No. 19-____

IN THE
Supreme Court of the United States

DAVID SAMARRIPA, ET AL.,
Petitioners,

v.

GREGORY KIZZIAH, WARDEN, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal courts have the authority to impose partial filing fees on habeas petitioners.

PARTIES TO THE PROCEEDING

Timmie D. Cole, Sr., Jose Adrian Hernandez, Stephon Mason, Arnulfo Torres Perez, and David Samarripa, petitioners on review, were the petitioners below.

Gregory Kizziah, Louis Milusnic, and Steven Lake, wardens, are respondents on review.

J. Ray Ormond, warden, was the respondent below.

RELATED PROCEEDINGS

To counsel's knowledge, all proceedings directly related to this petition include:

Petitioner Timmie D. Cole, Sr.:

- *Cole* v. *Ormond*, No. 17-6333 (6th Cir. Mar. 4, 2019); No. 17-6534 (6th Cir. dismissed Feb. 1, 2018); No. 6:17-cv-00150-GFVT (E.D. Ky. Dec. 13, 2017); No. 6:16-cv-053-DCR (E.D. Ky. May 18, 2016) (reported at 2016 WL 2903230); No. 6:17-cv-00346-JMH-CJS (E.D. Ky.)
- *United States* v. *Cole*, No. 3:02-cr-00034-RP-3 (S.D. Iowa closed Jan. 3, 2006); No. 03-3140 (8th Cir. Aug. 25, 2004) (reported at 380 F.3d 422); No. 07-2175 (8th Cir. May 23, 2008) (reported at 278 F. App'x 706); No. 08-3261 (8th Cir. Oct. 7, 2008); No. 08-3619 (8th Cir. Nov. 13, 2009) (reported at 371 F. App'x 693)
- *Cole* v. *United States*, No. 4:05-cv-635-REL (S.D. Iowa Sept. 10, 2007); No. 07-3173 (8th Cir. Sept. 18, 2008); No. 4:09-cv-00172-REL (S.D. Iowa Jan. 20, 2011); No. 4:14-cv-00317-REL (S.D. Iowa Aug. 13, 2014); No. 16-3416 (8th Cir. Feb. 23, 2017); No. 17-1705 (8th Cir. Aug. 14, 2017)

Petitioner Jose Adrian Hernandez:

- *Hernandez* v. *Ormond*, No. 17-6213 (6th Cir. Mar. 4, 2019); No. 17-6434 (6th Cir. dismissed Jan. 17, 2018); No. 6:17-cv-00081-DLB (E.D. Ky. Nov. 16, 2017)
- *United States* v. *Hernandez*, No. 5:05-cr-2481-2 (S.D. Tex. Apr. 6, 2006); No. 06-40683 (5th Cir. Aug. 21, 2007)

- *Hernandez* v. *United States*, No. 5:16-cv-00179 (S.D. Tex. Jan. 20, 2017)

Petitioner Stephon Mason:

- *Mason* v. *Ormond*, No. 17-6166 (6th Cir. Mar. 4, 2019); No. 17-6279 (6th Cir. dismissed Jan. 17, 2018); No. 18-5126 (6th Cir. dismissed July 3, 2018); No. 6:17-cv-00082-KKC (E.D. Ky. Oct. 19, 2017)
- *United States* v. *Mason*, No. 8:03-cr-321-DKC-4 (D. Md. Sept. 29, 2005); No. 05-5000 (4th Cir. July 13, 2007) (reported at 2007 WL 2046735); No. 10-6292 (4th Cir. May 28, 2010) (reported at 380 F. App'x 336)
- *Mason* v. *United States*, No. 8:08-cv-02260 (D. Md. Apr. 30, 2009) (reported at 2009 WL 1310886)
- *In re Mason*, No. 12-379 (4th Cir. Dec. 13, 2012); No. 14-135 (4th Cir. dismissed Feb. 25, 2014); No. 17-249 (4th Cir. dismissed June 6, 2017)
- *Mason* v. *O'Brien*, No. 2:13-cv-00050-JPB-JSK (N.D. W. Va. Dec. 16, 2013) (reported at 2013 WL 6583988); No. 14-06053 (4th Cir. Apr. 18, 2014) (reported at 566 F. App'x 269)

Petitioner Arnulfo Torres Perez:

- *Perez* v. *Ormond*, No. 6:17-cv-00072-KKC (E.D. Ky. Nov. 3, 2017); No. 17-6299 (6th Cir. Mar. 4, 2019); No. 17-6362 (6th Cir. dismissed Mar. 21, 2018)
- *United States* v. *Perez*, No. 1:11-CR-00360-SS-10 (W.D. Tex. Dec. 19, 2011); No. 16-51452 (5th Cir. dismissed Feb. 23, 2017); No. 16-51453 (5th Cir. dismissed July 13, 2017)

Petitioner David Samarripa:

