No. 16-1067

# In the Supreme Court of the United States

CHARLES MURPHY,
PETITIONER,

*v.*

ROBERT SMITH AND GREGORY FULK,
RESPONDENTS.

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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

The Prison Litigation Reform Act (PLRA) provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2).

Did Congress intend that a prevailing prisoner's attorney be compensated first from the judgment, not to exceed 25 percent thereof, and that the defendant be liable for any balance of the fee award?

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## INTRODUCTION

In ordinary tort litigation, attorney's fees are awarded first from the judgment itself. In civil rights actions, by contrast, prevailing plaintiffs are entitled to reasonable attorney's fees under 42 U.S.C. § 1988.

In the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e, Congress struck a balance between these two approaches by sparing prisoners who win damage awards from losing too great a portion of their awards to attorney's fees while at the same time deterring prisoners from filing marginal or trivial lawsuits by requiring them to "satisfy" any fee award up to 25% of the judgment. To this end, the PLRA provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." *Id.* § 1997e(d)(2). In this case, the Seventh Circuit held that a prevailing prisoner's attorney must be compensated first from the judgment, so long as that portion does not exceed 25% of the judgment, and that the defendant is liable for any balance of the fee award.

The petition should be denied for three reasons.

First, petitioner overstates the degree of conflict among the circuits. As the Court of Appeals recognized in this case, only two circuits (not four, as petitioner would have it) have squarely held that the PLRA gives district courts discretion to choose any portion of the judgment up to 25% to apply to a fee award. Moreover,

the conflict is not only shallow but thinly reasoned. The Seventh Circuit's terse discussion of the issue in the 2003 opinion relied upon by the court below was arguably dicta; the Eighth Circuit did not even mention the Seventh Circuit's construction when it reached a contrary result; and the Third Circuit summarily adopted the Eighth Circuit's conclusion. Given the absence of reasoning in those cases, there is every reason to believe that Third and Eighth Circuits will eventually review the issue en banc and agree with the Seventh Circuit. In any event, there is no pressing need for this Court to resolve the issue now.

Second, the issue arises far more rarely than petitioner asserts. As noted in the law review article on which petitioner himself relies, some 95% of prisoners in PLRA cases proceed pro se rather than being represented by private counsel, and very few prisoners litigate their claims to money judgments. When these factors are taken into account, it becomes clear that petitioner grossly overstates how often courts must grapple with the issue of satisfying attorney's fee awards out of prisoners' judgments. That, in turn, helps explain why only three circuits have had to address it in the more than 20 years since the PLRA's adoption.

Third, the Seventh Circuit correctly held that a prevailing prisoner under the PLRA must first compensate his attorney from the judgment but that, if 25% of the damages is inadequate to satisfy the fee award, the defendant is liable for the balance. This bright-line interpretation reflects the differences

between the PLRA's mandatory language and the discretionary wording of other fee-shifting statutes such as § 1988. And the Seventh Circuit's construction effectuates the PLRA's purposes by ensuring that prisoners bear some of their litigation costs even when they prevail but always keep at least 75% of the judgment, even if fees reach the PLRA's cap of 150% of the judgment—and even more if fees are less than 25% of the judgment. By contrast, petitioner's preferred rule creates no disincentive for marginal or trivial prisoner lawsuits and substitutes permissive language for Congress's mandatory wording. Worse, petitioner's construction would generate more litigation, in direct contradiction to the animating purpose of the PLRA.

## STATEMENT

1. Petitioner, an inmate in Vandalia Correctional Center in Illinois, sued respondent correctional officers and two other Vandalia employees, alleging (among other things) that respondents violated the Eighth Amendment by using excessive force when escorting him to a segregation cell and by their deliberate indifference to his resultant serious medical needs. Pet. App. 1a-3a. He also alleged state-law battery claims against respondents. Pet. App. 3a.

