No. 19-164

In the Supreme Court of the United States

DAVID SAMARRIPA, ET AL., PETITIONERS

v.

GREGORY KIZZIAH, WARDEN, ET AL.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a district court has the authority under 28 U.S.C. 1915(a)(1) to impose a partial filing fee on a prisoner who files an appeal from the denial of a habeas petition.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 917 F.3d 515. The orders of the district courts (Pet. App. 18a-19a, 20a-21a, 22a-23a, 24a-25a, 26a-27a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2019. On May 9, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 1, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners—five federal prisoners—filed habeas petitions under 28 U.S.C. 2241 in the United States District Court for the Eastern District of Kentucky. The

district judges denied or dismissed those petitions. Pet. App. 3a.

Each prisoner moved for leave to appeal the denial of his habeas petition *in forma pauperis* (IFP). Pet. App. 3a. Each district judge granted the motion in part, directing the prisoner at issue to pay a partial fee—which the court determined in light of the prisoner's statement of assets—"in full satisfaction of the appellate filing fee." *Id.* at 19a, 21a, 23a, 25a, 27a.

2. a. Each petitioner challenged the partial filing fee by renewing his IFP motion in the court of appeals. Pet. App. 3a. The court consolidated the appeals and appointed pro bono counsel to file a "unified brief" that would "accurately capture[]" the petitioners' position. C.A. Doc. 19-1, at 2 (Apr. 24, 2018). The court directed pro bono counsel to address "whether the statutes governing the payment of fees and pauper status, including the Prison Litigation Reform Act [of 1995 (PLRA), Pub. L. No. 104-134, Tit. VIII, § 801, 110 Stat. 1321-66], authorize the imposition of a partial filing fee in an appeal of a § 2241 petition." *Id.* at 1-2. The court directed the clerk to "invite the [government] respondent to file a responsive brief." *Id.* at 2.

Pro bono counsel and the government each filed briefs contending that the district court lacked statutory authority to impose a partial filing fee on habeas petitioners. See Gov't C.A. Br. 6-26; Pro Bono Counsel C.A. Br. 17-49.

The court of appeals then appointed an attorney to "brief and argue this case, as *amicus curiae*, in support of the district court's rulings." C.A. Doc. 34-1, at 1 (Dec. 7, 2018). The court-appointed amicus argued that the district courts had actually been required to impose partial-filing fees under a PLRA provision, 28 U.S.C.

1915(b). Court-Appointed Amicus C.A. Br. 9-26. Section 1915(b) requires each covered litigant to pay a partial filing fee in an amount set using a statutory formula based on the average monthly deposit in the prisoner's account and also requires each covered litigant to make additional monthly payments after filing until the entire filing fee is paid. 28 U.S.C. 1915(b). The court-appointed amicus argued that if petitioners were not subject to Section 1915(b), courts still had discretion to require a partial fee under Section 1915(a)(1). Amicus C.A. Br. 26-39.

At the oral argument, members of the panel expressed concern that the amicus's Section 1915(b) theory did not provide a proper basis for affirming the district judges' orders because it was not an argument in support of those orders, but rather an argument that would enlarge the orders to the detriment of petitioners, despite the absence of cross-appeals. 17-6048 Oral Argument at 38:00-41:45 (Jan. 30, 2019), http://www.opn.ca6.uscourts.gov/internet/court_audio?audSearch.html.

b. The court of appeals affirmed the district judges' orders under Section 1915(a)(1), without reaching the arguments of the court-appointed amicus concerning Section 1915(b). Pet. App. 1a-17a.

The court of appeals first concluded that the language of 28 U.S.C. 1915(a)(1) did not by itself establish "whether the law permits partial prepayment of fees or requires an all-or-nothing-at-all approach." Pet. App. 4a. It stated that the provision's "key language—'may authorize' and 'without prepayment of fees'—does not answer the question." *Ibid.* It reasoned that "[a] court that excuses all fees or some fees still allows a filing

'without prepayment of fees.'" *Ibid.* "Absent more textual guidance from these words alone," the court stated, "we must keep looking." *Ibid.*

The court of appeals next determined that surrounding text provided some evidence that the district court had discretion to award partial fees. Pet. App. 4a-5a. It explained that "[t]he clause immediately following the key language ('without prepayment of fees *or security therefor*') implies that courts may require litigants to post something as security for the filing fees in an appropriate case." *Ibid.*; see 28 U.S.C. 1915(a)(1). It stated that "[s]ecurity for costs falls within a court's broad discretion," and that "[i]t would be strange" for Congress to have "pair[ed] a non-discretionary item with an eminently discretionary one." Pet. App. 5a.