- *Samarripa* v. *Ormond*, No. 6:17-cv-00086-DCR (E.D. Ky. Oct. 11, 2017); Nos. 17-6048, 17-6260 (6th Cir. Mar. 4, 2019)
- *United States* v. *Samarripa*, No. 1:11-cr-00360-SS-14 (W.D. Tex. Dec. 19, 2011); No. 13-50048 (5th Cir. dismissed Apr. 4, 2013); No. 14-50283 (5th Cir. dismissed May 16, 2014); No. 14-50920 (5th Cir. dismissed Oct. 1, 2014); No. 17-50033 (5th Cir. Sept. 13, 2017) (reported at 697 F. App'x 374)
- *Samarripa* v. *United States*, No. 1:12-cv-01028-SS (W.D. Tex. Mar. 13, 2013) (reported at 2013 WL 12113202)
- *In re Samarripa*, No. 14-50267 (5th Cir. June 18, 2014); No. 14-50841 (5th Cir. Sept. 17, 2014); No. 14-51186 (5th Cir. dismissed Dec. 2, 2014); No. 16-51360 (5th Cir. dismissed Feb. 16, 2017); No. 17-50192 (5th Cir. dismissed Apr. 19, 2017)

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PETITION FOR A WRIT OF CERTIORARI

Timmie D. Cole, Sr., Jose Adrian Hernandez, Stephon Mason, Arnulfo Torres Perez, and David Samarripa respectfully petition for a writ of certiorari to review the judgment of the Sixth Circuit below.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 917 F.3d 515 (2019). Pet. App. 1a-17a. The district court opinions are not reported. *Id.* at 18a-19a, 20a-21a, 22a-23a, 24a-25a, 26a-27a.

JURISDICTION

The Sixth Circuit entered judgment on March 4, 2019. Justice Sotomayor granted an extension of the

period for filing this petition to August 1, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND PROCEDURAL PROVISIONS INVOLVED

Section 1913 of Title 28 of the U.S. Code provides:

> The fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and uniform in all the circuits.

Section 1915(a) of Title 28 of the U.S. Code provides:

> (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.
>
> (2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing

> the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.
>
> (3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

Rule 24(a) of the Federal Rules of Appellate Procedure states:

> (a) Leave to Proceed in Forma Pauperis.
>
> (1) Motion in the District Court. Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:
>
> (A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;
>
> (B) claims an entitlement to redress; and
>
> (C) states the issues that the party intends to present on appeal.
>
> (2) Action on the Motion. If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless

a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

* * *

(4) Notice of District Court's Denial. The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) Motion in the Court of Appeals. A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

INTRODUCTION

Petitioners are five federal prisoners seeking habeas corpus relief. All five qualify for in forma pauperis status, as the district courts determined below. All five petitioners, however, were required to pay a

significant sum—between $50 and $400—to appeal the denial of habeas corpus relief by the district court. The issue in this case, which has divided the circuits, is whether federal courts have the authority to impose partial filing fees on habeas petitioners.

Under 28 U.S.C. § 1915(a), federal courts may grant in forma pauperis status, authorizing a suit or appeal "without prepayment of fees." 28 U.S.C. § 1915(a). Rule 24 of the Federal Rules of Appellate Procedure provides that if a court grants in forma pauperis status, "the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise." Fed. R. App. P. 24(a)(2). The courts of appeals have adopted different interpretations of these two provisions, leading to significantly disparate outcomes for habeas petitioners seeking in forma pauperis status.

In *Garza* v. *Thaler*, 585 F.3d 888 (5th Cir. 2009) (per curiam), the Fifth Circuit held that courts lack authority to impose partial filing fees on habeas petitioners. *See id.* at 889-890. As the Fifth Circuit explained, the text of Rule 24 dictates that "if leave to proceed [in forma pauperis] is granted, the party may appeal without paying appellate fees and costs," and courts do "not have either the discretion or the inherent power" to impose partial filing fees on habeas petitioners. *Id.* at 890. In the Fifth Circuit's view, Section 1915(a) similarly does not permit courts to impose these fees. *See id.* As a matter of practice, numerous other circuits permit habeas petitioners to appeal without paying a partial filing fee. *See, e.g.*, *Bonadonna* v. *United States*, 446 F. App'x 407, 409 (3d Cir. 2011) (per curiam); *In re Ephraim*, 473 F. App'x 320, 320-321 (4th Cir. 2012)

(per curiam); *Jones* v. *Kelley*, No. 17-2317, 2017 WL 6327548, at *1 (8th Cir. Oct. 25, 2017); *In re Mimms*, 256 F. App'x 46, 46 (9th Cir. 2007); *York* v. *Terrell*, 344 F. App'x 460, 462 (10th Cir. 2009); *Collins* v. *Sec'y, Dept. of Corr.*, No. 17-13207-F, 2019 WL 3209880, at *1 (11th Cir. Mar. 12, 2019).[1]

