No. 17-579

In the Supreme Court of the United States

LABOR AND INDUSTRY REVIEW COMMISSION OF THE STATE OF WISCONSIN,

Petitioner,

v.

TRACEY COLEMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit correctly determined that, under 28 U.S.C. § 636(c), a magistrate judge lacks authority to enter final judgment when the unserved defendant has not consented to the exercise of authority by the magistrate judge.

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RESPONDENT'S BRIEF IN OPPOSITION

Resolving an intra-circuit conflict, the Seventh Circuit held that *all* the parties to a case must consent before a magistrate judge is empowered to enter final judgment under the Federal Magistrate Act, 28 U.S.C. § 636(c). In this case, the petition for certiorari maintains that the circuits are divided on this question, that the holding below is wrong, and that the Seventh Circuit's rule will lead to a "deluge" of cases, causing crippling inefficiencies. But petitioner is wrong on all counts.

In fact, the asserted circuit conflict does not warrant this Court's attention; that conflict may be illusory, is decades old, and concerns an issue on which uniformity is not essential. The Seventh Circuit's thorough and carefully considered holding is correct, faithfully applying the language and purposes of the governing statute. And the issue, in any event, is of limited practical importance, as the Seventh Circuit's rule can be easily and efficiently accommodated by the district courts. Accordingly, the petition should be denied.

STATEMENT

A. Statutory Background

1. In the Federal Magistrate Act of 1979 ("the Act"), Pub. L. No. 96-82, 93 Stat. 643, Congress sought to "improve access" to the federal courts (*Roell* v. *Withrow*, 538 U.S. 580, 588 (2003)) by expanding the power of magistrate judges to enter final judgment—so long as the parties consent to the magistrate judges' exercise of authority.

Magistrate judges are appointed to eight-year terms by the district courts and lack the Article III

guarantees of life tenure and protection against salary decreases afforded to district judges. 28 U.S.C. § 631. In general, magistrate judges assist the district courts with "subsidiary matters," allowing district judges to "concentrate on trying cases." *Gomez* v. *United States*, 490 U.S. 858, 872 (1989). To this end, magistrate judges have the authority to enter final judgment "upon the consent of the parties." 28 U.S.C. § 636(c)(1). Congress included this consent provision to protect litigants' "right to insist on trial before an Article III district judge" (*Roell*, 538 U.S. at 588), making consent a "critical limitation" on the magistrate judges' exercise of jurisdiction. *Gomez*, 490 U.S. at 870.

This consent process typically is managed by clerks of the court, not the district or magistrate judges themselves. Under Section 636(c)(2), the clerk notifies the parties if a magistrate judge is available. If and only if all parties consent will a district or magistrate judge be notified of the parties' responses. Fed. R. Civ. P. 73(b)(1). This proviso protects litigants from subtle coercion to consent to decision of the case by a magistrate judge that might arise if district judges were aware that particular litigants had exercised their right to appear before an Article III judge. See H.R. Rep. No. 95-1364, at 13-14 (1978).

By contrast, Section 636(b) permits magistrate judges to act without the parties' consent, conducting hearings on certain dispositive motions and providing district judges with proposed findings and recommendations. If a party objects to the magistrate judge's report and recommendation on such a matter, a district judge must review the objected-to portions of the magistrate judge's report de novo. H.R. Rep. No. 95-1364, at 14.

2. In this case, respondent filed a complaint pursuant to 28 U.S.C. § 1915, which Congress enacted to ensure that "no citizen shall be denied an opportunity to commence" a civil action solely because of his or her poverty. *Denton* v. *Hernandez*, 504 U.S. 25, 31 (1992) (quoting *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948)). This *in forma pauperis* ("IFP") statute allows litigants to avoid filing fees by submitting an affidavit showing that they are "unable to pay such fees." 28 U.S.C. § 1915(a)(1).

Upon filing of the affidavit, the United States pays necessary expenses like printing the record or preparing a transcript. 28 U.S.C. § 1915(c). But because IFP litigants lack economic incentives to curb their filings (*Denton*, 504 U.S. at 31), Congress gave courts the power to dismiss IFP complaints at any time if the court determines that "the allegation of poverty is untrue" or that the action is "frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2).[1] A related statute not implicated here sets out a similar standard for dismissing prisoner petitions. See *id.* § 1915A(b). Nothing in the statutory text or legislative history, however, suggests that Congress intended to deprive pro se complainants of their constitutional right to an Article III judge.

