No. 20-360

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 FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Ninth Circuit, ruling in favor of Petitioners, reversed and remanded for further consideration a district court order enhancing a fee award in a prison conditions case that had been settled through a court-approved stipulation between the parties. Because the district court on remand has not yet determined whether an enhancement is appropriate, the petition is premature. Should the Court decide otherwise, the Question Presented is:

Whether, in a stipulation between the parties authorizing "reasonable attorneys' fees . . . to be determined by the Court," the incorporation by reference of 42 U.S.C. § 1997e(d)—limiting the hourly rate for attorneys' fees in prison conditions cases—prohibits the district court from awarding an enhancement when § 1997e(d) does not address enhancements, and at the time of the stipulation case law permitted an enhancement in exceptional circumstances.

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INTRODUCTION

Petitioners seek certiorari to review a court of appeals decision *in their favor*, involving a routine attorneys' fees dispute governed by the terms of a court-approved stipulation. The court of appeals *reversed and remanded* an award of attorneys' fees that included an enhancement. The district court has yet to act on the remand and reassess the fee request, and therefore there is no enhancement at this point. Petitioners' request for an advisory opinion is sufficient reason alone to deny the petition.

Moreover, the question whether an enhancement is available would not be worthy of this Court's review even if there were actually an enhancement to review. Fees are governed here not by a statute, but by a stipulation between the parties ("Stipulation"). The Stipulation, entered into in 2014 and approved by the district court in 2015, requires the Arizona Department of Corrections to provide a constitutional level of health care to the people in its custody in ten state-operated prisons and constitutionally adequate conditions in its maximum custody units, and provides for "reasonable attorneys' fees … to be determined by the Court," should Respondents prevail in disputes with respect to enforcement of the Stipulation.

Petitioners' years of refusal to comply with basic provisions in that agreement resulted in several court orders aimed at achieving compliance with the Stipulation. As a result, the district court initially awarded Respondents attorneys' fees for their efforts pursuant to the fee provision of the Stipulation. That provision authorizes "reasonable attorneys' fees . . . to be determined by the Court," and sets the hourly rate by reference to 42 U.S.C. § 1997e(d). The district court granted Respondents' request for an enhancement of

their total award, applying Ninth Circuit case law regarding when enhancements of fee awards are appropriate. A unanimous panel of the court of appeals reversed the district court's fee award, finding both that it applied the incorrect hourly rate, and that it abused its discretion in the methodology by which it calculated the enhancement. The panel remanded the case to the district court for further proceedings. Thus, at this point, there is no fee award, much less any enhancement, to review.

Notwithstanding that they prevailed below in their appeal of Respondents' enhancement, and that there is no fee award to review, Petitioners prematurely ask this Court to intervene, and to decide in the abstract whether enhancements are ever available under 42 U.S.C. § 1997e(d), the attorneys' fee provision of the Prison Litigation Reform Act (PLRA) when it is the Stipulation that governs the fee award.. This case is an improper vehicle to consider that question, for three reasons.

First, there is no order awarding an enhancement. If on remand the district court denies an enhancement, or the court of appeals denies enhancement on appeal, the question will never be presented. Petitioners seek an advisory opinion.

Second, the availability of fees in this case is governed by a provision of the Stipulation, not by the PLRA as a whole. The interpretation of the Stipulation's fee provision does not present an important question of federal law—indeed, it is governed by Arizona state law—and would have no significance beyond this case.

Third, while the Stipulation incorporates one specific provision of the PLRA, governing the hourly rate, the Stipulation was negotiated against a

backdrop of case law in the Ninth Circuit and beyond that interpreted federal attorneys' fees statutes, including the PLRA, to allow the enhancement of a fee award in exceptional cases. It is that contemporaneous legal background, not the Court's understanding of the PLRA today, that would have informed the intentions of the parties at the time the Stipulation was written, and therefore the meaning of the Stipulation's terms. And that historical question also has little or no significance beyond this case.

Moreover, even if this case actually presented the question Petitioners pose, involving interpretation not of this Stipulation but of the PLRA itself, there is no split in the circuits and no conflict with the decisions of this Court on that question. The PLRA is silent on the matter of enhancements. And in other cases interpreting the PLRA, this Court has declined to treat Congress's silence as justification for reading into the statute additional restrictions beyond those in the text itself.

