**No. 19-6668**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

ANDREW J.J. WOLF, et al.,

*Petitioners,*

v.

IDAHO BOARD OF CORRECTIONS, et al.,

*Respondents.*

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

# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

(Rephrased) Did the Ninth Circuit erroneously fail to rule on the petitioners' claim that the district court abused its discretion in denying their motion under Federal Rule of Evidence 106 to receive a free copy of the full transcript of petitioner Kruger's deposition?

The body of the petition discussed the following additional question:

Were the petitioners entitled under Federal Rule of Evidence 106 to free copies of the full transcript of petitioner Kruger's deposition?

## PARTIES TO THE PROCEEDING

Petitioners Andrew J.J. Wolf and R. Hans Kruger are inmates in the custody of the Idaho Department of Correction ("IDOC").

Respondent Josh Tewalt is the IDOC Director and, in his official capacity, submits this brief in opposition to the petition. Director Tewalt is substituted pursuant to Supreme Court Rule 35(3) as the successor to Brent Reinke, Kevin Kempf and Henry Atencio, who, in each of their former official capacities as IDOC Director, were parties at different times during the district court or the Ninth Circuit proceedings below.[1]

In the petition, the petitioners identify not only Director Tewalt and these former IDOC Directors as respondents, they also identify the Idaho State Board of Correction, the Idaho Commission of Pardons and Parole and several other former or current officials of the State of Idaho who were named as defendants in the district court complaint. However, an initial review order entered early in the district court action pursuant to 28 U.S.C. § 1915A of the Prison Litigation Reform Act of 1995 ("PLRA") barred the petitioners from proceeding against any of the respondents listed in the petition except the IDOC Director, in his official capacity. (Supp. App. 004, 022–54.) Thus, only former IDOC Director Reinke received service of process. As none of the other respondents listed in the petition were parties to the district court or the Ninth Circuit proceedings, they are not properly named respondents before this Court.

[1] The petitioners also offered notice of this substitution in their petition. (Pet. ii.)

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## OPINIONS BELOW

The appendix to the petition includes the Ninth Circuit's memorandum decision and order, the Ninth Circuit's order denying rehearing or en banc review, and the district court's memorandum decision and order denying a stay and granting the IDOC Director's second summary judgment motion. Respondent Director Tewalt submits herewith a supplemental appendix which includes the final judgment and three additional decisions of the district court that clarify the procedural history in the case below.

## INTRODUCTION

The Ninth Circuit affirmed the district court's final judgment in an unpublished memorandum, and then later denied a rehearing or en banc review of this decision. The petitioners seek a writ of certiorari on a single question presented—whether the Ninth Circuit erroneously failed to rule on their claim that the district court abused its discretion in denying their motion to stay a summary judgment proceeding. But, in affirming the final judgment, the Ninth Circuit did not need to provide in-depth reasoning on each motion and argument advanced by the petitioners. The Ninth Circuit did not err.

While no other issue is stated as a question presented in the petition, the petitioners argue in the body of their petition that Federal Rule of Evidence 106 entitled each of them to a free copy of the entire transcript of petitioner Kruger's deposition and that the Ninth Circuit erred by not reversing the district court on this point. However, even if the Court considers this assertion, it does not warrant a writ of certiorari. The petitioners have not shown a conflict with any relevant decisions of this Court. They also have not shown any conflict among the circuits. Additionally, this case does not present any unsettled constitutional or other important federal questions to make it the vehicle for

this Court's discretionary review of whether or when *in forma pauperis* inmates should receive free deposition transcripts in 42 U.S.C. § 1983 civil rights litigation.

## STATEMENT OF THE CASE

1. *District Court Action.* The underlying 42 U.S.C. § 1983 action filed years ago challenged conditions of confinement in two Idaho prisons. (*See* Pet. App. B2–3; Supp. App. 022–54.) Early on, the district court entered an initial review order under 28 U.S.C § 1915A of the PLRA which limited the claims and defendants. (Supp. App. 022–54.) In one claim allowed to proceed, petitioner Kruger alleged that Director Reinke, in his official capacity, failed to protect him from assaults by other inmates in violation of the Eighth Amendment to the United States Constitution. (Pet. App. B2–3; Supp. App. 034–35.) The district court later dismissed all remaining parties except the two petitioners and the IDOC Director. (*See* Supp. App. 004.)