A jury returned a verdict against petitioner except on his excessive force and battery claims against respondent Smith and his medical claim against respondent Fulk. Pet. App. 3a. The jury awarded him compensatory and punitive damages of approximately

$410,000.00, which was remitted to $307,733.82. Pet. App. 3a.

Petitioner sought attorney's fees of almost $214,000, for approximately 612 hours at an hourly rate of $350. Pet. App. 18a-19a. The district court calculated the reasonable fee award to be $108,446.54, applying the PLRA's hourly rate cap for prisoners' lawsuits (see 42 U.S.C. § 1997e(d) (incorporating 18 U.S.C. § 3006A(3)) and excluding certain hours as unreasonably expended. Pet. App. 21a–26a. The court then ordered petitioner to contribute 10% of the judgment toward the fee award, rejecting respondents' argument that under *Johnson v. Daley*, 339 F.3d 582, 585 (7th Cir. 2003), the court had to apply 25% of the judgment to satisfy the fee award and that respondents could be held liable only for the amount by which the fee award exceeded 25% of the judgment. Pet. App. 27a.

2. Respondents appealed, challenging (among other things) the percentage of the judgment that the district court applied to satisfy the fee award. Pet. App. 1a–2a. The Seventh Circuit reversed on the PLRA issue, holding that "the attorney fee award must first be satisfied from up to 25 percent of the damage award, and the district court does not have discretion to reduce that maximum percentage." Pet. App. 2a.

Quoting its en banc opinion in *Johnson*, the court reiterated that "the most natural reading" of the PLRA is that "'attorneys' compensation come[s] first from the damages'" and that "'[o]nly if 25% of the award is

inadequate to compensate counsel fully' does the defendant contribute more to the fees." Pet. App. 13a (quoting 339 F.3d at 585). Although noting that the Third and the Eighth Circuits construed the statute as discretionary, the court reasoned that the statute's text did not "contemplate[ ] a discretionary decision by the district court" because it "neither uses discretionary language nor provides any guidance for such discretion." *Ibid.* The court then remanded the matter to the district court to modify the judgment to apply 25% of the judgment to satisfy the fee award. Pet. App. 13a–14a.

3. Petitioner subsequently filed a petition in the Seventh Circuit for an additional $71,663 in attorney's fees on appeal. 7th Cir. Doc. 51. Respondents opposed the petition, arguing that petitioner failed to show that (a) the PLRA authorizes fee-shifting for time spent opposing their appeal from the judgment on his non-federal claims, which was the only merits issue on appeal, and from the order that he contribute only 10% of the judgment toward his attorney's fee; (b) the PLRA's hourly rate cap for attorneys in prisoner litigation, 42 U.S.C. § 1997e(d)(3), is inapplicable to his appellate fees; and (c) the fee sought was "reasonable," as a matter of both billing judgment and sufficiency of the evidence for the hourly rate claimed (if the PLRA rate cap were inapplicable) as well as the number of hours and types of tasks for which the attorney sought compensation. 7th Cir. Doc. 55. His fee petition remains pending as of the date this brief is being filed.

## REASONS FOR DENYING THE PETITION

### I. Petitioner Overstates the Circuit Split.

Petitioner asserts that the circuits are split four to one on the question presented, Pet. 1–2, 4–7, but he overstates both the magnitude of the split and the depth of the lower courts' reasoning.

Petitioner contends that the Second Circuit in *Shepherd v. Goord*, 662 F.3d 603 (2011), "approved the District Court's decision to apply 10 percent of the judgment toward the attorney's fees." Pet. 5 (citing 662 F.3d at 610). But the issue in *Shepherd* was whether the PLRA's cap on attorney's fees at 150% of the judgment applied to a nominal judgment of one dollar. After holding that it did (meaning that fees were capped at $1.50), the Second Circuit explicitly declined to address the question presented here—which would have come down to whether the prisoner paid his lawyer a dime or a quarter. 662 F.3d at 604 n.1. As one of the unpublished district court cases cited by petitioner observed, "[t]he Second Circuit has *not* decided any case that interprets this section of the PLRA, and thus has provided no guidance on its application," stressing that "[t]he application of § 1997e(d)(2) . . . was not raised on appeal" in *Shepherd*. *Sutton v. City of Yonkers*, No. 13-civ-801 2017 WL 105022, at *7 (S.D.N.Y. Jan. 11, 2017) (emphasis added), *report and recommendation adopted in part*, 2017 WL 1180918 (S.D.N.Y. Mar. 29, 2017).

