No. 25-457

IN THE
Supreme Court of the United States

TOPAZ JOHNSON, IAN HENDERSON,

Petitioners,

v.

HIGH DESERT STATE PRISON; SYLVA, Sergeant; BRIAN KIBLER, Warden,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents can't deny that this case squarely presents a recurring question on which multiple circuits have acknowledged a split—or that this Court is unlikely to get another opportunity to resolve the issue any time soon. *See* Pet. 9-11, 16-18. Respondents instead devote the bulk of their BIO—more than half of the argument section (BIO 6-10, 15-19)—to contesting the merits. Respondents urge that, where the statute says "*in no event* shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action," it actually means that, sometimes, the filing fee collected may not only exceed but might double, triple, or quadruple the fees permitted by statute for the commencement of a civil action. *See* 28 U.S.C. § 1915(b)(3) (emphasis added); BIO 6. Respondents' reading is atextual and illogical and in any event cannot diminish the need for this Court to provide a uniform answer to an important question that has long divided the lower courts.

This Court should grant certiorari.

1. *Split.* As courts have acknowledged, there's a split in authority, with the Sixth Circuit on one side and the Third, Seventh, Ninth, and Eleventh Circuits on the other. *See, e.g.*, Pet. App. 64a; *Hagan v. Rogers*, 570 F.3d 146, 155 (3d Cir. 2009).

Respondents protest that the Sixth Circuit shouldn't count. It's true that the seminal Sixth Circuit opinion, *In re Prison Litigation Reform Act*, 105 F.3d 1131 (6th Cir. 1997) (*In re PLRA*), is something of an odd beast. Because it deals with matters of judicial administration (how much to

charge plaintiffs), it's styled a single-judge administrative order. But *In re PLRA* is published in the Federal Reporter, and the Sixth Circuit treats it exactly the same as any other entry in F.3d. Panels of the Sixth Circuit have taken fee-splitting in joint filings as a given for nearly 30 years. *See, e.g.*, *Talley-Bey v. Knebl*, 168 F.3d 884, 885, 887 (6th Cir. 1999). They treat the other parts of *In re PLRA* as binding holdings, too.[1] And the status quo in the Sixth Circuit won't change: In nearly 30 years, no panel has been asked to revisit *In re PLRA* or suggested it might do so.

Respondents can't seriously deny that petitioners' case would come out differently in the Sixth Circuit than it did here. District courts in that circuit have applied *In re PLRA*'s split filing fee holding hundreds of times. *See* Pet. 9-10 & nn.3-4. By contrast, between the panel, respondents, and petitioners, we've identified precisely *one* case since *In re PLRA* was decided in 1997 where a district court assessed each

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[1] *See, e.g.*, *Singleton v. Smith*, 241 F.3d 534, 541–42 (6th Cir. 2001) ("*We so held* directly in our administrative order on February 4, 1997 . . . ") (emphasis added); *Ongori v. Hawkins*, No. 16-2781, 2017 WL 6759020, at *1 (6th Cir. Nov. 15, 2017) ("But *we have held* that non-prisoners proceeding in forma pauperis are still subject to the screening requirements of § 1915(e).") (emphasis added) (discussing *In re PLRA*); *Bennett v. McBride*, 67 F. App'x 850, 854 (6th Cir. 2003) ("Plaintiff's argument is without merit since *we have held* that an initial partial filing fee imposed on a prisoner under § 1915(b)(1) does not deprive him of adequate, effective, and meaningful access to the courts . . .) (emphasis added) (discussing *In re PLRA*); *White v. Paskiewicz*, 89 F. App'x 582, 584 (6th Cir. 2004) ("*This court held* in *In re Prison Litigation Reform Act*… that a prisoner must pay the initial partial filing fee when funds become available.") (emphasis added) (cleaned up).

prisoner a full filing fee in a joint action. *Jones v. Fletcher*, No. 05-cv-07, 2005 WL 1175960 (E.D. Ky. May 5, 2005). Respondents claim two other cases did so, but in each case, plaintiffs were required to each pay the full filing fee only because they were *not* allowed to proceed jointly. *See Williams v. ODRC*, No. 2:20-cv-6424, 2020 WL 14005678, at *2 (S.D. Ohio Dec. 17, 2020); *Montague v. Schofield*, No. 2:14-cv-292, 2015 WL 1879590, at *4 (E.D. Tenn. Apr. 22, 2015). *See also* Pet. 9 n.2 (discussing *Montague*); BIO 12 & n.6 (acknowledging that respondents' other cases discuss *In re PLRA* only in dicta).