Despite receiving documents produced in response to more than 400 requests for production of documents, the petitioners moved to compel discovery. (*Id.* at 009–11.) In March 2016, the district court granted their motion to compel in part and denied it in part. (*Id.*) The court ordered Director Kempf (who succeeded Director Reinke) to produce to petitioner Kruger IDOC records of inmate assaults in the prison housing units (buildings) where he lived during the one-year period before the lawsuit was filed. (*Id.* at 005.) The district court denied the petitioners' remaining discovery demands. (*Id.* at 009–11.)

In this same order, the district court also granted in part and denied in part a motion for summary judgment filed by Director Kempf. As pertinent to the petition, the court denied summary judgment, without prejudice, on petitioner Kruger's failure to protect claim under the Eighth Amendment. (*Id.* at 005.)

The district court issued an order in June 2016 declining to broaden the scope of discovery of IDOC records ordered in March 2016, which led the petitioners to file two motions to reconsider and a motion for leave to conduct more discovery. (*Id.* at 005–6.)

In the meantime, Director Kempf deposed petitioner Kruger and, on July 29, 2016, moved again for summary judgment. (Pet. App. B1, D Ex. 81.) The petitioners responded by moving for an extension of time to oppose this motion. (Supp. App. 020.) In February 2017, the district court granted the petitioners "until March 1, 2017 to file a substantive response to defendant's pending summary judgment motion." (*Id.* at 021.) In so ruling, the court noted that they had "not filed a substantive response to the motion" in the nearly seven months since it was filed. (*Id.* at 020.)

Still, the petitioners did not file a substantive response to challenge the second summary judgment motion on its merits. Instead, they moved to stay summary judgment until the district court ruled on their pending motions. (Pet. App. D8–9.) In their motion to stay, they also demanded that Director Kempf give each of them a free, complete copy of the transcript of petitioner Kruger's deposition, with exhibits, pursuant to Federal Rule of Evidence 106. (*Id.* at D9–12.)

On March 6, 2017, the district court considered a "host of motions" filed by the petitioners and denied three of them, which included denying multiple discovery demands by the petitioners. (Supp. App. 003–18.) The district court refrained from issuing further rulings on motions, to allow completion of briefing on the second summary judgment motion. (*Id.* at 018–19.) Again, the court reminded the petitioners to file a substantive response to the summary judgment motion. (*Id*. at 018.)

Director Atencio (who succeeded Director Kempf) opposed the petitioners' motion to stay. (Pet. App. E.) In response, they filed a reply brief in which they argued that no response to the summary judgment motion was needed except their motion to stay. (Pet. App. F2.) The petitioners also argued that they filed their motion to stay pursuant to Rule 56(d) of the Federal Rules of Civil Procedure on the basis of unavailable facts, including "a complete copy of the Deposition Transcript and Exhibits." (*Id.*)

On March 21, 2017, the district court denied the petitioners' motion to stay and granted summary judgment to the IDOC Director. (Pet. App. B.)[2] In denying the motion to stay, the district court reasoned that the motion mainly rehashed arguments previously rejected by the court. (*Id.* at B6.) In the alternative, the district court denied the motion to stay based upon demands for free copies of the deposition transcript. First, the court reasoned that the petitioners had delayed for months in bringing the motion, from the summer of 2016 until February 2017. (*Id.*) Second, the court reasoned that petitioner "Kruger was present at his own deposition, so he has first-hand knowledge of what occurred there," that petitioner "Wolf also attended the deposition," and that petitioner "Kruger also took notes when he reviewed his transcript for errors." (*Id.*) Third, the court reasoned that 28 U.S.C. § 1915 did not require the Director or the court to pay the litigation costs of indigent parties. (*Id.* at B6–7 (citing *Rivera v. DiSabato,* 962 F.Supp. 38, 40 (D.N.J. 1997) (holding that a "plaintiff's obligations, even as an indigent litigant, to finance his own litigation expenses cannot be arbitrarily thrust upon defendants")).)

In this same order, after denying the motion to stay, the district court granted summary judgment to the Director, including, as pertinent to the petition, on petitioner

[2] The court also denied a motion to stay filed by the petitioners based upon an interlocutory appeal. (*Id.*, at B7.) On April 24, 2017, the Ninth Circuit dismissed that appeal, in Ninth Circuit Case No. 17-35215.

Kruger's failure to protect claim under the Eighth Amendment. (*Id.* at B7-12.) The district court entered the final judgment that same day. (Supp. App. 001–2.)

