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

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONER

Since the Petition was filed, the Ninth Circuit has joined the Seventh Circuit in holding, contrary to the Fifth Circuit's long-standing position, that where a pro se plaintiff has consented to a magistrate judge, the magistrate has no authority to screen out the case as frivolous or meritless under 28 U.S.C. § 1915(e)(2), unless the defendant is served and also consents. The recent experience of district judges in the Seventh and Ninth Circuits—being deluged with numerous cases in just a couple of months—demonstrates the urgent need for review. Notably, Respondent cannot seriously dispute the acknowledged circuit split, and does not contest that this case is an ideal vehicle for settling that division. And while Respondent attempts to minimize the split's importance by positing various stratagems that courts can use to deal with the flood of meritless cases, the artificial nature of these proposals only highlights the urgent need for review.

I. The Panel Majority's Opinion, Judge Easterbrook's Dissent From Rehearing En Banc, And The Ninth Circuit's Decision In *Williams* All Acknowledge The Circuit Split

The Question Presented has divided the Courts of Appeals, as the panel majority, App. 6a, Judge Easterbrook, App. 34a, and the Ninth Circuit acknowledge, *Williams v. King*, 875 F.3d 500, 505 (9th Cir. 2017). Indeed, the panel majority, *see* App. 34a, explicitly rejected *Neals v. Norwood*, 59 F.3d 530 (5th

Cir. 1995). And while Respondent is correct that the Eighth Circuit's decision in *Henry v. Tri-Services, Inc.*, 33 F.3d 931 (8th Cir. 1994), involved a factually distinguishable scenario, BIO 10, both the panel majority below, App. 6a, and Judge Easterbrook, App. 34a, properly explained that the Eighth Circuit's reasoning aligns only with the panel majority's.

Respondent paradoxically argues that the Fifth Circuit's decision in *Neals* does not conflict with the conclusion reached by the Seventh Circuit here or the Ninth Circuit in *Williams*, BIO 8–9, and that the Fifth Circuit will change its mind once it reads those recent decisions, BIO 11. These self-contradictory arguments are both wrong.

Respondent's assertion that *Neals* does not conflict with the Seventh and Ninth Circuits' decisions, BIO 8–9, is incorrect. The Fifth Circuit based its holding on the conclusion that defendants who have "not been served" were not "parties" whose consent is required under 28 U.S.C. § 636(c)(1). *Neals*, 59 F.3d at 532. This statutory text has remained unchanged since *Neals*. Respondent's argument that 28 U.S.C. § 1915 added another ground for dismissal since *Neals*, BIO 8–9, has nothing to do with the meaning of "parties" for purposes of Section 636(c)(1). Notably, the meaning of "parties" is *precisely* the point of disagreement between the panel majority below and Judge Easterbrook. Pet. 11–16.

Respondent's argument that the Fifth Circuit would change its mind if it were exposed to the reasoning of the panel majority and *Williams*, BIO 11, is baseless speculation. The Fifth Circuit has given no indication of abandoning its long-settled approach, upon which numerous district courts have relied. *See* Pet. 10 (collecting cases). Indeed, the Fifth Circuit articulated precisely Judge Easterbrook's understanding of "parties," and there is every reason to believe that the Fifth Circuit will continue following Judge Easterbrook's more fulsome explication of its long-held, entirely correct position.

Nor is anything "stale" about this split. BIO 12. Since the Petition was filed, the Ninth Circuit has joined the Seventh Circuit's approach. District courts in the Seventh and Ninth Circuits have now been inundated with frivolous and meritless lawsuits. *See infra* pp. 4–8. District judges in two circuits are flooded, while judges in a sister circuit do not face these needless burdens. This imbalance justifies this Court's review. *See* Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.4 (10th ed. 2013). And no benefit will be gained from allowing the split to percolate further, as this is a straightforward issue, which was fully developed below. Pet. 21.

