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 To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The Brief in Opposition goes to great lengths to avoid confronting the significant errors underlying the Ninth Circuit's decision. None of the procedural roadblocks that Respondents lay to avoid addressing the purely legal issue presented in this Petition is an obstacle to this Court's review.

Respondents first insist there is nothing to review because the Ninth Circuit vacated the attorneys' fees order and remanded to determine whether a fee enhancement was justified under the circumstances. But the legal issue presented in this Petition—whether the Prison Litigation Reform Act ("PLRA") precludes fee enhancements—was adversely decided against Petitioners and that will not change on remand. The Ninth Circuit's holding is final and binding in this case, as well as precedent for every prisoner-litigation defendant in its jurisdiction. Moreover, the holding tacitly affirms a second enhanced fee order against Petitioners already entered in this case. This purely legal issue is sufficiently ripe for review.

Attempting to minimize the issue, Respondents also contend that it does not concern the PLRA at all, but rather turns on an interpretation of the Stipulation. Neither the district court nor the Ninth Circuit, however, agreed with that premise; instead, they concluded as a matter of law that the PLRA authorizes fee enhancements. Petitioners challenge that interpretation of the PLRA in the Petition. Respondents' contention that the Stipulation incorporated only the PLRA's

hourly rate is belied not only by the text and context of the Stipulation but also by the Ninth Circuit's express recognition that the Stipulation incorporated all the PLRA's attorneys' fees provisions.

Only after painting an inaccurate picture of the lower-court proceedings to try and justify a fee enhancement do Respondents turn to the merits.[1] But once there, they simply repeat the Ninth Circuit's holdings in *Kelly v. Wengler*, 822 F.3d 1085 (9th Cir. 2016), and in this case. Respondents do not square them with the PLRA's text or purpose. They ignore the import of *Martin v. Hadix*, 527 U.S. 343 (1999), and the many circuit court decisions recognizing that the PLRA, not the lodestar method, controls in prisoner cases. And they hardly address *Murphy v. Smith*, 138 S. Ct. 784 (2018). Apparently acknowledging that the Ninth Circuit's decisions are indefensible, Respondents resort to arguing that the Court should not yet intervene because only the Ninth Circuit has reached this bad result, while at the same time urging—mercifully—that fee enhancements should be permitted, notwithstanding the plain and unambiguous text of the PLRA. These are even more reasons this Court should

[1] Whether Respondents *should* receive a fee enhancement under the factors in *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), is immaterial to the predicate, threshold question at issue in this Petition—whether the PLRA *authorizes* fee enhancements. Nonetheless, even the Ninth Circuit held that the district court abused its discretion in concluding that an enhancement was warranted. App. 41.

intervene, vacate the Ninth Circuit's attempt at judicial legislation, and harmonize its PLRA jurisprudence.

ARGUMENT

I. The Petition Raises an Issue That Is Ripe for This Court's Consideration.

Respondents contend that the enhancement issue is premature because the Ninth Circuit ultimately vacated the fee award and remanded to the district court to determine whether a multiplier is appropriate after considering the proper enhancement factors. App. 41. Thus, they argue, "there is no enhancement to review." Opp. at 10. But regardless of whether the district court finds that a fee enhancement is appropriate on remand, the Ninth Circuit's decision—holding that the PLRA authorizes fee enhancements in prisoner cases—remains intact. It is the law of this case and binding precedent in the Ninth Circuit. It also sets erroneous precedent for other circuit courts to follow. Reviewing that issue now is not merely advisory—it is necessary.[2]

In fact, the district court has issued a second attorneys' fees award and ordered a 2.0 multiplier worth

[2] Prisoner class action litigation is now becoming an attractive and lucrative undertaking for big law firms in Arizona. *See*, *e.g.*, *Satzman v. Shinn*, 20-cv-02402-SPL-JFM (D. Ariz.); *Fenty v. Penzone*, 20-cv-01192-SPL-JZB (D. Ariz.).

nearly $800,000, relying on *Kelly*. Dkt. 3245. If this Court does not grant review of the Petition and reverse the Ninth Circuit's decision in this appeal (and *Kelly*), that multiplied fee award will stand. Indeed, Respondents agreed to stay the appeal from that award pending resolution of this Petition. *See Jensen v. Ryan*, 19-16128 (9th Cir.), Doc. 27, 28. They have also refused to request the district court to act in accordance with the Ninth Circuit's mandate, an acknowledgment that the district court need not act if this Court holds that there is no legal basis to consider a fee enhancement.

