20-6354

In the

Supreme Court of the United States

No. _____

Richard Andrew Poplawski,
Petitioner,

v.

Secretary,
Pennsylvania Department of Corrections,
Respondent.

Petition for a Writ of Certiorari

On Petition for a Writ of Certiorari
to the Third Circuit Court of Appeals

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November 2nd, 2020

Questions Presented

I. In the Third Circuit, the Prison Litigation Reform Act has been applied to require separate, duplicative fees from joined litigants. But the district court made a one-time exception for the petitioner; because of this, the Court of Appeals dismissed. Can courts strategically exempt litigants from the law to thwart test cases? or Can this Court review an ostensibly favorable ruling that actually injured the petitioner?

II. The petitioner adhered to the PLRA and Federal Rules of Appellate Procedure. He received leave to appeal *in forma pauperis*, though his coappellant did not. Did the Third Circuit err by dismissing the appeal?

III. The fee provisions of the PLRA, as unanimously interpreted by this Court in 2016, apply on a "per-case" basis. But policy concerns have led many lower courts to continue imposing "per-litigant" fees. Does the PLRA demand separate, duplicative fees from prisoners proceeding jointly?

IV. Neither prisoners nor indigents are suspect classes under an Equal Protection analysis, but there must be a rational basis for defining classes subject to legislation. Since the PLRA already assures that all fees will be paid in full (thereby satisfying the statute's deterrence objective), does imposing excessive fees unduly burden incarcerated paupers in violation of the Fifth Amendment?

Parties

This case originated as a class-action lawsuit brought on behalf of all current and future death-sentenced prisoners in the Commonwealth of Pennsylvania. The representative plaintiffs are Anthony Reid, Ronald Gibson, Mark Newton Spotz, Jermont Cox, and Ricardo Natividad.

The class is represented by attorneys Bret Grote of the Abolitionist Law Center; Witold J. Walczak of the ACLU of PA; Susan M. Lin, Mark D. Taticchi & Wilson M. Brown of separate private law firms; and David Fathi & Amy Fettig of the ACLU's National Prison Project.

The defendants are John E. Wetzel, Secretary of the PA Department of Corrections; and K. Jaime Sorber, Superintendent of State Correctional Institution Phoenix (where all class members are housed). They are sued in their official capacities and are represented by the Department's internal Office of Chief Counsel.

About 65 to 70 class members—a majority—emerged as express objectors to the settlement agreement reached by the above parties. Objectors' names are recorded on the docket at #18-CV-0176. The Hon. Chief Judge John E. Jones, III, presided.

Objectors Richard A. Poplawski and H. Miguel Robinson filed a joint appeal to the Third Circuit Court of Appeals.

Poplawski is the petitioner.

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Orders Below

On April 9, 2020, the district court approved the settlement agreement. *Reid et al. v. Wetzel et al.*, #18-CV-0176 (M.D. Pa. 2018). Doc. 144. The court granted the appellants' joint motion to apportion appellants fees on August 18, 2020 (attached as Appendix A).

The order dismissing the appeal was filed on August 20, 2020 (attached as Appendix B). *Reid et al. v. Sec'y, Pa. Dep't of Corr.*, #20-2115 (C.A.3 2020).

Jurisdiction

Because the Third Circuit's final order was entered on August 20, 2020, this petition is due by November 18, 2020. An attached certificate of mailing proves timeliness. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

Statutory and Constitutional Provisions Involved

This case involves the fee provisions of the Prison Litigation Reform Act, 28 U.S.C. § 1915(b):

> (1) [I]f a prisoner brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of a filing fee.
>
> . . . .
>
> (3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement . . . or an appeal of a civil action[.]

The petitioner also raises an Equal Protection challenge grounded in the Fifth Amendment to the U.S. Constitution.