In the proceedings below, the Government filed a brief in support of *Petitioners*' position, urging the Sixth Circuit to conclude that federal courts lack authority to impose partial filing fees on habeas litigants. *See* Pet. App. at 4a, 8a-11a. The Sixth Circuit refused. In stark disagreement with the Fifth Circuit—and with the practice of most other courts of appeals—the Sixth Circuit held that neither the text of Rule 24 nor Section 1915 answers whether courts may impose partial filing fees on habeas petitioners. Pet. App. 4a-5a. The Sixth Circuit instead looked to "[h]istory" and "contextual clue[s]" to find a congressional intent to allow courts to collect these fees. *Id.* at 5a-7a. The Seventh Circuit has similarly held that courts may collect partial filing fees in habeas cases, concluding that these fees are "not an undue burden" on habeas petitioners. *Longbehn* v. *United States*, 169 F.3d 1082, 1083-84 (7th Cir. 1999). District courts in the Sixth and Seventh Circuits—but not elsewhere—continue to require partial filing fees in habeas cases. *See infra* pp. 17-18 (collecting cases).

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[1] These circuits have not explicitly addressed the question presented, but they do not appear to impose partial filing fees in habeas appeals. In those courts, habeas petitioners who qualify for in forma pauperis status may appeal without paying a fee.

Congress has instructed that the "fees and costs to be charged and collected in each court of appeals * * * * shall be reasonable and uniform in all the circuits." 28 U.S.C. § 1913. As it stands today, two identical prisoners seeking habeas relief may be subject to entirely different filing fee regimes merely because they are litigating in different circuits: One prisoner may pay hundreds of dollars to vindicate his rights on appeal, while another may pay nothing. One may be subject to a court-fashioned system of partial fees, while another may proceed under the system Congress designed, which does not require such fees. This Court's intervention is urgently warranted to restore the uniform fee system that Congress intended.

STATEMENT

A. Statutory Background

To file suit in federal court, litigants must typically pay a filing fee. For habeas petitions, the fee is $5; for civil actions, it is $350; and for appeals, it is $505. *See* 28 U.S.C. §§ 1913, 1914(a), 1917; *see also* Court of Appeals Miscellaneous Fee Schedule (effective Sept. 1, 2018), *available at* https://bit.ly/2OdLxTB. To ensure that no person "shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States solely because [of] his poverty," however, Congress permits litigants to file suit in forma pauperis. *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948) (internal quotation marks omitted).

Congress enacted the first in forma pauperis statute in 1892, which provided that a citizen may commence any suit or action "without being required to prepay fees or costs" by filing an affidavit stating

that he is impoverished and "unable to pay the costs of said suit or action." Act of July 20, 1892, ch. 209, §§ 1-5, 27 Stat. 252. In 1948, Congress enacted the modern version of the in forma pauperis statute, codified at 28 U.S.C. § 1915, which provided that any federal court "may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes [an] affidavit that he is unable to pay such costs." Act of June 25, 1948, ch. 646, 62 Stat. 954. Congress made minor revisions to Section 1915 in the decades that followed, leaving its text mostly intact. *See, e.g.*, Act of Sept. 21, 1959, Pub. L. No. 86-320, 73 Stat. 590 (substituting "person" for "citizen").

Congress enacted the current version of Section 1915 in 1996. At that time, Congress was concerned with the "alarming explosion of civil rights lawsuits filed by both state and federal prisoners" that "appeared in great measure to raise frivolous due process and cruel and unusual punishment claims." *Kincade* v. *Sparkman*, 117 F.3d 949, 951 (6th Cir. 1997). To address that concern, Congress adopted the Prison Litigation Reform Act (PLRA), which placed a number of restrictions on civil suits filed by prisoners.

The PLRA made two relevant amendments to the in forma pauperis statute. First, it amended Section 1915(a) to provide that courts may grant in forma pauperis status "[s]ubject to" the requirements of Section 1915(b). The revised Section 1915(a) states:

> *Subject to subsection (b)*, any court of the United States may authorize the com-

> mencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

28 U.S.C. § 1915(a)(1) (emphasis added).

Second, the PLRA added Section 1915(b), which requires any person who "brings a civil action or files an appeal in forma pauperis" to comply with an elaborate regime for collecting partial filing fees. *Id.* § 1915(b). Under that regime—which applies only to "civil" suits—courts are required to asses an initial partial filing fee of 20% of the average monthly deposits in a prisoner's trust fund account, or 20% of the average monthly balance of that account, whichever is greater. *Id.* Once the initial partial filing fee has been paid, prisoners must then make monthly payments until they satisfy the full fee. *Id.* The courts of appeals have unanimously held that the PLRA's partial filing fee regime does not apply to habeas actions. *See* Pet. App. 13a (collecting cases).[2]