II. This Case Is An Ideal Vehicle For Deciding The Legality Of A Pointless Practice, Which Has Flooded District Courts In The Seventh And Ninth Circuits

The Petition explained that this case is an ideal vehicle for resolving the Question Presented, as the parties are well-represented and the Question has been fully aired below; an unusual confluence of circumstances in cases dealing with frivolous or entirely meritless lawsuits. Pet. 20–21. Further, the Petition warned that the Seventh Circuit's decision would lead to a deluge of meritless and frivolous cases being forced onto district courts' dockets without any corresponding benefit. Pet. 17–20.

Developments since the Petition confirm the Petition's warnings about the practical consequences of the Seventh Circuit's approach. In the months since the decision below, district courts in the Seventh Circuit have had to deal with many instances of magistrate judges referring frivolous or meritless cases to district courts for dismissal under 28 U.S.C. § 1915. *See Kirk v. Rose*, No. 16-CV-799-JPS, 2017 WL 4023137 (E.D. Wis. Sept. 12, 2017); *Lopez v. United States*, No. 17-C-527, 2017 WL 3484951 (E.D. Wis. Aug. 14, 2017); *Chapman v. Migala*, No. 17-CV-266-PP, 2017 WL 3197235 (E.D. Wis. July 27, 2017); *Murray v. Mishlove*, No. 17-1479, 2017 WL 3975068 (7th Cir. July 7, 2017); *Jones v. Marcus,* No. 17-C-1265, 2017 WL 5032719 (E.D. Wis. Oct. 31, 2017); *Lopez v. Liska*, No. 17-C-526, 2017 WL 5991744 (E.D. Wis.

Dec. 4, 2017); *Hoeller v. BMO Harris Bank, N.A.*, No. 15-CV-1023-PP, 2017 WL 6389701 (E.D. Wis. Dec. 14, 2017).

The situation is even more troubling in the Ninth Circuit, with a startling number of examples in the six weeks since *Williams*. *See Argon v. Garibay*, No. 1:17-CV-00875-MJS(PC), 2017 WL 5292610 (E.D. Cal. Nov. 13, 2017); *Thunderbird v. Oregon*, No. 6:17-CV-01117-SB, 2017 WL 6271472 (D. Or. Nov. 16, 2017); *Baldhosky v. California*, No. 1:14-CV-00166-LJO-MJS(PC), 2017 WL 5625891 (E.D. Cal. Nov. 22, 2017); *Blair v. Cal. Dep't of Corr. & Rehab.*, No. 1:14-CV-01156-LJO-SAB(PC), 2017 WL 5900085 (E.D. Cal. Nov. 30, 2017); *Gonzales v. Ferrso*, No. 1:16-CV-01813-DAD-EPG, 2017 WL 5900068 (E.D. Cal. Nov. 30, 2017); *Buenrostro v. Fajardo*, No. 1:14-CV-00075-DAD-BAM(PC), 2017 WL 6033469 (E.D. Cal. Dec. 5, 2017); *Galicia v. Jennings*, No. 1:16-CV-00011-DAD-SAB(PC), 2017 WL 5900062 (E.D. Cal. Nov. 30, 2017); *Solano v. Tate*, No. 1:15-CV-00756-DAD-SAB(PC), 2017 WL 5900060 (E.D. Cal. Nov. 30, 2017); *Germany v. Coelho*, No. 1:17-CV-00005-DAD-SAB(PC), 2017 WL 5900042 (E.D. Cal. Nov. 30, 2017); *Anderson v. United States*, No. 1:16-CV-00352-DAD-SAB(PC), 2017 WL 5972743 (E.D. Cal. Dec. 1, 2017); *Pasillas v. Soto*, No. 1:16-CV-00487-SAB-PC, 2017 WL 5972741 (E.D. Cal. Dec. 1, 2017); *Turner v. Admin. Sec. Personnel*, No. 1:16-CV-01643-DAD-SAB(PC), 2017 WL 5900067 (E.D. Cal. Nov. 30, 2017); *Perrotte v. Johnson*, No. 1:15-CV-00026-LJO-SAB(PC), 2017 WL 5900081 (E.D. Cal. Nov. 30, 2017); *Kirkelie v. Thissell*,

