No. 08-7683

In the Supreme Court of the United States

RODNEY M. PATTON, PETITIONER

v.

WILVIS HARRIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Under the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Tit. VIII, 110 Stat. 1321-66, prisoner litigants must pay the full amount of all court filing fees; for prisoners, a grant of *in forma pauperis* (IFP) status simply permits the prisoner to pay the filing fees in installments rather than up front. The question presented is whether a prisoner who files a notice of appeal remains liable for the full amount of the appellate filing fees if the court of appeals determines that he is ineligible to proceed IFP and dismisses the appeal for failure to pay the fees in a timely fashion.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The general rule in federal court is that litigants must pay certain fees upon filing either a new civil action or a notice of appeal. See 28 U.S.C. 1913, 1914(a), 1917; Fed. R. App. P. 3(e). However, 28 U.S.C. 1915(a)(1) creates an exception to that rule. It provides that a court generally may allow a litigant to proceed "without prepayment of fees or security therefor" if the litigant submits an affidavit setting forth his assets and stating that he is unable to pay the relevant fees.

2. In 1996, Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, Tit.

VIII, 110 Stat. 1321-66. The PLRA contained a number of provisions designed to "discourage prisoners from filing claims that are unlikely to succeed," *Crawford-El* v. *Britton*, 523 U.S. 574, 596 (1998), and it made two changes to Section 1915 that are particularly relevant here.

First, the PLRA redefined what it means for a prisoner to proceed *in forma pauperis* (IFP). Post-PLRA, even prisoners who are granted IFP status are required "to pay the full amount of" the relevant filing fees. 28 U.S.C. 1915(b)(1); accord *Crawford-El*, 523 U.S. at 596 (noting that the PLRA "requires all inmates to pay filing fees"). For prisoners, the benefit of IFP status now involves only the *timing* of the required payments. A prisoner who is permitted to proceed IFP may pay the fees in monthly installments that are calculated using a statutory formula. See 28 U.S.C. 1915(b)(1)-(3). In contrast, a prisoner whose request for IFP status is denied must, like any non-prisoner litigant who is not proceeding IFP, pay all filing fees up front.

Second, the PLRA enacted a new "three strikes" provision that "denies *in forma pauperis* status to" certain prisoners who have abused the judicial process. *Craword-El*, 523 U.S. at 596. Section 1915(g) provides that "in no event shall" IFP status be granted to a prisoner who has brought "3 or more * * * action[s] or appeal[s]" in federal court that were "dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. 1915(g).

3. Petitioner, a repeat litigant, is incarcerated at the Stateville Correctional Center in Illinois. Pet. App. 6. On April 7, 2008, he filed a complaint in federal district

court, alleging that five state correctional officials had violated his rights under the First and Fourteenth Amendments. Br. in Opp. App. 1a-13a. Petitioner also filed a motion to proceed IFP. *Id.* at 24a-28a.

4. a. The district court *sua sponte* dismissed petitioner's complaint. In an initial memorandum order dated April 10, 2008, the court described petitioner as "scarcely a stranger to the federal courts," noting that he had filed at least seven previous lawsuits, as well as an eighth suit that was still pending. Pet. App. 3.[1] The court determined that petitioner had at least two strikes for purposes of 28 U.S.C. 1915(g). Pet. App. 4. The court also identified a potential third strike, and observed that, if petitioner had three strikes, that fact "alone would call for a dismissal of the Complaint and this action" absent prompt payment of the full amount of the relevant filing fees. *Ibid.*

The district court did not, however, rely on Section 1915(g) in its initial order. Instead, given "the possibility that" petitioner did not yet have a third strike, the district court pre-screened the complaint as required by 28 U.S.C. 1915A. Pet. App. 4. That provision, also added by the PLRA, instructs district courts to "review * * * as soon as practical" any prisoner-filed complaint that "seeks redress from a governmental entity or officer or employee of a governmental entity" and "dismiss the complaint" if it "is frivolous, malicious, or fails to state a claim upon which relief may be granted" or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. 1915A(a), (b)(1) and (2). The district court dismissed petitioner's complaint for