In the court of appeals' view, historical evidence also suggested that district courts have the authority to require partial fees under Section 1915(a)(1). It observed that when "Congress amended the pauper statute in 1996, every circuit to address the issue had held that § 1915(a)—in place since 1892—allowed courts to require parties to prepay *part* of the filing fees." Pet. App. 5a-6a (citing cases). The court noted that the 1996 amendments to the pauper statute "did not meaningfully change the text of § 1915(a)(1)." *Id.* at 6a. It concluded that this history "permit[ted] 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." *Ibid.*

The court of appeals also relied on the changes that Congress did make when it enacted the PLRA in 1996. Pet. App. 6a-7a. It noted that under the PLRA provision codified at Section 1915(b), courts are required in a subset of IFP cases to assess an initial partial filing fee

"calculated as 20% of either the average monthly deposits to the prisoner's account or the average balance in the account over the previous six months." *Id.* at 6a. Section 1915(b) also requires that in such cases, the prisoner must thereafter "make precise monthly payments until they pay the fee in full." *Ibid.* The court reasoned that "Congress's decision to clamp down on judicial discretion in one area of prisoner litigation"—cases covered by Section 1915(b)(1)—suggested that Congress had left judicial discretion in place for the remaining cases still subject to Section 1915(a). *Id.* at 6a-7a.

In addition, the court of appeals found support for partial fees in the provisions governing awards of costs. Pet. App. 7a-8a. The court explained that those provisions give courts discretion whether to tax costs and, if so, in what amount. *Id.* at 7a; see 28 U.S.C. 1915(f)(1) ("Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings."); 28 U.S.C. 1920 (stating that a court "may tax" certain items "as costs"). The court stated that "[i]f Congress gives courts broad discretion over fees on the back end of a pauper's case (and over cost assessments in general), it's fair to infer that it wishes equally permissive language on the front end of a pauper's case to be read in a like way." Pet. App. 7a.

The court of appeals noted that its conclusion accords with a Seventh Circuit decision that "approved the district court's discretionary decision to borrow the PLRA's 20% formula for determining the requisite prepayment" in a habeas case under Section 1915(a)(1). Pet. App. 8a (discussing *Longbehn* v. *United States*, 169 F.3d 1082 (1999)). It described the Fifth Circuit as having "t[aken] a different approach" in reversing a dis-

trict court determination that a prisoner should be "required * * * to pay the full filing fee according to the PLRA's statutory formula." *Id.* at 8a-9a (discussing *Garza* v. *Thaler*, 585 F.3d 888 (2009) (per curiam)). But the court of appeals concluded that *Garza* was "not convincing" and "did not consider many of the[] arguments" that the court here found persuasive, including "the breadth of discretion in § 1915(a)(1)'s text, the history of courts interpreting it to allow partial prepayment, and the statutory context." *Id.* at 9a.