In sum, Petitioners are asking this Court to issue an advisory opinion on a question that only one circuit court has considered, and that would affect the interpretation of a single settlement agreement applicable only to one case. The Court should deny the petition.

STATEMENT OF THE CASE

I. Underlying Facts

This case arises from a class action lawsuit filed by Respondents in 2012 on behalf of more than 34,000 adults and children housed in Arizona state prisons, and on behalf of the Arizona Center for Disability Law

("ACDL").[1] The class action alleged, among other things, "grossly inadequate" medical, mental health, and dental care, which subjected all prisoners to a substantial risk of serious harm, including "unnecessary pain and suffering, preventable injury, amputation, disfigurement, and death." Doc. 1 at 2.

The parties settled the case through a Stipulation in October 2014. App. 67-86. The district court held that the Stipulation was necessary to correct constitutional violations. Doc. 1458 at 1, Att. 1. It further held that the Stipulation was "fair, adequate, and reasonable," Doc. 1458 at 1, and retained jurisdiction to enforce the Stipulation "through all remedies provided by law" subject to two exceptions not relevant here. App. 80.

Pursuant to the Stipulation, Petitioners promised to comply with a series of health care performance measures designed to bring Arizona's state-operated prisons into compliance with the Constitution. App. 69. The Stipulation created systems to monitor Petitioners' compliance, App. 69-70, and provided an enforcement mechanism to ensure that Petitioners met their obligations. App. 79.

In the years that followed entry of the Stipulation, Petitioners repeatedly refused to fulfill their obligations, instead flouting the agreement, raising "spurious legal arguments" and failing to comply with orders of the district court. *See, e.g.*, Doc. 2898 at 1-2 (holding Petitioners in contempt and detailing Petitioners' repeated failure to comply with both the Stipulation and court orders enforcing the

[1] Petitioners list ACDL, an institutional plaintiff in the matter, as a party to this proceeding. Pet. ii. However, ACDL was not a party to the district court motion for fees, nor a party to the fees appeal to the Ninth Circuit, and therefore is not a Respondent to the Petition.

Stipulation); App. 60 (noting enforcement of the Stipulation "could have been simple if Defendants had been able to comply with the Stipulation's requirements . . . and had not raised spurious legal arguments."); App. 61 ("Defendants have been unable to comply with multiple performance measures . . . ."). Respondents therefore were forced repeatedly to utilize the Stipulation's enforcement mechanism.

Enforcement litigation proved necessary, not only to enforce the Stipulation, but even to resolve disputes over clearly defined terms. As just one example, Petitioners required Respondents to seek court resolution of what it means for a prisoner to be "seen" by a mental health clinician, even though the Stipulation itself defined that term as "an encounter that takes place in a confidential setting outside the prisoner's cell, unless the prisoner refuses to exit his or her cell for the encounter." *See* App. 29 (discussing the action necessary to enforce this definition). In direct contravention of this definition, Petitioners unilaterally sought to satisfy this requirement with *non-confidential* group and cell-front encounters where the prisoner was not allowed to leave the cell. *Id.*

When this was brought to court, Petitioners made no effort to explain how non-confidential treatment satisfied the Stipulation's requirement of confidential treatment, or how counseling while the patient was confined to his cell satisfied a requirement that the counseling take place outside the cell unless the prisoner refused to leave. They instead argued that mental health staff could complete a full mental health evaluation through the narrow tray slot in a solid cell door and that group counseling was adequate. The dispute ultimately required three rounds of briefing and two district court orders requiring Petitioners to

comply with the plain language of the Stipulation. *See, e.g.*, App. 29-30; App. 57 ("[T]he Court has resolved a long string of disputes about how to interpret various terms in the Stipulation such as '90 days' and 'being seen.'").

Each of Respondents' enforcement actions followed a similarly protracted pattern. Between October 2015 and June 2017, Respondents served Petitioners with multiple Notices of Non-Compliance, extensively detailing Petitioners' repeated failures to comply with the Stipulation and documenting serious harm to class members. Respondents also filed four separate Motions to Enforce the Stipulation regarding noncompliance with nearly 40% of the health care measures in the Stipulation as well as Petitioners' inadequate monitoring methodology. And Respondents were required to seek emergency relief regarding Petitioners' retaliation against class members. The district court ordered Petitioners to provide a letter to class members "assuring interviewees freedom from any retaliation for their participation in the interviews conducted by Class Counsel." Doc. 1734.