Petitioner also implies that the Sixth Circuit construes § 1997e(d)(2)'s 25% requirement as merely discretionary, citing that court's instruction to the district court on remand in *King v. Zamiara*, 788 F.3d 207, 218 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 797 (2016), "'to exercise its discretion to apply some percentage of the judgment, not to exceed 25 percent, to attorney fees.'" Pet. 6. Yet the question was not squarely presented in *King*, for the district court had abused its discretion in denying punitive damages and then applying *none* of the judgment to satisfy the fee award. 788 F.3d at 218.

Prior Sixth Circuit cases do not clarify the picture. In *Walker v. Bain*, 257 F.3d 660 (6th Cir. 2001), which upheld the PLRA's fee cap against an equal protection challenge, the Sixth Circuit observed in dicta that § 1997e(d)(2) "*requires* 25 percent of the attorney fee award to be paid out of the plaintiff's recovery." *Id.* at 669 (emphasis added). Later, in *Riley v. Kurtz*, 361 F.3d 906, 911 (6th Cir. 2004), the Sixth Circuit observed, again in dicta, that under § 1997e(d)(2) "an attorney's compensation comes first from the damages (up to 25 percent), and then, if inadequate, the defendant is liable for attorney's fees under § 1988" for the balance. In short, the Sixth Circuit has yet to squarely address the question presented here, and its dicta on the issue point in both directions.

As neither the Second Circuit nor the Sixth Circuit has held that § 1997e(d)(2) confers discretion on district courts to apply less than 25% of the judgment to satisfy

a fee award, the Seventh Circuit was correct to conclude that the split currently stands at 2–1. Pet. App. 13a. What's more, the reasoning in these cases hardly represents the kind of percolation that ought to precede the grant of certiorari. The Seventh Circuit's discussion of the 25% issue in *Johnson* was itself arguably dicta, since that case, like *Walker*, involved an equal protection challenge to the PLRA's fee caps. For its part, the Eighth Circuit in *Boesing v. Spiess*, 540 F.3d 886 (8th Cir. 2008), ignored *Johnson*, choosing instead to follow what it called the "majority view" among district courts. *Id.* at 892 & n.5. And as for *Parker v. Conway*, 581 F.3d 198 (3d Cir. 2009), the Third Circuit in that case performed no legal analysis whatsoever; rather, it stated summarily that it "agree[d] with the *Boesing* court's holding" and "declined to follow" *Johnson*, *Riley*, and *Walker*. 581 F.3d at 204-05 & n.7.

Now that the Seventh Circuit has reiterated its construction of the statute in an opinion that cannot be deemed dicta, there is every reason to believe that both the Third and the Eighth Circuits will revisit the question en banc and agree with the Seventh Circuit. In any event, such a shallow and thinly reasoned circuit split does not warrant certiorari review, especially given that the issue arises so rarely (*see infra* Section II).

## II. The Question Presented Arises Far More Rarely than Petitioner Asserts.

Petitioner insists that this Court's intervention is necessary because the question presented "arises almost every time a prisoner wins damages" under 42 U.S.C.

§ 1983, an event that he "extremely conservatively" estimates occurs about 800 times every year. Pet. 8–10. That is a gross overestimate.