The court of appeals declined to resolve the court-appointed amicus's claim that petitioners had actually been required to pay partial fees, in statutorily determined amounts, under the *mandatory* partial-filing fee provisions in the PLRA. Pet. App. 12a-15a. The court stated that whether prisoners appealing the denial of habeas petitions are subject to those PLRA provisions is "a more complicated question than first meets the eye," and it identified some textual and contextual support for the amicus's argument. *Id.* at 12a-13a. It "recognize[d] that each circuit to address the issue has said that the PLRA does not apply to habeas appeals," but it stated that "many of those courts, including ours," had not accounted for the statutory language on which the amicus principally relied. *Id.* at 13a. The court concluded that "[a]ll of this must await another day and another case, one in which the parties squarely present the arguments below." *Id.* at 17a. "For now," the court of appeals "accept[ed] and agree[d] with each district court's approach to the case," and therefore "den[ied] the requests of the petitioners to lower their filing fees." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 12-25) that this Court should review the court of appeals' determination that the district courts had authority to order petitioners to pay partial appellate filing fees under 28 U.S.C. 1915(a)(1). Further review is not warranted. The government argued below that the district courts lacked authority to require petitioners to pay partial filing fees. But the court of appeals' decision affirming the partial-fee orders accords with that of the only other circuit to squarely address the question presented, and the tension between the decision below and a per curiam Fifth Circuit decision does not presently warrant certiorari. The arguments pressed by the court-appointed amicus curiae also counsel against granting the petition, because while the court of appeals suggested those arguments deserved further development and consideration, those arguments would not be properly presented for this Court's review if it granted the petition here.

1. a. Petitioners renew their contention (Pet. 21-25) that Section 1915(a)(1) gives district courts an all-or-nothing choice between granting IFP status and waiving all filing fees and denying IFP status. This Court has long held that the right to proceed *in forma pauperis* is one that "depends on statute and not on the common law." *Bradford* v. *Southern Ry. Co.*, 195 U.S. 243, 250 (1904). Accordingly, a court has no power to confer IFP status "unless derived from statute." *Id.* at 251.

Section 1915 of Title 28 provides the statutory mechanism for the filing of an IFP appeal. Section 1915(a)(1) provides that, subject to Section 1915(b), "any court of the United States may authorize" an appeal in any civil or criminal proceeding "*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). The government argued below that the phrase "without prepayment of fees," *ibid.*, is most naturally read to authorize a court of appeals to forgo the filing fee, rather than to reduce it. Gov't C.A. Br. 11-12; see, *e.g.*, *Webster's New International Dictionary of the English Language* 2941 (2d ed. 1958) (defining "without" as "[e]xempt or free from"); *The American Heritage Dictionary of the English Language* 1990 (5th ed. 2016) (defining "without" as "[n]ot having; lacking"). Conversely, the government suggested, a court that conditions the filing of an appeal on the payment of $400, see, *e.g.*, Pet. App. 21a, 23a, is most naturally understood as having required prepayment of a fee—just not the full fee. See Gov't C.A. Br. 11.

Congress's express authorization elsewhere of partial payments provides additional support for that reading of Section 1915(a). See 18 U.S.C. 3006A(c) (providing that if a court finds a defendant in a criminal case for whom counsel has been appointed "is financially able to obtain counsel *or to make partial payment* for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate") (emphasis added). Relying on these textual indicators, the government argued before the court of appeals that Section 1915(a) authorizes district courts to permit habeas litigants to forgo the filing fee, but does not allow those courts to collect a partial fee.

b. As the court of appeals noted, however, statutory history provides some support for a contrary conclusion. See Pet. App. 5a-7a. Federal law has permitted district courts to allow appeals without prepayment of fees since 1910. See *Kinney* v. *Plymouth Rock Squab Co.*, 236 U.S. 43, 48-49 (1915). Beginning in the 1970s, courts became increasingly concerned about the volume of frivolous IFP litigation brought by prisoners challenging conditions of confinement. See *Braden* v. *Estelle*, 428 F. Supp. 595, 597-598 (S.D. Tex. 1977); see also Thomas E. Willging, *Partial Payment of Filing Fees in Prisoner In Forma Pauperis Cases in Federal Courts: A Preliminary Report* 1 (Sept. 1984) (Willging Report). Some courts responded with "innovations in application of the federal in forma pauperis statute * * * to prisoner cases." Willging Report 1. "The core innovation" was the imposition of "a portion of the full filing fee based on a projection of the prisoner's ability to pay." *Ibid.*; see Mary Van Vort, *Controlling and Deterring Frivolous In Forma Pauperis Complaints*, 55 Fordham L. Rev. 1165, 1184-1185 (1987).