In connection with these enforcement efforts, the district court made more than 100 findings of substantial non-compliance. *See, e.g.*, Doc. 1583; Doc. 1709; Doc. 2030. Based on those findings, the district court ordered Petitioners to submit remedial plans to reach compliance with the Stipulation. Among other enforcement actions, the district court conducted four days of evidentiary hearings on the accuracy and reliability of Petitioners' self-monitoring methods.

Respondents' near-continuous enforcement work for the relevant time period culminated in the district court's June 14, 2017 order providing that continued non-compliance would result in an order to show cause

why fines of $1,000 should not be imposed for each failure to comply. Doc. 2124.

A. The Stipulation's Fee Provision

The Stipulation, agreed to by both parties, provides for attorneys' fees in connection with work necessary to enforce the agreement, as follows:

> In the event that Plaintiffs move to enforce any aspect of this Stipulation and the Plaintiffs are the prevailing party with respect to the dispute, the Defendants agree that they will pay reasonable attorneys' fees and costs, including expert costs, to be determined by the Court. The parties agree that the hourly rate of attorneys' fees is governed by 42 U.S.C. § 1997e(d).

App. 82 ¶ 43.

The Stipulation thus authorizes "reasonable attorneys' fees . . . to be determined by the Court." *Id.* Section 1997e(d), the sole reference to PLRA fees in the Stipulation, addresses only the calculation of the hourly rate, and provides that "No award of attorney's fees . . . shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel." 42 U.S.C. § 1997e(d)(3).

Beyond authorizing "reasonable attorneys' fees," the Stipulation is silent on whether and under what circumstances the court may grant an enhancement of any attorneys' fees award, as is generally permissible under attorneys' fees regimes in exceptional cases when a prevailing party meets each of the several factors courts consider. As detailed below in Part I, the Stipulation was negotiated in 2014 against a backdrop of caselaw making clear that enhancements

were available under both the PLRA and other federal attorneys' fees statutes.

B. Fee Proceedings Below

In September 2017, pursuant to the Stipulation, Respondents sought attorneys' fees for enforcement work completed between October 1, 2015 and June 30, 2017. Doc. 2276 (modified by Doc. 2543). Respondents requested fees only for attorneys and support staff working for or contracted with two not-for-profit legal organizations, the American Civil Liberties Union and the Prison Law Office.[2] Doc. 2276 n. 1.

As part of their fee request, Respondents sought enhancement of the total award. Doc. 2276 at 28. Petitioners mischaracterize Respondents' request as based solely on the inadequacy of the PLRA's hourly rate incorporated into the Stipulation. Pet. 4. In fact, Respondents based their request for an enhancement on counsel's "superior performance, commitment of resources, and excellent results[.]" Doc. 2276 at 21. Petitioners opposed Respondents' request for fees, including their request for an enhancement. *See* Doc. 2402 at 16-25.

The district court awarded Respondents fees. *See* App. 65. The court held that under the Stipulation, Respondents are entitled to fees where "Defendants have not satisfied their obligations under the Stipulation" and where that failure required "Plaintiffs to move to enforce it." App. 57-58. The court

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[2] Petitioners' assertion that the case involves fees for an "army of lawyers" including a national law firm is inaccurate. *See* Pet. 19. No fees were sought on behalf of any attorney at a national law firm. As the district court noted, "Plaintiffs are seeking fees only for a subset of the attorneys who are counsel of record." App. 62.

also granted an enhancement of the overall award. *See* App. 59. The court noted that the "parties do not dispute that analysis of an enhancement is governed by *Kerr v. Screen Guild Extras, Inc.,* 526 F.2d 67, 70 (9th Cir. 1975)," a case setting forth factors for attorneys' fees under a federal labor statute that have been applied generally to attorneys' fees cases. *Id*. The court held that Respondents "satisfy the *Kerr* factors." *Id.*

Petitioners appealed.[3] The court of appeals unanimously affirmed in part and reversed and remanded in part. App. 13. On the only issue presented here, the court of appeals reversed and remanded the district court's grant of an enhancement. The court acknowledged that an enhancement is in theory available in exceptional cases, but determined that the district court "abused its discretion by enhancing the fee award" here because it improperly double-counted some of the *Kerr* factors. App. 40-41. The court therefore vacated the fees order and remanded to the district court with instructions to reconsider whether an enhancement is merited and if so, to properly recalculate using the *Kerr* factors. App. 42.[4] The district court has yet to undertake that analysis on remand.