In addition, Respondents ignore the fact that this case is in post-judgment enforcement litigation subject to future fee applications and enhancement requests. *See*, *e.g.*, Dkt. 3753. The Ninth Circuit's mandate has sealed the threat of fee enhancements, which directly impacts Petitioners' ongoing defense of this case. Thus, this purely legal issue is real—not abstract—and ripe for this Court's review now.[3] *See Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 86 & n.15 (1981) ("basic legal questions" concerning statutory interpretation are ripe for review).

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[3] Respondents' assertion that "Petitioners prevailed in their appeal of Respondent's [sic] enhancement," Opp. at 11, is belied by their request for fees in that appeal. *See Parsons v. Ryan*, 18-16358 (9th Cir.), Doc. 80-1 ("Plaintiffs Are Entitled To Attorneys' Fees For The Attorneys' Fees Appeal Because They Are The Prevailing Party.").

II. The PLRA Governs This Issue, Not the Stipulation.

1. Respondents next argue that this case is a poor vehicle to consider the enhancement issue because "the availability of an enhancement in this case is governed by the Stipulation, and not by the PLRA itself." Opp. at 11. Thus, they argue, resolving the issue will only "affect the interpretation of a single settlement agreement applicable only to one case." *Id*. at 2–3. But neither the district court nor the Ninth Circuit agreed with Respondents' interpretation of the Stipulation. The district court ruled that a fee enhancement was available because *Kelly* says so:

> The Stipulation contains no mention of an enhancement or multiplier and the Court understands that silence to mean that it is free to evaluate the propriety of such an enhancement. *See*, *e.g.*, *Kelly v. Wengler*, 822 F.3d 1085, 1100 (9th Cir. 2016) (noting absence of limitation means multiplier is acceptable).

App. 59. *Kelly* involved a fee award pursuant to 42 U.S.C. § 1988, not a settlement agreement. 822 F.3d at 1099. And the passage in *Kelly* that the district court relied on confirms it considered a multiplier because *Kelly* held that the PLRA authorizes them:

> As explained above, the lodestar method is a two-step process. A court first determines the lodestar figure by multiplying the hours reasonably expended by a reasonable hourly rate; it then determines whether to adjust that figure upward or downward. *There is nothing in*

> *the attorney's fees provisions of the PLRA that instructs a court not to take both steps in this process*.

822 F.3d at 1100 (emphasis added; internal citations omitted).

More importantly, the Ninth Circuit in this case expressly held that the Stipulation incorporated 42 U.S.C. § 1997e(d), not just the PLRA's hourly rate cap, and further held, citing *Kelly*, that the PLRA authorizes a multiplier:

> The Stipulation explicitly incorporates the PLRA's rules for determining "reasonable attorneys' fees and costs," because it provides that the hourly rate is "governed by 42 U.S.C. § 1997e(d)"—which codifies the PLRA. The PLRA, in turn, authorizes multipliers to the base hourly rate above the cap set by 42 U.S.C. § 1997e(d)(1). *See Kelly v. Wengler*, 822 F.3d 1085, 1100 (9th Cir. 2016).

App. 40. Petitioners seek review of the lower courts' legal interpretation of the statute, which applies to *every* prisoner case.

Respondents' contention that the Stipulation authorizes a fee enhancement is unsupportable. As they concede, the Stipulation is "silent" on whether a fee enhancement is permitted, Opp. at 7, and neither fee provision mentions, much less incorporates, § 1988 or the lodestar framework. App. 82, ¶¶ 42–43. To the contrary, it *restricts* the court's discretion by incorporating § 1997e(d), App. 82, ¶ 42, which, in turn, expressly