Nor is further percolation necessary. The issues have been thoroughly aired, with jurists writing detailed opinions taking every possible position.[2]

Whatever it's captioned, then, *In re Prison Litigation Reform Act* satisfies all the criteria for a split of authority and calls out for this Court's intervention.[3]

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[2] *Compare* Pet. App. 31a-33a (Graber, J., dissenting); *id.* at 65a (Fletcher, J., dissenting from the denial of rehearing en banc); *Hagan*, 570 F.3d at 164 (Roth, J., concurring in part and dissenting in part); *with id.* at 150; *id.* at 160-61 (Jordan, J., concurring in part and dissenting in part); *Hubbard v. Haley*, 262 F.3d 1194, 1198 (11th Cir. 2001); *Boriboune v. Berge*, 391 F.3d 852, 855-56 (7th Cir. 2004).

[3] Respondents emphasize that the order was "issued by a single jurist." BIO 12-13. But there's nothing talismanic about the three-judge panel opinion. So long as the decision is binding, the outcome of the case would be different in a different forum, and the arguments have sufficiently percolated, the question presented is certworthy. Indeed, this Court has granted certiorari to resolve splits of authority where one of the authorities in question was significantly further afield from the

2. *Vehicle.* Respondents don't deny that the issue was pressed and passed upon below or identify any obstacle to this Court resolving the question presented. Nor can they deny that the cost of an appeal and the procedural complexities of appealing a joinder case make it exceedingly unlikely that this Court will ever see another petition raising the issue—even though the issue crops up routinely. Pet. 17-18.

Instead, respondents make various argument that petitioners will lose on remand, arguments that are irrelevant and, in any event, entirely wrong.

First, respondents urge that Messrs. Henderson and Johnson won't get in forma pauperis status on remand because they did not file "a certified copy" of their "trust fund account statement." BIO 19 (quoting 28 U.S.C. § 1915(a)(1)-(2)). But petitioners didn't submit an account statement only because they were dismissed from the case before the deadline to do so. *See* C.A. ER-20 (account statement due "sixty days from the date" of the IFP application); C.A. ER-17 (dismissing Messrs. Henderson and Johnson from case 48 days after filing of IFP application). Besides, in California, the prison, not the prisoner, is responsible for submitting the account statement. *See* C.A. ER-38 ("The California Department of Corrections and Rehabilitation is DIRECTED to submit a Certified Prison Trust account statement for Kevin Jones."). And the suggestion that "the Court

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three-judge panel opinion than *In re PLRA*. *See, e.g.*, *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014) (granting certiorari "to resolve the division of opinion" between the First Circuit and the Department of Labor Administrative Review Board).

has no way of knowing whether" petitioners will be able to proceed IFP once they submit the account statement (BIO 19-20) is absurd: As respondents acknowledge, each petitioner already submitted an affidavit swearing he was "unable to pay the fees for these proceedings." BIO 19; C.A. ER-19-20.

Second, respondents claim it is "unclear whether petitioners would even be allowed to proceed jointly" because they are no longer in the same prison. BIO 20. But respondents already made precisely that argument to the Ninth Circuit, which rejected it. *Id.* (acknowledging that different prisons argument was raised in C.A. Answering Br. 19-20). The court explained that the record to date showed no "challenges to communication"—all three prisoners had "each signed the complaint, and also signed the application to proceed IFP." Pet. App. 26a-27a. The Ninth Circuit held that "hypothetical concerns" that petitioners "*might* face communication challenges" could not be a basis for denying joinder; at best, they might support "sever[ing] Plaintiffs from the lawsuit" if they "ever came to fruition." Pet. App. 27a.

Finally, respondents urge that Messrs. Henderson and Johnson would lose on the merits of their Eighth Amendment claim because "the district court has already screened" the claims of their co-plaintiff, Kevin Jones. BIO 20-21. That's misleading at best: The district court dismissed Mr. Jones's case because he declined to amend his complaint to cure the deficiencies identified by the magistrate judge. C.A. ER-4-5. Messrs. Henderson and Johnson did not have that opportunity to amend, because they'd already been severed from the case. Pet. App. 9a-10a. They cannot be bound by Mr. Jones's failure to do so.

