No. _____

In The

Supreme Court of the United States

DAVID SHINN, et al.,

Petitioners,

v.

SHAWN JENSEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Prison Litigation Reform Act ("PLRA") prescribes precisely how to calculate an award of attorneys' fees in prisoner cases. *See* 42 U.S.C. § 1997e(d). This Court and several circuit courts have recognized that the PLRA's fee formula, not the traditional lodestar method, applies and limits a district court's discretion to award more than what it expressly authorizes. The Ninth Circuit, however, followed its own precedent and held that a district court retains the discretion to enhance a fee award, notwithstanding the PLRA's limitations.

The question presented is whether the PLRA leaves any room for a district court to enhance a fee award in prisoner cases beyond what it statutorily prescribes.

PARTIES TO THE PROCEEDING

The Petitioners are David Shinn, Director of the Arizona Department of Corrections, Rehabilitation and Reentry ("ADCRR"), and Larry Gann, Assistant Director of ADCRR's Medical Services Contract Monitoring Bureau. They are the Defendants below, sued in their official capacities.[1]

The Respondents are Shawn Jensen, Stephen Swartz, Sonia Rodriguez, Christina Verduzco, Jackie Thomas, Jeremy Smith, Robert Gamez, Maryanne Chisholm, Desiree Licci, Joseph Hefner, Joshua Polson, Charlotte Wells, and the Arizona Center for Disability Law ("ACDL"). The individual Respondents are ADCRR inmates. The ACDL is a non-profit law firm statutorily authorized to pursue legal remedies for individuals with disabilities. All Respondents were Plaintiffs below and brought the underlying action under 42 U.S.C. § 1983.[2]

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[1] Director Shinn and Mr. Gann replaced Charles Ryan and Richard Pratt, respectively, during this appeal.

[2] Victor Parsons and Dustin Brislan were also Plaintiffs below, but they were dismissed from the lawsuit prior to its disposition.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the District of Arizona and the United States Court of Appeals for the Ninth Circuit:

- *Parsons, et al. v. Ryan, et al.*, No. 2:12-cv-00601-DKD (D. Ariz.) (order and judgment awarding attorneys' fees entered June 22, 2018).
- *Parsons, et al. v. Ryan, et al.*, Nos. 18-16358, 18-16365, 18-16368, 18-16424 (9th Cir.) (opinion affirming in part and vacating in part attorneys' fees award issued January 29, 2020; petition for rehearing en banc denied April 17, 2020; mandate issued May 7, 2020).

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The PLRA was enacted to reduce the "ever-growing number of prison-condition lawsuits that were threatening to overwhelm the capacity of the federal judiciary." *Wilkins v. Gaddy*, 734 F.3d 344, 349 (4th Cir. 2013) (citation omitted). To accomplish that goal, Congress declared that attorneys' fees in prisoner litigation would no longer be awarded using the traditional lodestar method, but instead calculated under 42 U.S.C. § 1997e(d). The PLRA's rigid formula affords no discretion to enhance an award beyond its limits. It caps fee awards in prisoner cases.

This Court recently confirmed that Congress left no room for courts to stray from the PLRA's prescribed calculation. In *Murphy v. Smith*, 138 S. Ct. 784 (2018), the Court held that Congress removed the discretion normally afforded to district courts under 42 U.S.C. § 1988 and the lodestar method when awarding fees in prisoner cases. Indeed, the PLRA expressly precludes an award of any fees under § 1988 "except to the extent" authorized by § 1997e(d). *See* 42 U.S.C. § 1997e(d)(1). As this Court aptly put it, "[t]he fee landscape changed with the passage of the PLRA." *Martin v. Hadix*, 527 U.S. 343, 349 (1999).

In the Ninth Circuit, however, the PLRA's fee cap is only a visor. In *Kelly v. Wengler*, 822 F.3d 1085 (9th Cir. 2016), it became the first court to authorize a fee enhancement under the PLRA since its enactment in 1996. *Id.* at 1100. The panel in this case cemented its outlier status, even in the face of this Court's

subsequent holding in *Murphy*. The Ninth Circuit's intransigence not only ignores the text and purpose of the statute, but it departs from several other circuit courts that have recognized the PLRA supplanted § 1988's lodestar calculation in prisoner cases. As a result, district courts in the Ninth Circuit are free to disregard the PLRA's fee cap under the guise of a fee multiplier.