denies any fees under § 1988 "except to the extent" prescribed by § 1997e(d). *See* 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. . . ."). And, as discussed in the Petition, even if the Stipulation incorporated only the PLRA's hourly rate cap in § 1997e(d)(3), a fee enhancement effectively allows an increase beyond that cap. Pet. at 13–14. Respondents cannot read into the Stipulation something that is not expressly included and otherwise prohibited by statute. *See Pottinger v. City of Miami*, 805 F.3d 1293, 1300 (11th Cir. 2015) (the "bargained-for paragraphs" of a settlement agreement, including provisions authorizing attorneys' fees, control over § 1988); *Ashker v. Cate*, 2018 WL 3108924, at *21 (N.D. Cal. June 25, 2018) (fee enhancement was not available where the settlement agreement did "not expressly provide for" one and included a provision setting fees "at the hourly rate set forth under . . . § 1997e(d)").

2. Because the PLRA, not the Stipulation, governs this issue, Respondents' attempt to glean the parties' intent and extrapolate from it an interpretation of the Stipulation's terms is unavailing. Similarly, the "background case law" at the time the parties entered the Stipulation is irrelevant. Opp. at 13–14. Nevertheless, the law in the Ninth Circuit at the time did not "clearly" provide that "enhancements were available under the PLRA." *Id*. at 14. The only case that did was the district court's non-binding and non-final decision in *Kelly*, which issued just several months before the parties signed the Stipulation (while an appeal from

the decision was pending). *See Kelly v. Wengler*, 7 F. Supp. 3d 1069, 1083 (D. Idaho 2014). The Ninth Circuit did not issue its binding decision in *Kelly* until more than a year and a half *after* the Stipulation was signed.[4] Since *Kelly* was the first—and only—circuit court to allow a multiplier in a prisoner case, the parties clearly did not contemplate that the Stipulation authorized them. The purpose of incorporating the PLRA was to make clear that fee enhancements were *not* available.

Respondents also cite cases that have recognized the availability of fee enhancements under the attorneys' fees provisions in the Solid Waste Disposal Act and Clean Air Act. *See City of Burlington v. Dague*, 505 U.S. 557, 559 (1992); *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 548 (1986). But whereas those fee-shifting statutes authorize a "reasonable" fee award to a prevailing party, just as § 1988 does—and therefore incorporates the lodestar method—the PLRA expressly limits "the usual operation of § 1988(b) in prisoner cases," *Murphy*, 138 S. Ct. at 789, and supplants the lodestar calculation, 42 U.S.C. § 1997e(d). *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975) (Congress must make "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or

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[4] Respondents also cite the two district court decisions, *Ginest v. Bd. of Cty. Comm'rs of Carbon Cty.*, 423 F. Supp. 2d 1237, 1241 (D. Wyo. 2006), and *Skinner v. Uphoff*, 324 F. Supp. 2d 1278, 1287–88 (D. Wyo. 2004), which the *Kelly* district court relied on. Opp. at 14. But those decisions were issued by the District of Wyoming and are not binding in the District of Arizona.

protecting various federal rights"). By incorporating § 1997e(d) into the Stipulation, the parties rejected the lodestar method and its enhancement feature.

III. Respondents Ignore the Text and Purpose of the PLRA and the Cases That Recognize Its Restrictions on the Lodestar Formula.

1. Respondents contend that a "[s]tatutory analysis 'begins and ends with the text' of the statute," Opp. at 20 (quoting *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014)), but they gloss over the PLRA's text and do exactly what they accuse Petitioners of doing: superimpose words into the statute. Although they acknowledge that the PLRA supplanted the lodestar formula's hours and rate components, 42 U.S.C. §§ 1997e(d)(1), (d)(3), they assert that Congress "did not even address, much less modify, the second step of the lodestar analysis regarding upward" enhancements. Opp. at 19. But Congress could not have been clearer: "In 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*" allowed by § 1997e(d). 42 U.S.C. § 1997e(d)(1) (emphasis added). Astonishingly, this statutory directive is not cited anywhere in Respondents' Brief in Opposition. Yet, they urge the Court to believe that Congress implicitly preserved the lodestar's fee enhancement, despite expressly qualifying § 1988 and prescribing a new formula.