No. 1:15-CV-00735-DAD-SAB(PC), 2017 WL 5900075 (E.D. Cal. Nov. 30, 2017); *Sim v. Duran*, No. 1:16-CV-01051-SAB(PC), 2017 WL 5972739 (E.D. Cal. Dec. 1, 2017); *Rhodes v. Fresno Cnty.*, No. 1:15-CV-01714-SAB(PC), 2017 WL 5972736 (E.D. Cal. Dec. 1, 2017); *Russell v. Toor*, No. 1:15-CV-00255-SAB-PC, 2017 WL 5972731 (E.D. Cal. Dec. 1, 2017); *Williams v. Alcala*, No. 1:17-CV-00916-SAB(PC), 2017 WL 5972730 (E.D. Cal. Dec. 1, 2017); *Starrett v. Mimms*, No. 1:15-CV-01582-AWI-SAB(PC), 2017 WL 5972725 (E.D. Cal. Dec. 1, 2017); *Cramblit v. Cal. Dep't of Corr. & Rehab.*, No. 1:17-CV-00058-SAB(PC), 2017 WL 5972724 (E.D. Cal. Dec. 1, 2017); *Hoffman v. Coyle*, No. 1:16-CV-01617-AWI-SAB(PC), 2017 WL 5998221 (E.D. Cal. Dec. 4, 2017); *Jacobsen v. Curran*, No. 1:16-CV-1050-MJS(PC), 2017 WL 5998207 (E.D. Cal. Dec. 4, 2017); *Sahibi v. Gonzales*, No. 1:15-CV-01581-LJO-MJS(PC), 2017 WL 5998206 (E.D. Cal. Dec. 4, 2017); *Salazar v. Kokor*, No. 1:14-CV-00211-AWI-MJS(PC), 2017 WL 5998203 (E.D. Cal. Dec. 4, 2017); *Baldhosky v. Hubbard*, No. 1:12-CV-01200-LJO-MJS(PC), 2017 WL 5998198 (E.D. Cal. Dec. 4, 2017); *Millner v. Dileo*, No. 1:17-CV-00507-AWI-SAB(PC), 2017 WL 5997695 (E.D. Cal. Dec. 4, 2017); *Ayobi v. Adams*, No. 1:17-CV-00693-SAB(PC), 2017 WL 5997622 (E.D. Cal. Dec. 4, 2017); *Lear v. Biter*, No. 1:15-CV-01903-MJS(PC), 2017 WL 6025251 (E.D. Cal. Dec. 5, 2017); *Bennett v. Asuncion*, No. 1:16-CV-1749-MJS(PC), 2017 WL 6016639 (E.D. Cal. Dec. 5, 2017); *Masterson v. Killen*, No. 1:11-CV-01179-DAD-SAB(PC), 2017 WL 6040338 (E.D. Cal. Dec. 6, 2017); *Meador v. Sellers*, No. 1:14-CV-00006-DAD-EPG(PC), 2017 WL 6040325 (E.D.