Petitioner relies on a law review article for the assertion that prisoners win approximately 10% of the approximately 22,000 civil rights cases they file each year. Pet. 8 (citing Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 164 (2015)). Although he acknowledges the dearth of published data on point, petitioner infers from a sample of cases decided in 2012 that "a large majority of these cases involve damages awards." *Ibid.* (citing Schlanger, 5 U.C. Irvine L. Rev. at 168). And then, while frankly admitting that there is no published data on how many prevailing prisoners are awarded attorney's fees, petitioner speculates that the proportion is "likely to be very high," so he chooses 50 percent. *Ibid.*[1]

What petitioner fails to mention is that, according to the same law review article, prisoners in PLRA cases appear *pro se* about 95% of the time. *See* Schlanger, 5 U.C. Irvine L. Rev. at 167 (prisoners represented themselves in 95.6% of civil rights cases terminated in

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[1] The basis for this assumption is unclear. Pre-PLRA data indicated that prevailing prisoners received attorney's fees in "almost none" of their cases. Stewart J. Schwab and Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 772 (1988); *see also id.* at 730 n.42, 756, 770 n.191, 771–73.

2000, 96.5% of cases terminated in 2006, and 94.9% of cases terminated in 2012). Thus, counseled cases represent about 1,100 of the 22,000 civil rights cases filed yearly. The question presented can arise 800 times a year only if we assume prisoners obtain a money judgment and a fee award in almost three-quarters of those 1,100 counseled cases. Even granting that counseled cases probably constitute a disproportionately meritorious slice of the overall data set, that is a far-fetched assumption.

Closer study of the data in the cited law review article shows how far afield petitioner's estimates are. Using 22,000 cases per year as a baseline, as petitioner does (Pet. 8), we can deduct the 9.1% of prisoner civil rights cases that terminated without a judgment in 2012 (the most recent year studied), or 2,002 cases. Schlanger, 5 U.C. Irvine L. Rev. at 164. Of the remaining 19,998 cases, prisoners win just 0.5% (100) before trial; only 1.3% (260) proceed to trial, of which prisoners win 11.9% (31). *Ibid.* Thus, judging from the 2012 data, prisoners win something like 131 civil rights cases a year, counseled or not, a far cry from the figure of more than 2,000 that petitioner cites. *See* Pet. 8. Not all of those prevailing prisoners both obtain a money judgment *and* are represented by counsel, the two prerequisites for the question presented to arise. And even then, the parties will not raise the issue if, for instance, damages are nominal or the portion of the judgment applied to fees is for some other reason too small to be worth litigating.

Given the relative infrequency with which the question presented arises, it is unsurprising that only three federal courts of appeals have squarely addressed the question since Congress enacted the PLRA in 1996. It is also unsurprising that petitioner apparently could find only two district court cases per year addressing it, most of them unreported, over that 21-year period. Pet. at 8–10.[2] A question that arises so rarely does not merit this Court's attention.

## III. The Seventh Circuit's Interpretation of the Statute Is Correct.

The Seventh Circuit's bright-line rule enforces the mandatory language of § 1997e(d)(2) and effectuates the PLRA's objective of discouraging prisoners from litigating marginal or trivial claims. By contrast, petitioner's standardless interpretation frustrates that objective by inviting additional litigation over the acceptable rationales for applying less than 25% of the judgment to satisfy a fee award, or over whether district courts abused their discretion by choosing a particular percentage.

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[2] Moreover, at least two of those district court cases did not address the issue. *See*, *e.g.*, *Carter v. Wilkinson*, No. 1:06-cv-02150, 2010 WL 5125499, at *10 (W.D. La. Dec. 9, 2010) (court "refrain[ed] for the present from rendering a decision on this point" because plaintiff had not provided sufficient information to award fees); *Sutton v. City of Yonkers*, No. 13-civ-801 2017 WL 105022 (S.D.N.Y. Jan. 11, 2017), *report and recommendation adopted in part*, 2017 WL 1180918, at *7 (S.D.N.Y. Mar. 29, 2017) (finding PLRA inapplicable).