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[1] A previous version of the IFP statute did not contain the "failure to state a claim" requirement that was used to dismiss respondent's claim in this case. That requirement was added in 1996. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 804(a), 110 Stat. 1321, 1321–74 (1996).

B. Procedural Background

1. Respondent Tracey Coleman was fired from his job for what he alleged were racially discriminatory reasons. In addition to pursuing a Title VII claim in federal court, respondent filed an administrative complaint with the Equal Rights Division of petitioner Wisconsin Labor and Industry Review Commission. In that proceeding, an administrative law judge dismissed respondent's complaint for allegedly failing to satisfy a filing deadline. Pet. App. 3a. Respondent then initiated this action against petitioner, alleging that petitioner failed to provide him with a fair hearing or adequate notice of the impending deadline. Pet. App. 49a.

Pursuant to Section 636(c)(2), respondent sent the court clerk a form consenting to have a magistrate judge enter final judgment in his case. Even before petitioner could be served or consent to have the case heard by a magistrate judge, however, a magistrate judge took up the case, determining that respondent's income qualified him for *in forma pauperis* status but ordering him to amend his complaint to clarify the basis for federal jurisdiction. Pet. App. 45a, 50a. Respondent then filed an amended complaint, renewing his allegation that petitioner failed to provide him with adequate notice of deadlines and denied him a fair hearing. But the magistrate judge interpreted respondent's amended complaint as a request for unemployment benefits and dismissed the complaint for failure to state a claim. *Id.* at 43a-44a. In doing so, the magistrate judge purported to enter final judgment and informed respondent that he should appeal to the Seventh Circuit, rather than file objections with the district court. *Id.* at 44a.

2. Respondent appealed to the Seventh Circuit, which appointed undersigned counsel to argue the jurisdictional question presented here. Pet. App. 2a. On appeal, respondent argued that Section 636(c) denied the magistrate judge jurisdiction to enter final judgment without *both* parties' consent. Although petitioner had not participated in the district court, it filed an opposition brief, arguing that, given the frequency of IFP filings, Section 636(c) should be read to permit magistrate judges to exercise jurisdiction and enter final judgment with the consent of only a single party in IFP cases.

In an opinion authored by Chief Judge Wood, the Seventh Circuit reversed, holding that both parties' consent is required under Section 636(c) for the entry of final judgment by a magistrate judge. Pet. App. 2a. After reviewing the underlying Article III concerns and the history of the IFP statute, the court rejected petitioner's argument that only a litigant whose rights will be adversely affected by the district court's judgment should count as a "party" that must consent under the Act. *Id.* at 10a. The court observed that dismissals for failure to state a claim under Section 1915(e)(2)(B)(ii)—such as that ordered by the magistrate judge in this case—go to the merits of a complaint and therefore have *res judicata* effect on *both* parties. Pet. App. 14a. The court also rejected the argument, made by Judge Posner in dissent, that a defendant's consent to resolution of the case by a magistrate judge could be implied in the circumstances here, noting that a finding of implied consent requires *some* action by the defendant. *Id.* at 16a.

The court further explained that the word "parties" generally means all of the named parties to a case and that, unlike in the cases cited by Judge

Easterbrook's dissent from the denial of rehearing en banc, the context of Section 636 suggests that "parties" includes those "on both sides of the 'v.'" *Id.* at 22a. In addition, the court expressed concern about "the constitutional problem that would arise if we were to hold that the consent of one party alone was enough to permit an Article I judge to resolve the case on the merits." *Id.* at 24a. To "la[y] to rest" that constitutionally troubling result, the court interpreted Section 636(c) to require that "all parties consent." *Ibid.*

In so holding, the court below resolved an intra-circuit conflict. In *Geaney* v. *Carlson*, 776 F.2d 140, 142 (7th Cir. 1985), the Seventh Circuit had held that a magistrate judge lacks authority to enter final judgment without the consent of unserved defendants. By contrast, in *Hains* v. *Washington*, 131 F.3d 1248, 1249 n.2 (7th Cir. 1997) (per curiam), the court had held that magistrate judges do *not* need the consent of unserved defendants to dismiss IFP complaints filed by prisoners. In the decision below, the Seventh Circuit found these precedents irreconcilable and overruled *Hains*. Pet. App. 26a.

