No. 19-164

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Court should grant certiorari to resolve a clear, acknowledged, and longstanding circuit split on an important question that affects habeas petitioners across the country. The Sixth and Seventh Circuits hold that 28 U.S.C. § 1915 and Rule 24 of the Federal Rules of Appellate Procedure permit courts to impose partial filing fees on habeas petitioners who qualify for in forma pauperis status. *See* Pet. App. 4a-8a; *Longbehn* v. *United States*, 169 F.3d 1082, 1083-84 (7th Cir. 1999). In those circuits, habeas petitioners may be required to pay *hundreds of dollars* to pursue their claims—despite meeting in

forma pauperis requirements. The Fifth Circuit holds that neither Section 1915 nor Rule 24 authorizes courts to impose *any* kind of filing fee on habeas petitioners who qualify for in forma pauperis status. *See Garza* v. *Thaler*, 585 F.3d 888, 889-890 (5th Cir. 2009) (per curiam). As a matter of practice, every other circuit permits habeas petitioners who qualify for in forma pauperis status to appeal without paying a partial filing fee. *See* Pet. 14, 17-18. The Court should grant certiorari to resolve this divergence of both law and practice among the courts of appeals, which has a real-world impact on habeas petitioners seeking appellate review.

Petitioners, the Sixth Circuit's court-appointed amicus, and the court below all agree that there is a clear split. *See* Pet. 12-18; Amicus Br. of Sixth Circuit Appointed Counsel 10; Pet. App. 8a-9a. The Government nevertheless contends that because the Fifth Circuit prohibits courts from imposing *both* initial partial filing fees *and* further installment fees on habeas petitioners, there is no clear split. *See* U.S. Br. 11-12. The fact that the Fifth Circuit prohibits courts from imposing any kind of fee, however, merely emphasizes the sharp divergence between the circuits. Nor does the Government dispute that as a matter of practice, courts across the country take very different approaches, leading to disparate outcomes for petitioners in different jurisdictions.

The Government contends that this Court should wait to confront the question presented until courts have had an opportunity to address amicus's argument that Section 1915 *requires* courts to impose filing fees in habeas appeals. *See* U.S. Br. 14. Twelve circuits, however, have already rejected

amicus's position, and the Government agreed below that those circuits got it right. This Court should not deny certiorari here—where there is a pressing circuit conflict—so that it may later address an argument that has been denied by every circuit (apart from the Federal Circuit, which lacks jurisdiction over habeas appeals).

Congress has mandated that filing fees "shall be reasonable and uniform in all the circuits." 28 U.S.C. § 1913. As it stands now, habeas petitioners with identical financial circumstances do *not* pay the same filing fee in every circuit. This Court should grant certiorari to address the important question presented and to restore uniformity among the courts of appeals.

I. THERE IS A CLEAR, LONGSTANDING, AND ACKNOWLEDGED CIRCUIT SPLIT.

There is a longstanding circuit split. In *Longbehn*, the Seventh Circuit held that courts have authority under Section 1915 to impose partial filing fees on habeas petitioners. 169 F.3d at 1083-84. The Seventh Circuit reaffirmed that conclusion in *Walker* v. *O'Brien*, 216 F.3d 626 (7th Cir. 2000), emphasizing "the right of the court to insist on some payment of fees wholly apart from" the Prison Litigation Reform Act (PLRA). *Id.* at 638-639 & n.5.

In *Garza*, the Fifth Circuit held that courts *lack* authority to impose partial filing fees on habeas petitioners. *See* 585 F.3d at 889-890. As the Fifth Circuit explained, "[t]he 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. The Fifth Circuit examined

whether Section 1915 "provides otherwise," and concluded that it did not. The court analyzed Section 1915(a)(1), which "provides that a court may authorize an appeal without prepayment of fees or security therefor, by a person who submits an affidavit" demonstrating that he is "unable to pay such fees." *Id.* (internal quotation marks omitted). It also analyzed Section 1915(a)(3), which states that an "appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." *Id.* (internal quotation marks omitted). The Fifth Circuit concluded that neither provision on its face authorizes courts to impose partial filing fees on habeas petitioners and that courts thus lack authority to impose such fees, creating a clear split with the Seventh Circuit. This circuit split has remained unresolved for a decade.

