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

REPLY BRIEF FOR PETITIONER

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Respondents acknowledge, as did the Court of Appeals below, that the circuits are divided on the question presented. Respondents instead argue: (1) that the circuits are split 2-1, not 4-1; (2) that the question arises infrequently; and (3) that the decision below is correct. Respondents are mistaken in all three respects.

First, there are four circuits, not two, that have interpreted the statute literally, to give district courts the discretion to apply any percentage of the judgment, "not to exceed 25 percent," toward attorney's fees. While respondents are correct that some of the circuits have not discussed the issue at great length, that is because it is so simple that extended discussion would be silly.

Second, the issue arises frequently—indeed, it arises every time a counseled prisoner wins damages under 42 U.S.C. § 1983.

Third, the decision below is contrary to both the text and the purpose of the statute. The statute provides that the portion of the judgment to be applied to attorney's fees is "not to exceed 25 percent." 42 U.S.C. § 1997e(d)(2). Congress could not have been any clearer in authorizing district courts to choose the appropriate percentage, so long as the percentage is no greater than 25 percent. This provision comes into play only after the prisoner has already won his lawsuit, so interpreting it literally will not encourage frivolous suits, as respondents profess to fear. The only effect of a literal interpretation will be

to deter the sort of egregious misconduct by prison guards that took place in this case.

I. The circuits are split 4-1.

Respondents concede (BIO 8) that the Third and Eighth Circuits disagree with the Seventh. *See Parker v. Conway*, 581 F.3d 198, 205 (3d Cir. 2009) ("The PLRA's 25-percent provision does not require a district court to apply 25 percent of the judgment to satisfy an attorney's fee award"); *id.* at 205-6 n.7 (expressly rejecting the Seventh Circuit's view); *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008) ("the phrase 'not to exceed 25 percent' clearly imposes a maximum, not a mandatory, percentage").

But respondents err in claiming (BIO 6-7) that the Second and Sixth Circuits do not also disagree with the Seventh. In *Shepherd v. Goord*, 662 F.3d 603, 607 (2d Cir. 2011), the Second Circuit observed that the statute "requires the district court to apply some part of the monetary judgment awarded to plaintiff, 'not to exceed 25 percent,' against any fee award." The Second Circuit accordingly affirmed an award of 10 percent. *Id.* at 610. While the issue was not litigated in *Shepherd* because the amount at stake was so small, *id.* at 604 n.1, the district courts in the Second Circuit, one explicitly relying on *Shepherd*, now understand that they have the authority to apply less than 25 percent of a judgment to satisfy attorney's fees. *See Houston v. Cotter*, 2017 WL 587178, *5 n.7 (E.D.N.Y. 2017) (applying a nominal $1 from a $5,000 judgment); *Berrian v. City of New York*, 2014 WL 6604641, *4 (S.D.N.Y. 2014) (relying on *Shepherd* and applying a nominal $1 from a $65,000

judgment); *Hernandez v. Goord*, 2014 WL 4058662, *13 (S.D.N.Y. 2014) (applying approximately 5 percent of the judgment).[1]

The Sixth Circuit likewise disagrees with the Seventh. In *King v. Zamaria*, 788 F.3d 207, 218 (6th Cir. 2015), the Sixth Circuit observed that "some courts have determined that requiring plaintiffs to pay as little as $1 in attorney fees from the judgment is appropriate." The Sixth Circuit then instructed the district court "to exercise its discretion to apply some percentage of the judgment, not to exceed 25 percent, to attorney fees." *Id.* Contrary to respondents' view (BIO 7), the issue was squarely presented in *King*, because the parties were disputing the lawfulness of the district court's apportionment of fees. *Id.* The district courts in the Sixth Circuit, before and after *King*, have exercised their discretion to apply less than 25% of the judgment. *See Kensu v. Buskirk*, 2016 WL 6465890, *5 (E.D. Mich. 2016) (applying 1% of the judgment); *Murphy v. Gilman*, 2008 WL 2139611, *2 (W.D. Mich. 2008) (applying a nominal $1 from a judgment of $2.75 million).

Respondents suggest (BIO 8) that "the reasoning in these cases" does not go on long enough to be "the kind of percolation that ought to precede the grant of certiorari." But this issue is so simple that no

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[1] As respondents note (BIO 6), a Magistrate Judge within the Second Circuit has asserted that *Shepherd* offers no guidance, *Sutton v. City of Yonkers*, 2017 WL 105022, *7 & n.9 (S.D.N.Y. 2017), but this portion of the Magistrate Judge's opinion was not adopted by the District Court, which determined that the PLRA did not even apply to the case. *Sutton v. City of Yonkers*, 2017 WL 1180918, *3-4 (S.D.N.Y. 2017).

lengthy reasoning is required. The question is whether the phrase "a portion of the judgment (not to exceed 25 percent) shall be applied" authorizes district courts to apply a portion of the judgment that is less than 25 percent. Of course it does. Until they start paying judges by the word, it would be astonishing to find an opinion that devotes more than a few sentences to this question.