Judge Posner dissented from the panel opinion, reasoning that the court should simply presume the defendant's consent because petitioner would have consented to the exercise of jurisdiction had it known that the magistrate judge would dismiss the complaint against it. Pet. App. 31a. In the circumstances of this case, Judge Posner regarded a remand to address the jurisdictional issue as a "waste of time." *Ibid.*

Because the panel overruled a circuit precedent, see 7th Cir. R. 40(e), the opinion was circulated to the en banc court, which denied rehearing. Judge

Easterbrook, joined by Judge Sykes, dissented from the denial of rehearing en banc. Rather than adopt either petitioner's suggestion that paid and IFP cases be treated differently or Judge Posner's implied-consent theory, Judge Easterbrook advocated a bright-line rule: in his view, a litigant is a party for purposes of the Section 636(c) consent requirement only after it has been served with process. Pet. App. 34a. Failure to serve petitioner in this case, Judge Easterbrook reasoned, meant that it was not a party and that the magistrate judge could dismiss the complaint on the merits at the screening stage.

Because petitioner did not file a timely motion to stay the issuance of the mandate, the Seventh Circuit remanded the case to the district court. There, the magistrate judge restyled his order as a report and recommendation. Report and Recommendation, *Coleman* v. *Dep't of Labor Review Comm'n*, No. 15-cv-00984 (E.D. Wis. July 11, 2017), ECF No. 22. But before the district court could act or the time to file objections lapsed, the Seventh Circuit recalled the mandate at petitioner's request so that it could seek this Court's review. Order, *Coleman*, No. 15-cv-00984 (E.D. Wis. July 17, 2017), ECF No. 27.

REASONS FOR DENYING THE PETITION

In its petition for certiorari, petitioner has abandoned the argument it relied upon below. Instead, it advances *both* Judge Posner's implicit-consent theory and Judge Easterbrook's very different service-of-process bright-line rule. Pet. 11. These theories—which petitioner does not even attempt to reconcile—rest on misunderstandings of this Court's doctrine and were properly rejected by the court below. They do not merit this Court's review.

I. Any Circuit Split Here Does Not Warrant This Court's Attention.

In seeking review, the petition contends principally that the circuits are in conflict on the question presented, identifying two decisions that petitioner describes as inconsistent with the holding below. Pet. 9-11. But the first of these decisions, *Neals* v. *Norwood*, 59 F.3d 530 (5th Cir. 1995), differs from this case in material respects—and there is reason to believe that any conflict with *Neals*, even assuming that one exists, would resolve itself without this Court's intervention. And the second decision invoked by petitioner, the Ninth Circuit's ruling in *Wilhelm* v. *Rotman*, 680 F.3d 1113 (9th Cir. 2012), did not resolve the issue here at all. In any event, since the petition was filed, the Ninth Circuit published a decision expressly adopting the Seventh Circuit's approach. *Williams* v. *King*, 875 F.3d 500 (9th Cir. 2017). This purported conflict does not call for consideration by this Court.

A. There is no square conflict in the circuits on the question presented.

In asserting that the circuits are in conflict, petitioner centrally relies on the Fifth Circuit's decision in *Neals*. *Neals*, however, differed in material respects from this case. It involved the dismissal of a "frivolous" prisoner petition under a prior version of the IFP statute, which did not contain the "failure to state a claim language" upon which the magistrate judge relied to dismiss respondent's complaint here. 59 F.3d at 531.

That distinction was of key importance to the majority below. In response to Judge Easterbook's opinion dissenting from the denial of rehearing, the

Seventh Circuit carefully analyzed the *res judicata* impact of dismissal for failure to state a claim under Section 1915(e)(2)(B)(ii), observing that such a dismissal is a ruling on the merits that binds both parties (see Pet. App. 11a-14a) and that "if both parties are bound, then both must consent to the assignment of the case to the magistrate judge." *Id.* at 15a. In contrast, as this Court held in *Denton* v. *Hernandez*, a dismissal for frivolousness—like that at issue in *Neals*—is *not* a "dismissal on the merits" for *res judicata* purposes. 504 U.S. at 32. Given these important differences, it is not at all apparent that the Fifth Circuit would disagree with the holding in this case if presented with the same facts, even given the decision in *Neals*. This is not a square conflict calling for resolution by this Court.