In the decision below, the Sixth Circuit explicitly recognized the split. *See* Pet. App. 8a-9a. The Sixth Circuit endorsed the Seventh Circuit's approach in *Longbehn*, and it rejected the Fifth Circuit's analysis in *Garza*, which the Sixth Circuit "acknowledge[d] took a different approach" that the Sixth Circuit found "not convincing." *Id.* at 8a-9a. The court below explained that "*Garza* viewed the district court's choice under § 1915(a)(1) as binary: Either grant pauper status and require no prepayment, or deny pauper status and require full prepayment." *Id.* at 9a. The Sixth Circuit then disagreed with "*Garza*'s holding," concluding instead that "Congress contemplated giving courts discretion when it comes to requiring litigants to pay some or all of the filing fees." *Id.* The Sixth Circuit similarly disagreed with the Fifth Circuit's interpretation of Rule 24, which the Sixth Circuit held "does not rule in or rule out

discretion" to impose partial fees. *Id.* at 5a. The Court should grant certiorari to resolve this clear split.

The Government agrees that there is "some tension" between the Fifth, Sixth, and Seventh Circuits, but contends that there is no "conflict that warrants certiorari." U.S. Br. 11. According to the Government, the "parties in *Garza* were concerned with whether a district court could require a habeas litigant granted [in forma pauperis] status to pay the entire appellate filing fee through installments—not with whether a district court could require a partial filing fee." *Id.* In *Garza*, however, the court concluded that courts lack authority to impose any kind of filing fee on habeas litigants who qualify for in forma pauperis status, including an "initial partial filing fee" and further fees payed in "installments." 585 F.3d at 890. Indeed, as the Government recognizes, the Fifth Circuit in *Garza* ordered the clerk of court to refund *all* filing fees paid by the petitioner, including the initial partial filing fee, on the ground that those fees were inconsistent with the district court's authority. *See* U.S. Br. 11.

The Fifth Circuit's interpretation of Section 1915 and Rule 24, moreover, is directly contrary to that of the Sixth and Seventh Circuits. In *Garza*, the Fifth Circuit construed the plain text of Section 1915 as a narrow grant of authority to determine whether a litigant meets the financial qualifications for in forma pauperis status and has appealed in good faith; if those requirements are met, the Fifth Circuit held that under Rule 24, the litigant can "proceed on appeal without prepaying or giving security for fees and costs." 585 F.3d at 890 (emphasis and internal

quotation marks omitted). The Sixth and Seventh Circuits interpreted the very same statutory provisions as a grant of "broad discretion" to impose partial filing fees, despite the absence of clear statutory authority for such fees. Pet. App. 4a-5a, 8a (acknowledging that the text of Section 1915 "is silent about allowing partial prepayment of fees"); *see Longbehn*, 169 F.3d at 1082-83. The Court's attention is warranted to address this stark divergence in the interpretation of Section 1915 and Rule 24, which directly impacts the resolution of the question presented.

The Government also claims that the Fifth Circuit in *Garza* did not have an opportunity to adequately "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." U.S. Br. 12 (internal quotation marks omitted). The appellee's brief in *Garza*, however, expressly argued that Section 1915 conferred "discretion" on courts to impose partial fees, cited the historical practice of courts imposing such fees on prisoners who filed civil suits, and argued that the statutory amendments wrought by the PLRA did not change the courts' discretion to impose these fees. *See* Appellee Br. at 5-6, *Garza*, 585 F.3d 888 (No. 08-40814) (arguing that "[e]ven prior to enactment of the PLRA, federal courts were authorized to collect partial filing fees"). The appellee's brief in *Garza* cites many of the same cases that both the Sixth and Seventh Circuits relied on to uphold the imposition of partial filing fees, including *In re Epps*, 888 F.2d 964, 967 (2d Cir. 1989), and *Lumbert* v. *Ill. Dep't of Corr.*, 827 F.2d 257, 259 (7th Cir. 1987). The Fifth Circuit was aware of these cases and arguments; it simply disa-

greed with them. *Garza* created a clear split with the Seventh Circuit, and the decision below deepened it.[1]