2. *The Ninth Circuit Proceeding.* The petitioners appealed from the final judgment. On June 24, 2019, without oral argument, the Ninth Circuit affirmed the final judgment in an unpublished memorandum decision. (Pet. App. A.) On August 12, 2019, the Ninth Circuit denied a rehearing or en banc review. (Pet. App. C.)

## REASONS FOR DENYING THE PETITION

### I. The Ninth Circuit did not err by affirming the final judgment without expressly mentioning Federal Rule of Evidence 106 or the Motion to Stay

#### A. The Ninth Circuit did not need to provide in-depth reasoning for affirming the final judgment

In the question presented, the petitioners ask this Court to grant review on whether the Ninth Circuit erred in failing to address the district court's denial of their motion to stay. They argue that denial of their motion to stay and demand for free copies of the deposition transcript left them without a full and fair opportunity to respond to the second summary judgment motion. (Pet. i.) However, the Ninth Circuit did not err at all, much less err in a manner warranting this Court's review.

U.S. courts of appeals "should have wide latitude in their decisions of whether or how to write opinions," particularly when affirming final judgments below. *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam); *see also Sumner v. Mata,* 449 U.S. 539, 548 (1981) ("Undoubtedly, a court need not elaborate or give reasons for rejecting claims which it regards as frivolous or totally without merit."). "There is no requirement in law that a federal appellate court's decision be accompanied by a written opinion." *Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983) (per curiam).

Rule 36(a)(2) of the Federal Rules of Appellate Procedure permits a U.S. court of appeals to enter a judgment on appeal "without an opinion." Fed. R. App. P. 36(a)(2). Thus, summary affirmances, which are issued without any opinions, are permissible. *See Taylor*, 407 U.S. at 194 n.4 (recognizing that the wide latitude regarding whether or how to write opinions on appeal "is especially true with respect to summary affirmances").[3]

While summary affirmances are permissible, the Ninth Circuit implements Rule 36(a)(2) by issuing dispositions in the form of opinions, memoranda or orders. *See* 9th Cir. R. 36-1. Detailed opinions are issued and published when delineated criteria are met, including, for example, to establish, alter, modify or clarify a rule of federal law, or to call attention to a rule of law that has been generally overlooked, or to criticize existing law, or to address a legal or factual issue of unique interest or substantial public importance. *See* 9th Cir. R. 36-2. In contrast, a memorandum is a "written, reasoned disposition of a case or a motion which is not intended for publication." 9th Cir. R. 36-1.

Ninth Circuit General Order 4.3(a) describes unpublished memoranda as follows:

> Unlike an opinion for publication which is designed to clarify the law of the circuit, a memorandum disposition is designed only to provide the parties and the district court with a concise explanation of this Court's decision. Because the parties and the district court are aware of the facts, procedural events and applicable law underlying the dispute, the disposition need recite only such information crucial to the result.

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[3] This Court recently denied a petition for writ of certiorari on a question presented of whether a U.S. Court of Appeals could permissibly affirm, without any explanation, a district court judgment resolving issues of law regarding patent rights. *See Straight Path IP Group, LLC v. Apple Inc.*, 140 S. Ct. 520 (2019) (Case No. 19-253), *denying cert. to Straight Path IP Group, LLC v. Apple Inc.*, Nos. 18-1491, 18-1492, 748 F. App'x 1027 (Fed. Cir. Jan. 23, 2019) (unpublished). Several circuits issue summary affirmances. *See Dia v. Ashcroft*, 353 F.3d 228, 240 n.7 (3d Cir. 2003) (en banc) (upholding practice of summary affirmances, as a well-established practice that is constitutional); *Furman v. United States*, 720 F.2d at 264 (rejecting challenge that a summary order of affirmance gave inadequate consideration to an appeal); *United States v. Baynes*, 548 F.2d 481, 482-84 (3d Cir. 1977) (per curiam) (denying rehearing, rejecting claim that affirming by a judgment order without an opinion denies due process); *N.L.R.B. v. Amalgamated Clothing Workers of Am.*, *AFL-CIO, Local 990,* 430 F.2d 966, 971-72 (5th Cir. 1970) (per curiam) (upholding one-word disposition, discussing instances where a full opinion on appeal serves no useful purpose).