The Ninth Circuit denied Petitioners' petition for rehearing en banc. App. 88.

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[3] Petitioners also appealed ten other district court orders imposing contempt sanctions, appointing expert witnesses, and enforcing Respondents' obligations under the Stipulation. *See* App. 9. The court of appeals affirmed the contempt order and two other enforcement orders, and dismissed the remainder of Petitioners' appeals for lack of jurisdiction. App. 13.

[4] The court of appeals also vacated and remanded for recalculation with a revised hourly rate. *See* App. 39-40, 43.

REASONS FOR DENYING THE PETITION

I. This Case Is A Poor Vehicle To Consider The Question Of Fee Award Enhancements Under The PLRA.

Petitioners ask the Court to review whether enhancements of attorneys' fees awards are available under the PLRA. But this case is an especially poor vehicle to consider that question, for three reasons. First, and dispositively, the court of appeals did not uphold an enhancement of the fee award, but vacated the award and remanded to the district court for reconsideration. Thus, there is no enhancement to review. Second, fee awards in this case are governed by a Stipulation expressly authorizing "reasonable attorneys' fees," not by the PLRA, and therefore any decision from this Court would have necessarily limited impact. Third, even if the Court were to deem PLRA jurisprudence on enhancements relevant, at the time the parties entered into the Stipulation, courts interpreted the PLRA, like other attorneys' fees statutes, to allow enhancements in exceptional cases. That contemporaneous statutory interpretation, in force when the agreement was signed, and not the meaning of the PLRA today, controls the interpretation of the Stipulation. And that historical question is of significance to few, if any, other cases.

First, consideration by the Court at this stage is premature because the court of appeals did not uphold an enhancement. Rather, it agreed with Petitioners that the district court had abused its discretion in granting an enhancement, by misapplying Ninth Circuit precedent on the factors to be considered in assessing whether an enhancement should be awarded. App. 41. As a result, there is no enhancement to review, and there may never be an

enhancement. Petitioners prevailed in their appeal of Respondent's enhancement, but nonetheless seek this Court's review.

If the district court on remand grants an enhancement, and if that enhancement is upheld on appeal, Petitioners are free to seek this Court's review at that time. But without any actual enhancement award, the Court's intervention would be premature and unnecessary.

Second, because the availability of an enhancement in this case is governed by the Stipulation, and not by the PLRA itself, this case does not present an opportunity for the Court to answer the question of statutory interpretation presented by Petitioners. The plain language of the Stipulation authorizes "reasonable attorneys' fees . . . to be determined by the Court." It then incorporates by reference only a single PLRA provision: that defining the hourly rate. *See* App. 82 ¶ 43 ("The parties agree *that the hourly rate of attorneys' fees* is governed by 42 U.S.C. § 1997e(d).") (emphasis added). The PLRA's hourly rate provision, in turn, provides, "No award of attorney's fees . . . shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel." 42 U.S.C. § 1997e(d)(3). Thus, the Stipulation's incorporation of the PLRA is expressly limited to the hourly rate.

Other aspects of the Stipulation borrow terminology, such as "prevailing party" and "reasonable attorneys' fees," used in many attorneys' fees statutes, including 42 U.S.C. § 1988. And the Stipulation by its terms authorizes fees that are not authorized by other federal attorneys' fees statutes, such as compensation for expert witnesses. *Compare* App. 82 ¶ 43

("Defendants agree that they will pay reasonable attorneys' fees and costs, including expert costs, to be determined by the Court.") *with W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 102 (1991) ("[W]e conclude that § 1988 conveys no authority to shift expert fees.").

The Stipulation does not expressly address enhancement of overall awards. It neither prohibits nor mandates an enhancement, but merely authorizes "reasonable attorneys' fees . . . to be determined by the Court." App. 82 ¶ 43. The district court, which approved the Stipulation in the first place, interpreted the Stipulation to authorize the court "to evaluate the propriety of such an enhancement." App. 59. *See also* App. 59 n. 2 (recognizing that "[b]efore the Court is the enforcement of a contractual term"). The Ninth Circuit affirmed that interpretation of the Stipulation. App. 40.

