No. 23-933

In the Supreme Court of the United States

JAY HYMAS, D/B/A DOSMEN FARMS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

The Rule 29.6 Statement in the petition remains accurate.

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The petition presents an important and recurring question that is subject to a circuit split resulting in unequal access to the federal courts for litigants seeking to proceed *in forma pauperis*. The government does not meaningfully dispute that there is a circuit split or that this case offers a good vehicle to address the question presented. Instead, the government disagrees with Petitioner's interpretation of 28 U.S.C. § 1915(a)(1) on the merits and urges this Court to decline to adjudicate this dispute, as it did in 2019 when it denied a petition in *Samarripa* v. *Kizziah*, 140 S. Ct. 515 (2019) (No. 19-164). The government's arguments on the merits are incorrect, but more importantly, they do nothing to change the fact that a split affecting the vast number of federal-court IFP litigants exists and requires a resolution from this Court. Indeed, since *Samarripa* was decided, the split among federal courts has deepened. For the reasons stated in the Petition and set forth below, this Court should grant the Petition and provide lower courts much-needed guidance on this important issue affecting access to the federal courts.

I. THE CIRCUITS ARE SPLIT OVER WHETHER § 1915(a)(1) AUTHORIZES INITIAL PARTIAL FILING FEES ON LITIGANTS PROCEEDING IFP.

1. Petitioner Jay Hymas has identified a deepening split over whether 28 U.S.C. § 1915(a)(1) authorizes courts to require the prepayment of partial filing fees by litigants seeking to proceed IFP. Pet. 6-10. The

government downplays the split as "some tension" created by a "per curiam" circuit opinion. Opp. 10-11. That *Garza* was a per curiam decision, however, has no effect on its legal significance. It is a precedential Fifth Circuit opinion setting forth the court's detailed legal reasoning and a straightforward approach to interpreting § 1915(a).

2. The government also insists that *Garza* is unimportant because it (i) focused on fee payments through installments rather than an initial partial fee; (ii) concerned Federal Rule of Appellate Procedure 24, which does not apply here; (iii) relied on unconvincing reasoning; and (iv) did not acknowledge the Seventh Circuit's decision in *Longbehn*. *Id.* at 11-12. None of these contentions has merit.

That *Garza* addressed the imposition of an appellate filing fee in installments, rather than an initial partial fee, is immaterial. The first payment in an installment plan is necessarily a partial filing fee. Thus, whether a court orders an installment payment plan, as in *Garza*, or a one-time, upfront partial filing fee, as in this case, the question is the same: Does § 1915(a)(1) grant courts discretionary authority to impose an initial partial filing fee, or must courts choose between waiving or imposing the full fees set by Congress and the Judicial Conference. *Garza's* holding that there is "no authority" in § 1915 to grant an IFP application without waiving, entirely, the prepayment of the filing fee applies equally to situations where the court orders a partial prepayment or payment by installments rather than prepayment of the entire fee.

And while *Garza* analyzed Federal Rule of Appellate Procedure 24, the court also held that "there is 'no

authority'" in § 1915 to "grant" an IFP application while requiring partial payments of the appellate filing fee. 585 F.3d at 890. Thus, the court in *United States* v. *Cotton* followed Garza's reasoning and held that when § 1915(b)(1) does not apply, "there is no option for installment payments," and the litigant "must either pay the fee in full or satisfy the requirements for proceeding in forma pauperis," in which case prepayment of all court fees would be waived. 2011 WL 13213858, at *2 & n.14 (W.D. La. Aug. 25, 2011).

The government (at 11-12) also relies on the Sixth Circuit's decision in *Samarripa*, which characterizes *Garza*'s analysis as "not convincing" and states that *Garza* did not expressly address all the issues the Sixth Circuit considered. 917 F.3d at 519. But disagreement over the substance of the *Garza* ruling only supports the existence of a circuit split; it is no reason to deny review.

Similarly, the government gains nothing from *Garza*'s failure to discuss the Seventh Circuit's decision in *Longbehn*.[1] The Ninth Circuit below likewise failed to cite *Garza*. If anything, the fact that Circuits overlook contrary authority from other courts only heightens the need for this Court's intervention to resolve the conflict and ensure nationwide uniformity in access to justice for IFP litigants.

In short, *Garza* is binding precedent in the Fifth Circuit. Indigent litigants applying for IFP status there will receive either a complete prepayment fee

[1] Moreover, as explained in the Petition (at 9-10), *Longbehn* only adds to the discord among the Circuits by limiting district court discretion in a way that the Ninth Circuit does not.

waiver or no fee waiver at all. In contrast, IFP litigants in the Sixth, Seventh, and Ninth Circuits may be subject to prepayment of a one-time partial filing fee or an installment plan. This circuit split affects a great number of litigants and is ready for this Court's intervention.