Statement of the Case

In January of 2018, death-sentenced prisoners in Pennsylvania brought a class-action lawsuit in federal court, under 28 U.S.C. §§ 1331 and 1343, claiming violations of the Eighth and Fourteenth Amendments. Eventually, a settlement agreement was reached. In April 2020, the district court approved the deal over the opposition of class members.

Two objectors (petitioner Poplawski and Robinson) timely filed a joint notice of appeal. The appellants then filed separate motions for proceed *in forma pauperis* and a "Joint Motion for Apportionment of Appellate Fees" in the district court. Poplawski's IFP motion was granted right away.

The appeal was docketed in the Third Circuit. Then things went haywire.

The district court actually *granted* the fee-sharing motion on August 18, 2020. Two days later, the entire appeal was dismissed by the Third Circuit because Robinson had not yet secured IFP approval.

The petitioner did not learn of these last two developments until mid-October when he received a letter from the Clerk of the Third Circuit.[1] (He therefore lost two months off the cert. clock.)

Poplawski scrambled to assemble this petition to challenge the Third Circuit's dismissal and to seek clarification of the law on fee apportionment under the PLRA.

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1. The district court's order does state that the clerk "shall mail" a copy to the appellants. This did *not* happen (which can be proven by DOC legal-mail logs). Poplawski found out about it when he was served with plaintiff-appellees' opposition to an *en banc* hearing in the Third Circuit.

The letter from the Third Circuit's clerk pertained to that application for an *en banc* hearing on apportionment which the appellants filed in mid-September without even knowing the entire appeal had been dismissed. The petitioner has been operating in the blind.

Reasons for Granting the Writ

This is a *real* petition for certiorari.

Many lower courts have been torturing the plain text of the PLRA to find that the Act requires duplicative fees from joined litigants. Such an interpretation:

- has been the subject of a long-standing rift among Circuit Courts of Appeal;
- contradicts this Court's recent pronouncement on the provisions at issue; and
- adversely impacts the rights of vast, yet marginalized and vulnerable, population.

But there's a funky twist: the petitioner raised the issue in the district court and the judge ruled in his favor—against binding precedent of the Third Circuit. Then the appeal was immediately dismissed. Was there an intent to keep the underlying question from reaching this Court? Can the Justices reach through that unusual procedural posture to find the issue and set all American courts aright?

I. The petitioner was strategically exempted from the law—then summarily dismissed—to stonewall his challenge.

The controlling interpretation of the PLRA in the Third Circuit holds that "the requirement for each prisoner to pay a full fee is simply one price that a prisoner must pay for IFP status under the PLRA." *Hagan v. Rogers*, 570 F.3d 146, 155 (2009).

As such, petitioner Poplawski expected the lower court to be bound by *Hagan* to deny his apportionment motion. He hoped to get a reexamination by the Third Circuit *en banc* and then, if necessary, bring it before this Court. Instead, the district judge either (a) saw the correct interpretation of the law, or (b) strategically bucked precedent with the aim of smothering a test case in the cradle.

If that were all, the petitioner would have no room to complain. But there's more.

Selective exemption from the law was used like a weapon: under the peculiar circumstances of this case, granting that motion actually killed the whole appeal. Because Poplawski's coappellant did not secure IFP approval, once apportionment was granted [illegally?] in the district court, the appeal was dismissed within 48 hours (under the theory that only half the fee was spoken for?).

Be careful what you wish for: Poplawski received what he sought—only to be ejected from court on the strength of it. The Third Circuit dismissed the appeal without offering him the option of proceeding alone—a bizarre occurrence indeed given that, *in every other civil case filed in the circuit since 1997,* once a petitioner gains approval to proceed IFP, the fee is considered satisfied–pending per the PLRA.

Talk about uneven application of federal law! This is a case from the X-Files. What explains the aberration? *Cui bono*?

The lower courts "win": one meritorious appeal disappears without a trace, the Third Circuit doesn't have to reevaluate its beleaguered precedent, and courts can continue charging duplicative per-litigant fees—until another competent prisoner raises a challenge? at which time the law will be selectively ignored again? How often does this happen? The truth is out there.