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[2] Court-appointed amicus argued below that the PLRA does apply to appeals by habeas petitioners. *See* Pet. App. 12a. The Sixth Circuit held that the issue was not "squarely present[ed]" on appeal, and the court declined to pass on it. *Id.* at 17a. As the Sixth Circuit noted, the courts of appeals have universally

Rule 24 addresses the proper steps for seeking in forma pauperis status on appeal. *See* Fed. R. App. P. 24(a). It states that a litigant must first file a motion for in forma pauperis status in the district court, attaching an affidavit describing the litigant's inability to pay. *See id.* at 24(a)(1). If the district court grants the motion, the litigant "may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise." *Id.* at 24(a)(2). If the district court denies the motion, the litigant "may file a motion to proceed on appeal in forma pauperis in the court of appeals." *Id.* at 24(a)(5).

B. Procedural History

Petitioners are five federal prisoners serving sentences for drug-related offenses. Each sought federal habeas relief in the Eastern District of Kentucky under 28 U.S.C. § 2241, and each paid the $5 filing fee for habeas petitions. The district courts denied habeas relief, and Petitioners timely appealed.

Petitioners sought in forma pauperis status on appeal, stating that they were unable to pay the $505 appellate filing fee. The district courts determined that each petitioner was unable to pay the full fee and was thus entitled to in forma pauperis status. *See* Pet. App. 18a-19a, 20a-21a, 22a-23a, 24a-25a, 26a-27a. Nevertheless, the district courts imposed a partial filing fee on each petitioner: $50 for Cole and Samarripa; $350 for Hernandez; and $400 for Mason and Perez. *See* Pet. App. 3a. The fee

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held that the PLRA does not apply to habeas cases, and the Government agrees with that position. *See id.* at 12a-13a.

was based on an assessment of each Petitioner's ability to pay a portion of the $505 fee.

Petitioners challenged the partial filing fees in the Sixth Circuit, which consolidated Petitioners' cases and appointed Counsel of Record to brief and argue Petitioners' position. The Government filed a brief in support of Petitioners, and the Sixth Circuit appointed an amicus curiae to defend the district courts' judgments. The Sixth Circuit ultimately adopted amicus's position, affirming imposition of the partial filing fees. The Sixth Circuit concluded that courts have "ample discretion" to impose such fees on habeas petitioners. *Id.* at 7a-8a. In reaching its conclusion, the Sixth Circuit recognized a clear split between the Fifth, Sixth, and Seventh Circuits. *See id.* at 8a-9a (acknowledging that the Fifth Circuit "took a different approach").

Following the Sixth Circuit's decision, Petitioners Hernandez, Mason, Perez, and Samarripa paid the partial filing fee. Their appeals are pending before the Sixth Circuit.[3] Petitioner Cole did not pay the partial filing fee, and his appeal was dismissed by the Sixth Circuit for want of prosecution.

This petition followed.

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[3] Perez's case was dismissed by the Sixth Circuit for failure to prosecute, but he is seeking reinstatement.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT OVER WHETHER COURTS HAVE AUTHORITY TO IMPOSE PARTIAL FILING FEES ON HABEAS PETITIONERS.

The decision below deepened a clear split among the courts of appeals. The Fifth Circuit, and the Government below, conclude that federal courts lack authority under Section 1915 and Rule 24 to impose partial filing fees on habeas petitioners. *See Garza*, 585 F.3d at 890; Appellee Br. at 10-12, C.A. Dkt. 32. As a matter of practice, the Third, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits do not appear to impose partial filing fees on habeas petitioners. *See infra* p. 14 (collecting cases). In contrast, the Sixth and Seventh Circuits hold that federal courts may impose these fees, and district courts in those jurisdictions regularly collect them. *See* Pet. App. 4a-8a; *Longbehn*, 169 F.3d at 1083-84. This straightforward division in authority with respect to both the Federal Rules of Appellate Procedure and the in forma pauperis statute has consequential implications for habeas petitioners nationwide, who are subject to different fee requirements based solely on geography. The Court should grant certiorari to resolve this pressing issue.

1. The Fifth Circuit holds that courts may not collect partial filing fees from habeas petitioners. In *Garza*, a state prisoner seeking habeas relief requested in forma pauperis status on appeal. *See* 585 F.3d at 889. The district court acknowledged that the petitioner could not afford to pay the full fee, and it granted in forma pauperis status. *See id.* The court nevertheless adopted the PLRA's filing fee

regime as a matter of discretion, requiring the litigant to pay "an initial partial filing fee of $10.11" and the "balance of $444.89" in "periodic installments" in order to file an appeal. *Id.*

