Torok II,* 2023 WL 2384999, at *4; *Torok III*, 2023 WL 3070892, at *3; *see also Torok,* No. 1:21-cv-779 (Compl., R.1, PageID.4-6; Compl. Exhibit 1, R.1-1, PageID.55-71) (Mr. Taylor alleging in his complaint that he filed several grievances and attaching multiple grievances).

Thus, even accepting *Pointer*'s reasoning, which *Crump* called into question, those distinguishing facts resolve this appeal under *Pointer*. Mr. Taylor's having validly pled several claims, which proceeded to summary judgment, established the meritorious nature of his action and foreclosed *Torok* from being deemed a strike under *Pointer*'s own terms. Thus, the district court erred in concluding that *Torok* was a strike.

II. The District Court Correctly Abandoned Its Initial Strike Assessments With Respect To *Taylor v. Adler* And *Taylor v. Stump*, As Neither Constitutes A PLRA Strike.

In its post-appeal order, the district court abandoned reliance on *Adler* or *Stump* as a potential third strike, Order in Aid of Appeal, R.11, PageID.43-44, and with good reason—this Court's decision in *Crump* forecloses such a conclusion. Both *Adler* and *Stump* were dismissed on immunity grounds, making the district court's initial assessment that they constituted strikes flatly inconsistent with *Crump*. *See Crump*, 121 F.4th at 1113-14.

A. *Adler* is not a strike.

First, *Adler* is not a strike because the dismissing court disposed of the case entirely "on grounds of immunity." *Taylor v. Adler*, No. 1:22-cv-300, 2022 WL 2965476, at *3 (W.D. Mich. July 27, 2022). In *Adler*, Mr. Taylor sued two correctional officers in their official capacities only. *Id.* at *2. At screening, the district court "dismiss[ed] [Mr. Taylor's] complaint" entirely "on grounds of [Eleventh Amendment] immunity," concluding that his claims against both defendants were barred because "official capacity defendants are absolutely immune from monetary damages." *Id.* at *2. The court gave no other ground for dismissal, and

stated expressly that it did "not conclude that any issue Plaintiff may raise on appeal would be frivolous." *Id.* at *3.

In *Crump*, this Court held that dismissals for Eleventh Amendment sovereign immunity do not count as strikes. 121 F.4th at 1112. After all, this Court explained, "Eleventh Amendment immunity does not appear on the list of grounds for a cognizable strike," and Congress showed "that it knew how to deal with immunity issues elsewhere in the Act" by including immunity as a ground for dismissal just "two subsections up." *Id.* Moreover, this Court reasoned, a dismissal for sovereign immunity "is not a dismissal premised on the merits—the failure to state a claim" nor is it "necessarily frivolous or malicious" since, while a "claimant *might* frivolously or maliciously ignore an immunity defense," the district court must expressly deem it such, and "the district court made no such finding here." *Id.* at 1113.

Crump is dispositive here. The *Adler* court dismissed Mr. Taylor's complaint solely on sovereign immunity grounds and made no express finding that it was frivolous or malicious. Indeed, the court went so far as to say that it "does *not* conclude that any issue Plaintiff might raise on appeal would be frivolous"—thereby signaling that the underlying claims

were *not* frivolous or malicious. *See Adler*, 2022 WL 2965476, at *3 (emphasis added). Thus, under *Crump*, *Adler* is not a strike.

B. *Stump* is not a strike.

Stump is also not a strike because, as in *Adler*, the court held that "Plaintiff's complaint will be dismissed on grounds of immunity." *Taylor v. Stump*, No. 1:22-cv-530, 2022 WL 2913992, at *3 (W.D. Mich. July 25, 2022). In *Stump*, Mr. Taylor sued several correctional officers in their official capacities only, alleging violations of his First, Eighth, and Fourteenth Amendment rights. *Id.* at *1-2. He sought relief for these violations in the form of punitive and compensatory damages. *Stump*, No. 1:22-cv-530 (Compl., R.1, PageID.5). At the end of his complaint, he also attached a separate page in which he requested that he be placed on home confinement due to risks to his health posed by COVID-19. *Stump*, No. 1:22-cv-530 (Compl. Exhibit 1, R.1-1, PageID.8).

As in *Adler*, the court "dismiss[ed] [Mr. Taylor's] claims for monetary damages against Defendants in their official capacities" on grounds of Eleventh Amendment immunity. *Stump*, 2022 WL 2913992, at *3. Characterizing Mr. Taylor's tack-on request for home confinement as a request for "prospective injunctive relief," the *Stump* court went on

to consider that request under the exception to sovereign immunity for injunctive relief recognized in *Ex Parte Young*, 209 U.S. 123 (1908). *See Stump*, 2022 WL 2913992, at *3. It concluded, however, that "[s]uch relief is available only upon habeas corpus review" and is thus not the "proper subject" of a § 1983 civil rights action. *Id.* Thus, Mr. Taylor's home-confinement request did not change the court's ultimate conclusion that his complaint would "be dismissed on grounds of immunity." *Id.* Finally, as in *Adler*, the court also stated that it did "not conclude that any issue Plaintiff might raise on appeal would be frivolous." *Id.*

Like with *Adler*, *Stump* is not a strike under this Court's binding decision in *Crump* because the action was dismissed on Eleventh Amendment sovereign immunity grounds and the *Stump* court did not make an express finding that the case was frivolous or malicious. Indeed, like in *Adler*, the *Stump* court signaled the opposite, stating that it did "not conclude that any issue Plaintiff might raise on appeal would be frivolous." *Id.* Thus, because *Stump* was "dismissed on immunity grounds," *id.*, and *Crump* definitively held that "Eleventh Amendment immunity does not appear on the list of grounds for a cognizable strike," 121 F.4th at 1112, *Stump* is not a strike.