Petitioners are therefore incorrect when they state that under the Stipulation "any fees awarded" are "'governed by 42 U.S.C § 1997e(d)' of the PLRA." Pet. 3-4. In fact, the *only* aspect of a fee award governed by the PLRA in this case, the hourly rate, is not at issue here. The availability of an enhancement is governed not by the PLRA, but by the Stipulation. The question is whether an enhancement is part of "reasonable attorneys' fees . . . to be determined by the Court." App. 82 ¶ 43. As a result, any decision this Court reaches would concern only this particular Stipulation, and would provide no guidance to other courts.

Third, because the authority for fees is the Stipulation itself, entered in 2014, and not the law as it stands today, this case is an inappropriate vehicle to consider whether enhancements are available under the PLRA today. A decision by this Court that the PLRA prohibits an enhancement would not affect the

outcome of this case, as the governing settlement agreement must be interpreted according to the intent of the drafters as informed by the state of the law at the time the Stipulation was signed. *See, e.g.*, *Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991) ("Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form part of it[.]") (quoting *Farmers and Merchants Bank of Monroe v. Federal Reserve Bank of Richmond*, 262 U.S. 649, 660 (1923)). The "fundamental goal of contract interpretation is to give effect to the mutual intent of the parties *as it existed at the time* of contracting." *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1165 (9th Cir. 2015) (emphasis in original) (internal quotation marks and citations omitted). Moreover, because the Stipulation is a contract entered into in Arizona, its interpretation is a question of Arizona law.[5] *See Brown & Bain, P.A. v. O'Quinn*, 518 F.3d 1037, 1040 (9th Cir. 2008) (applying Arizona law and holding "Arizona courts attempt to ascertain and give effect to the intention of the parties at the time the contract was made.") (citation omitted).

The background case law was clear when the parties entered into the Stipulation that enhancements were generally available as "reasonable attorneys' fees"

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[5] In a previous appeal by Petitioners, the court of appeals held that the Stipulation must be interpreted according to Arizona contract law. *Parsons v. Ryan*, 912 F.3d 486, 487 (9th Cir. 2018) (interpreting the Stipulation in this case and applying "Arizona contract law because the parties entered into the Stipulation in Arizona, Defendants are senior officials of the Arizona Department of Corrections, and the Stipulation concerns the policies and practices of the Arizona prison system."), *cert. denied sub nom. Ryan v. Jensen*, 140 S.Ct. 142 (2019).

under a variety of fee statutes, including the PLRA. *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1989) ("This language is similar to that of many other fee shifting statutes, see, e.g. 42 U.S.C. §§ 1988, 2000e-5(k), 7604(d); *our case law construing what is a 'reasonable' fee applies uniformly to all of them*.") (emphasis added) (citation omitted). The parties signed the Stipulation in October 2014, and the court approved the settlement in February 2015. *See* App. 82 and Doc. 1458. The law in the Ninth Circuit at that time clearly provided that enhancements were available under the PLRA, just as they are under other fee statutes, including 42 U.S.C. § 1988, and the Clean Air Act, 42 U.S.C. § 7604(d). *See Kelly v. Wengler*, 7 F. Supp. 3d 1069, 1083 (D. Idaho 2014), *aff'd*, 822 F.3d 1085 (9th Cir. 2016) (holding enhancements were available under the PLRA and awarding an enhancement); *see also Hensley v. Eckerhart*, 461 U.S. 434, 434 (1983) (enhancements available under § 1988); *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 557 (1986) (enhancements available under Clean Air Act); *Ginest v. Bd. of Cnty. Comm'rs of Carbon Cnty., WY*, 423 F. Supp. 2d 1237, 1241 (D. Wyo. 2006) (enhancements available under PLRA); *Skinner v. Uphoff*, 324 F. Supp. 2d 1278, 1287-88 (D. Wyo. 2004) (same). The parties included no language in the Stipulation to depart from that understanding or to prohibit the award of an enhancement in appropriate circumstances.

At the time they entered into the Stipulation, therefore, the parties contemplated that attorneys' fees statutes, and the PLRA in particular, allowed for enhancement of an overall award as "reasonable attorneys' fees" in extraordinary circumstances. That contemporaneous state of the law, and the parties' understanding of it at the time of the Stipulation,

control in this case. This case is therefore an inappropriate vehicle for providing guidance to courts applying the PLRA today.

II. The Ninth Circuit's Opinion Does Not Create A Circuit Split.

There is no circuit split regarding the availability of an enhancement. The Ninth Circuit is the only court of appeals that has considered whether enhancements are available under this particular Stipulation, and is also the only court of appeals to have assessed whether enhancements are available under the PLRA itself. Petitioners point to no decision of any court of appeals reaching a different result interpreting language similar to the Stipulation, or interpreting the PLRA.