Respondents are on no firmer ground in speculating (BIO 8) that the circuits on the majority side of the split will now revisit the issue en banc in light of the decision below. It is very unlikely that any circuit will abandon a literal and sensible interpretation of the statute for the Seventh's Circuit's view, which is contrary to the statute's text and purpose. It is far more likely that the Seventh Circuit will continue to stand alone until this Court intervenes.

II. This issue arises whenever a counseled prisoner wins damages in a section 1983 suit.

Respondents erroneously suggest (BIO 8-11) that the question presented arises infrequently. In fact, it arises in every case in which a counseled prisoner wins damages in a section 1983 suit. No one seems to know exactly how often that is. Based on one set of assumptions, we presented one estimate in our certiorari petition; respondents, using a different set of assumptions, offer a smaller estimate.[2] But the

[2] For what it's worth, respondents' lower figure appears to result primarily from a misinterpretation of Table 3 in Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 164 (2015). Using 2012 as

exact number does not matter much. Even on respondents' assumptions, the issue arises in more than 100 cases per year (BIO 10), which is plenty. The issue arises more frequently than most issues on which the Court grants certiorari.

Respondents further err in conflating (BIO 11) the frequency with which the issue arises with the number of district court opinions on Westlaw that address the issue. When prisoners win lawsuits, district courts almost certainly apportion attorney's fees without writing opinions in many cases. Even when district courts do write opinions, many never appear on Westlaw. No matter how one slices the available data, this issue arises every time a counseled prisoner wins damages in a section 1983 suit.

III. Respondents' view of the statute is contrary to its text and purpose.

The statute provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." 42 U.S.C. § 1997e(d)(2). Statutory text does not get any clearer than that. Some portion of the judgment must be applied to attorney's fees, and that portion cannot exceed 25 percent.

Respondents contend (BIO 12) that the statute "contains no discretion-triggering" language, but that is not so. By authorizing district courts to apply a portion of the judgment "not to exceed 25 percent,"

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an example, prisoners prevailed in 11.1% of judgments, which constituted 90.9% of terminations—an approximate 10% success rate in all suits. Respondents are counting only prisoner victories *at trial*, which is a much smaller number.

the statute plainly gives district courts the discretion to choose any percentage that does not exceed 25 percent. Respondents likewise err in suggesting (BIO 12-13) that the statute "instructs district courts to look first to the judgment to 'satisfy' the fee award." The statute says nothing of the kind. All it says is that some portion of the judgment, not to exceed 25 percent, should go toward the attorney's fees.

Most of respondents' merits argument (BIO 13-17) is understandably directed at the statute's purpose rather than its text. But respondents are mistaken here as well, for two reasons.

First, the purpose of the Prison Litigation Reform Act was not merely to deter frivolous suits. It was to "filter out the bad claims and facilitate consideration of the good." *Jones v. Bock*, 549 U.S. 199, 204 (2007). The particular provision at issue in our case applies only to meritorious suits. Before it can come into play, the prisoner must already have prevailed. Congress evidently intended to give District Courts some discretion to make defendants pay a greater share of the attorney's fees in egregious cases like ours, in which respondents administered such a savage beating that they crushed Charles Murphy's eye socket. To this day, six years after the beating, Murphy's vision remains doubled and blurred. A literal interpretation of the statute will not encourage frivolous suits, but perhaps it will deter similar misconduct by prison guards in the future.

Second, respondents profess to worry (BIO 16-17) that a literal interpretation of the statute will engender collateral litigation over the appropriate per-

centage of the judgment to be applied to attorney's fees. This worry is unfounded. District courts outside the Seventh Circuit have been exercising the discretion conferred by section 1997e(d)(2) for more than two decades now, without experiencing any burden. By the time the district court apportions the attorney's fees, the court has already presided over the case from start to finish, so the court knows everything it needs to know. No collateral litigation is required.

Of course, even if respondents' policy concerns were well founded, they could not override the plain text of the statute. The Seventh Circuit's non-literal interpretation denies district courts the discretion Congress intended them to have, and leaves prisoners whose constitutional rights have been violated with smaller net recoveries than Congress intended them to receive.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the decision below is so clearly wrong, the Court may wish to reverse summarily. In the alternative, the case should be set for argument.

Respectfully submitted,

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