9th Cir. Gen. Order 4.3(a). Unpublished memoranda keep "the books from being cluttered with dicta that could result in confusion" and permit the Ninth Circuit "to resolve the issues concretely before us without the need to state the facts and how the case arose in order to display the context for purposes of future distinctions of the case from others, and without laboring to refine our language lest it be taken out of context." *In re Burns,* 974 F.2d 1064, 1068 (9th Cir. 1992).

Consistent with Rule 36(a)(2) of the Federal Rules of Appellate Procedure and Rule 36-1 of the Ninth Circuit Rules, the Ninth Circuit issued an unpublished memorandum in the case below that affirmed the final judgment of the district court. (Pet. App. A.) The Ninth Circuit later issued an order denying a rehearing or en banc review of this decision. (Pet. App. C.) In affirming the final judgment, the Ninth Circuit was not required to issue a fully developed and detailed opinion that analyzed the motion to stay, much less a particular Federal Rule of Evidence 106 argument asserted in that motion. The Ninth Circuit did not err.

**B. The Ninth Circuit did not deprive the petitioners of their rights**

Even if the Court looks beyond federal rules and principles of appellate procedure governing decisions on appeal to consider the petitioners' claim that the Ninth Circuit unfairly denied them a ruling on appeal on their motion to stay, a writ should not issue.

First, the Ninth Circuit should not be faulted for mentioning discovery and summary judgment but not the motion to stay, because the motion to stay was a motion to stay summary judgment in order to seek more discovery. The petitioners' demand for free deposition transcripts was one of several discovery arguments asserted in this motion to stay. (Pet. App. D.) The district court addressed each alternative argument before denying the motion to stay and granting summary judgment. The district court refused to

reopen discovery, rejected "rehashed arguments" that were previously rejected, and then denied the petitioners' one new discovery demand—namely, to get the full transcript of petitioner Kruger's deposition for free—before reviewing the second summary judgment motion and then granting summary judgment in favor of the Director. (Pet. App. B6–7.)

Like the district court, the Ninth Circuit's brief reasoning in the decision on appeal addressed the status of discovery at summary judgment. The Ninth Circuit held: "Plaintiffs have not shown error in the district court's denial of their motions to reconsider discovery orders and summary judgment, or to reopen discovery." (Pet. App. A4.) The Ninth Circuit also held: "The record does not support plaintiffs' contention that the district court granted summary judgment while discovery motions were pending." (*Id.*) Addressing discovery at summary judgment encompassed the motion to stay.

Second, while the petitioners fault the Ninth Circuit for not expressly addressing their motion to stay, they fail to acknowledge how they argued the motion on appeal. Like the district court, which addressed the motion to stay and the motion for summary judgment together in the same order, so too the petitioners addressed their arguments on both motions together in their briefing on appeal. The petitioners presented their Rule 56(d) motion to stay as one argument in support of "Issue Fourteen," which challenged the summary judgment award. They argued that their motion to stay was the crux of their challenge to the summary judgment award. (*See* 9th Cir. Dkt. 41 [45–50].) After merging their own arguments on these issues together on appeal, their claim that the Ninth Circuit erred by not separately addressing their motion to stay rings hollow.

Neither does the petitioners' assertion that they were denied a full and fair opportunity to respond to the second summary judgment motion warrant this Court's

review. A ruling at summary judgment may be refused "where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986). But, to request a delay of summary judgment pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, a party "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." *Mendez v. Poitevent,* 823 F.3d 326, 336 (5th Cir 2016) (quoting *American Family Life Assur. Co. of Columbus v. Biles,* 714 F.3d 887, 894 (5th Cir 2013) (per curiam) (citation omitted)). "A district court abuses its discretion only if the party requesting a continuance can show that allowing additional discovery would have precluded summary judgment." *Singh v. American Honda Finance Corp.,* 925 F.3d 1053, 1076 (9th Cir. 2019) (quoting *Michelman v. Lincoln Nat. Life Ins. Co.*, 685 F.3d 887, 892 (9th Cir. 2012) (citations omitted)).

The petitioners' demand to delay summary judgment until they got two free copies of the deposition transcript did not meet these standards. They did not even show that they were entitled by law to free transcript copies. The court correctly reasoned that 28 U.S.C. § 1915 did not require others to pay indigent parties' litigation costs. (Pet. App. B6–7.) For this reason, there was no need to delay a summary judgment ruling.