Enhancements in the Ninth Circuit are awarded in "rare" and "exceptional" cases after a fact-specific analysis and consideration of those factors enumerated in *Kerr* that are not already subsumed in the initial "lodestar" calculation for fees. *See Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 & n. 4 (9th Cir. 2000).[6] The lodestar method, the "guiding light of our fee-shifting jurisprudence," *Dague*, 505 U.S. at 562, involves two steps. First, courts determine the "lodestar" amount by

[6] The relevant *Kerr* factors when considering an enhancement are: (5) the customary fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Kerr*, 526 F.2d at 70; *Morales v. City of San Rafael*, 96 F.3d 359, 364 n.9 (9th Cir. 1996) (setting forth factors for enhancement under 42 U.S.C. § 1988). The other *Kerr* factors are subsumed in the initial lodestar calculation, and therefore are not counted when considering whether to enhance the award. *Cunningham v. Cty. of Los Angeles*, 879 F.2d 481, 487 (9th Cir. 1988).

multiplying the hourly rate by the hours reasonably expended on the litigation. *Hensley*, 461 U.S. at 433-34. Second, a court may decide to enhance or reduce the lodestar figure. *Id.* at 434. *See also Blum v. Stenson*, 465 U.S. 886, 901 (1984) (affirming the two-step lodestar analysis and declining to award an enhancement based on the facts of the case before the Court). As such, upward or downward adjustments "are proper only in certain 'rare' and 'exceptional' cases, supported both by 'specific evidence' on the record and detailed findings by the lower courts." *Citizens' Council for Clean Air*, 478 U.S. at 565 (quoting *Blum*, 465 U.S. at 898-901).

None of the cases Petitioners cite as purportedly conflicting with the decision below even *addresses* the availability of an enhancement under the PLRA. *Johnson v. Breeden,* 280 F.3d 1308 (11th Cir. 2002), does not even mention enhancements. It involved a different provision of the PLRA, not at issue here, 42 U.S.C. § 1997e(d)(1)(A), which limits fees to those "directly and reasonably incurred in proving an actual violation of the plaintiff's rights." *Id.* at 1326. The Eleventh Circuit merely held that the district court abused its discretion by awarding attorneys' fees for all work expended on the case rather than only for work directly and reasonably incurred in proving the plaintiff's sole successful claim of excessive force. *Id.* at 1327. The Stipulation does not incorporate that provision.

Boivin v. Black, *Walker v. Bain*, and *Shepherd v. Goord* are similarly off-topic. They concern 42 U.S.C. § 1997e(d)(2), a provision of the PLRA that governs only fees stemming from monetary judgments. *See Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000); *Walker v. Bain,* 257 F.3d 660 (6th Cir. 2001); *Shepherd v. Goord,* 662 F.3d 603 (2d Cir. 2011). Both the First Circuit in

Boivin and the Second Circuit in *Shepherd* specifically noted that their rulings were limited to cases involving monetary damages. *See Shepherd*, 662 F.3d at 607 n.4; *Boivin*, 225 F.3d at 41 n.4. Because the Stipulation did not cite this provision, and this case does not involve a monetary judgment, these cases are inapposite. *Webb v. Ada County*, 285 F.3d 829 (9th Cir. 2002), another Ninth Circuit decision, also does not even address enhancements.[7]

Petitioners suggest these cases support the proposition that the "lodestar method is inapplicable in prisoner cases . . . ." Pet. 11. But none of the cases cited rejects the lodestar method, which long ago had "become the guiding light of our fee-shifting jurisprudence," *Dague*, 505 U.S. at 562; *Citizens' Council for Clean Air*, 478 U.S. at 564 (endorsing the Court's prior adoption of the lodestar method to determine a "reasonable attorney's fee" under fee-shifting statutes).

None of Petitioners' cited cases rejected the lodestar method. *Johnson* determined that the district court's lodestar calculation was improper only "because it ignore[d] the limitations set forth in § 1997(e)(d)(1)(A)" when it awarded fees for unsuccessful claims in addition to successful claims. *Johnson*, 280 F.3d at 1327. And contrary to Petitioners' characterization, the Ninth Circuit in *Webb* did not "agree[] that the lodestar method did not apply in prisoner cases." Pet. 11. Rather, it came to the unremarkable conclusion that the hourly rate portion of the attorneys' fee calculation is controlled by the PLRA for services

[7] Even if the decision below created a conflict with *Webb* – and it does not – an intra-circuit conflict does not warrant certiorari. *Cf.* Supreme Court Rule 10(a).

performed after the PLRA's effective date. *Webb*, 285 F.3d at 840 n.6.