As the court of appeals observed, courts of appeals before the enactment of the PLRA consistently allowed district courts to require such fees in conditions-of-confinement cases under the then-applicable version of Section 1915(a). Pet. App. 5a-6a (citing *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), cert. denied, 454 U.S. 1153 (1982); *Williams* v. *Estelle*, 681 F.2d 946, 947 (5th Cir. 1982) (per curiam); *McMurray* v. *McWherter*, No. 93-6059, 1994 WL 91851, at *1 (6th Cir. Mar. 21, 1994); *Lumbert* v. *Illinois Dep't of Corr.*, 827 F.2d 257, 259-260 (7th Cir. 1987); *In re Williamson*, 786 F.2d

1336, 1338 (8th Cir. 1986); *Olivares* v. *Marshall*, 59 F.3d 109, 111 (9th Cir. 1995); *Stack* v. *Stewart*, No. 95-4189, 1996 WL 187540, at *1-*2 (10th Cir. Apr. 18, 1996); *Collier* v. *Tatum*, 722 F.2d 653, 655 (11th Cir. 1983)).

Congress subsequently addressed filing fees in conditions-of-confinement litigation through the mandatory partial-filing-fee provisions that Congress enacted in the PLRA, see 28 U.S.C. 1915(b), without making any "meaningful[] change" to "the text of § 1915(a)(1)," Pet. App. 6a. That history permits a reasonable argument that Section 1915(a) allows for partial fees in the cases as to which it still governs, on the theory that Congress accepted the consensus among the courts of appeals when it left in place the relevant portions of Section 1915(a).

2. The limited circuit authority addressing Section 1915(a) after the PLRA does not present a circuit conflict that warrants this Court's intervention. The Seventh Circuit has held, like the court below, that district courts have discretion to impose partial filing fees in habeas appeals. *Longbehn* v. *United States*, 169 F.3d 1082 (1999).

More recently, the Fifth Circuit concluded that a district court was not free to adopt the fee mechanisms of the PLRA in a habeas case, in a per curiam decision that focused on whether a district court could require payment of the *full* filing fee through installments. See *Garza* v. *Thaler*, 585 F.3d 888 (2009) (per curiam). A magistrate judge had determined that the habeas litigant "could not afford to prepay the $455 appellate filing fee" but "could pay the fee in installments without undue hardship." *Id.* at 889. The magistrate recommended that the litigant be required to pay an initial sum of $10.11 and to pay the balance of the appellate

filing fee in installments, under the mechanism set forth in the PLRA. *Ibid.* After the district court agreed, the habeas litigant argued in a pro se appeal that there was "no authority for *requiring him to pay the appellate filing fee in installments* pursuant to the provisions of the PLRA." *Ibid.* (emphasis added). The state government responded in a letter brief that "the district court possessed the inherent authority to order [the litigant] to pay the fee over time." *Ibid.* The court of appeals concluded that "[t]he only statute that authorizes payment of an initial partial filing fee, with the remainder in installments, is the PLRA, and it does not apply in § 2254 appeals." *Id.* at 890. Accordingly, the court held, "the district court did not have either the discretion or the inherent power to require [the litigant] to pay an appellate filing fee in accordance with the terms of the PLRA." *Ibid.* The court ordered a refund of sums the litigant had already paid "pursuant to th[e collection] order." *Ibid.*

Garza's conclusion that district courts lack discretion to adopt in habeas cases the fee mechanisms of the PLRA is in some tension with the decision below, but does not generate a conflict that warrants certiorari. The parties in *Garza* were concerned with whether a district court could require a habeas litigant granted IFP status to pay the entire appellate filing fee through installments—not with whether a district court could require a partial filing fee. 585 F.3d at 889-890; see Court-Appointed Amicus C.A. Br. 28 (concluding that the Fifth Circuit "took issue not with the partial filing fee itself, but instead with the district court forcing the pauper to pay the *entire fee* in regular installments") (citation and internal quotation marks omitted). Insofar as

Garza can be read to cast doubt on partial fees for habeas litigants more generally, the decision—issued following limited briefing and without oral argument—contained limited analysis. See Pet. App. 9a (stating that *Garza* did not "consider the breadth of discretion in § 1915(a)(1)'s text, the history of courts interpreting it to allow partial prepayment, and the statutory context"). In addition, the parties did not cite, and the decision did not address, the Seventh Circuit's decision authorizing partial fees in *Longbehn, supra.* It is not clear that the Fifth Circuit would reject partial fees in a future case under these circumstances, after consideration of the decisions of the two circuits that now permit such fees. Under these circumstances, the tension between *Garza* and the decision below does not warrant this Court's intervention.