The Fifth Circuit reversed. It explained that the "language of Rule 24 is explicit: if leave to proceed [in forma pauperis] is granted, the party may appeal without paying appellate fees and costs, unless a statute provides otherwise." *Id.* at 890 (emphasis omitted). The Fifth Circuit held that "no statute" authorizes "a court to grant leave to proceed" in forma pauperis in a habeas appeal and yet "require payment of the appellate filing fee" in accordance with the PLRA. *Id.* The court emphasized that it could "not find any authority" to support the district court's imposition of a filing fee. *Id.* The Fifth Circuit concluded that the "district court did not have either the discretion or the inherent power to require" the petitioner "to pay an appellate filing fee in accordance with the terms of the PLRA," and it directed the clerk of court to refund all fees paid by the petitioner. *Id.*

In the proceedings below, the Government agreed that courts lack the authority to impose partial filing fees on habeas litigants. As the Government stated, "[t]here is no statutory authority for a district court to impose a partial filing fee on a prisoner who files an appeal from the denial of a petition for a writ of habeas corpus, and the judicial decisions claiming the authority to impose partial filing fees fail to give a persuasive justification." Appellee Br. at 3, C.A. Dkt. 32. Instead, the plain meaning of "1915(a) permits a court to grant or deny *in forma pauperis* status to a litigant; it permits no other options." *Id.*

at 10-11. Rule 24 "likewise offers the district court only the two options of granting or denying the motion" to proceed in forma pauperis. *Id.* at 12.

As a matter of practice, courts of appeals outside the Sixth and Seventh Circuits do not appear to impose partial filing fees on habeas petitioners. The Tenth Circuit has stated that filing fees are "not required for habeas matters." *York*, 344 F. App'x at 462 (10th Cir.). Other circuits similarly permit habeas petitioners to proceed in forma pauperis without requiring partial filing fees. *See, e.g.*, *Bonadonna*, 446 F. App'x at 409 (3d Cir.); *Ephraim*, 473 F. App'x at 320-321 (4th Cir.); *Jones*, 2017 WL 6327548, at *1 (8th Cir.); *Mimms*, 256 F. App'x at 46 (9th Cir.); *Collins*, 2019 WL 3209880, at *1 (11th Cir.). In these courts too, Petitioners would have been permitted to file an appeal without paying a partial filing fee.

2. In the decision below, the Sixth Circuit—over the Government's objection—rejected the Fifth Circuit's analysis. It held that Rule 24 "does not rule in or rule out" the ability of courts to impose partial filing fees on habeas petitioners. Pet. App. 5a. It similarly held that the text of Section 1915(a) "does not answer the question" whether courts may require habeas petitioners to pay partial filing fees. *Id.* at 4a. The Sixth Circuit nevertheless concluded that because Section 1915(a) "implies that courts may require litigants to post something as security" for filing fees, courts must *also* have implied authority to require partial filing fees. *Id.* at 4a-5a. To justify its ruling, the Sixth Circuit explained that it "would be strange" to "pair a non-discretionary item with an eminently discretionary one," and that the "same kind of discre-

tion that accompanies 'security' decisions applies to 'prepayment of fees' decisions." *Id.* at 5a.

The Sixth Circuit looked to "[h]istory" to confirm its interpretation. *Id.* Prior to Congress's passage of the PLRA, multiple circuits had interpreted Section 1915(a) to permit courts to impose partial filing fees on prisoners who file civil suits.[4] The purpose of these partial fees was to contain the "flood of *pro se* § 1983 prisoner actions now in federal court." *Collier* v. *Tatum*, 722 F.2d 653, 655 (11th Cir. 1983). Drawing on this history, the Sixth Circuit held that because Congress "did not meaningfully change the text of § 1915(a)(1)" when it adopted the PLRA, that "reality permits the inference that Congress did not wish to change what had become a uniform practice of permitting courts to require indigent litigants to prepay some but not all of the fee." Pet. App. 6a. The Sixth Circuit, however, did not cite a consistent practice of courts imposing such fees on habeas petitioners prior to the PLRA.[5]

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[4] *See, e.g.*, *In re Epps*, 888 F.2d 964, 967 (2d Cir. 1989); *Bullock* v. *Suomela*, 710 F.2d 102, 103 (3d Cir. 1983); *Evans* v. *Croom*, 650 F.2d 521, 524-525 (4th Cir. 1981); *Lumbert* v. *Ill. Dep't of Corr.*, 827 F.2d 257, 259-260 (7th Cir. 1987); *In re Williamson*, 786 F.2d 1336, 1338-39 (8th Cir. 1986); *Olivares* v. *Marshall*, 59 F.3d 109, 111 (9th Cir. 1995); *Collier* v. *Tatum*, 722 F.2d 653, 655 (11th Cir. 1983). These cases were decided prior to Congress's passage of the PLRA, which amended Section 1915 and created a uniform fee regime for prisoners who file civil suits. Apart from the Seventh Circuit, these courts do not appear to impose partial filing fees on habeas petitioners.