3. *Importance*. Respondents don't deny that the question presented recurs constantly. *See* Pet. 16-17. Nor can they deny that, for a prisoner, the difference between a $350 district-court filing fee and a fee of $175 (or $116.67, or $87.50, or less) might amount to months of labor. Pet. 14-15. (And the difference between a $600 appellate filing fee paid by one prisoner or split among more than one could amount to *years* of labor. *Id.*)

Respondents nonetheless claim that the question presented won't matter on the ground for prisoners. First, respondents suggest that California prisoners don't need money because, thanks to California regulations, prisoners have all their needs met. BIO 17. But of course, the regulations on paper may not be honored in practice. California regulations may require "a wholesome, nutritionally balanced diet" (BIO 17)—but the Orange County Jail still served meals that were "cold, rotting, and moldy,"[4] meaning that inmates had to use commissary accounts to meet their nutritional needs (indeed, "those without the means to buy extra provisions became ill"[5]). California may, on paper, require incarcerated people to be provided with clothing (BIO 17)—but without

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[4] ACLU OF SOUTHERN CALIFORNIA & STOP THE MUSICK COALITION, *Cold, Rotting & Moldy Meals: Food Oppression in the Orange County Jails* 1, 8 (Dec. 15, 2021), *available at* https://www.aclusocal.org/app/uploads/2021/12/food-oppression-oc-jails-report.pdf.

[5] VERA INSTITUTE, *Cheap Jail & Prison Food Is Making People Sick. It Doesn't Have To.* (Feb. 27, 2024), *available at* https://www.vera.org/news/cheap-jail-and-prison-food-is-making-people-sick-it-doesnt-have-to.

commissary money to buy warm clothing, two inmates died of hypothermia.[6] And besides, the Ninth Circuit's ruling covers plenty of States—Alaska, Arizona, and Nevada among them—that don't even purport to provide clothing, phone calls, or medical care without a fee.[7]

Second, respondents suggest that the total filing fee doesn't matter because a prisoner's "month-to-month" budget won't vary. BIO 17-18. But even if a State would take the same amount of money out of a prisoner's account each month, a larger filing fee means that the prisoner's account is garnished for twice or thrice as long. Four or six months without being able to afford a phone call home is bad enough, but a year is worse still.

Finally, respondents urge that the difference in filing fees won't matter in practice because "prisoners may be released before they finish paying off their fees, and courts have held that indigent prisoners need not continue to make payments under the PLRA once they have been released from prison." BIO 18. But many courts have held exactly the opposite—that prisoners continue to owe the balance of their filing fee upon release. *See In re Smith*, 114 F.3d 1247, 1251-

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[6] Keri Blakinger, *After jail deaths, supervisors ask LASD to give more warm clothes to inmates*, LOS ANGELES TIMES (July 12, 2023), *available at* https://www.latimes.com/california/story/2023-07-12/after-jail-deaths-supervisors-ask-lasd-to-give-more-inmate-warm-clothes.

[7] Tiana Herring, *For the poorest people in prison, it's a struggle to access even basic necessities*, PRISON POLICY INITIATIVE (Nov. 18, 2021), *available at* https://www.prisonpolicy.org/blog/2021/11/18/indigence.

52 (D.C. Cir. 1997); *Robbins v. Switzer*, 104 F.3d 895, 897 (7th Cir. 1997).

4. *Merits*. Respondents devote more than half of their argument to litigating the merits of the question presented. BIO 6-10, 15-19. There will be time enough to address the merits in detail should this Court grant certiorari. For now, it suffices to reiterate just a few of the reasons the statute cannot bear respondents' reading.

a. As the petition explained, the PLRA's text couldn't be clearer. *See* Pet. 18-19. The PLRA says that "[i]n *no event* shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action." 28 U.S.C. § 1915(b)(3) (emphasis added). On respondents' reading, the district court *must* collect a filing fee for a single civil action that "exceed[s] the amount of fees permitted by statute"—something that the statute tells us should "in no event" occur.

To justify that reading, respondents first try to make hay of a difference between the generic filing fee provision, 28 U.S.C. § 1914 (which refers to "the parties," plural, "instituting any civil action"), and Section 1915(b)(1) (which refers to "the prisoner," singular, who must "pay the full amount of a filing fee"). BIO 8-9. But respondents ignore half of the relevant sentence. Section 1915(b)(1) says that "if *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." Respondents must believe that the Dictionary Act applies to the first clause—that is, that the reference to "a prisoner" includes "prisoners," plural. Otherwise, Section 1915(b)(1) simply wouldn't apply to this case: "A

prisoner," singular, didn't bring this civil action; several prisoner*s*, plural, did. Surely, then, the Dictionary Act must apply to the second clause of the sentence, too: "Prisoners," plural, "shall be required to pay the full amount of a filing fee." Respondents explain why the Dictionary Act would apply to the first half of the sentence and not to the second half.