Petitioners respectfully request a writ of certiorari to review the Ninth Circuit's judgment.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 949 F.3d 443 (9th 2020). Appendix A. The district court's order is unreported but available at 2018 WL 3239692. Appendix B.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its opinion on January 29, 2020. Appendix A. It denied Petitioners' timely petition for rehearing en banc on April 17, 2020. Appendix D. On March 19, 2020, this Court issued an order extending the deadline to file any petition for writ of certiorari to 150 days from the date of the order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutes, 42 U.S.C. § 1988(b) and 42 U.S.C. § 1997e(d), are set forth in Appendix E.

STATEMENT OF THE CASE

A. Factual and Procedural Background.

In March 2012, Respondents filed this class-action lawsuit on behalf of all ADCRR inmates in Arizona state-operated facilities, alleging Petitioners failed to provide adequate healthcare and exposed them to unlawful conditions of confinement, in violation of the Eighth Amendment, and seeking declaratory and injunctive relief. Dkt. 1. The district court certified the class action in March 2013. *See Parsons v. Ryan*, 289 F.R.D. 513 (D. Ariz. 2013), *aff'd*, 754 F.3d 657 (9th Cir. 2014).

In October 2014, on the eve of trial, the parties entered into a settlement agreement ("Stipulation"), whereby Petitioners agreed to comply with more than 100 performance measures. Appendix C. Respondents' counsel monitor Petitioners' compliance on a monthly basis, and if they believe that Petitioners are failing to substantially comply in some significant respect, they may file a motion to enforce the Stipulation with the district court. App. 78–80, ¶¶ 29–33. If Respondents ultimately prevail, the district court may award them their "reasonable attorneys' fees and costs, including expert costs," but any fees awarded, and particularly

the hourly rate, are "governed by 42 U.S.C. § 1997e(d)" of the PLRA. App. 82, ¶ 43.

B. The District Court's Attorneys' Fees Order.

In the first two years after the Stipulation's effective date, Respondents filed four motions to enforce. After securing varying degrees of success, Respondents filed a motion to recoup their attorneys' fees and costs. Dkt. 2276, 2543. Multiplying the number of hours spent enforcing the Stipulation by the PLRA's maximum hourly rate, Respondents calculated a total of $558,281.80 in attorneys' fees. *Id*. But, because the "PLRA's cap on hourly rates" yielded an amount that was "orders of magnitude less than would be recovered in litigation not governed by the PLRA," Respondents requested a "2.0 multiplier enhancement," for a total of $1,116,563.60 in fees. *Id*.

To support their request, Respondents relied solely on the Ninth Circuit's decision in *Kelly v. Wengler*. *Id*. That case involved a request for attorneys' fees against a privately operated correctional facility. 822 F.3d at 1091. Despite acknowledging that "the PLRA alters the lodestar method in prisoner civil rights cases in three fundamental ways"—including restricting the billable hours used to determine the fee award, *see* 42 U.S.C. § 1997e(d)(1), and capping the hourly rate to 150 percent of the hourly rate used for paying appointed counsel under the Criminal Justice Act ("PLRA hourly rate"), *see* 42 U.S.C. § 1997e(d)(3)—it held that the PLRA "does not cap the total amount of attorney's fees

awards in cases seeking declaratory and injunctive relief, and it continues to authorize a court to enhance the lodestar figure." *Id*. at 1099–01. The court reached that conclusion because "[t]here is nothing in the attorney's fees provisions of the PLRA that instructs a court not to [enhance the award]" and its "silence is strong evidence that the PLRA contemplates the continuation of the normal practice under § 1988 of adjusting the lodestar figure." *Id*.

Believing itself bound by *Kelly*, the district court considered Respondents' request for a fee enhancement and found they were entitled to a multiplier. App. 59–63. The court refused to consider *Murphy v. Smith*—issued after *Kelly*—ruling it was "inapposite" because it involved 42 U.S.C. § 1997e(d)(2) and the "allocation of fees after a monetary award for damages." App. 59, n.2. After slightly adjusting for certain non-compensable tasks, the court awarded a total of $1,107,361.40 in fees. App. 65. Petitioners appealed.