In an attempt to manufacture a circuit split, petitioner also asserts that the Ninth Circuit's decision in *Wilhelm* is in conflict with the holding below. But as petitioner candidly concedes, *Wilhelm* actually does not speak to this issue at all. Pet. 10 (acknowledging that the Ninth Circuit reached its result "without discussing whether an unserved defendant is a 'part[y]' under Section 636(c)"). Rather, that decision analyzed whether a prisoner needed to consent to have his case heard by the *specific* magistrate judge who dismissed it, instead of a magistrate judge generally. 680 F.3d at 1119. In a footnote, the Ninth Circuit mentioned that the defendants in *Wilhelm* had not been served, but failed to discuss that fact's legal significance. *Id.* at 1118 n.3. That observation hardly qualifies as a holding on the question presented here. See *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so de-

cided as to constitute precedents."); accord *In re Larry's Apartment, LLC*, 249 F.3d 832, 839 (9th Cir. 2001).

And in any event, the Ninth Circuit held just last month that "28 U.S.C. § 636(c)(1) requires the consent of all plaintiffs and defendants named in the complaint—irrespective of service of process—before jurisdiction may vest in a magistrate judge to hear and decide a civil case." *Williams*, 875 F.3d at 501. The Ninth Circuit reached this result based on the "legal meaning of the term" "parties." *Id.* at 503. In so holding, the Ninth Circuit expressly confirmed its "agree[ment] with the Seventh Circuit's sound reasoning" and "extensive analysis" in this case. *Id.* at 504. The Ninth Circuit also faulted "the Fifth Circuit [for] not explain[ing] the basis for its contrary holding" in *Neals*. *Id.* at 505.[2] In light of *Williams*, petitioner cannot plausibly contend that the Seventh and Ninth Circuits are in conflict.

It should be added that, although identified by petitioner as being on the same side of the alleged circuit split as the Seventh Circuit (see Pet. 10-11), the Eighth Circuit's decision in *Henry* v. *Tri-Services, Inc.*, 33 F.3d 931 (8th Cir. 1994), also is beside the point here, as it involved a default judgment entered *against* an unserved defendant. Because petitioner has sought review of Section 636(c)'s application to IFP cases at the screening stage, which by definition does not involve a judgment adverse to a defendant, *Henry* is outside the scope of the question presented.

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[2] In addition, the Ninth Circuit criticized Judge Posner and Judge Easterbrook for failing to give sufficient weight to the "language employed in the statute." *Id.* at 504 n.2.

B. Even if the courts currently are in conflict on the question presented, this Court's intervention is not warranted.

There is no square conflict in the circuits on the question presented here. But even if *Neals* is thought to be in real tension with the decision below, the Fifth Circuit may well reconsider its *Neals* holding in light of the Seventh and Ninth Circuits' recent decisions—and that tension, in any event, concerns an issue on which there is no need for national uniformity. It need not concern this Court.

1. The Fifth Circuit's decision in *Neals* is barely reasoned: it consists of only two sentences of analysis on the relevant question. 59 F.3d at 532. Indeed, the Ninth Circuit remarked that the Fifth Circuit reached its result in *Neals* "[w]ithout explanation." *Williams*, 875 F.3d at 505. In light of the "sound reasoning" (*id.* at 504) and "thoughtful opinions" (Pet. 21) in this case, the Fifth Circuit might well reconsider its view.

This is especially so given that *Neals* was neither briefed nor argued by counsel. Indeed, in the five circuit court cases discussed above that bear on this question, petitioner's argument failed in the three where the issue was briefed and prevailed in the two where it was not.[3] Briefing thus clearly makes a dif-

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[3] The need for a defendant's consent to magistrate judge jurisdiction was briefed in *Coleman*, *Henry*, and *Williams*, but *not* in *Neals* or *Wilhelm*. See Appellant's Opening Brief; Brief of California as Amicus Curiae; Appellant's Reply Brief, *Williams*, 875 F.3d 500 (No. 15-15259); Appellant's Opening Brief; Brief of California as Amicus Curiae; Appellant's Reply Brief, *Wilhelm*, 680 F.3d 1113 (No. 11-16335); Brief of Appellant, *Neals*, 59 F.3d 540 (No. 95-10209); Brief of Defendant-Appellant Tri-Services, Ltd.; Supplemental Brief of Plaintiffs-Appellees; Reply to Plain-

ference on this complex jurisdictional question, and the Fifth Circuit should be given the opportunity to reconsider this issue with the benefit of counseled argument.

The history of the intra-circuit conflict in the Seventh Circuit also demonstrates why review is not needed and how a circuit split here might resolve itself. Judge Easterbrook sat on both *Geaney* and *Hains*, but acknowledged their inconsistency in his dissent below. Pet. App. 34a. If Judge Easterbrook can change his opinion on this issue, the Fifth Circuit surely can reconsider its two-sentence analysis without this Court's intervention.

