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 OF *AMICI CURIAE* RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AND UPTOWN PEOPLE'S LAW CENTER IN SUPPORT OF PETITIONER

ALAN MILLS
UPTOWN PEOPLE'S
LAW CENTER
4413 North Sheridan
Road
Chicago, IL 60640
(773) 769-1411
uplc@uplcchicago.org

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0711
david.shapiro@
law.northwestern.edu

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at the Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

The Uptown People's Law Center is a not-for-profit legal clinic founded in 1975. In addition to providing legal representation, advocacy, and education for poor and working people in Chicago, the Uptown People's Law Center also provides legal assistance to people housed in Illinois prisons in cases related to their confinement. The Uptown People's Law Center has provided direct representation to over 100 prisoners, and currently has nine class action or putative class

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of amici curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

action cases pending relating to the civil rights of people confined in Illinois prisons.

SUMMARY OF ARGUMENT

This case affects the ability of men and women to recover a full measure of damages for injuries they suffer while incarcerated. Less obviously, however, the question presented also affects an attorney's compensation—and consequently, plaintiffs' access to counsel in civil rights cases challenging prison conditions. Slashing incentives for attorneys to take prisoners' rights cases—which the Court of Appeals did here by interpreting a statute to mean the opposite of what it says—ultimately curtails prisoners' access to counsel.

Retainer agreements in prisoners' rights cases often provide for an attorney who prevails for her client to recover a share of the damages award in addition to the statutory fees. Thus, the more a court reduces the damages award to cover statutory fees under 42 U.S.C. § 1997e(d)(2), the more the attorney's overall compensation declines, and the less attractive prisoners' rights cases become to attorneys in the future. For that reason, the Seventh Circuit's rule that a court must reduce the damages award by 25% to offset statutory fees in prison conditions cases has the ultimate effect of curtailing prisoners' access to counsel. This Court should grant certiorari not only because the Seventh Circuit's interpretation of the statute is incorrect for the reasons stated in the Petition, but also because the ruling below, if allowed

to stand, will diminish prisoners' ability to secure representation in future cases.

This Court has long recognized that access to counsel for indigent parties promotes the fair and orderly administration of justice. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). Prisoners, however, must go it alone an astounding 95% of the time in civil rights cases, a figure that dwarfs the usual rate in federal civil cases.

Not only are prisoners forced to litigate without counsel at an extremely high rate, but they face special obstacles that exacerbate the disadvantages of pro se representation. Prisoners are often illiterate, they cannot conduct a complete factual investigation and interview witnesses while locked up, and they frequently cannot afford litigation costs, such as court reporter and expert witness fees.

ARGUMENT

I. Among All Litigants, Prisoners Challenging the Conditions of Their Confinement Have the Worst Chances of Securing Representation.

Prisoners in civil rights cases represent themselves at a higher rate than any other category of litigant—nearly 95% of the time, as of 2012. Margo Schlanger, *Trends in Prisoner Litigation as the PLRA enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 167 (2015). That proportion exceeds the pro se rate for civil

cases litigated in federal court generally—which is 26%—by an enormous margin. *Id.*

Federal court appointment of counsel in prisoner civil rights cases is "quite rare, which makes sense given that courts can neither compel counsel to serve nor compensate them for their service." Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1612 (2003). That leaves most prisoner civil rights cases to the private bar, but the average prison conditions case is economically unattractive to attorneys attempting to secure an income through contingent fees. In 2012, for example, the average damages awarded for a prison conditions case successfully litigated to judgment was $20,815, and the total damages recovered in prison conditions cases brought by prisoners was just above $1,000,000 nationwide. Schlanger, *Trends in Prisoner Litigation*, at 166.

Nor can prisoners obtain representation through federally-funded Legal Services Corporations (LSCs) because of a 1996 law that forbids such organizations from representing prisoners. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(15), 110 Stat. 1321 (1996). In 1995, the year before that ban went into effect, LSCs had provided counsel in over 10,000 inmate matters. Schlanger*, Inmate Litigation*, 1632.

II. Justice Depends on the Very Thing Prisoners Almost Never Get: Access to Counsel.

Granting poor people access to counsel is "fundamental and essential to fair trials," *Gideon*, 372 U.S. at 344, in part because "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of R.R. Trainmen*, 377 U.S. at 7. As Justice Breyer has observed, "[n]o one believes that a democracy's legal system can work effectively while reserving its benefits exclusively for those who are more affluent. We often debate who should provide those services, government or the private sector, but few deny that they should be provided." Stephen Breyer, Assoc. Justice, Supreme Court of the United States, Gauer Distinguished Lecture in Law and Public Policy: The Legal Profession & Public Service (Sept. 12, 2000).