C. The Ninth Circuit's Decision.

The Ninth Circuit panel adhered to *Kelly*, holding: "The PLRA, in turn, authorizes multipliers to the base hourly rate above the cap set by 42 U.S.C. § 1997e(d)(1)." App. 40 (citing *Kelly*, 822 F.3d at 1100). It also dismissed *Murphy* because it involved "only the interpretation of 42 U.S.C. § 1997e(d)(2), and it did not disapprove the lodestar method or fee enhancements in any way, despite explicitly discussing both the overall 'surrounding statutory structure of § 1997e(d)' and

the lodestar method in particular."[3] App. 40–41, n.14 (quoting *Murphy*, 138 S. Ct. at 789–90).

The Ninth Circuit denied Petitioners' petition for rehearing en banc. Appendix D.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Nullifies the PLRA's Cap on Fees, Undermines This Court's Precedents, and Conflicts with Several Circuit Courts.

A. The Lodestar Method Was Created to Determine a "Reasonable" Fee Award Under 42 U.S.C. § 1988.

"The general rule in our legal system is that each party must pay its own attorney's fees and expenses." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 (2010); *see also Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 370 (2019) (stating the "bedrock principle known as the 'American Rule'" requires litigants to pay their "own attorney's fees, win or lose"). An exception to this "American Rule" is when Congress has enacted a fee-shifting statute. *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975) (Congress must make "specific and explicit

[3] The court ultimately vacated the fee award and remanded to the district court to reweigh an enhancement using the appropriate factors. App. 41–42.

provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights").

In 1976, "Congress exercised its power to partially abrogate the American Rule when it enacted the Civil Rights Attorney's Fees Awards Act" and 42 U.S.C. § 1988(b). *Wilkins*, 734 F.3d at 349; *accord Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Section 1988(b) authorizes a district court to award a prevailing party its "reasonable attorney's fee" in certain federal actions, including actions under 42 U.S.C. § 1983. *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990). "Unfortunately, [§ 1988] does not explain what Congress meant by a 'reasonable' fee, and therefore the task of identifying an appropriate methodology for determining a 'reasonable' fee was left for the courts." *Perdue*, 559 U.S. at 550.

In response, courts adopted the lodestar method to guide them in awarding a "reasonable" fee under § 1988. *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (noting that the lodestar method has become the "guiding light" for determining "what is a 'reasonable' fee" under § 1988). The lodestar calculation is a three-part formula: multiply (1) "the number of hours worked" by (2) the "prevailing market rates in the relevant community," and, then, (3) in its discretion, a district court may adjust that presumptively reasonable measure of fees upward (an enhancement) or downward to reflect what is actually "reasonable" for purposes of § 1988. *Perdue*, 559 U.S. at 546, 551–53; *Hensley*, 461 U.S. at 433–34.

B. The PLRA Places Substantial Limitations on Any Fee Award Authorized by § 1988.

Twenty years after it enacted § 1988, Congress enacted the PLRA. *See* PRISON LITIGATION REFORM ACT OF 1995, Pub. L. No. 104–134, 110 Stat. 1321 (1996). The primary purpose of the PLRA is "to curtail frivolous prisoners' suits and to minimize the costs—which are borne by taxpayers—associated with those suits." *Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir. 1999). "The PLRA contains a number of provisions intended to reduce the number of such lawsuits," *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), including a stringent limitation on the scope and amount of attorneys' fees that can be awarded to a prevailing party in prisoner cases. *See* 42 U.S.C. § 1997e(d); *see also* H.R.Rep. No. 104–21, at 28 (1995), *reprinted in* 1 Bernard D. Reams, Jr. & William H. Manz, *A Legislative History of the Prison Litigation Reform Act of 1996*, Pub. L. No. 104–134 Stat. 1321 (1997) ("This subsection permits prisoners challenging prison conditions under 42 U.S.C. § 1983 to receive attorney fees but reasonably limits the circumstances under which fees may be granted as well as the amount of the fees.").