In any event, the district court's ruling on the motion to stay did not deny the petitioners discovery of unknown facts essential to oppose summary judgment. *See Anderson*, 477 U.S. at 250 n.5. As the district court correctly held, both petitioners attended and had first-hand knowledge of the deposition, and petitioner Kruger took notes when he reviewed the transcript. (Pet. App. B6.) No declaration in support of the motion to stay contradicted these facts. (*See* Pet. App. D14–17.) The district court also

correctly faulted the petitioners for delaying nearly eight months after petitioner Kruger's deposition, from the summer of 2016 until February 2017, to move for a stay. (*Id.*)

The district court acted within its discretion to not further delay ruling on the summary judgment motion. This motion was the Director's second motion for summary judgment in a lawsuit filed years earlier in 2012. Also, the petitioners had nearly eight months to substantively oppose the summary judgment motion on its merits, from July 2016 when it was filed until March 2017 when it was granted. Twice, the district court reminded them to file a substantive opposition to the motion, but they ignored both reminders. (Supp. App. 018, 020.) *See Adrono v. Crowley Towing and Transp. Co.,* 443 F.3d 122, 127–28 (1st Cir. 2006) (denying continuance where the plaintiffs delayed for months to move for discovery after summary judgment motions were filed). The petitioners also had ample discovery, as the district court found. (Supp. App. 009–18.)

The Ninth Circuit did not need to offer more reasons for affirming the final judgment, and the petitioners received every opportunity required by law to litigate their claims. The Ninth Circuit did not err, much less err in a manner that "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." *See* Sup. Ct. R. 10(a). A writ of certiorari should not issue on the basis of alleged error.

## II. The petitioners' argument in the body of the petition that Federal Rule of Evidence 106 entitled them to free copies of the deposition transcript does not warrant this Court's review

The Court need look no further to deny the petition than the legal analysis of the question presented discussed above in this brief. *See Yee v. City of Escondido, Cal.,* 503 U.S. 519, 535 (1992) (holding that "under this Court's Rule 14.1(a), '[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court'").

However, if the Court chooses to consider the petitioners' discussion of Federal Rule of Evidence 106 in the body of the petition, that discussion does not warrant granting certiorari. First, the decision is not in conflict with relevant decisions of this Court. Second, there is no split among the circuits. Third, this case is not an appropriate vehicle for the Court to review whether or when *in forma pauperis* inmates should receive free copies of deposition transcripts in Section 1983 prison litigation.

**A. There is no conflict with relevant decisions of this Court**

In the petition, the petitioners assert that "the [N]inth Circuit Court of Appeals is out of step with this Court . . . in its consideration of F.R.E. 106 and *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 171–72 (1988)." (Pet. 10.) But, there is no conflict between the Ninth Circuit's decision and *Beech Aircraft Corp*.

At issue in *Beech Aircraft Corp.* was testimony at trial in a products liability lawsuit. The dispute at trial was whether a Navy plane crash was caused by pilot error or by an equipment malfunction caused by either the manufacturer or the company that serviced the plane. During the trial, the district court allowed the defendants to question one of the plaintiffs (a surviving spouse) on direct examination about statements in a letter he wrote but denied cross-examination about other statements in the same letter. The jury found for the defendants, but the Eleventh Circuit reversed and remanded for a new trial. *Id.* at 159–61. On review, this Court held that because the defendants examined the plaintiff about some statements in his letter (indicating pilot error), the district court abused its discretion by refusing to allow cross-examination on other statements in the same letter (regarding a theory of power failure). *Id.* at 160, 170–73. The Court reasoned that as a result of this evidentiary ruling, the jury was left with a "distorted and prejudicial impression" of the letter. *Id.* at 170.

In so holding, the Court did not reach the question of whether Federal Rule of Evidence 106 applied, but instead cited concerns underlying Rule 106. *Id.* at 172. The Court reasoned that "[t]he common-law 'rule of completeness,' which underlies Federal Rule of Evidence 106, was designed to prevent exactly the type of prejudice" caused by restricting cross-examination at trial regarding the letter. *Id.* at 171. Citing relevancy standards, the Court held that "when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rules 401 and 402." *Beech Aircraft Corp.*, 488 U.S. at 172 (citing 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 106[02] (1986)).

Under *Beech Aircraft Corp.,* the petitioners' reliance upon Federal Rule of Evidence 106 is misplaced. Additionally, *Beech Aircraft Corp.* is distinguishable from this case. *Beech Aircraft Corp.* addressed the admissibility of evidence during cross-examination at trial. *Beech Aircraft Corp.* did not address pre-trial discovery or summary judgment, much less an *in forma pauperis* inmate's Rule 56(d) demand for a free deposition transcript. *Beech Aircraft Corp.* does not control this case.