Cal. Dec. 6, 2017); *Perez v. Padilla*, No. 1:14-CV-01730-DAD-EPG(PC), 2017 WL 6040298 (E.D. Cal. Dec. 6, 2017); *Molina v. Holland*, No. 1:15-CV-01260-DAD-EPG(PC), 2017 WL 6055843 (E.D. Cal. Dec. 7, 2017); *Dawson v. Beard*, No. 1:15-CV-01867-DAD-GSA(PC), 2017 WL 6055836 (E.D. Cal. Dec. 7, 2017); *Garcia v. Tulare Cnty. Main Jail*, No. 1:14-CV-00476-BAM(PC), 2017 WL 6055829 (E.D. Cal. Dec. 7, 2017); *Underwood v. Cox*, No. 1:16-CV-00597-AWI-EPG(PC), 2017 WL 6055828 (E.D. Cal. Dec. 7, 2017); *Caruso v. Solorio*, No. 1:15-CV-00780-AWI-EPG(PC), 2017 WL 6055823 (E.D. Cal. Dec. 7, 2017); *Moore v. Gipson*, No. 1:13-CV-01820-DAD-BAM(PC), 2017 WL 6055782 (E.D. Cal. Dec. 7, 2017); *Hilson v. Arnett*, No. 1:15-CV-01240-MJS(PC), 2017 WL 6209390 (E.D. Cal. Dec. 8, 2017); *Corena v. Rodriguez*, No. 1:16-CV-01025-DAD-EPG(PC), 2017 WL 6209388 (E.D. Cal. Dec. 8, 2017); *Willis v. Kandkhorova*, No. 1:15-CV-01572-AWI-MJS(PC), 2017 WL 6209383 (E.D. Cal. Dec. 8, 2017); *Riley v. Tallerico*, No. 1:16-CV-01189-AWI-EPG(PC), 2017 WL 6209387 (E.D. Cal. Dec. 8, 2017); *Alvarez v. Kernan*, No. 1:17-CV-00609-DAD-EPG(PC), 2017 WL 6316833 (E.D. Cal. Dec. 11, 2017); *Heredia v. Cal. Corr. Inst.*, No. 1:16-CV-00788-JLT(PC), 2017 WL 6311669 (E.D. Cal. Dec. 11, 2017); *Hutchins v. Lockyer*, No. 1:15-CV-01537-DAD-MJS(PC), 2017 WL 5625894 (E.D. Cal. Nov. 22, 2017); *Hicks v. Mantevousian*, No. 1:16-CV-01440-JLT(PC), 2017 WL 6316834 (E.D. Cal. Dec. 11, 2017); *Joy v. Laszuk*, No. 1:16-CV-01652-LJO-EPG(PC), 2017 WL 6311666 (E.D. Cal. Dec. 11, 2017); *Vanderbusch v. Enenmoh*, No. 1:13-CV-01422-LJO-EPG(PC), 2017

WL 6311653 (E.D. Cal. Dec. 11, 2017); *Brown v. Rasley*, No. 1:13-CV-02084-AWI-BAM(PC), 2017 WL 6344424 (E.D. Cal. Dec. 12, 2017); *McCrea v. Hubbard*, No. 1:17-CV-00247-MJS(PC), 2017 WL 6344355 (E.D. Cal. Dec. 12, 2017); *Gray v. Romero*, No. 1:13CV-01473-DAD-GSA-PC, 2017 WL 6375293 (E.D. Cal. Dec. 13, 2017); *Hall v. Smith*, No. 1:15-CV-00860-BAM(PC), 2017 WL 6371343 (E.D. Cal. Dec. 13, 2017); *Flores v. Cruz*, No. 1:15-CV-01184-DAD-BAM-PC, 2017 WL 6371321 (E.D. Cal. Dec. 13, 2017); *Cranford v. Adams*, No. 1:16-CV-00783-AWI-GSA-PC, 2017 WL 6371313 (E.D. Cal. Dec. 13, 2017); *Pennings v. Broomfield*, No. 1:15-CV-01183-AWI-EPG, 2017 WL 6406839 (E.D. Cal. Dec. 15, 2017); *Johnson v. Cal. Forensic Med. Grp.*, No. 1:17-CV-00755-LJO-EPG(PC), 2017 WL 6406119 (E.D. Cal. Dec. 15, 2017); *Voss v. Baker*, No. 1:17-CV-00626-DAD-EPG(PC), 2017 WL 6406044 (E.D. Cal. Dec. 15, 2017); *Coats v. Chaudhri*, No. 1:13-CV-02032-AWI-BAM(PC), 2017 WL 6448004 (E.D. Cal. Dec. 18, 2017); *Washington v. Hernandez*, No. 1:16-CV-01439-LJO-BAM(PC), 2017 WL 6448003 (E.D. Cal. Dec. 18, 2017); *Mitchell v. Beard*, No. 1:15-CV-01512-DAD-GSA-PC, 2017 WL 6447766 (E.D. Cal. Dec. 18, 2017); *Matthews v. Liles*, No. 1:14-CV-00083-AWI-BAM(PC), 2017 WL 6513255 (E.D. Cal. Dec. 20, 2017); *Cochran v. Sherman*, No. 1:15-CV-01388-DAD-BAM(PC), 2017 WL 6538991 (E.D. Cal. Dec. 21, 2017).