Use of the PLRA hourly rate does not fundamentally alter the lodestar analysis. Prior to the PLRA, the hourly rate was "'guided by the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation.'" *Id.* at 840 (quoting *Chalmers v. City of L.A.*, 796 F.2d 1205, 1210-11 (9th Cir.1986)). Following enactment of the PLRA, "the method of calculating the hourly rate for attorney's fees is dictated by the PLRA." *Id.* at 840 n.6. As the court of appeals' decision in this very case shows, the remainder of the lodestar analysis remains the same.

III. The Ninth Circuit's Ruling Does Not Conflict With This Court's Precedent.

The fact that in ruling *for* Petitioners, the court of appeals declined to accept Petitioners' sweeping argument that enhancements are absolutely precluded, would not merit this Court's review, even if all the other obstacles to review enumerated above were not present.

As discussed above, the Stipulation authorizes "reasonable attorneys' fees . . . to be determined by the Court," and cites only a single provision of the PLRA for purposes of setting the hourly rate. Given the general availability of enhancements under attorneys' fees law at the time the Stipulation was entered, the "reasonable attorneys' fees" language is sufficient to permit an enhancement in exceptional circumstances, as attorneys' fees jurisprudence generally provided in 2014 and 2015.

But even if the fees in this case were governed directly by the PLRA itself, rather than by the

Stipulation entered in 2015, the lower court's decision would be correct. The court of appeals correctly concluded that the PLRA did not supersede the lodestar analysis, but only modified it in two specific ways. As noted above, the lodestar method, which "had already 'achieved dominance in the federal courts'" when the PLRA was enacted in 1996, *Kelly*, 822 F.3d at 1100 (quoting *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002)), involves two steps: (1) multiplying the hourly rate by the reasonable number of hours expended; and (2) adjusting the lodestar upward or downward to reach the total award. *See Hensley*, 461 U.S. at 433-34.

Against that judicial backdrop, Congress legislated two specific modifications to the *first* step of the lodestar analysis, and did not seek to change the second step. The PLRA specifies the hourly rate to be used. *See* 42 U.S.C. § 1997e(d)(3). And it limits the hours eligible for compensation to those "reasonably incurred." *See* 42 U.S.C. § 1997e(d)(1) (limiting attorneys' fees to those "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" and "proportionally related to the court ordered relief" or "directly and reasonably incurred in enforcing the relief").

In enacting the PLRA, Congress did not even address, much less modify, the *second* step of the lodestar analysis regarding upward or downward departures from the lodestar figure. And both *Martin* and *Murphy*, which Petitioners argue are in conflict with the opinion below, teach that where Congress was silent in the PLRA, courts should not read additional provisions into it: "[R]espect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Murphy v. Smith*, 138 S. Ct. 784, 788 (2018);

Martin v. Hadix, 527 U.S. 343, 354 (1999) (holding that Congress could have, but did not, legislate the temporal application of the PLRA and therefore declining to read a retroactive application of the hourly rate provision into the statute). Statutory analysis "begins and ends with the text" of the statute. *Octane Fitness, LLC. v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014) (rejecting the lower court's attempt to "superimpose" onto a fee shifting statute a framework not found in the statute's text).

Petitioners object that an enhancement may be construed as affecting the hourly rate. But that proves too much. Under a typical fee-shifting analysis, the hourly rate is tied to the objective market rate in a given location for attorneys with certain levels of experience. *See, e.g.*, *Blum*, 465 U.S. at 895 ("'Reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community[.]") For example, in Washington, D.C., the U.S. Department of Justice's Laffey Matrix sets the hourly rate for cases brought under fee-shifting statutes and ties those rates to years of experience. *See Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995) (discussing the use of the Laffey Matrix to determine reasonable hourly rates under § 1988). The PLRA's hourly rate parameters serve the same function of providing an objective source for the hourly rate in cases brought by incarcerated people, just as the Laffey Matrix or other objective measures are used in other fee-shifting matters. And just as attorneys utilizing the Laffey Matrix may seek an enhancement when the circumstances warrant, notwithstanding the hourly rates established by the Laffey Matrix, so too may attorneys using the PLRA hourly rate. Nothing in the

language of the PLRA suggests otherwise—nor does the Stipulation that actually governs here.