Moreover, even by petitioner's count, fewer than a third of the circuits have weighed in on this issue, even though the alleged circuit split has existed since 1995. In these circumstances, there is no reason to preempt other circuits from weighing in on the question should it arise in their jurisdictions.

2. In addition, even if it is assumed that there will be a real and persistent conflict in the circuits on the issue presented, review by this Court *still* would not be warranted. Recall that the Seventh Circuit decided *Geaney* in 1985 and *Hains* in 1997. District courts in the Seventh Circuit nevertheless managed their dockets notwithstanding an irreconcilable two-decade intra-circuit conflict between these decisions. This history strongly suggests that the divergent approaches on the issue here are tolerable. The asserted conflict between the circuits itself is likewise stale, and a "stale conflict sometimes may suggest that the disagreement is not a recurring and im-

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tiffs-Appellants' Supplemental Brief by Defendant-Appellant Tri-Services, Ltd., *Henry*, 33 F.3d 931 (No. 93-2907).

portant one." Stephen M. Shapiro et al., *Supreme Court Practice* 248 (10th ed. 2013).

The unsuitability of this case for review and the insignificance of any conflict in the circuits on the question presented (if such a conflict is thought to exist) is further confirmed by recognition of the issue's unimportance as a practical matter. Of course, it is important that courts know what rule governs the cases before them. But *which* of the possible approaches is taken on the issue here will affect the outcome of few cases: there simply is no evidence of a "need for a uniform rule on the point." *Comm'r* v. *Bilder*, 369 U.S. 499, 501 (1962).

II. The Question Presented Is Of Little Practical Significance.

In nevertheless seeking review, petitioner maintains that the Seventh Circuit's holding "will burden district courts" and produce "an obvious 'waste of time' for busy federal courts." Pet. 17. But that simply is not so.

In fact, the decision below will not have any significant impact on district courts. Thus, although petitioner asserts that requiring district judges to review IFP complaints at the screening stage will crowd district dockets with a "deluge" of IFP cases (Pet. 18), it cites only five cases to support that assertion. *Id*. at 17-18.

And even when the rule announced below does apply, it will not lead to "congested civil dockets in the federal courts." Pet. 19 (citation and internal quotation marks omitted). In accordance with the decision below, a district court may choose between two options in addressing cases that are referred to magistrate judges: it may require service of process on

previously unserved defendants, or it may have a district court judge review magistrate recommendations for the dismissal of IFP complaints. Neither would impose a significant burden.

If the first option is chosen, States and other defendants that are not currently being served *will* be served and given the opportunity to consent (or not) to the magistrate judge. But this will not require the defendant to respond to the complaint; all the defendant will have to do is decide whether to consent to the magistrate judge's role. States can easily develop systems for granting or withholding such consent in categories of cases (such as those filed IFP) as a matter of course. Private defendants also can choose for themselves whether or not their cases will be resolved by a magistrate or district court judge.

In the alternative, district courts may choose to have district court judges review IFP complaints prior to dismissal. This would be akin to the report and recommendation process and would be similarly nondisruptive. A number of factors support this conclusion.

First, the standard for screening IFP complaints is easily administered, meaning review will not create significant additional work for district court judges. A district court judge may dismiss an IFP complaint based on simple statutory guidelines: if "the allegation of poverty is untrue"; the action or complaint "is frivolous or malicious"; the action or complaint "fails to state a claim on which relief may be granted"; or the action or complaint "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2).

Second, district court judges still can be assisted in the resolution of IFP cases by magistrate judges and pro se law clerks (who often work for the clerk of the court). A significant number of judges already use magistrate judges and pro se law clerks to assist in handling the pro se caseload. Donna Stienstra et al., Fed. Judicial Ctr., *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges* 29 (2011), https://www.fjc.gov/sites/default/files/2012/ProSeUSDC.pdf (finding that district judges send 31.1% of prisoner pro se cases and 24.6% of pro se non-prisoner cases to pro se law clerks for management and 75.4% refer pretrial matters in pro se cases to magistrate judges); see also Christopher Smith, *United States Magistrates in the Federal Courts: Subordinate Judges* 61 (1990) (magistrate judge workloads are "designed for flexible utilization by district judges according to the needs of their respective districts"). Pro se law clerks do the bulk of review where they are used. Jefri Wood, Fed. Judicial Ctr., *Pro Se Case Management for Nonprisoner Civil Litigation* 31-36 (2016), https://www.fjc.gov/sites/default/files/2017/Pro_Se_Case_Management_for_Nonprisoner_Civil_Litigation.pdf.