That the *Stump* court went on to consider Mr. Taylor's request to be moved to home confinement due to COVID-19 concerns does not change this conclusion. For starters, although *Stump* used the phrase "claim for injunctive relief," *Stump*, 2022 WL 2913992, at *3, the characterization of Mr. Taylor's tack-on request to be moved to home confinement as a separate legal "claim" was dubious at best.[9] Regardless, the *Stump* court's basis for dismissing Mr. Taylor's home-confinement request was that a "challenge to the fact or duration of confinement" had to be "brought as a petition for habeas corpus" and could not be sought under § 1983. *Id*. But a dismissal of a claim on the ground that it was brought under the wrong legal vehicle—*i.e.*, that it was a "mislabeled habeas petition"—is not a qualifying ground for a strike. Like sovereign immunity and failure to exhaust, "mislabeled habeas petition" is not an enumerated ground within § 1915(g). *El-Shaddai v. Zamora*,

[9] Mr. Taylor's constitutional claims, for which he requested compensatory and punitive damages, stemmed from allegations of sexual assault and retaliation by prison officials. *Stump*, No. 1:22-cv-530 (Compl., R.1, PageID.3-4). His tack-on request for home confinement, by contrast, was unrelated to his constitutional claims and derived from concerns about "the risk to [his] health posed by the COVID-19 pandemic." *Stump*, No. 1:22-cv-530 (Compl. Exhibit 1, R.1-1, PageID.8).

833 F.3d 1036, 1047 (9th Cir. 2016) (holding that "a habeas petition . . . mislabeled as a § 1983 claim . . . does not constitute a strike"); *see also Heard v. Strange*, 127 F.4th 630, 636 (6th Cir. 2025) (PLRA analysis "begins, and pretty much ends, with the text" (cleaned up)).[10]

But even if it were, at most that would make *Stump* a mixed-dismissal case: Mr. Taylor's damages "claim" was dismissed on immunity grounds, and his injunctive "claim" was dismissed for being a mislabeled habeas petition. Yet, *Crump* squarely held that a mixed dismissal is a strike only "when all of its claims are dismissed on [§ 1915(g)] grounds." 121 F.4th at 1111. Thus, *Stump*'s dismissal on immunity grounds—even if only in part—is alone sufficient to foreclose a conclusion that *Stump* is a strike. After all, the question of whether a mixed dismissal based in

[10] Earlier in the opinion, the *Stump* court characterized its dismissal of Mr. Taylor's request for injunctive relief as being for "fail[ure] to state a claim upon which relief can be granted *in a civil rights action*." *Stump*, 2022 WL 2913992, at *2 (emphasis added). The *Stump* court's addition of the language "in a civil rights action," *id.*—language that is not the text of § 1915(g)—further evinces that the court was concerned only with the *vehicle* Mr. Taylor chose rather than the *merits* of the underlying claims, which is what a "failure to state a claim" means for purposes of § 1915(g). *See Crump*, 121 F.4th at 1112. Regardless, this Court is not bound by the *Stump* court's characterization but must independently evaluate whether its basis for dismissal constitutes a strike. *See Simons v. Washington*, 996 F.3d 350, 352-54 (6th Cir. 2021).

part on immunity grounds constitutes a strike was precisely the question presented in *Crump*. *Id.* And this Court concluded in *Crump* that such a dismissal does not count as a strike. *Id.*

* * *

Ultimately then, the district court was correct to abandon its reliance on *Stump* and *Adler* in its post-appeal order "clarify[ing]" what it deemed to be Mr. Taylor's "three 'strikes.'" Order in Aid of Appeal, R.11, PageID.43. Neither case is a strike, as both were dismissed (in whole or in part) on immunity grounds, which *Crump* unequivocally held is not a strike. But the district court then erred in substituting *Torok* in for the third strike, as *Torok* was plainly not a strike for the reasons explained above. Thus, because Mr. Taylor was not a three-strikes litigant, the district court erred in denying him IFP status and dismissing his case.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial of Mr. Taylor's request to proceed IFP as well as its judgment dismissing Mr. Taylor's case.

Dated: March 17, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This Brief complies with type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because, according to the word count function of Microsoft Word 2019, the Brief contains 6,871 words excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b)(1).

2. This Brief complies with the typeface and type style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook font for the main text and 14-point Century Schoolbook font for footnotes.

Dated: March 17, 2025 */s/ Christine A. Monta*

CERTIFICATE OF SERVICE

I, Christine A. Monta, hereby certify that on March 17, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Christine A. Monta

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