Section 1997e(d)(2) mandates that "a portion of the judgment (not to exceed 25 percent) *shall be applied to satisfy*" the fee award. 42 U.S.C. § 1997e(d)(2) (emphasis added). Unlike the general civil rights fee-shifting statute, which provides that a district "court, *in its discretion, may allow* the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," 42 U.S.C. § 1988 (emphasis added), § 1997e(d)(2) contains no discretion-triggering (or discretion-guiding) language.

As § 1988 shows, Congress plainly knows how to insert such language into fee-shifting statutes. In the PLRA, it chose not to do so. Instead, it enacted a kind of automatic contingent fee mechanism whereby prisoner plaintiffs — like Social Security claimants, tort plaintiffs, real estate tax appellants, and many others — pay out 25% of their recovery as attorney's fees (so long as the fee award equals or exceeds 25% of the judgment) with the defendant picking up the balance up to 150% of the judgment. Prisoners are, of course, free to negotiate additional fee agreements with their counsel. *See* 42 U.S.C. § 1997e(d)(4); *cf. Gisbrecht v. Barnhart*, 535 U.S. 789 (2002) (holding that 42 U.S.C. § 406(b), which limits attorney's fees to 25% of past-due benefits, controls but does not displace attorney-client contingent fee agreements).

Petitioner focuses on the statutory phrase "not to exceed 25 percent," Pet. 10–12, but the Seventh Circuit's construction makes sense of that phrase. Section 1997e(d)(2) instructs district courts to look first

to the judgment to "satisfy" the fee award—but the portion applied may not exceed 25% of the judgment. When fees exceed one-fourth of the judgment, the 25% figure acts as a cap on the plaintiff's exposure. But in some cases—consider a plaintiff who recovers $100,000 in damages while incurring $15,000 in compensable fees—the entire fee award can be "satisf[ied]" by applying less than 25% of the judgment. Thus petitioner is wrong in his Question Presented to accuse the Seventh Circuit of reading "not to exceed 25 percent" to mean "*exactly 25 percent*." Pet. i (emphasis in original).

By requiring that prevailing prisoners apply 25% of the judgment to satisfy any fee award that equals or exceeds that amount, § 1997e(d)(2) promotes the PLRA's purpose of discouraging prisoners from filing marginal or trivial claims. Before the PLRA, prisoners "had little disincentive to file cases in [low expected damages or low chance of success or both] because their litigation costs were low or nonexistent." Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1608 (2003). Their filing fees were waived if they were indigent; prisons had to provide paper, writing materials, and postage; and a lawsuit often "might provide a useful relief from prison boredom." *Id.* at 1607-08; *see also Cleavinger v. Saxner*, 474 U.S. 193, 211 (1985) (Rehnquist, J., dissenting) (characterizing prisoners as "hav[ing] much to gain and virtually nothing to lose" from filing lawsuits). By enacting the PLRA, Congress sought to lighten the burden on the

federal judicial system caused by prisoners' claims and to protect the public fisc by shifting some litigation costs to prisoners to discourage them from filing frivolous or marginal lawsuits. *See*, *e.g.*, 141 Cong. Rec. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) ("[W]e have witnessed an alarming explosion in the number of lawsuits filed by State and Federal prisoners. . . . Frivolous lawsuits filed by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population.").

The PLRA was a "sea change" that "rewrote both the law of procedure and the law of remedies" for prisoner litigation. Schlanger, 116 Harv. L. Rev. at 1627. Under the PLRA, prisoners must pay filing fees, either over time (if indigent) or up front (if they have "three strikes") (28 U.S.C. § 1915(b), (g)), as well as the defendant's costs if they lose (28 U.S.C. § 1915(f)), and they may not be awarded damages for mental or emotional injury absent physical injury (42 U.S.C. § 1997e(e)). *See* Schlanger, 116 Harv. L. Rev. at 1628–30.