When a bad law (or a valid law operating improperly) routinely injures the citizens, how does the issue ever get reviewed by higher courts if every would-be challenger gets deprived of standing by means of strategic exemption? And what of the law's victims who lack the know-how to gain an exemption for themselves?

Poplawski had the ideal vehicle; he knew it, he was warming it up, and he was keen on parking it right in front of Cass Gilbert's marble staircase. Has the Third Circuit

Court of Appeals—with help from the Middle District of PA—managed a procedural finesse to stall the challenge (thereby impeding the prerogative of this Court), in hopes of preserving their preferred interpretation of federal law?

II. The petitioner's appeal was erroneously dismissed.

Standing alone, this might not be a cert.-worthy issue because it applies narrowly to the present parties under unique circumstances that [we hope] are unlikely to recur. Nevertheless, if the Court agrees to review any of the petitioner's questions, he would need to articulate a request for concrete relief. Thus, granting certiorari on this issue would give the Court an avenue to redress the petitioner's injury.

Poplawski's appeal was dismissed under dubious circumstances. He carefully adhered to the law in every particular and has not been charged with any technical missteps. But filing a motion to preserve his rights triggered an outbreak of procedural irregularities—happening in two courts simultaneously—that were impossible to counter. Poplawski, a first-time civil litigant who struggled to get his *pro se* hands on docket sheets from Death Row, was powerless to prevent the lightning-strike dismissal.

Barring intercession by this Court, that error will stand. The petitioner hopes to ask for a remand so that he and Mr. Robinson may pursue the original appeal under fee arrangements to be determined by this Court.

III. The PLRA does not require duplicative filing fees.

In 1996, Congress enacted the Prison Litigation Reform Act to stem the tide of frivolous litigation generated by legions of incarcerated shoo-flies. Among other sensible reforms, the Act eliminated the fee waivers that inmates were abusing to clog federal

courts with handwritten complaints about insufficiently nutty peanut butter and presidential conspiracies to spy on convicts via toilet bowls (citations omitted).

While largely a success, one part of the Act has proven particularly troublesome to interpret. "The worst provision . . . is the fee assessment and collection procedure . . . [which] refers only to 'the prisoner' and neglects to address the case of multi-prisoner plaintiffs." *Burke v. Helman*, 208 F.R.D. 246, 247 (C.D. Il. 2002) (internal citation omitted).

Acting with prescience, Chief Judge Boyce F. Martin, Jr., established procedures for the Sixth Circuit in a 1997 special administrative order. Among them: "[A]ny fees and costs . . . shall be equally divided among all prisoners." *In re Prison Litigation Reform Act*, 105 F.3d 1131, 1138.

A quarter century later, Chief Judge Martin's approach is in the minority among Circuit Courts of Appeal—an unsurprising result to an observer who notes that erecting ever-higher barriers to courthouse entry might look like worthwhile construction to a busy federal judge. In time, courts came up with plenty of "enhancements" to the PLRA.

Such judicially created embellishments have withered under the gaze of this Court. Invoking Mr. Justice Frankfurter to strike down enhanced pleading requirements, the Court unanimously declared that judges must never succumb to the "temptations [of] statesmanship" to "depart from the usual practices . . . on the basis of perceived policy concerns." *Jones v. Bock*, 549 U.S. 199, 212, 216 (2007).

With that in mind, we turn back to the text: 28 U.S.C. § 1915(b)(3) is clear that fees shall not be collected in excess of statutory maximums. Neutering § (b)(3) means surplus dead language in the statute. And statutory surplusage is intolerable. Ew.

According to § 1913, fees are to be prescribed by the Judicial Conference of the United States. In turn, the fee schedule of the Conference notes that "parties filing a joint notice of appeal . . . are required to pay only one fee."; *accord* 3d. Cir. L.A.R. 3.2 ("When parties have filed a joint notice of appeal, . . . only one docketing fee [will be] paid.").