The PLRA provides that, "[i]n any action brought by a prisoner . . . in which attorney's fees are authorized under section 1988, such fees shall not be awarded, except to the extent that" it was "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" and "the amount of the fee is proportionately related to the court ordered relief for the

violation," or it was "directly and reasonably incurred in enforcing the relief ordered for the violation." 42 U.S.C. § 1997e(d)(1). The PLRA further provides that "[n]o award of attorney's fees . . . shall be based on an hourly rate greater than 150 percent of the hourly rate established under" the Criminal Justice Act for court-appointed counsel. 42 U.S.C. § 1997e(d)(3).

Thus, whereas in non-prisoner cases a "reasonable fee" is calculated by multiplying the number of hours worked by the prevailing hourly rate and then adjusting, in the discretion of the district court, that presumptive amount upward or downward, *Perdue*, 559 U.S. at 546, 551–53, fees in prisoner cases are calculated using the PLRA formula: § 1997e(d)(1) (certain hours billed) x § 1997e(d)(3) (limited hourly rate) = PLRA fee award. Notably absent from § 1997e(d) is any discretion to enhance the resulting PLRA fee award. To the contrary, it expressly denies any fees under § 1988 "except to the extent" allowed by § 1997e(d). 42 U.S.C. § 1997e(d)(1); *see also* 42 U.S.C. § 1997e(d)(3) ("No award of attorney's fees in an action described in paragraph (1) shall be based on. . . .").

C. Congress Effectively Replaced the Judicially Created Lodestar Framework with § 1997e(d) and Removed Any Discretion to Award Fees Beyond that Statutory Scheme.

The text, structure, and purpose of the PLRA confirm that Congress effectively supplanted § 1988's

lodestar calculation with § 1997e(d) and fixed the amount of fees that can be awarded in prisoner cases. This Court in *Martin* recognized that seemingly obvious proposition: "On April 26, 1996, through the PLRA, the plaintiffs' attorneys were on notice that their hourly rate had been adjusted. From that point forward, they would be paid at a rate consistent with the dictates of the law." 527 U.S. at 360. The PLRA, it held, "set[s] substantive limits on the award of attorney's fees" and "places a cap on the size of attorney's fees that may be awarded in prison litigation suits." 527 U.S. at 350, 354; *see also id*. at 352 (the PLRA "caps all fees that are ordered to be paid after the enactment of the PLRA").

The First, Second, Sixth, and Eleventh Circuits have likewise recognized that the PLRA is the standard for awarding attorneys' fees in prisoner cases, not the lodestar method. For example, in *Johnson v. Breeden*, 280 F.3d 1308 (11th Cir. 2002), *partially abrogated on other grounds as recognized in Patel v. Lanier Cty. Georgia*, 969 F.3d 1173 (11th Cir. 2020), the district court applied the "common lodestar method" to a fee request in a prisoner case. *Id*. at 606. The Eleventh Circuit held "[t]hat is not the proper legal standard." *Id*. Instead, the provisions of the PLRA controlled:

> Although the lodestar method provides the correct approach for determining a reasonable attorney fee under § 1988 generally, the amount which may be awarded in a case brought by a prisoner is now capped. Specifically, both the availability of fees *and their*

> *amount* have been restricted by . . . [42 U.S.C. § 1997e(d)].

Id. (emphasis added; brackets in original) (quoting *Walker v. Bain*, 65 F. Supp. 2d 591, 596 (E.D. Mich. 1999)); *see also Shepherd v. Goord*, 662 F.3d 603, 606 (2d Cir. 2011) ("With the 1996 enactment of the PLRA, Congress imposed 'substantial restrictions' on § 1988(b) attorney's fees awards to prevailing prisoner-plaintiffs."); *Walker v. Bain*, 257 F.3d 660, 665 (6th Cir. 2001) ("Among the many new changes relating to prisoner civil rights suits, the PLRA modifies the application of 42 U.S.C. § 1988 to prevailing prisoners by providing stringent limitations on both the availability *and the amount of attorney fee awards*.") (emphasis added); *Boivin v. Black*, 225 F.3d 36, 39 (1st Cir. 2000) ("In enacting the PLRA, Congress deviated from this pattern, choosing to place some explicit limitations on the fees that courts can award to prisoners' lawyers in civil cases."). At one point, even the Ninth Circuit agreed that the lodestar method did not apply in prisoner cases. *See Webb v. Ada Cty.*, 285 F.3d 829, 840 n.6 (9th Cir. 2002) (recognizing that, although the lodestar method was the proper fee calculation in prisoner cases "[p]rior to the enactment of the PLRA," now "the method of calculating the hourly rate for attorney's fees is dictated by the PLRA").