Prisoners' attorney's fees and government defendants' litigation costs were of particular concern to Congress. *See*, *e.g.*, 141 Cong. Rec. S14317 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) ("[A]ttorney's fees must be proportionally related to the court ordered relief. No longer will attorneys be allowed to charge massive amounts to the State for the service of correcting minimal violations."); *Prison Reform:*

*Enhancing the Eff[f]ectiveness of Incarceration, Hearing before the Committee on the Judiciary United States Senate*, July 28, 1995, at 3 ("The money saved by reducing litigation costs could more appropriately be used by the states to help ensure that adequate prison space is available . . . .") (Sen. Hatch); 141 Cong. Rec. H1480 (daily record Feb. 9, 1995) (the PLRA "places common sense limitations on the recovery of attorneys fees in prison litigation") (statement of Rep. Canady).

In view of this concern, the PLRA makes it more difficult for prisoners than for other prevailing civil rights plaintiffs to require government defendants to subsidize their litigation costs. *See Johnson*, 339 F.3d at 598 (explaining that PLRA "simply reduces the extent to which defendants must underwrite prisoners' suits"). Thus, attorney's fees "shall not be awarded" to prevailing prisoners unless they show such fees were (1) "directly and reasonably incurred" in proving a violation of the prisoner's federal rights, 42 U.S.C. § 1997e(d)(1)(A); (2) are either "proportionately related to the court ordered relief" or "directly and reasonably incurred in enforcing the relief," § 1997e(d)(1)(B); (3) are no more than 150 percent of the damages, § 1997e(d)(2); and (4) are calculated based on an hourly rate of no more than 150 percent of the hourly rate established under the statute authorizing the appointment of federal public defenders, § 1997e(d)(3). At the same time, § 1997e(d) does not limit the total amount the attorney may "*receive* . . ., not only because the attorney is entitled to 25% of the judgment under

subsection (2) but also because the client is free under subsection (4) to agree by contract to pay more" out of the judgment or other assets. *Johnson*, 339 F.3d at 584 (emphasis in original).[3]

By contrast, petitioner's construction of § 1997e(d)(2) ignores Congress's mandate that a portion of the judgment "shall be applied to satisfy" the judgment. It also conflicts with the PLRA's purpose: instead of decreasing prisoner lawsuits, it creates fodder for additional litigation. Because the statute provides no guidelines for exercising discretion, courts following petitioner's approach must step in to fill that gap. For example, the Eighth Circuit has transplanted into the PLRA its multi-factor test for determining whether a prevailing ERISA plaintiff should receive any fees, even though the PLRA's purpose, unlike ERISA's, is to limit how much governments must subsidize prisoner litigation. *Kahle v. Leonard*, 563 F.3d 736, 743 (8th Cir. 2009). District courts in some cases have looked to a variety of other criteria, such as the nature of the right at issue, the egregiousness of the defendant's conduct, and a punitive damages award's intent to punish the defendant. *See*, *e.g.*, *Sutton v. Smith*, No. CIV. A. AW-98-2111, 2001 WL 743201, at *2 (D. Md. June 26, 2001) (applying $1 from $9,000 judgment based on defendant's "egregious conduct"); *Morrison v. Davis*, 88

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[3] The district court here deemed petitioner's separate fee agreement with his attorney irrelevant. Pet. App. 27a.

F. Supp. 2d 799, 811 (S.D. Ohio 2000) (applying $1 from $15,000 judgment in light of "significant violation of the Plaintiff's rights," "the constitutional rights implicated, and the jury's clear signal that the Defendants should be punished"), *amended in part on other grounds*, 195 F. Supp. 2d 1019 (S.D. Ohio 2001). And at least one district court applied 25% of the compensatory damages but none of the punitive damages. *Livingston v. Lee*, No. 9:04-CV-00607-JKS, 2007 WL 4440933, at *2 (N.D.N.Y. Dec. 17, 2007). This multiplicity of approaches illustrates the error of petitioner's interpretation, for in enacting the PLRA Congress aimed to discourage prisoner litigation, not to create additional issues for litigation after prisoners prevail.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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