In any event, Federal Rule of Evidence 106 is a rule of evidence, not a discovery rule.[4] Rule 106 states: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the

[4] The petitioners relied upon Federal Rule of Evidence 106 and Rule 56(d) of the Federal Rules of Civil Procedure in the courts below as the grounds for their motion to stay and did not develop a record in regard to Rule 32(a)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 32(a)(6). Respondent Director Tewalt thus limits his arguments in this brief to Federal Rule of Evidence 106 and Rule 56(d) of the Federal Rules of Civil Procedure. Fed. R. Evid. 106; Fed. R. Civ. P. 56(d).

same time." Fed. R. Evid. 106. Rule 106 makes no mention of discovery or deposition transcripts. But deposition transcripts are what the petitioners want.

The petitioners claim in the petition that they asked the district court "to order respondent's counsel to produce a complete copy to Wolf and Kruger so they could properly defend the second summary judgment" motion. (Pet. 5–6.) In support, they argue that the Director offered portions of the deposition transcript at summary judgment that took the meaning of petitioner Kruger's testimony out of context. However, they fail to identify a single instance of testimony taken out of context, much less explain how it was taken out of context. They also fail to identify any facts in deposition testimony outside of the summary judgment record that would have corrected the alleged problem, even though Petitioner Kruger knew his own deposition testimony and took notes when he reviewed the transcript. (Pet. App. D10 Ex. 85.) As to objections, they identify only an objection "to every question that has been asked and every question you will ask," which is not a proper objection. (Pet. 8–9, citing Pet. App. D10.)

Thus, the petitioners have not shown any "misunderstanding or distortion" in the evidence at summary judgment nor how any alleged "misunderstanding or distortion [could] be averted only through presentation of another portion" or part of the deposition transcript. *See Beech Aircraft Corp.*, 488 U.S. at 172. Their demand for free transcript copies falls outside the scope of *Beech Aircraft Corp.* and the plain text of Rule 106.

There is no conflict between *Beech Aircraft Corp.* and the Ninth Circuit decision below, and the petitioners have not pointed to any other decision of this Court to show any conflict with relevant decisions of this Court. No writ should issue on this basis.

### B. There is no split among the circuits

The petitioners assert that the decision of the Ninth Circuit below conflicts with the decisions of other U.S. courts of appeals. (Pet. 8.) But, in support, they cite two U.S. Court of Appeals decisions that are inapposite: (1) an overruled Fourth Circuit decision, *United States v. Bollin,* 264 F.3d 391 (4th Cir. 2001), *overruled by United States v. Chamberlain,* 868 F.3d 290 (4th Cir. 2017); and (2) a Sixth Circuit decision, *United States v. Dotson,* 715 F.3d 576 (6th Cir. 2013).

Unlike this case, the Fourth Circuit and Sixth Circuit decisions in *Bollin* and *Dotson* were issued on appeals in criminal cases. *Bollin,* 44 F.3d at 399; *Dotson,* 715 F.3d at 578. Here, the underlying action is a Section 1983 civil action. Additionally, the issue presented in both *Bollin* and *Dotson* was the admissibility of evidence at trial. *Bollin,* 44 F.3d at 413–14; *Dotson,* 715 F.3d at 581–83. Here, there was no trial below.

Regardless, even if *Bollin* and *Dotson* are considered, they are not contrary to any decision below. The petitioners complain that the entire deposition transcript was excluded from evidence at summary judgment because they did not have two free copies of it. But both *Bollin* and *Dotson* upheld the exclusion of portions of witness statements from evidence at trials, as consistent with Federal Rule of Evidence 106. *Id.* Thus, even if these cases are considered, their holdings do not require granting certiorari review here.

Moreover, the district court's denial of the petitioners' demand for free copies of a deposition transcript is consistent with well-settled Third Circuit precedent. In *Tabron v. Grace*, 6 F.3d 147 (3d Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994), the Third Circuit held that a district court did not abuse its discretion in denying a *pro se* inmate free copies of the transcripts of depositions taken by prison officials in Section 1983 litigation.