Because the lodestar method is inapplicable in prisoner cases, so must its application of enhancers and multipliers, which were only utilized as part of the lodestar calculation to arrive at an accurate

"reasonable" fee under § 1988(b). In prisoner cases, fee awards are calculated under the PLRA.

D. In Contradiction to the PLRA's Text and Purpose, the Court's Decision in *Martin*, and the Decisions of Other Circuit Courts, the Ninth Circuit Has Continued to Apply the Lodestar Method in Prisoner Cases.

The Ninth Circuit in *Kelly* ignored all of this. It presumed that the lodestar method and its enhancement feature carried over—and could be layered on top of—§ 1997e(d). *See Kelly*, 822 F.3d at 1100 ("When Congress enacted the PLRA, the lodestar method for determining a reasonable attorney's fees award under § 1988 had already achieved dominance in the federal courts.") (internal quotation marks and citation omitted). But it failed to grasp that Congress explicitly retracted any fee shifting it had authorized under § 1988 when it enacted the PLRA ("fees shall not be awarded") and prescribed a particular formula for awarding fees in prisoner cases going forward ("except to the extent" authorized by § 1997e(d)). *See Wilkins*, 734 F.3d at 349 ("But what Congress provides, Congress can adjust or take away."). Congress was far from "silen[t]." *Kelly*, 822 F.3d at 1101. It expressly qualified the lodestar method and omitted any fee enhancement.[4]

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[4] The judges who decided *Kelly* wanted more explicit language, similar to the attorneys' fees provision in the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1415(i)(3)(C), which states that "[n]o bonus or multiplier may be used in

Kelly also reasoned that § 1997e(d)(3) caps only the PLRA hourly rate, not the "total amount" of a fee award, reserving some discretion to enhance a PLRA fee award. 822 F.3d at 1100–01. But permitting a fee enhancement of the total award is literally an end-run around § 1997e(d)(3)'s rate cap. Indeed, even the panel here recognized that *Kelly* effectively allows an increase in the PLRA hourly rate: "The PLRA, in turn, authorizes multipliers *to the base hourly rate* above the cap set by 42 U.S.C. § 1997e(d)(1)." App. 40 (emphasis added); *see also Ramos v. Swatzell*, 2018 WL 6113093, at *5 (C.D. Cal. Feb. 15, 2018) ("*Kelly* appears to allow the court to enhance the hourly rate for plaintiffs' counsel beyond the PLRA rate cap."). So do Respondents. *See* Dkt. 2276 (requesting an enhancement, in part, because the PLRA hourly rate was lower than their normal rates).

Kelly's reasoning is both suspect and fails to accord with the PLRA's intent to limit fee awards. By way

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calculating the fees awarded under this subsection." 822 F.3d at 1100–01. Section 1988(b), however, does not authorize fee awards in IDEA actions, and thus Congress had to build a fee-shifting provision directly into the IDEA, which it did at 20 U.S.C. § 1415(i)(3)(B). That provision adopted, almost identically, the language in § 1988(b) and the lodestar calculation. Because Congress imported § 1988(b) into the IDEA, it had to expressly disclaim any part of it that it did not want to apply, which it did. Conversely, the PLRA did not import wholesale § 1988(b), but instead expressly qualified its application. *See* 42 U.S.C. § 1997e(d)(1) ("[S]uch fees shall not be awarded [under § 1988], except to the extent" authorized in § 1997e(d)). Thus, there was no need to additionally disclaim any of its features.

of example, under *Kelly*'s reasoning, the PLRA precludes this calculation:

2017 PLRA Rate	Multiplier	New Rate	2017 Hours	Total Fees
$219/hr	x 2	$438/hr	x 1,105.4	=$484,165.20

But it allows this calculation:

2017 PLRA Rate	2017 Hours	Base Fees	Multiplier	Total Fees
$219/hr	x 1,105.4	=$242,082.60	x 2	=$484,165.20

As this example illustrates, a lodestar multiplier is the *same* as an increase of the hourly rate, as this Court and other circuit courts have recognized. *See Perdue*, 559 U.S. at 557 ("[T]he effect of the enhancement was to increase the top rate for the attorneys to more than $866 per hour."); *In re Illinois Cong. Dists. Reapportionment Cases*, 704 F.2d 380, 384 (7th Cir. 1983) ("[T]he enormous bonus the multiplier yielded for the lead attorney leads us to caution that a multiplier has little significance by itself. Its importance is in its effect on the basic hourly rate[.]"); *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1276 (8th Cir. 1980) ("The 1.5 multiplier as a bonus to the hourly rate would result in some of the Doherty attorneys receiving in effect $135.00 for their services."). Section 1997e(d)(3)'s rate cap is meaningless if a court may simply turn around and enhance the total fee

award under the guise of a multiplier. The PLRA's cap on the hourly rate *is* a cap on the total fee award: Section 1997e(d)(3) "set[s] substantive limits on the award of attorney's fees" and "places a cap on the size of attorney's fees that may be awarded in prison litigation suits." *Martin*, 527 U.S. at 350, 354. *Kelly* tacitly assumes that Congress was troubled only by one factor in how courts calculate fee awards: the base hourly rate. That assumption is unreasonable. By allowing courts to continue making large fee awards by simple mathematical adjustments, *Kelly*'s interpretation leaves the PLRA a paper tiger.

Construing the PLRA to allow an enhancement of the PLRA fee award is also inconsistent with § 1997e(d)(3)'s purpose of reducing inmate litigation. *See Martin*, 527 U.S. at 363 (Scalia, J., concurring in part and concurring in the judgment) ("In my view, the most precisely defined purpose of the provision at issue here was to reduce the previously established incentive for lawyers to work on prisoners' civil rights cases."); *Perez v. Cate*, 632 F.3d 553, 558 (9th Cir. 2011) (Congress's decision to place "a strict cap on attorney's fees" furthers its goal to "curtail frivolous prisoners' suits"); *Perez v. Westchester Cty. Dep't of Corr.*, 587 F.3d 143, 153 (2d Cir. 2009) (noting that "[o]ne of the ways" the PLRA "limits the availability of attorneys' fees under § 1988" in prisoner cases is through § 1997e(d)(3)); *Parker v. Conway*, 581 F.3d 198, 204 (3d Cir. 2009) ("[C]apping the amount of attorney's fees a court may award to a prevailing prisoner plaintiff may cause a prisoner to evaluate more carefully the merit of the

action he intends to file, therefore reducing the likelihood he would file an insubstantial lawsuit, because it reduces the chance the prisoner will find an attorney to take his case (and because he believes the chances of winning are lower without a lawyer than with one)."); *Robbins v. Chronister*, 435 F.3d 1238, 1244 (10th Cir. 2006) (noting that the purpose of the PLRA's fee limitation is to reduce any "incentive to plaintiffs to engage in litigation to vindicate civil rights"); *Walker*, 257 F.3d at 665 (noting that the purpose of the PLRA's fee limitation was "to discourage prisoners from filing claims that are unlikely to succeed"). If a court can simply make up the difference by enhancing it on the back end, the incentive to engage in frivolous prisoner litigation returns. Prisoner litigation will continue to proliferate if it is as lucrative for attorneys to pursue as any other litigation.