[1] The district court also observed that petitioner had not "compli[ed] with his obligations to pay * * * filing fees" in previous cases. Pet. App. 5 n.4.

failure to state a claim. Pet. App. 4-5. The court also observed that its order constituted another strike, and that petitioner "has now attained the three-strike level under any view of the matter." *Id.* at 5.

b. Petitioner filed a motion asking the district court to reconsider its April 10, 2008 order, which the district court denied. Pet. App. 9-10. The court stated that it previously had given petitioner "the benefit of * * * considerable doubt by going on * * * to discuss the substance of his then-tendered Complaint, rather than simply invoking" the three-strikes provision. *Ibid.* (footnote omitted). But, having "given full consideration to the latter question," the district court concluded that petitioner "ha[d] accumulated three 'strikes' before he sought to file this action" and that petitioner thus "cannot proceed with the current action unless he first pays the $350 [district-court] filing fee[s] in full." *Id.* at 10. Because petitioner had not paid the fees, the district court denied his motion for reconsideration. *Ibid.*

5. a. On May 9, 2008, petitioner filed with the district court both a notice of appeal from the district court's original April 10, 2008 decision and an accompanying "Motion to Continue as a Poor Person." Pet. App. 11; see Fed. R. App. P. 3(a)(1) (providing that a notice of appeal must be filed "with the district clerk"); Fed. R. App. P. 24(a)(1) ("a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court"). On May 13, 2008, the district court denied that motion. Pet. App. 11-12. The court observed that petitioner had "fail[ed] to tender the type of documentation that is required for any such in forma pauperis request." *Id.* at 11; see 28 U.S.C. 1915(a)(1) and (2) (describing required documents). The court also cited its previous determination that petitioner had "ac-

cumulated three 'strikes' * * * before he sought to file this action in the District Court," which rendered petitioner ineligible for IFP status on appeal. Pet. App. 11.

b. Petitioner next filed with the court of appeals a pro se motion to proceed IFP on appeal. See 08-2175 Docket entry No. 6 (7th Cir. May 22, 2008); see also Fed. R. App. P. 24(a)(5) (providing that a litigant whose motion to proceed IFP on appeal is denied by the district court may renew the motion with the court of appeals). On August 20, 2008, the court of appeals issued an unpublished per curiam order denying that motion. Pet. App. 1. Like the district court, the court of appeals determined that petitioner "is not permitted to proceed in forma pauperis under 28 U.S.C. § 1915(g)," the "three strikes" provision. *Ibid.*[2] The court of appeals stated that petitioner "shall pay the required docketing fee within 14 days, or else this appeal will be dismissed for failure to prosecute pursuant to Circuit Rule 3(b). *See Newlin v. Helman*, 123 F.3d 429, 434 (7th Cir. 1997)." Pet. App. 1; see 7th Cir. R. 3(b) ("If a proceeding is

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[2] The Seventh Circuit's August 20, 2008 order also states that the district court "certif[ied] that the appeal was filed in bad faith." Pet. App. 1; see 28 U.S.C. 1915(a)(3) ("An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."). That statement appears to have been incorrect: the district court's May 13, 2008 order neither cited Section 1915(a)(3) nor made any express finding about petitioner's lack of good faith. See Pet. App. 11-12.