In the Southern District of New York, for example, a "pro se law clerk [reviews the complaint and then] forwards the case file to the judge assigned with a written recommendation with regard to *in forma pauperis* status, attorney assignment, the underlying merits, and possible consolidation." Comm. on Fed. Courts of the N.Y. State Bar Ass'n, *Pro Se Litigation in the Second Circuit*, 62 St. John's L. Rev. 571, 578 (2012). This system has proven to be quite efficient: the average pro se case in that district is pending for only twenty-seven days. *Ibid.* It thus is

not likely that the Seventh Circuit's rule "will burden district courts by slowing down the [IFP] screening process." Pet. 17.

III. The Case Was Correctly Decided Below.

Perhaps because it is impossible to make a serious case that the issue here is one of great practical importance, petitioner directs the bulk of its attention to the merits of the holding below. Pet. 11-17. But here, too, it is wrong: The Seventh Circuit's decision is supported by Section 636(c)'s text, structure, and legislative background, as well as by the constitutional considerations that govern the construction of statutes.

A. The text and structure of Section 636(c) support the Seventh Circuit's interpretation.

Section 636(c) empowers magistrate judges to enter final judgment "upon the consent of the parties." The question here, then, is whether an unserved defendant is a "part[y]" whose consent is needed for the magistrate judge to lawfully enter final judgment. The better reading is that an unserved defendant *is* a party, for several reasons.

First, in ordinary usage, the word "party" encompasses both plaintiffs and defendants. A "party" is generally defined for legal purposes as "[o]ne by or against whom a lawsuit is brought." *Black's Law Dictionary* 1232 (9th ed. 2009). As the Ninth Circuit explained in *Williams*, "[t]he term 'party' or 'parties' is a legal term of art" that had this same definition when Congress enacted Section 636(c), making "all plaintiffs and defendants named in the complaint * * * 'parties' within the meaning of § 636(c)(1)"—and "Section 636(c)(1) * * * requires consent of all par-

ties—not a subset of them—for jurisdiction to vest in the magistrate judge." 875 F.3d at 503-04.

Second, this common-sense understanding is reinforced by Section 636(c)'s structure. In crafting Section 636(c), Congress differentiated between "parties" and "party," using the plural whenever consent is discussed but using the singular when referring to other issues (*e.g.*, "an aggrieved party" may appeal, 28 U.S.C. § 636(c)(3); "any party" may move to have the district court "vacate a reference of a civil matter to a magistrate judge," 28 U.S.C. § 636(c)(4)). In fact, the term "parties" is repeatedly used in the Federal Rules of Civil Procedure in contexts where it is clear that treating the plaintiff as the only "party" would defeat the point of the rule. See, *e.g.*, Fed. R. Civ. P. 4(a)(1) ("A summons must * * * name the court and the parties * * * ."); Fed. R. Civ. P. 10(a) ("The title of the complaint must name all of the parties."); Fed. R. Civ. P. 56(b) ("[A] party may file a motion for summary judgment at any time until 30 days after the close of all discovery"); see also Pet. App. 17a. Thus, as the Seventh Circuit explained, it is apparent that "Congress used the singular when it meant one party, and it used the plural when it meant all parties." Pet. App. 24a.

Third, Section 636(c)(2) requires the clerk of the court to "notify the parties" about their option to consent to a magistrate judge at "the time the action is filed." This statutory language clearly contemplates a single-step consent procedure in which plaintiffs and defendants consent simultaneously; in contrast, petitioner proposes a multi-step process in which the clerk notifies the plaintiff, records his or her consent, assigns the case to a magistrate judge, and then re-

peats this process for the defendant once it has been served.

And although the definition of "party" may vary with context (see *Devlin* v. *Scardelledetti*, 536 U.S. 1, 10 (2002)), the context *here* does not support a departure from the ordinary understanding of the term. On that point, Judge Easterbrook was incorrect in relying on *Murphy Bros.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), for a general presumption that unserved defendants are not parties. See Pet App. 35a-36a. That case concerned a removal statute, which provided that the timeliness of a petition for removal would be determined by "the receipt by the defendant, through service or otherwise," of the complaint. 28 U.S.C. § 1446(b). *Murphy Brothers* therefore stands for the proposition that, *when the statutory text identifies service of process as the dividing line*, a defendant is a party only when he or she has been served. Here, by contrast, Section 636(c) does not make service of process the touchstone.