II. THE QUESTION PRESENTED IS IMPORTANT.

Rather than address the importance of the question presented, the government contends that this Court should not answer the question because "collateral review of [the] fee" is available, and Petitioner's rule may yield less favorable results for litigants. Opp. 12. Both arguments fail.

First, that litigants may seek review of IFP fee decisions on a case-by-case basis does nothing to improve uniformity. Without this Court's intervention, courts reviewing these cases will simply continue to apply different constructions of § 1915(a). Moreover, the contention that an individual may simply appeal an adverse fee order ignores the reality that indigent litigants likely cannot afford a $600 appeal fee (or a partial one if IFP status is granted in part as in Petitioner's case) and likely lack the legal knowhow needed to pursue such an appeal if proceeding pro se.

Second, the government speculates about which rule would be better for indigent litigants. But the question presented is what discretion Congress afforded courts in § 1915(a), not the merits of Congress' policy choice. And even assuming that this policy concern were an appropriate issue for the Court, the parties and any amici can present information and argu-

ment on what rule would be best for indigent litigants—an issue that no decision in the split has meaningfully addressed.

The material point is that indigent litigants like Petitioner must be allowed to pursue their civil rights claims without court access being dependent on the location of the federal courthouse.

III. THE NINTH CIRCUIT'S DECISION IS WRONG ON THE MERITS.

1. Petitioner showed that the plain language of § 1915 only grants district courts discretion to "authorize the commencement" of a suit or action without the prepayment of any fees, rather than discretion to engage in fee setting. See Pet. 12-13. In response, the government renews its arguments that the "text, context, and history of 28 U.S.C. § 1915(a) confirm that district courts may require non-prisoner litigants to pay a partial filing fee." Opp. 6. The government's interpretation is incorrect.

As noted in the Petition (at 9), the government's interpretation of this provision has evolved over time. Indeed, initially the government agreed with *Petitioner's* construction. The government attempts to explain its about-face in a footnote, saying merely that "it had reconsidered the issue and adopted the Sixth Circuit's view." Opp. 4 n.1. This does little to justify the reversal. More importantly, however, the government's own change in position further illustrates the need for this Court's intervention and guidance.

2. Petitioner agrees with the government that § 1915(a)(1) "creates an exception to the default rule established by the statutory provisions that otherwise govern court fees," wherein a plaintiff must pay a $350

filing fee, plus an administrative fee prescribed by the Juridical Conference. Opp. 6-7 (citing 28 U.S.C. § 1914(a); 28 U.S.C. § 1914(b)). Petitioner also agrees that Congress' use of the phrase "may authorize" in § 1915(a)(1) grants district courts "discretion to decide whether an exception is warranted in a particular case." Opp. 7.

But the "'greater power to waive all fees'" does not "'include[] the lesser power to set partial fees'" because those are two distinct grants of authority. Opp. 7 (quoting *Olivares*, 59 F.3d at 111). Indeed, that Congress did not intend courts to exercise discretion to fashion a partial fee—as opposed to waiving the fee entirely—is evident from the statutory text, which offers no guidance for courts to use in calibrating partial fees.

Nor does the government's "greater includes the lesser" argument hold water as a practical matter. Police officers, for example, are authorized to issue speeding tickets at a set amount, or to let a driver off with a warning, but no one would contend that the authority to issue a ticket empowers the officer to demand payment of some made-up, intermediate sum for the same offense. Likewise, a district court may impose the fees set by Congress and the Judicial Conference, or waive them, but that does not imply the power to demand payment of some intermediate amount.

3. The government is also wrong that "without prepayment of fees" can mean an "exemption[] from all fees or only some fees." Opp. 7. There are only two fees at issue here: the filing fee and the administrative fee prescribed by the Judicial Conference. Impos-

ing one but not the other still requires suit to commence only *with* the prepayment of fees, not "without prepayment of fees" as the statute requires. Similarly, applying a percentage discount to a fee still requires suit to commence only *with* the prepayment of fees, rather than "without." Furthermore, the statutory language "without prepayment of *fees*," plural, signifies an all-or-nothing approach. It does not allow for the imposition of one fee, but not another, or for discounted fees. Either the "fees" must be waived or not.