By reading an implied enhancement feature into § 1997e(d) from the absence of restrictive language, Respondents distort the negative implication rule, expressio unius est exclusio alterius. As this Court explained, such reasoning defies common sense and common usage. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 8 (2000) ("Petitioner argues that in the absence of such restrictive language, no party in interest is excluded. This theory—that the expression of one thing indicates the inclusion of others unless exclusion is made explicit—is contrary to common sense and common usage."). Respondents' interpretation of the statute also substitutes the particular method Congress provided for calculating attorneys' fees with one that it did not. *See Raleigh & G.R. Co. v. Reid*, 80 U.S. 269, 270 (1871) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.").

Respondents also attempt to diminish the fact that a fee enhancement effectively negates § 1997e(d)(3)'s hourly rate cap ("No award of attorney's fees in an action described in paragraph (1) shall be based on. . . ."). In fact, they advocate that they *should* be permitted to exceed the rate cap in prisoner cases because, for example, attorneys utilizing the *Laffey* Matrix in non-prisoner cases may seek an enhancement if the circumstances warrant. Opp. at 20. That bold contention proves Petitioners' point and highlights the fundamental flaw in the Ninth Circuit's decisions. Aside from the fact that, unlike the PLRA, the *Laffey* Matrix is not a statutory mandate, *Rodriguez v. Sec'y of Health &*

Human Servs., 91 Fed. Cl. 453, 468–69 (2010), *aff'd*, 632 F.3d 1381 (Fed. Cir. 2011), Congress placed *restrictions* on fee awards in prisoner cases to reduce prisoner litigation and disincentivize lawyers from pursuing frivolous cases. Pet. at 15–16. Construing § 1997e(d)(3) to allow an enhancement of the *total* fee award (but not the hourly rate) is nonsensical and frustrates Congress's intent.

2. Respondents contend that the issue is not worthy of review because the Ninth Circuit is "the only court of appeals to have assessed whether enhancements are available under the PLRA," and they attempt to distinguish the many circuit court decisions cited in the Petition. Opp. at 15–17. Respondents ignore, however, the import of those decisions—each one recognized that the PLRA is the standard for awarding attorneys' fees in prisoner cases, not the lodestar method. *See Shepherd v. Goord*, 662 F.3d 603, 606 (2d Cir. 2011); *Webb v. Ada Cty.*, 285 F.3d 829, 840 n.6 (9th Cir. 2002); *Johnson v. Breeden*, 280 F.3d 1308, 1327 (11th Cir. 2002); *Walker v. Bain*, 257 F.3d 660, 665 (6th Cir. 2001); *Boivin v. Black*, 225 F.3d 36, 39 (1st Cir. 2000). Respondents' contention that none of them "rejected the lodestar method," Opp. at 17, is belied by the passages quoted in the Petition (at 10–11). The Ninth Circuit's decisions in this case and in *Kelly*—which applied the lodestar method's fee-enhancement feature to circumvent the PLRA's fee restrictions—conflicts with those cases.

3. Respondents similarly attempt to distance this Court's decision in *Martin*, contending it addressed only whether the PLRA's fee provisions apply retroactively and did not suggest that it caps a total fee award. Opp. at 22–23. Once again, the decision speaks for itself. The Court held that § 1997e(d)(3) "sets 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; *see also id*. at 352 (adding that circuit courts have held that the PLRA "caps all fees that are ordered to be paid after the enactment of the PLRA"). *Kelly* and the Ninth Circuit's decision in this case effectively lifts the "cap" and removes the "substantive limits" that § 1997e(d)(3) imposes by allowing a fee enhancement of the total fee award. In that respect, they directly conflict with *Martin*.

IV. Respondents Have No Answer to *Murphy*.

Respondents address *Murphy* in a few paragraphs, but their argument is simply that the Court did not address the availability of enhancements under the PLRA. Opp. at 21–22. But Respondents ignore *Murphy*'s overarching analysis of the interplay between § 1988 and the PLRA, and its conclusion that the PLRA "limit[s] the district court's pre-existing discretion under § 1988(b)." 138 S. Ct. at 789. Those limits are meaningless under *Kelly* and the Ninth Circuit's decision in this case if a district court can disguise a rate multiplier as an enhancement of the total fee award. Authorizing that end-run around the PLRA

and restoring a district court's pre-PLRA discretion conflicts with *Murphy*'s reasoning.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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