Respondent does not dispute that this flood of frivolous and meritless cases to district courts' dockets *will not benefit anyone*, including pro se litigants.

Pet. 19. Instead, Respondent offers his own ideas of how to "minimize" this burden on busy district judges. BIO 13–16. These work-arounds only highlight the problems with Respondent's position.

Respondent first suggests that district courts could require service of process on unserved defendants where the plaintiff elected a magistrate judge. BIO 13–14. This is a waste of court resources. Notably, Respondent does not suggest that such procedures would be beneficial if a pro se litigant elected to proceed in the district court instead, and the district court determined that immediate dismissal was appropriate under 28 U.S.C. § 1915(e)(2). Requiring a different procedure where the pro se litigant elects a magistrate disrespects pro se litigants' choices to "advance their own interests by consenting to decision by a magistrate judge, who may be able to give the case immediate attention that a district judge cannot provide." App. 39a (Easterbrook, J., dissenting from denial of rehearing en banc). In any event, service can present logistical difficulties, such as locating the proper defendant, a problem that might be especially acute in this category of cases. After all, pro se litigants bringing frivolous claims may not provide fulsome information for serving defendants.

Alternatively, Respondent suggests that district courts reviewing IFP complaints prior to dismissal, under the Seventh and Ninth Circuits' approach, can enlist "magistrate judges and pro se law clerks to assist in handling the pro se caseload." BIO 15. No

doubt, magistrates can assist in the handling of frivolous and meritless lawsuits by, for example, filing reports and recommendations of dismissal, as is now happening over and over (and over) again in the Seventh and Ninth Circuits. But busy district judges must review each report and enter a final order. Forcing district judges to enter more orders adopting magistrate judges' recommendations exacerbates "the district courts' mounting queue of civil cases." *Roell v. Withrow*, 538 U.S. 580, 588 (2003) (citation omitted).

III. The Seventh And Ninth Circuits Decided The Question Presented Incorrectly

A. As Judge Easterbrook explained below, the term "parties" in Section 636(c)(1) applies *only* to those that have been served with process, an interpretation that is both correct and resolves all of the difficulties that the panel majority raised. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), establishes the general "presumption" that "someone named as a defendant does not become a party until served with process." App. 35a (Easterbrook, J., dissenting from denial of rehearing en banc). That presumption is especially appropriate in the context of Section 636(c)(1), because that provision's consent requirement exists to protect litigants from being bound by non-Article III judges without their consent, *see Roell*, 538 U.S. at 588–89, and unserved defendants cannot be bound, Pet. 13 (collecting cases).

Respondent does not answer these points, but instead makes various flawed arguments.

Respondent begins by arguing that "parties" is a "legal term of art" meaning "all plaintiffs and defendants named in the complaint." BIO 16–17 (citation omitted). This argument is directly refuted by *Devlin v. Scardelletti*, 536 U.S. 1 (2002), which explained that "[t]he label 'party' does not indicate an absolute characteristic," and one may be "[a] part[y] for some purposes and not for others," depending on "context." *Id.* at 10. Here, "context" favors reading "parties" consistent with the *Murphy Brothers* presumption.