4. The government's reliance on the PLRA's history likewise fails. The government contends that, prior to the enactment of the PLRA, "every court of appeals to address the question had held that it allowed courts to impose partial fees." Opp. 7. But those cases involved prisoners seeking IFP status, not nonprisoners like Petitioner. Thus, the reasoning in those decisions does not support partial filing fees for nonprisoner litigants. And the government ignores what happened in response to courts setting partial fees for prisoners proceeding IFP: Congress rewrote the statute and eliminated all district court discretion in fee setting. The statute now spells out how district courts must set fees in prisoner cases, specifying what the initial fee must be and when and in what amounts the remainder must be collected. In short, with the PLRA, Congress rejected the fee setting that courts had performed before the PLRA and reasserted congressional authority over access to federal court.[2]

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[2] Even the government concedes that the PLRA "impos[ed] new constraints on district courts' discretion to allow prisoners pursuing ordinary civil cases to proceed without prepayment of fees." Opp. 8.

5. Additionally, the government's construction violates the canon that courts generally presume that "Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Intel Corp. Inv. Pol'y Comm.* v. *Sulyma*, 140 S. Ct. 768, 777 (2020) (cleaned up). As the government concedes, § 1915(b) refers to an "initial partial fling fee" in multiple places. And again, if Congress intended § 1915(a)(1) to grant district courts discretion to order partial fee payments, § 1915(b) shows that Congress knew precisely how to do so. When Congress enacted the PLRA, it did not include any such language in § 1915(a)(1), further confirming that Congress was rejecting the then-prevailing practice of fee setting by courts.

6. The government also relies on § 1915(f) to interpret §1915(a). Opp. 9-10. But nothing in § 1915(f) supports the government's position. As the government acknowledges, § 1915(f)'s reference to "in other proceedings" is likely a cross-reference to the general costs statute, 28 U.S.C. § 1920, under which a judge has "broad authority to tax costs against a losing party" in six categories of fees. Gov't C.A. Br. 17-18 (citing *Samarripa*, 917 F.3d at 519). But there is no reason (and the government offers none) why discretion to award costs after litigation ends affects courts' discretion to waive prepayment of fees before suit begins. That Congress grants discretion in one subpart of a statute does not mean it gives the same discretion in every subpart of the same law. On the contrary, the parties agree that §§ 1915(a) and 1915(b), for example, afford courts very different degrees of discretion.

And §§ 1915(a) and 1915(f) address quite different circumstances. It is entirely reasonable for Congress

to afford courts broader discretion to impose fees on a losing party, even an IFP litigant, while cabining courts' discretion in granting initial access to a federal forum.

7. Further, the government fails even to address several of the Petition's arguments. As Petitioner explained, for example, the "District Court Miscellaneous Fee Schedule," established by the Judicial Conference, provides: "Administrative fee for filing a civil action, suit, or proceeding in a district court, $52." Pet. App. 19a; see Pet. 3. The Schedule continues: "This fee does not apply to applications for a writ of habeas corpus or to persons granted in forma pauperis status under 28 U.S.C. § 1915." Pet. App. 19a. The government makes no effort to square the Ninth Circuit's rule with the Schedule, which takes an all-or-nothing approach to the fee for IFP litigants.

8. The government also ignores Petitioner's citation to § 1915(c), which offers still more support for Petitioner's reading. That subsection provides that, "[u]pon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment *of any partial filing fee as may be required under subsection (b)*, the court may direct payment by the United States of [certain] expenses." Thus, Congress expressly stated that partial filing fees are permitted under subsection (b), while omitting any reference to "partial filing fees" under subsection (a). If Congress meant to authorize courts to impose partial fees under subsection (a)(1), then it would have used the word "partial" in subsection (c) in connection with those fees as well. Again, the government offers no response.

9. Finally, the government's attempt to address *Crawford*, buried in a footnote, is unpersuasive. Opp.

10 n.3. The holding in *Crawford* did not rely on the fact that the district court sought to impose higher, rather than lower, costs than authorized. Instead, *Crawford* reasoned that the "discretion granted by Rule 54(d) is not a power to evade [the] specific congressional command" that a witness "shall" be paid an attendance fee of $30 per day for each day's attendance under 28 U.S.C. § 1821. 482 U.S. at 442. "Rather, it is solely a power to decline to tax, as costs, the items enumerated in § 1920." *Ibid.* The same is true of § 1915(a)(1)—courts may either impose the filing fees set by Congress and the Judicial Congress or not, but as in *Crawford*, courts may not engage in fee setting and cut their own fee numbers from whole cloth.

IV. THIS CASE IS AN EXCELLENT VEHICLE FOR ANSWERING THE QUESTION PRESENTED.

The government does not dispute that this case offers an ideal vehicle to answer the question presented. And it clearly does. There are no jurisdictional hurdles, the parties thoroughly briefed the issue below, and the question is ripe for adjudication.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 13, 2024