The Government does not dispute, moreover, that as a matter of practice, courts across the country have adopted conflicting approaches to imposing filing fees on habeas petitioners. The Sixth and Seventh Circuits are the only circuits that impose partial fees on habeas petitioners who qualify for in forma pauperis status. In every other circuit, courts permit impoverished habeas petitioners to proceed on appeal without paying a filing fee. *See* Pet. 14, 17-18.[2] It is this divergence in practice that undermines Congress's mandate that filing fees be "reasonable and uniform in all the circuits." 28 U.S.C. § 1913. And it is this divergence in practice that impacts whether a habeas petitioner may be required to pay hundreds of dollars in fees, despite qualifying for in forma pauperis status. Whether habeas petitioners are required to pay a filing fee to

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[1] The Government suggests that the Fifth Circuit might follow the Seventh Circuit's approach in a future case. *See* U.S. Br. 12. But the Seventh Circuit decided *Longbehn* 20 years ago; if the Fifth Circuit had wanted to adopt the Seventh Circuit's position, it would have done so. Nor could the Fifth Circuit revisit its decision in *Garza* without an en banc proceeding. The Government does not cite any case in the Fifth Circuit calling for an en banc determination of the question presented.

[2] The Government notes that orders granting in forma pauperis status are frequently unpublished, *see* U.S. Br. 12-13, but neither the Government nor the Sixth Circuit's court-appointed amicus has pointed to a single case (published or otherwise) outside the Sixth and Seventh Circuits where a court has imposed a partial filing fee on a habeas petitioner.

vindicate their rights on appeal should not be a matter of geography. The Court should grant certiorari.

II. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS THE QUESTION PRESENTED.

This case presents an ideal vehicle to address the question presented. Neither the Government nor the Sixth Circuit's court-appointed amicus has identified any jurisdictional obstacles to the Court's review, nor is there any dispute that the question presented was pressed and passed on below. The Sixth Circuit's court-appointed amicus has filed a certiorari-stage amicus brief in support of its position, providing the Court with full briefing on the question presented.

The Government nevertheless contends that the court should deny review because the Sixth Circuit's court-appointed amicus argued below that Section 1915 imposes mandatory filing fees in habeas appeals, and the Sixth Circuit did not take a definitive position on that argument. *See* U.S. Br. 13. This is no obstacle to certiorari. The Court's task is to interpret Section 1915; it is not limited to the statutory interpretation adopted by the Sixth Circuit below, or even to the interpretation pressed by the parties. If the Court is interested in further briefing on amicus's position, the Court may appoint an advocate to present it. *See Sebelius* v. *Auburn Reg'l Med. Ctr.*, No. 11-1231 (July 23, 2012) (appointing amicus to advocate for statutory interpretation

supported by neither party nor the court below).[3]

More fundamentally, amicus's position that Section 1915 imposes mandatory filing fees in habeas appeals has been rejected by every court of appeals, including the Sixth Circuit in an earlier decision. *See Martin* v. *Bissonette*, 118 F.3d 871, 874 (1st Cir. 1997); *Reyes* v. *Keane*, 90 F.3d 676, 678 (2d Cir. 1996); *Santana* v. *United States*, 98 F.3d 752, 756 (3d Cir. 1996); *Smith* v. *Angelone*, 111 F.3d 1126, 1131 (4th Cir. 1997); *United States* v. *Cole*, 101 F.3d 1076, 1077-78 (5th Cir. 1996); *Kincade* v. *Sparkman*, 117 F.3d 949, 950-952 (6th Cir. 1997); *Martin* v. *United States*, 96 F.3d 853, 855-856 (7th Cir. 1996); *Malave* v. *Hedrick*, 271 F.3d 1139, 1139-40 (8th Cir. 2001) (per curiam); *Naddi* v. *Hill*, 106 F.3d 275, 277 (9th Cir. 1997); *United States* v. *Simmonds*, 111 F.3d 737, 743 (10th Cir. 1997); *Anderson* v. *Singletary*, 111 F.3d 801, 803-806 (11th Cir. 1997); *Blair-Bey* v. *Quick*, 151 F.3d 1036, 1039-42 (D.C. Cir. 1998). This Court should not deny certiorari in this case—where there is a clear split—so that it may in some later case address an argument that has not been accepted by any court.