*Tabron,* 6 F.3d at 158–60. The Third Circuit reasoned that there is no provision in the *in forma pauperis* statute, 28 U.S.C. § 1915, "for the payment by the government of the costs of deposition transcripts, or any other litigation expenses, and no other statute authorizes courts to commit federal monies for payment of the necessary expenses in a civil suit brought by an indigent litigant." *Id.* at 159 (citations omitted). The Third Circuit also reasoned that while a court can require an opposing party to pay for copies of deposition transcripts for an indigent party as a condition precedent to taking depositions, the district court acted within its discretion to not do so. *Id.* This Court denied certiorari review of the Third Circuit's decision. *Grace v. Tabron,* 510 U.S. 1196 (1994), *denying cert to Tabron v. Grace*, 6 F.3d 147 (3d Cir. 1993).

Here, the district court declined to use court funds to provide free transcripts to the petitioners or to order the Director to provide free transcripts to them. These decisions are consistent with *Tabron*. The petitioners have not shown a split between the Ninth Circuit and the Third Circuit, the Fourth Circuit, the Sixth Circuit or any other circuits. A writ of certiorari should not issue on the basis of a conflict among the circuits.

### C. If the Court wishes to consider whether *in forma pauperis* inmates should be entitled to free deposition transcripts in 42 U.S.C. § 1983 prison litigation, this case is not the vehicle to do so

This case does not present any unsettled constitutional or other important questions of federal law. In arguing their motion to stay in the courts below, the petitioners did not claim that free deposition transcripts in Section 1983 prison litigation are constitutionally required. They did not argue that the lack of free copies of the transcript denied them access to the courts, to due process, or to equal protection. There is no unsettled constitutional question in this case to warrant the Court's review.

At most, the record of this case raises a question about the scope of a rule of evidence. The petitioners strain to make Federal Rule of Evidence 106 apply to them, while ignoring another federal rule which disfavors their position that inmates should get deposition transcripts at no cost. Rule 30(f)(3) of the Federal Rules of Civil Procedure addresses a court reporter's duty to make copies of transcripts available, stating: "When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent." Fed. R. Civ. P. 30(f)(3). The rule does not entitle an *in forma pauperis* inmate to a "free" copy. Faced with a court reporter's right to collect a reasonable charge, the petitioners insist that Federal Rule of Evidence 106 required someone else—namely, the IDOC Director or the court—to pay the charge for them. Their "not my bill" take on Rule 106 is not an important question of federal law. [5]

If the Court wants to consider whether or when deposition transcripts should be free to *in forma pauperis* inmates in Section 1983 litigation, this case does not offer an appropriate vehicle to consider the question. As discussed above, the record in this case does not present any constitutional questions about access to courts, due process, or equal protection in regard to transcripts. This case is also not about an inmate litigant facing multiple depositions, or depositions of non-party witnesses. This case is certainly not about a *pro se* inmate litigant having no opportunity to attend the depositions of non-party witnesses, like the facts in *Sangster v. Clark County Det. Ctr.,* No. 2:05-cv-00195-JCM-PAL, 2006 WL 8439461, *3 (D. Nev. Jan. 26, 2006) (unpublished) (placing at issue, in an unpublished decision, a request for transcripts made by a pre-trial jail detainee who was unable to attend three depositions taken outside of the jail).

[5] Respondent Director Tewalt denies the petitioners' allegations that the IDOC reneged on promises to give them free deposition transcripts. Their own evidence contradicts this claim. (Pet. D Ex. 86 [5], 89, 92.)

Rather, this case is about an inmate who attended his own deposition in a Section 1983 lawsuit he filed and who, afterwards, reviewed and took notes of the deposition transcript. (Pet. App. B6.) Nothing stopped petitioner Kruger from attesting to facts within his personal knowledge. If he wanted to offer more statements into evidence to contest evidence offered by the Director, he did not need the transcript of his own deposition to do so. On these facts, the district court acted within its discretion in refusing to order the Director to finance inmate litigation against the IDOC. *See Tabron v. Grace,* 6 F.3d at 158–60; *Rivera v. DiSabato,* 962 F.Supp. at 40.

As this case does not offer an appropriate vehicle for this Court's review of whether or when *in forma pauperis* inmates should receive free deposition transcripts in Section 1983 lawsuits against prison officials, a writ of certiorari should not issue.

## CONCLUSION

Respondent Director Tewalt respectfully requests this Court to deny the petition.

DATED this 23rd day of March 2020.

Respectfully submitted,

By: /s/ Emily A. Mac Master

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