[5] The Government explained below that prior to the PLRA, "the courts' focus was on the abuse of conditions-of-confinement litigation" and that there "were almost no cases involving

The Seventh Circuit agrees with the Sixth Circuit's position. In *Longbehn*, a federal prisoner filed a habeas petition challenging his ineligibility for parole. *See* 169 F.3d at 1083. The district court acknowledged that the petition was not subject to the PLRA's partial filing fee regime, but it nevertheless applied the PLRA's formula "to set a partial filing fee as a condition of proceeding in forma pauperis on appeal." *Id.* The district court reasoned that the PLRA's statutory formula for collecting fees was "a reasonable accommodation of the interests involved in selecting a partial fee." *Id.* The court thus "adopted the PLRA's formula as a matter of discretion for setting a partial filing fee when the PLRA does not apply of its own force." *Id.*

The Seventh Circuit held that the district court's "exercise of discretion" was "sound." *Id.* It explained that although the PLRA does not apply, "every litigant has a legal responsibility to pay the filing and docketing fees to the extent feasible." *Id.* The Seventh Circuit "commend[ed]" the district court's approach "to other district judges." *Id.* The Seventh Circuit later affirmed its position in *Walker* v. *O'Brien*, 216 F.3d 626 (7th Cir. 2000), emphasizing "the right of the court to insist on some payment of

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habeas petitions." Appellee Br. at 17-18, C.A. Dkt. 32. Indeed, the Government noted that several pre-PLRA cases *reversed* the imposition of filing fees on habeas petitioners. *See, e.g.*, *Jones* v. *Zimmerman*, 752 F.2d 76, 79 (3d Cir. 1985) ("[I]t is of some significance that the action at issue is a habeas corpus action pertaining to the validity of the underlying conviction * * * ."); *Souder* v. *McGuire*, 516 F.2d 820, 823 (3d Cir. 1975) ("The purpose of [§] 1915 is to provide an entré, not a barrier, to the indigent seeking relief in the federal court.").

fees wholly apart from the PLRA." *Id.* at 639; *see also id.* at 638 n.5.

3. The district courts are similarly split. Following the Sixth Circuit's decision in *Samarripa*, district courts in the Sixth Circuit have continued to impose partial filing fees on habeas petitioners. *See, e.g.*, *Greer* v. *Smith*, No. 5:16-cv-338-JMH-CJS, 2019 WL 2062949, at *1 (E.D. Ky. May 9, 2019) (assessing partial fee of $37.95). District courts in the Seventh Circuit do the same. *See, e.g.*, *Homelsey* v. *Dittman*, No. 16-cv-47-bbc, 2017 WL 3927543, at *2 (W.D. Wis. May 3, 2017) (assessing partial fee of $76.89); *Ellis* v. *Werlich*, No. 16-cv-737-DRH, 2016 WL 10703623, at *2 (S.D. Ill. Nov. 10, 2016) (assessing partial fee of $19.50); *Carlos* v. *Williams*, No. 14-cv-1263, 2015 WL 5813004, at *2 (C.D. Ill. Oct. 5, 2015) (assessing partial fee of $39.46); *Wilborn* v. *Pfister*, No. 10-0423-DRH, 2014 WL 1220535, at *2 (S.D. Ill. Mar. 25, 2014) (assessing partial fee of $16.15); *Rodriguez* v. *Nicholson*, No. 10-0077-DRH, 2013 WL 2383630, at *2 (S.D. Ill. May 30, 2013) (assessing partial fee of $99.88).

By contrast, district courts in the Fifth Circuit have followed *Garza*'s direction in subsequent cases. *See, e.g.*, *United States* v. *Cotton*, No. 6:00-cr-60029, 2011 WL 13213858, at *2 & n.14 (W.D. La. Aug. 25, 2011) ("[T]he prisoner must either pay the fee in full or satisfy the requirements for proceeding *in forma pauperis*."). As a matter of practice, district courts outside the Sixth and Seventh Circuits generally do not impose partial fees on habeas petitioners. *See, e.g.*, *Witkin* v. *Yates*, No. CIV S-10-0091 GEB DAD P, 2013 WL 3148454, at *2 (E.D. Cal. June 19, 2013); *Ramsey* v. *Redmann*, No. 3:11-cv-65, 2011 WL

6217073, at *4 (D.N.D. Dec. 14, 2011); *Castillo* v. *United States*, No. 09-CV-4222 (ENV), 2011 WL 4592829, at *11 (E.D.N.Y. Sept. 30, 2011).

4. This Court's intervention is plainly warranted. There is a straightforward division in authority among the courts of appeals on a question of federal law. The circuit split extends to the proper interpretation of both the in forma pauperis statute and the Federal Rules of Appellate Procedure, and this case is a clean vehicle for deciding the question presented. In the decision below, the Sixth Circuit acknowledged the split, which has persisted for almost a decade, and which controls access to the courthouse doors for thousands of habeas petitioners across the country. The Court should grant certiorari.

II. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is important for at least three reasons.