B. Section 636(c)'s history further supports the Seventh Circuit's interpretation of "parties."

Introduced in the 95th Congress and passed by the 96th Congress, Section 636(c) was enacted as part of the Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643. Throughout the legislative process, the requirement of unanimous consent to decision by a magistrate judge was a crucial component of the bill. This background suggests that Section 636(c) means what it says: *all* parties must consent.

Perhaps most important, Congress viewed consent as critical to preserving the bill's constitutional-

ity. The House sponsor of the bill, Rep. Kastenmeier, made repeated statements during House debates to the effect that consent was a priority for legislators in considering the law. As he reassured colleagues: "[T]his is entirely based on consent, the consent of *both* parties for the expanded jurisdiction. We are not imposing a magistrate on anybody. We are doing that partly to meet any constitutional challenge." *Hearing on S. 1613 and H.R. 13511 Before the H. Comm. on Rules*, 95th Cong. 4 (1978) (statement of Rep. Kastenmeier) (emphasis added); see also 125 Cong. Rec. 16,447 (1979) (statement of Rep. Kastenmeier) (repeating that "*both* parties must consent to trial before a magistrate and must consent to entry of final judgment by the magistrate for the district court" (emphasis added)). Similarly, the legislation's primary Senate sponsor, Sen. DeConcini, described the Act as authorizing "magistrates to enter dispositive judgments in civil cases if designated to do so by the district court and if *all* parties consent *in advance*." 125 Cong. Rec. 9,469 (1979) (emphasis added).

In addition, Congress was especially concerned with maintaining anonymity in consent. To further this end, Section 636(c)(2)'s "blind consent" provision protects litigants who exercise their right to a hearing in front of a district court judge and who otherwise might face the "possibility of coercion." 125 Cong. Rec. 25,342 (1979). The Department of Justice shared this view, supporting inclusion of the blind consent provision to address "any apprehension" about "full, uncoerced consent by the parties." *The Federal Magistrates Act of 1979: Hearing on S. 237 Before the S. Subcomm. on Improvements in Judicial Machinery of the Comm. on the Jud.*, 96th Cong. 71. (1979) (statement of Daniel J. Meador, Ass't Att'y

Gen.). But petitioner's approach, in which parties consent seriatim, often would make anonymity impossible.

C. By requiring the consent of both parties, the Seventh Circuit properly avoided a constitutionally problematic interpretation of Section 636(c).

The language and history of Section 636(c) are thus clear enough. But if there is any doubt about the answer to the question here, the issue is resolved by the constitutional avoidance doctrine: petitioner's approach would raise grave doubts about the constitutionality of Section 636(c) under Article III.

1. Magistrate judges "do not enjoy the protections of Article III" (*Wellness International Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1938 (2015)), as they have neither life tenure nor a guarantee against salary decreases. Nor are magistrate judges appointed by the President and confirmed by the Senate.

Constitutional concerns are implicated when such non-Article III adjudicators exercise "essential attributes of judicial power." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 851. And the Court has explained that the "entry of a final, binding judgment" is "the most prototypical exercise of judicial power," and typically must be reserved for an Article III court. *Stern* v. *Marshall*, 564 U.S. 462, 494 (2011). A magistrate judge's entry of final judgment thus raises Article III concerns.

The Court has identified two constitutional problems that arise when a non-Article III adjudicator improperly exercises Article III power.

First, the exercise of Article III authority by a non-Article III adjudicator threatens the integrity of the judiciary. "The Framers considered it essential that 'the judiciary remain[] truly distinct from both the legislature and the executive,'" and that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *Stern*, 564 U.S. at 483. Thus, Article III serves as an "inseparable element of the constitutional system of checks and balances" that "defines the power and protects the independence of the Judicial Branch." *Id.* at 482 (quoting *N. Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)).