The Government suggests that "amicus's argu-

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[3] The Government contends that amicus's argument is not properly presented because neither party filed a petition seeking the Court's review of that argument. *See* U.S. Br. 13. As amicus points out, however, amicus's position is unlikely to *ever* come before the Court except through a court-appointed amicus, given that every court has rejected it and the Government does not support it. *See* Amicus Br. of Sixth Circuit Appointed Counsel 15-16. And in any event, the Court can plainly address the proper interpretation of Section 1915 in the context of a case asking the Court to construe that statute.

ments deserve additional development from lower courts and litigants." U.S. Br. 14. Such development is unlikely to occur. Habeas petitioners are unlikely to argue that they are required to pay mandatory fees, and the Government below *agreed* that courts may not impose such fees. *See* U.S. CA6 Resp. to Amicus Curiae Br. 1 ("[T]he arguments in the amicus brief, if accepted, would confer on district judges certain powers that Congress has not given them."). No district court would adopt such a position, given binding circuit precedent, and no court of appeals could reach amicus's argument without an *en banc* (or similar) proceeding. Where no litigant advocates for overturning longstanding precedent, such a proceeding is unlikely to occur. Even the Sixth Circuit below declined to accept amicus's argument where neither party supported it. *See* Pet. App. 17a.

Nor is additional development necessary. At least five courts of appeals have rejected amicus's precise contention that the word "appeals" in Section 1915(b)(1) encompasses habeas appeals, subjecting those appeals to Section 1915(b)'s mandatory fee regime. *See Reyes*, 90 F.3d at 678 (2d Cir.) (Section 1915(b)'s mandatory filing fee regime applies to "incarcerated prisoners who bring 'civil actions' or appeals of 'civil actions.' "); *Martin*, 96 F.3d at 854 (7th Cir.) ("[I]n context it is apparent that the word 'appeal' means the appeal in a civil action."); *Naddi*, 106 F.3d at 277 (9th Cir.) ("The term 'civil action or appeal' used in Section 1915" was "not intended to include" habeas proceedings.); *Simmonds*, 111 F.3d at 744 (10th Cir.) ("[R]ead in context, the word 'appeal' means an appeal of a civil action."); *Blair-Bey*, 151 F.3d at 1040 n.2 (D.C. Cir.) ("The word 'appeal' in the statute does not reach all appeals, but

only appeals in civil actions."). Neither the Government nor amicus has pointed to a single court that has accepted amicus's position in the more than *two decades* since Congress amended Section 1915 to impose mandatory filing fees in prisoner civil suits, and numerous courts have rebuffed it.

In short, this case presents a clean vehicle to address the question presented, and the Court should grant certiorari.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

The Government does not dispute that the question presented is important or that its resolution affects thousands of habeas petitioners across the country. Both district courts and courts of appeals must decide whether to collect the $505 filing fee, or a portion thereof, each time a habeas petitioner seeks in forma pauperis status on appeal. If this Court does not intervene, impoverished habeas petitioners in different circuits will continue to be treated very differently: In some circuits, petitioners may be required to pay hundreds of dollars before a court will hear the merits of their appeal; in other circuits, petitioners will face no such obstacle to presenting their case. This stark divergence between the circuits is worthy of the Court's attention.

The partial filing fee regime adopted by the Sixth and Seventh Circuits is particularly troubling because it discourages habeas litigants from filing potentially meritorious claims. As amici the Innocence Project et al. explain, for many habeas petitioners, in forma pauperis "status provides the only avenue of relief to appeal denials of habeas petitions." Amicus Br. of Innocence Project et al. 5.

Preserving an avenue for appeal is particularly important for impoverished litigants, who "may, in the trial court, have suffered disadvantages in the defense of their cases inherent in their impecunious condition." *Coppedge* v. *United States*, 369 U.S. 438, 450 (1962). Notably, one of the Petitioners in this case with the fewest resources declined to press his appeal after the district court imposed a partial filing fee. *See* Pet. 10-11.

This petition presents a clear split on a matter of both law and practice. It involves the authority of the federal courts to create an ad hoc filing fee regime that is not authorized by statute, and that is directly contrary to Congress's mandate that filing fees remain uniform among the circuits. And it impacts the ability of habeas petitioners to obtain relief on the merits of their claims. The Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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