First, Congress has provided that the "fees and costs to be charged *and collected* in each court of appeals" shall be prescribed by the Judicial Conference of the United States and "shall be reasonable and uniform in all the circuits." 28 U.S.C. § 1913 (emphasis added). The divergence in authority between the circuits on the question presented, however, guarantees that the fees collected from impoverished habeas petitioners will *not* be uniform among the circuits.

In the Sixth and Seventh Circuits, a habeas petitioner who qualifies for in forma pauperis status may nonetheless be required to pay hundreds of dollars to seek habeas relief on appeal. In the Fifth Circuit—

and in nearly every other circuit as a matter of practice—the very same habeas petitioner may appeal the denial of habeas relief without paying an appellate filing fee. This divergence in approaches on a straightforward issue of law is directly contrary to Congress's mandate that the courts collect uniform filing fees, and it is ample reason to grant certiorari.

Second, the decision below embraces a judicially created scheme for collecting partial filing fees from impoverished prisoners seeking habeas relief. Instead of requiring habeas petitioners to pay the full fee or seek in forma pauperis status—in accordance with the statute written by Congress—the Sixth and Seventh Circuits have authorized a pay-as-you-can approach. Congress, of course, could have adopted such a scheme; indeed, it has already done so in the PLRA for prisoners who file civil suits. But "Congress wrote the statute it wrote—meaning, a statute going so far and no further." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014) (internal quotation marks omitted). It is not the role of the federal courts to step in and create a filing fee regime for habeas petitioners.

The approach adopted by the Sixth Circuit, moreover, imposes significant burdens on habeas petitioners without the procedural safeguards afforded by the PLRA. Under the PLRA, Congress limited the initial partial filing fee to 20% of the prisoner's average monthly deposits or monthly balance, whichever is greater. *See* 28 U.S.C. § 1915(b)(1). The decision below includes no such limit. Petitioner Mason, for example, was required to pay $400 to file his appeal; his initial partial filing fee under the

PLRA would have been half that amount. *See* Pet. App. 22a (describing Mason's monthly deposits as nearly $1,000). Petitioner Cole was required to pay $50; under the PLRA, his filing fee would have been less than $30. *See id.* at 27a (describing Cole's average monthly deposits as under $150).[6] In effect, the Sixth Circuit has adopted a version of the PLRA that provides *fewer* protections for habeas petitioners than Congress afforded prisoners challenging prison conditions. This is yet another reason to grant the petition.

Third, the "writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris* v. *Nelson*, 394 U.S. 286, 290-291 (1969). "It has long been available in the federal courts to indigent prisoners of both the State and Federal Governments to test the validity of their detention." *Smith* v. *Bennett*, 365 U.S. 708, 712 (1961). "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers." *Harris*, 394 U.S. at 291. By requiring impoverished habeas petitioners to pay partial filing fees, the Sixth and Seventh Circuits have imposed a significant barrier—found nowhere in the in forma pauperis statute—on petitioners seeking

[6] The district court opinions below do not list Mason or Cole's average account balance, which does not appear to have been a factor in determining the amount of the partial filing fee. *See* Pet. App. 22a, 27a.

habeas relief. For this reason too, the Court should grant certiorari and reverse.

III. THE DECISION BELOW IS WRONG.

The decision of the Sixth Circuit, on an important question of federal law, is wrong. Text, structure, history, and the Federal Rules of Appellate Procedure all point to the same conclusion: Courts lack authority to impose partial filing fees on habeas petitioners. The Court should grant certiorari and reverse.

1. The text of Section 1915(a) is straightforward. It states that "[s]ubject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, *without prepayment of fees* or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor." 28 U.S.C. § 1915(a)(1) (emphasis added). Section 1915(a) thus gives courts two options: The court may require a litigant to pay the full filing fee, or it may permit the litigant to proceed "without prepayment of fees." *Id.* The text of Section 1915(a) nowhere mentions partial filing fees, or in any way suggests that courts are authorized to impose such fees. Under the plain text of Section 1915(a), courts cannot require them.

2. The structure of Section 1915 further demonstrates that Congress did not authorize courts to impose partial filing fees in habeas actions. Section 1915 specifies three situations in which a litigant is not entitled to in forma pauperis status. First, a court may not grant in forma pauperis status if a

litigant fails to "submit[ ] an affidavit." *Id.* Second, a court may not grant in forma pauperis status if doing so would be inconsistent with Section 1915(b). *See id.* Section 1915(b) in turn provides that a court may not grant in forma pauperis status to a prisoner in a civil suit. *See id.* § 1915(b)(1). Third, a court may not grant in forma pauperis status on appeal "if the trial court certifies in writing that [the appeal] is not taken in good faith." *Id.* § 1915(a)(3).