So, typically, once an appellant authorizes funds to be deducted from his prison account (in installments per the law), and his IFP motion is approved, the full docketing fee is accounted-for. Assessing another fee runs afoul of § 1915(b)(3).

Two free men walk into the clerk's office: John cuts a check to cover the price of a joint lawsuit; Tony signs the complaint but keeps his wallet shut. What does the clerk say to Tony?

(a) "We need another full fee from you, sir."
(b) "You must pay half."
(c) "You must contribute at least a nickel."
(d) "Both of you get out." or
(e) "Thank you. Good luck in Court!"

Given the PLRA's silence, why should the answer be much different in prison litigation? Congress could have spoken; they did not. Thus, fees can be shared—equally or disproportionately. One party can even cover the full fee (the default since our friend Tony, like Miguel Robinson, neglected to make an arrangement). All that really matters is what the law requires: that one—*just one*—fee gets paid.

This prevailing misapplication of the PLRA creates riddles that admit of no logical answer—another sure sign of flawed statutory interpretation. Under normal circumstances (*i.e.*, when district judges apply the erroneous-but-controlling law of their

jurisdiction), courts open the door to potentially irrational outcomes. For example, if all 70 class-action objectors had joined this appeal, the filing fee would have been *thirty-five thousand dollars*! (Incidentially, do courts ever construe §§ 1915(f)(2)(A) and (C) (re: costs) the same way as the fee provisions? The language is identical.)

Writing only two years after this Court waved a caution flag, the three-judge panel in *Hagan v. Rogers* did not even cite *Bock*. In a badly fractured decision, all three judges wrote separately on fees. The dissent opined that "[the majority] holding is incorrect because it violates § 1915(b)(3) and misconstrues (b)(1)." *Hagan*, 570 F.3d at 164 (Roth, J. concurring and dissenting).

The deciding vote about apportionment was left to Judge Jordan, though he would not have permitted joinder of the plaintiffs at all (a posture that prompted the dissent to question his eligibility to pass on the issue. *See* n.13.):

> I find it much harder to agree that multiple prisoners can . . . each be compelled to pay a full filing fee. . . . The language of the PLRA is reasonably plain in this regard. . . . Having multiple prisoners in a single suit, each paying a full fee, creates an "event" that we are instructed should in no event be created.
> *Id.* at 160-161. (Jordan, J., concurring and dissenting).

Judge Jordan then executed a startling about-face in announcing that he was, however, "unable to agree with Judge Roth's resolution of the fee conundrum because it appears incompatible with the plain language of the PLRA." *Id.*

The petitioner respectfully observes that Judge Jordan's statements seem to be internally inconsistent. Yet it was these very comments that narrowly decided an important question of federal law to the severe disadvantage of vulnerable citizens.

As seen in the Great *Hagan* Debate, the competing interpretations of the PLRA's fee provisions are framed by courts as the "per-case" versus the "per-prisoner" approach.

The *Hagan* majority relied heavily on the Seventh Circuit's decision in *Bouriboune v. Berge*, in which they assessed duplicative filing fees after finding "section [1915](b)(1) specifies a per-litigant approach to fees." 391 F.3d 852, 856 (2004).

But this Court has decided that question the other way. When considering sequential v. simultaneous recoupment of fees under §§ (b) and (2), this Court unanimously concluded that "the Circuits following the per-case approach . . . better comprehend the statute." *Bruce v. Samuels*, 136 S. Ct. 627, 632 (2016). It naturally follows that "[t]he other two paragraphs of § 1915(b) confirm that the subsection as a whole is written from the perspective of a single case." *Id.*

Bruce is the *coup de grâce*; it controls our question *contra* the faction-in-error among Courts of Appeal. Their position bangs into *Bock* then bashes smack against *Bruce*. Only the People are getting hurt.