The Court has explained that the Constitution's separation of powers is threatened even when the incursion on Article III appears *de minimis* in individual cases. "'[I]llegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure,'" so that even "challenges that may seem innocuous at first blush" may "compromise the integrity of the system of separated powers and the role of the Judiciary in that system." *Stern*, 564 U.S. at 503 (internal quotation marks omitted). In fact, this Court in *Stern* drew precisely that distinction, explaining that, although bankruptcy judges were not "barred from * * * proposing findings of fact and conclusions of law," district courts had to nonetheless "finally decide[]" cases. *Id.* at 502. The Seventh Circuit's interpretation of Section 636(c) thus avoids an unconstitutional encroachment on the judiciary.[4]

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[4] Judge Posner's dissent below, in emphasizing practicality and labeling it a "waste of time" for district judges to be given a

Second, "[t]he structural principles secured by the separation of powers protect the individual as well." *Stern*, 564 U.S. at 483 (quoting *Bond* v. *United States*, 564 U.S. 211, 222 (2011)). By specifying the "defining characteristics of Article III judges" (*Stern*, 564 U.S. at 483), Article III protects individuals by ensuring that those judges are freed from external influences and are able to render impartial judgments.

Here, Judge Posner's dissent misapprehends the issue. Although a defendant would of course consent to a magistrate judge's entry of final judgment in its favor (see Pet. App. 31a), the proper question is whether a defendant would consent to the magistrate judge's adjudication without knowing how the magistrate would rule. This is the importance of the consent provision: it protects those litigants who may wish to exercise their constitutional right to have their case tried by an Article III judge—because, perhaps, they think a magistrate judge will be too generous to plaintiffs.

2. Given these concerns, the doctrine of constitutional avoidance counsels in favor of requiring both parties' consent before entry of final judgment. It is the Court's usual approach that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Under this principle, Section 636(c) should be

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more prominent role (Pet. App. 31a-33a), gives improperly short shrift to these Article III concerns.

interpreted to require the consent of both parties—including an unserved defendant—prior to entry of final judgment, so as to avoid any threat to the integrity of the judiciary and the rights of the individual litigants.

The Court's precedents have made clear the importance of consent in authorizing non-Article III adjudicators to perform tasks that would otherwise be the province of Article III judges. Although Congress has "enlarged the magistrate's jurisdiction over civil and criminal trials," a "critical limitation on this expanded jurisdiction is consent." *Gomez*, 490 U.S. at 869-70. In fact, consent is consistently recognized as grounds for resolving constitutional concerns regarding adjudication by non-Article III judges. See *Peretz* v. *United States*, 501 U.S. 923, 932 (1991) (explaining that consent resolves concerns about magistrate supervision of *voir dire*); *Thomas* v. *Union Carbide Agr. Products Co.*, 473 U.S. 568, 584 (1985) ("Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders * * * *without consent of the litigants*, and subject only to ordinary appellate review.") (emphasis added).

As the Court recently explained in *Wellness International Network, Ltd.* v. *Sharif*, litigant consent permits Article I judges to adjudicate claims that would otherwise be prohibited under *Stern*. 135 S. Ct. at 1945. "Adjudication based on litigant consent has been a consistent feature of the federal court system since its inception" (*id.* at 1947), and "allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process." *Id.* at 1944.

The same principle applies here. By construing Section 636(c) to require the consent of both parties, the decision below avoids any constitutional concerns associated with a magistrate judge exercising Article III power.

* * * *

There is one additional problem with petitioner's approach. It appears to advocate a special, adverse rule for pro se and IFP litigants. See Pet. i (question presented directed at pro se plaintiffs); *id.* at 1 ("This case is about whether magistrate judges can continue to dispose promptly of meritless lawsuits filed by pro se litigants * * *."). But this submission runs strongly counter to the policy of the governing federal statutes. Section 1915, which authorizes IFP filings, was designed to expand access to the federal courts for the indigent. *Denton*, 504 U.S. at 31. Nothing in the language of Section 636 or of the IFP statute suggests that the constitutional concerns outlined above are inapplicable to the indigent, or that Congress intended to ease the burden of processing IFP complaints only if IFP litigants surrender their Article III protections. To the contrary, Congress was concerned that district court judges would coerce disfavored litigants—including, presumably, those proceeding IFP—into consenting to adjudication before a magistrate judge; it thus crafted the unanimous- and blind-consent provisions to avoid that result. See H.R. Rep. No. 95-1364, at 13-14 (1978) ("This language [in Section 636(c)(2)] is an important safeguard against what has been characterized as the 'velvet blackjack' problem. Some judges may be tempted to force disfavored cases into disposition before magistrates by intimations of lengthy delays

manufactured in district court if the parties exercise their right to stay in that court.").

Put simply, petitioner seeks to create one system of review for those who can afford Article III's protections and another for those who cannot. Without benefit of counsel, pro se litigants—who often proceed IFP—are unlikely to appreciate the full significance of those constitutional protections. The decision below avoids that constitutionally troubling result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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