As this Court has emphasized, "[w]here Congress explicitly enumerates certain exceptions * * *, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (internal quotation marks omitted); *see also Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 353 (2013) ("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."). Here, Congress explicitly considered when a prisoner is entitled to proceed in forma pauperis on appeal. A prisoner who does not submit an affidavit, or who files a civil suit, or who appeals in bad faith, is not entitled to such status. Congress did not create a similar exception for prisoners who can afford to pay part—but not all—of the appellate filing fee in a habeas action. The Court should apply the text of Section 1915(a) as written and conclude that petitioners may appeal without payment of a partial fee.

The contrast between Sections 1915(a) and (b), moreover, is stark: Section 1915(b) creates a uniform mechanism for collecting filing fees from prisoners in civil actions, including an initial partial filing fee and installment payments until the full fee is paid. *See* 28 U.S.C. § 1915(b)(1)-(2). This provision sets the

amount of the fee and explains how it should be collected. *See id.* Section 1915(a), in contrast, permits courts to grant in forma pauperis status to habeas petitioners—or to deny them that status—but it does not provide for the collection of any fees that fall in-between.

If Congress had wanted to require habeas petitioners to pay a partial filing fee, it could have done so. It did not. Courts must "give effect to Congress' choice." *Nassar*, 570 U.S. at 354 (internal quotation marks omitted). The Sixth Circuit's assumption that Congress, by adopting a uniform filing fee regime for prisoners who file civil suits, intended to sanction the ad hoc imposition of fees on habeas petitioners, is inconsistent with the structure of Section 1915. As the Fifth Circuit explained in *Garza*, the "only statute that authorizes payment of an initial partial filing fee" is the PLRA, and it simply "does not apply" to habeas appeals. *Garza*, 585 F.3d at 890.

3. History similarly supports Petitioners' position. In the decision below, the Sixth Circuit concluded that Congress should have used more definitive language—such as "without prepayment of *any* fees"—if it meant to prohibit courts from collecting partial filing fees. Pet. App. 4a (emphasis added and internal quotation marks omitted). But there is strong historical evidence of Congress's intent: In the first in forma pauperis statute, adopted in 1892, Congress required a litigant seeking in forma pauperis status to submit an affidavit stating that "because of his poverty, he is unable to pay *the costs* of said suit or action which he is about to commence, or to give security for *the same*." Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252 (emphases added).

This statutory language makes clear that Congress's original intent in adopting the in forma pauperis statute was to permit litigants to proceed without paying *the entire cost* of suit, not part of that cost. This Court, moreover, has construed the in forma pauperis statute narrowly in the past. *See Adkins*, 335 U.S. at 337 (emphasizing that Section 1915 "provide[s] that a court may exercise a limited judicial discretion in the grant or denial of the right" to proceed in forma pauperis); *see also Bradford* v. *Southern Ry. Co.*, 195 U.S. 243, 251 (1904) ("[A]n act giving the right to prosecute *in forma pauperis* cannot be extended by implication beyond its terms * * * .").

4. Rule 24 confirms that courts lack authority to impose partial fees. It states that if a district court grants in forma pauperis status, "the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise." Fed. R. App. P. 24(a)(2). In the proceedings below, the district courts *granted* in forma pauperis status. *See* Pet. App. 18a-27a. As the Fifth Circuit held in *Garza*, no statute provides that a habeas petitioner who is granted in forma pauperis status may nevertheless be required to pay a partial filing fee. *See* 585 F.3d at 890. Under the plain text of Rule 24, Petitioners must accordingly be permitted to proceed on appeal without paying such fees. The clear conflict between the Sixth Circuit's decision and Rule 24 is yet another reason that the decision below is wrong.

In short, the traditional tools of statutory interpretation all lead to the same conclusion: Section 1915 does not grant courts authority to impose partial

filing fees on habeas petitioners, and Rule 24 provides that they cannot collect them. The Court should reverse.

IV. THIS CASE IS A CLEAN VEHICLE TO ADDRESS THE QUESTION PRESENTED.

This case is a clean vehicle to address the question presented. The district courts below held that Petitioners could not afford to pay the full filing fee—and were thus entitled to in forma pauperis status—but could nevertheless afford to pay a lesser fee. *See* Pet. App. 19a, 20a, 22a, 25a, 27a. Petitioners challenged the imposition of the partial filing fees in the Sixth Circuit, which appointed counsel to argue both sides of the issue. *See id.* at 3a-4a. The Sixth Circuit issued a published opinion addressing the question presented and acknowledging the split. *See id.* at 8a-9a. Four of the five Petitioners paid the filing fee following the Sixth Circuit's decision, and they are seeking the return of that fee. The fifth Petitioner did not pay the partial filing fee, and his case was dismissed for want of prosecution—preventing him from pursuing the merits of his habeas claim. This petition presents a straightforward question of law that affects not only the five Petitioners in this case but also thousands of habeas petitioners across the country. The question presented has divided the circuits, and the split has persisted for almost a decade. The Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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