Petitioners alternatively invoke (Pet. 13-14) passing statements in several unpublished cases. The unpublished decisions on which petitioners rely are nonprecedential, and accordingly could not generate the type of conflict that would warrant this Court's review. In any event, none of those cases addresses whether courts have discretion to impose partial filing fees in habeas appeals. The courts in *York* v. *Terrell*, 344 Fed. Appx. 460, 462 (10th Cir. 2009), and *In re Mimms*, 256 Fed. Appx. 46, 47 (9th Cir. 2007), vacated fees orders (and, in *York*, authorized a litigant to proceed IFP) after determining that the district courts had erroneously treated the PLRA as controlling in habeas appeals. *Bonadonna* v. *United States*, 446 Fed. Appx. 407, 409 (3d Cir. 2011) (per curiam), likewise did not consider the legitimacy of partial filing fees, but instead summarily dismissed an IFP appeal after determining that it was frivolous. And in *Collins* v. *Secretary, Dep't of*

Corr., No. 17-13207-F, 2019 WL 3209880 (11th Cir. Mar. 12, 2019), *Jones* v. *Kelley*, No. 17-2317, 2017 WL 6327548 (8th Cir. Oct. 25, 2017), and *In re Ephraim*, 473 Fed. Appx. 320 (4th Cir. 2012) (per curiam), the appellate courts simply granted litigants leave to proceed IFP—without suggesting that courts did not possess discretion to impose partial filing fees.

3. The arguments raised by the court-appointed amicus also counsel against granting review of partial filing fees for habeas petitioners in this case. Those arguments would not be properly before this Court if the petition for a writ of certiorari were granted. The court of appeals properly determined that those arguments were not "squarely present[ed]" and declined to pass on them. Pet. App. 17a. If this Court granted the petition, the amicus's arguments would likewise not be before this Court, because "[t]he established doctrine governing appeals to all appellate courts, including the Supreme Court, is that a party must cross-appeal or cross-petition if such party seeks to change the judgment below or any part thereof." Stephen M. Shapiro et al., *Supreme Court Practice* § 6.35, at 491 (10th ed. 2013); see, *e.g.*, *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). As several members of the panel below suggested at oral argument, the amicus's Section 1915(b) arguments do not support the district courts' rulings—which is what the court of appeals invited, see C.A. Doc. 34-1. Instead, they are arguments that the rulings are incorrect because the district courts did not adhere to the PLRA formula for partial initial fees and deemed the partial fees to fully satisfy the fee requirement. See Court-Appointed Amicus Br. 7 & n.2 (asserting these deficiencies). They therefore would not be properly presented in this Court.

The amicus's Section 1915(b) arguments would not warrant review in this case even absent that bar, because the arguments were not passed upon below. Indeed, as the court of appeals noted, the amicus's Section 1915(b) arguments—which present "a more complicated question than first meets the eye"—have not yet received substantial analysis in any of the courts of appeals. Pet. App. 12a-13a. The principle that this Court acts as a court of review, not first view, *e.g.*, *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018), would counsel against consideration of the amicus's arguments in this case even were they otherwise properly presented.

The amicus's arguments provide additional reasons why this Court's intervention on the question presented would be premature. Were the amicus correct regarding Section 1915(b), the provision the court of appeals addressed in this case (Section 1915(a)) would be irrelevant for prisoners, like petitioners, who appeal their habeas denials. And the court of appeals suggested that the amicus's argument might warrant further consideration. Pet. App. 12a; see *ibid.* (setting out the amicus's argument at length, on the ground that doing so "may be useful to future litigants or courts"). The court's suggestion that the amicus's arguments deserve additional development from lower courts and litigants is an additional reason why the Court should refrain from granting certiorari to address partial appellate filing fees here, before any such development has occurred.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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