IV. Imposing excessive fees violates Equal Protection as afforded by the Fifth Amendment.

It is undisputed that legislation may impose special burdens on defined classes in order to achieve permissible ends, and that neither prisoners nor indigents are considered suspect classes. "But the Equal Protection Clause [of the 14th Amendment] does require that . . . the distinctions that are drawn have some relevance to the purpose for which the classification is being made." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (striking down state restitution statute imposing special obligations on prisoners only). The Fifth Amendment provides the same kind of Equal Protection against actions of the federal government.

The PLRA was meant to deter frivolous litigation. But even the poorest prisoners

no longer receive fee waivers in lower federal courts. So the deterrence objective is satisfied because the Act ensures that all fees will be paid in full eventually. Going further to construe § 1915(b) as a punitive subsection meant to impose *extra* monetary obligations on only those prisoners who are certifiably indigent risks "invidious discrimination." *Id.* at 310. Under the current scheme, prisoners are taxed *because of* their poverty.

If the PLRA did expressly call for duplicative fees, that might not withstand even the relatively deferential rational-basis test. Of course, the statute is silent and this Court is left to scrutinize only the judge-made stylings heaped atop the law like gaudy blue icing smeared on a pet cat's birthday cake.

May this Court forgive the petitioner for intentionally conjuring the ghastly spectre of long-standing, wide-spread, and ongoing constitutional violations against the poorest citizens at the hands of the federal judiciary. Through certiorari, we face our fears together. Under God.

Even assuming an Equal Protection challenge were to ultimately fail, the mere possibility of a meritorious attack on that basis is enough to trigger the doctrine of constitutional avoidance. That is, "[w]here a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other . . . such questions are avoided, [the Court's] duty is to adopt the latter." *United States ex. rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

The petitioner may be presenting it, but the Court must do everything it can to avoid this question. The issue can be—has been—decided on textual grounds. There's no need to drop a constitutional nuke on this dead horse.

Conclusion

The petitioner hopes that the Justices will not be deterred by the extraordinary, lawless maneuvers of the lower courts in this case. The controversy is still live and one citizen is woozy and stinging from his injury.

More importantly, the masses huddled in their prison cells are desperate for intervention of the Supreme Arbiters on a pure question of law. With humility, with genuine reverence for the dignity, majesty, and power of this Court, the petitioner seeks out the Final Word.

Courts of Appeal are in embarrassing conflict with one another, and, worse yet, the majority is wrong. Worst of all, the erroneous position is entrenched and appears to have partisan defenders who are on alert for potential challengers.

Misapplication of the PLRA's fee provisions has caused untold mischief across the country. Claims with merit are being embargoed by powerful financial disincentives that do not exist outside of prison walls. The petitioner mounted an aggressive run against the blockade, but was thrown out of court, spinning, onto his ear. Absurd outcomes like that—and $35,000.00 filing fees—signal an underlying error.

In defense of the honorable judges sitting on the lower courts, they haven't had much time to come into conformity with *Bruce v. Samuels*—which, though less than a millimeter off-the-bullseye, did not explicitly decide this question. The trio of *Rinaldi, Bock,* and *Bruce* provides uncommonly strong guidance; but a specific directive is evidently needed to secure fairness and uniformity in application of federal law.

WHEREFORE, granting the writ of certiorari is appropriate. The petitioner respectfully prays for it *in propria persona* and on behalf of a million people who are comparatively helpless to confront the Power of the Sovereignty and all its bars, batons, cuffs, chains, lethal needles, chemical irritants, and strange electrical devices.

Allowing incarcerated litigants to apportion fees—much like the Sixth Circuit does—is a sound approach that avoids irrationality, ugly statutory surplusage, and grave constitutional doubtfulness while assuring that all fees get paid in full as Congress intended.

Respectfully submitted,

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