Neither the opinion below, nor *Kelly*, 822 F.3d 1085, upon which it relied, conflict with Supreme Court precedent. Petitioners point to this Court's decisions in *Murphy* and *Martin* to suggest that a conflict exists. But neither case addresses the availability of enhancements under the PLRA. Nor does their reasoning conflict with the lower court's use of the traditional two-step lodestar analysis to determine a fee award.

Only the second step of the lodestar analysis—in which the total fees are adjusted up or down in exceptional circumstances—is at issue here. Yet neither *Murphy* nor *Martin* disclaim, or even discuss, this step. Indeed, Petitioners concede that *Murphy* did not disapprove of enhancements under the PLRA. Pet. 18. The Court in *Murphy* reviewed only 42 U.S.C. § 1997e(d)(2), which governs attorneys' fees only in damages cases, and its holding is specifically limited to that provision. *See Murphy*, 138 S. Ct. at 786 ("This is a case about how much prevailing prisoners must pay their lawyers."). As the court of appeals noted, *Murphy* "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." App. 40-41 n.14.

Petitioners suggest that the Court should read *Murphy* in sweeping terms to "foreclose[] the availability of fee enhancements." Pet. 18. But *Murphy* did no such thing. In fact, Murphy recognized that the lodestar method developed under 42 U.S.C. § 1988 is the "guiding light of our fee shifting jurisprudence" and did not disavow its use under the PLRA. *Murphy*, 138

S. Ct. at 789 (quoting *Dague*, 505 U.S. at 562). To the contrary, the Court specifically rejected one proffered argument because it conflicted with § 1988's traditional lodestar analysis. *See Murphy*, 138 S. Ct. at 790 (". . . Mr. Murphy effectively seeks to (re)introduce into § 1997e(d)(2) exactly the sort of unguided and freewheeling choice . . . that this Court has sought to expunge from practice under § 1988.").

This Court in *Murphy*, like the Ninth Circuit in *Kelly,* recognized that the PLRA modified § 1988's fee award procedures. *See Murphy*, 138 S. Ct. at 789; *Kelly*, 822 F.3d at 1099. Both cases discuss the limits on activities and hours that can be compensated. *Murphy*, 138 S. Ct. at 789; *Kelly*, 822 F.3d at 1099-1100. And both cases acknowledge that the PLRA sets the hourly rate to be used at step one of the lodestar analysis. *Murphy*, 138 S. Ct. at 789; *Kelly*, 822 F.3d at 1100.[8] But *Murphy* simply does not address the availability of enhancements at step two of the lodestar analysis.

Martin addressed only whether the PLRA's fee provisions apply retroactively. *See Martin*, 527 U.S. at 347. Petitioners' suggestion that *Martin* stands for the proposition that the PLRA capped the "total fee award" is incorrect. Pet. 15. The "cap" referenced in *Martin* referred only to the PLRA's *hourly rate* cap in § 1997(d)(3), about which there is no dispute here. *See Martin*, 527 U.S. at 350 (noting that the "section of the PLRA at issue here" is § (d)(3), which governs the

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[8] Petitioners also suggest that the Court in *Murphy* "*removed* the discretion" afforded to district courts under Section 1988 and the lodestar method. Pet. 1 (emphasis added). Not so. The Court noted that various provisions of the PLRA, "*restrain*[,]" not remove, the discretion of the district court. *Murphy*, 138 S. Ct. at 789 (emphasis added).

hourly rate). This Court in *Martin* did not consider, much less "cap," the second step in the lodestar analysis. As Justice Scalia noted, "In reality, . . . the PLRA simply revises the fees provided for by § 1988[.]" *Martin*, 527 U.S. at 363 (Scalia, J., concurring in part and concurring in the judgment).

Finally, allowing an enhancement in "rare" and "exceptional" cases has not resulted in a proliferation of frivolous prisoner litigation. More broadly, while enhancements have been available in prisoner rights cases since the 1996 enactment of the PLRA, prisoner litigation has plummeted during that time. *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 156 (2015) (presenting empirical data demonstrating the "steep decline" in prisoner filings and filing rates following enactment of the PLRA).

CONCLUSION

The petition for certiorari should be denied.

Dated December 7, 2020

Respectfully submitted,

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