E. *Kelly* and the Ninth Circuit's Decision Conflict with the Court's Analysis in *Murphy v. Smith*.

Although *Kelly* did not have the benefit of *Murphy*, the Ninth Circuit in this appeal did. But instead of correcting course, the Ninth Circuit doubled down on its error, dismissing *Murphy* in a footnote as inapposite. *Murphy* addressed whether 42 U.S.C. § 1997e(d)(2) gives a district court any discretion to offset a fee award with a portion of the judgment.[5] This Court held

[5] Section 1997e(d)(2) provides:

> Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the

that district courts have no discretion and "must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees." 138 S. Ct. at 790. Although the Court addressed the offset provision in Subsection (d)(2), the question came down to the interplay between § 1988's lodestar method and § 1997e(d) generally. *Id*. at 789. Immediately, it recognized that the PLRA governed over § 1988's lodestar framework:

> In 1976, Congress enacted what is now 42 U.S.C. § 1988(b) to authorize discretionary fee shifting in civil rights suits. For years that statute governed the award of attorney's fees in a large variety of civil rights actions, including prisoner civil rights lawsuits like this one. But in the Prison Litigation Reform Act of 1995, Congress reentered the field and adopted § 1997e's new and specialized fee shifting rule for prisoner civil rights suits alone. Comparing the terms of the old and new statutes helps to shed a good deal of light on the parties' positions.

Id. (internal citation omitted).

The Court then noted that, whereas "[§] 1988(b) confers discretion on district courts in unambiguous terms . . . , § 1997e(d) expressly qualifies the usual operation of § 1988(b) in prisoner cases." *Id*. at 789 (citing 42 U.S.C. § 1997e(d)(1)). "If Congress had wished to

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> judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

confer the same discretion in § 1997e(d) that it conferred in § 1988(b)," it held, "we very much doubt it would have bothered to write a new law; omit all the words that afforded discretion in the old law; and then replace those old discretionary words with new mandatory ones." *Id*. To reinforce that conclusion, the Court pointed to Subsections 1997e(d)(1) and (d)(3), which, it noted, "*also* limit the district court's pre-existing discretion under § 1988(b)." *Id*. "All this," it held, "suggests a statute that seeks to restrain, rather than replicate, the discretion found in § 1988(b)." *Id*.

Thus, *Murphy* confirms at least two things: (1) the PLRA's fee formula effectively supplanted § 1988(b) and its lodestar framework in prisoner cases; and (2) none of § 1997e(d)'s provisions confer discretion to enhance a fee award beyond what it prescribes. The Ninth Circuit's presumption that the lodestar method applies is thus wrong, and its insistence—and application in this case—that the PLRA allows a district court to enhance the resulting PLRA fee award is irreconcilable with *Murphy*'s reasoning. Although *Murphy* did not expressly disapprove of fee enhancements in PLRA awards (since the appeal did not involve the propriety of an enhanced fee award), the reasoning underlying its holding relating to Subsection (d)(2) nonetheless forecloses the availability of fee enhancements under § 1997e(d). *See id*. at 790 (refusing to read a lodestar-type methodology into Subsection (d)(2) because "precisely none of this appears in § 1997e(d)(2)"). Because the PLRA removed § 1988's pre-existing discretion, there can be no discretion to enhance an award. By

enhancing the fees award, the lower courts here have improperly used § 1997e(d) to sneak through the back door the very discretion that *Murphy* foreclosed.

II. The Question Presented Has National Implications, and This Case Is an Ideal Vehicle to Decide It.

Whether a district court has the discretion to multiply fee awards in prisoner cases is a question that impacts all prisoner litigation. Each case presents the opportunity for fees and therefore the opportunity for a fee enhancement. Every prison and jail is subject to a doubled or tripled fee award. This Court's guidance is sorely needed, as indefinite fee exposure affects not only litigation costs but the availability of federal, state, and local resources.

This case is a perfect example. Respondents are represented by an army of lawyers from multiple organizations and a national law firm (a recent trend in prisoner litigation). The district court doubled the fee award, applying a multiplier to augment the award by more than $550,000.00 of taxpayer money. It subsequently issued a second fee award and ordered a 2.0 multiplier worth nearly $800,000.00. Dkt. 3245.[6] A third fee application is forthcoming. Dkt. 3401, 3495. This case is thus an ideal vehicle to resolve this purely

[6] Petitioners have appealed that award as well. Dkt. 3272. The Ninth Circuit has stayed the appeal pending resolution of this Petition. *See Jensen v. Ryan*, No. 19-16128 (9th Cir.), Doc. 28.

legal issue and restore consistency with its precedent and among the circuit courts.

CONCLUSION

The petition for writ of certiorari should be granted.

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