If any doubt remains, Section 1915(f)(2), the PLRA's costs provision, should quell it. As explained in the petition, the costs provision and the fees provision operate nearly identically: "[T]he prisoner shall be required to pay the full amount" (of costs or fees); payment of costs is collected "in the same manner as is provided for filing fees"; and "[i]n no event shall" the amount of fees or costs collected "exceed the amount" of fees or costs" ordered by the court." *Compare* 28 U.S.C. §§ 1915(b)(1)-(2) *with id.* §§ 1915(f)(2)(B)-(C). Everyone agrees that the costs provision allows splitting.

To argue that the fee provision nonetheless does not allow splitting, respondents lean on the phrase "as in other proceedings" in the costs provision: "Judgment may be rendered for costs at the conclusion of the suit or action *as in other proceedings* . . . ." 28 U.S.C. § 1915(f)(1) (emphasis added). But as explained in the petition, that phrase would be quite an opaque way to override the otherwise identical language—especially since by its terms, the phrase "as in other proceedings" modifies only how judgment is to be rendered (that is, *whether* costs are awarded), not how costs are to be divided. *See* Pet. 20-21.

Finally, respondents cannot overcome the presumption that the PLRA does not "depart from the usual procedural requirements" unless it says so

"expressly." *Jones v. Bock*, 549 U.S. 199, 212, 216 (2007). Respondents first claim there is no "usual procedural requirement[]" here because there is no "usual practice for litigants proceeding IFP to pay *anything*." BIO 9-10 (quoting Pet. App. 22a). But as explained in the petition (Pet. 21-22), there's no "usual" practice" of requiring litigants to exhaust administrative remedies, either, yet this Court had no trouble applying the presumption in a pair of exhaustion cases. *See Jones*, 549 U.S. at 212, 216; *Perttu v. Richards*, 605 U.S. 460, 470 & n.2 (2025); *see also* Pet. 22. Respondents' halfhearted suggestion that the presumption only applies to cases about the Federal Rules (BIO 9) is also wrongheaded: This Court applied the presumption just last Term in a case about the jury trial right that had nothing to do with the federal rules. *See Perttu*, 605 U.S. at 470 & n.2.

b. Like the panel below, respondents ultimately fall back on policy. *See* BIO 15-16. As a threshold matter, this Court has admonished that "perceived policy concerns" are no basis for departing from the text of the PLRA. *Jones*, 549 U.S. at 212.

In any event, respondents' policy concerns—that petitioners' reading of the statute will be unadministrable—are misplaced. Courts in the Sixth Circuit have managed just fine, allowing split filing fees in hundreds of cases over the past 30 years. *See* Pet. 9-10 & nn.3-4, 24-25. For instance, respondents worry that 100 prisoners might file jointly specifically to reduce their filing fees. BIO 15-16. The very Sixth Circuit cases respondents cite, however, *rejected* attempts by prisoners to file jointly just to circumvent the filing fee requirement—making clear that the

requirements of Federal Rule of Civil Procedure 20 and the sound discretion of district courts will prevent such abuse. *Id.*

Conversely, respondents don't dispute that their reading of the statute results in the truly odd outcome that a prisoner entitled to proceed IFP—that is, a prisoner with *less* resources—will pay two, three, or four times more than a prisoner with more resources. Pet. 22-23. Respondents double down on the panel's claim that prisoners who want to avoid that outcome should simply "choose" to pay a split filing fee up front, rather than paying a full filing fee in installments. BIO 15-16. But as the petition explained, IFP prisoners by definition *cannot* "choose" to pay the full filing fee up front. Pet. 23. Respondents' speculation that "two indigent prisoners who individually cannot afford to pay the full, upfront filing fee of $350 may nevertheless be able to afford half of that fee and thus may choose to proceed jointly" misunderstands how the IFP process works. BIO 16 n.8. IFP status is determined in relation to the fees at issue: A prisoner must attest that he "is unable to pay *such fees*" as are necessary to commence the civil action. 28 U.S.C. § 1915(a)(1). Respondents' hypothetical prisoners who can easily pay $175 up front aren't entitled to proceed IFP on a joint complaint in the first place.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2025