Limited access to counsel undermines the fair administration of justice in American courts. Nearly a century ago, Chief Justice William Howard Taft declared, "[w]e must make it so that a poor man will have as nearly as possible an equal opportunity in litigating as the rich man." *See* American Federation of Labor, Report of Proceedings of the Forty-Second Annual Convention (June 12-24, 1922), at 387. But today, "[n]early one million low-income Americans are denied help from legal aid providers every year because of insufficient funding resources." Lauren Sudeall Lucas, *Deconstructing the Right to Counsel*,

Issue Brief, American Constitution Society (July 2014), at 1.

As Justice Ginsburg has noted, the United States lags behind other affluent democracies in funding for non-profit legal representation:

> Public funding for the legal representation of poor people in the United States is hardly generous . . . In civil cases, the combined legal services spending of U.S. local, state, and federal government agencies is, per capita, far below that of the governments of other democracies. In the 1990s, U.S. per capita government spending on civil legal services for poor people ranged around $2.25. New Zealand's government spent three times as much, per capita, funding legal aid in civil matters; the Netherlands, four times as much; and England, with a per capita outlay of $26, exceeded U.S. spending more than elevenfold.

Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the United States, Joseph L. Rauh Lecture at the University of the District of Columbia David A. Clarke School of Law: In Pursuit of Public Good: Lawyers Who Care (April 9, 2001).

Limited access to counsel can also undermine the orderly progression of litigation. "[E]very trial judge knows the task of determining the correct legal outcome is rendered almost impossible without

effective counsel." Robert Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 505 (1998). Thus, access to counsel for poor people "result[s] in greater judicial efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or unprepared litigants." *See* AM. BAR ASS'N, ABA TOOLKIT FOR A RIGHT TO COUNSEL IN CIVIL PROCEEDINGS 8 (2010).

III. Prisoners Face Even Greater Obstacles Than Other Laypeople When They Litigate Cases Without Counsel.

"[I]t is far more difficult for a prisoner to write a detailed complaint than for a free person to do so, and again this is not because the prisoner does not know the law but because he is not able to investigate before filing suit." *Billman v. Indiana Dept. of Corr.*, 56 F.3d 785, 790 (7th Cir. 1995) (Posner, J.). Thus, prisoners not only fare the worst in getting counsel—they also fare the worst when forced to proceed without counsel.

Literacy rates, which are lower among prisoners than non-prisoners, contribute to the difficulty of navigating the legal system without a lawyer. Andrea Amodeo et al., *Preparing for Life Beyond Prison Walls: The Literacy of Incarcerated Adults Near Release*, American Institutes for Research 7 (2010) ("Incarcerated adults had lower mean prose and quantitative literacy scores than adults in the household population.").

That said, "illiteracy is actually the least of an inmate plaintiff's problems." Schlanger, *Inmate Litigation*, 1611. Professor Schlanger elaborates:

> Inmates are unable to conduct most kinds of informal investigations; they cannot interview most witnesses, for example. And they cannot conduct effective discovery either, in part because of lack of legal skills and in part because prisons and judges are extremely nervous about sharing information with prisoners. Even in a very strong case, inmates have no cash and little access to credit, so they cannot fund litigation expenses (for example, deposition costs or expert fees) on the expectation of an eventual judgment or settlement.

Id. 1611-12.

Empirical evidence confirms that prisoners face major disadvantages when litigating cases pro se. A review of prisoner civil rights cases concluded in 2000 revealed that "counseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff's victory at trial." *Id.* at 1610.

* * *

Access to counsel in prisoners' rights cases is bleak. Prisoners need counsel, they need it badly, and most of the time they cannot get it because their cases are not worth a lot of money. The opinion below exacerbates the problem, and does so in defiance of the plain language of the relevant statute. The Court

should grant certiorari not only because the lower court's decision is wrong, but because it is wrong in a way that harms access to counsel and the equitable administration of justice.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

DAVID M. SHAPIRO*
RODERICK AND SOLANGE MACARTHUR
JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

ALAN MILLS
UPTOWN PEOPLE'S LAW CENTER
4413 North Sheridan Road
Chicago, IL 60640
(773) 769-1411
uplc@uplcchicago.org

Counsel for Amici Curiae

April 3, 2017 *Counsel of Record