Next, Respondent repeats the panel majority's assertion that Section 636(c)(1)'s use of the "plural," "parties," rather than the "singular," "party," demonstrates that all parties must consent. BIO 17. But as the Petition explained, Pet. 15, all agree that every *party* to a case must consent under Section 636(c)(1). The critical point is that the *Murphy Brothers* presumption and statutory context make clear that an unserved defendant is not a party.

Respondent's claim that Petitioner is attempting to add an overly complicated, "multi-step [consent] process" gets matters exactly backward. BIO 17–18. Congress directed courts to screen out frivolous and meritless pro se prison lawsuits, 28 U.S.C. § 1915A, and lower courts "have understood section 1915(e)" to require the same "screen[ing]" for "all complaints filed

with requests to proceed IFP," App. 5a (citation omitted). Courts must conduct this screening "*before docketing, if feasible or, in any event, as soon as practicable after docketing*," 28 U.S.C. § 1915A(a) (emphasis added), so this "initial screening" often "takes place before the defendants are served," App. 5a. Under Petitioner's approach, there is just one step in the typical case where a pro se plaintiff files a frivolous lawsuit and consents to magistrate jurisdiction under Section 636(c)(1): a dismissal of the claim. Under Respondent's approach, on the other hand, courts will need to adopt some form of the cumbersome processes that Respondent suggests, which involve multiple steps and/or needless district judge involvement. *See supra* pp. 9–10.

Respondent's references to the legislative history of the Federal Magistrate Act do not support his position. BIO 18–19. Respondent quotes a sponsor's assertion that the consent requirement avoids "imposing a magistrate on anybody," BIO 19 (citation omitted), but when a plaintiff consents to a magistrate who then dismisses the case, no one has been "imposed" upon.

The "constitutional concerns" Respondent raises at length, BIO 20–24, all suffer from a fundamental flaw: an unserved defendant is not bound by a judgment, meaning that there is not even a possible constitutional issue. Pet. 13 (collecting cases). There is, after all, "no constitutional problem with binding consenting *plaintiffs* to adverse decisions by magistrate

judges." App. 35a (Easterbrook, J., dissenting from denial of rehearing en banc) (emphasis added).

Respondent's argument that Petitioner's approach would create a "special, adverse rule for pro se and IFP litigants" is meritless. BIO 24–25. Like any litigant, a pro se plaintiff can choose not to consent to a magistrate. The only "special" rule for these litigants is the screening process, but that is mandated by Congress. *See* 28 U.S.C. §§ 1915A; 1915(e). This screening out of meritless cases will continue under either interpretation of "parties"—just much less efficiently if district judges must get involved in every case.

Finally, Respondent wrongly accuses Petitioner of "abandon[ing] the argument it relied upon below." BIO 7. Below, as here, Petitioner argued that defendants who "ha[ve] not been served" are not parties, Br. of Def.-Appellee 13–14, No. 15-3254, ECF No. 23 (7th Cir. 2016) (quoting *Neals*), and should not be required to consent prior to dismissal because "the plaintiff is the only party with an affected interest at [the initial screening] stage," *id*. at 11.

B. Alternatively, as Judge Posner argued below, even if an unserved defendant is a "party," its consent should be presumed when there is "no possible reason for the defendant to [withhold consent]." App. 31a. Respondent concedes that "a defendant would of course consent to a magistrate judge's entry of final judgment in its favor," but argues that the "proper

question is whether a defendant would consent . . . without knowing how the magistrate would rule." BIO 22. But at the screening stage, before the defendant is served and can be adversely bound, *supra* pp. 10–11, the only action a magistrate *or* district judge can take is dismissing the case, *see* 28 U.S.C. §§ 1915A, 1915(e), and the defendant's consent can safely be presumed for purposes of this screening.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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