This potential discrepancy is not material to the resolution of the case. As noted in the text, the court of appeals found that Section 1915(g) barred petitioner from proceeding IFP on appeal, and petitioner does not contest that finding. See Pet. 2 (acknowledging that petitioner "is subject to the 'three strikes rule.'"). It is thus immaterial whether petitioner was barred from proceeding IFP for some other reason as well.

docketed without prepayment of the docketing fee, the appellant shall pay the fee within 14 days after docketing. If the appellant fails to do so, the clerk is authorized to dismiss the appeal.").

c. Petitioner did not make payment within 14 days as required by the Seventh Circuit's August 20, 2008 order. Pet. App. 2. On September 10, 2008, the court of appeals issued an unpublished per curiam order that dismissed petitioner's appeal "for failure to pay the required docketing fee." *Ibid.* The Seventh Circuit "FURTHER ORDERED that [petitioner] pay the appellate fee of $455.00 to the clerk of the district court," and stated that "[t]he clerk of the district court shall collect the appellate fees from the prisoner's trust fund account using the mechanism of Section 1915(b)." *Ibid.* (emphasis omitted).[3] As support for its collection order, the Seventh Circuit again cited its decision in *Newlin* v. *Helman*, 123 F.3d 429 (1997), cert. denied, 522 U.S. 1054 (1998). *Ibid.*

In *Newlin*, Judge Easterbrook, writing for a unanimous Seventh Circuit panel, resolved "a series of questions about payment" of filing fees under the PLRA. 123 F.3d at 433. *Newlin* specifically addressed the situation presented by a prisoner who is denied leave to proceed IFP on appeal. Because such a prisoner is not entitled to "defer payment of the appellate fees," *Newlin* ex-

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[3] On February 8, 2006, Congress enacted a provision stating that the "fee for docketing a case on appeal or review * * * in a court of appeals * * * shall be increased to $450." Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 10001(b), 120 Stat. 183. Section 1917 of Title 28, United States Code, further provides that "[u]pon the filing of any separate or joint notice of appeal * * * or upon the receipt of any order allowing * * * an appeal or * * * a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner."

plained, "he must pay them in full immediately" or "his appeal will be dismissed for failure to pay the fees." *Id.* at 434. But *Newlin* also held that, "[w]hether or not the appeal is dismissed," the prisoner remains legally obligated to pay the full amount of the fees, and the court of appeals stated that it would "rely on the clerks of the district courts" to collect the fees "from the prisoner's trust account using the mechanism of § 1915(b)." *Ibid.*

DISCUSSION

Petitioner contends (at 3-4) that this Court should grant certiorari to decide whether a prisoner who is denied leave to proceed IFP on appeal may avoid any obligation to pay the fees associated with filing a notice of appeal by failing to pay the fees and permitting his appeal to be dismissed as a consequence of that non-payment.[4] The petition for a writ of certiorari should be denied. The Seventh Circuit correctly resolved the question of statutory construction at issue here, and three of the four other circuits that have considered it have reached the same conclusion. The D.C. Circuit has taken a different view. But that lopsided conflict is of limited practical significance, and this petition for a writ of certiorari would be an unsuitable vehicle for resolving the conflict in any event.

A. The Seventh Circuit's Interpretation Of The PLRA Is Correct

The Seventh Circuit has correctly held that, under the PLRA, a prisoner who files a notice of appeal "irrevocably incurs an obligation to pay the" relevant appel-

[4] Petitioner raises no question about whether the Seventh Circuit properly calculated the amount of the relevant fees in this case. See note 3, *supra*.

late filing fees. *Newlin* v. *Helman*, 123 F.3d 429, 433 (1997) (Easterbrook, J.), cert. denied, 522 U.S. 1054 (1998). Federal Rule of Appellate Procedure 3(e) provides that the duty to pay "all required fees" arises "[u]pon filing a notice of appeal." No fees are "required" of a non-prisoner litigant who is granted leave to proceed IFP. See 28 U.S.C. 1915(a). But the PLRA makes clear that even "a prisoner [who] brings a civil action or files an appeal in forma pauperis * * * shall be required to pay the full amount of a filing fee." 28 U.S.C. 1915(b)(1). The only difference between a prisoner whose request for IFP status is granted and one whose request is denied is that the former may defer full payment without jeopardizing his ability to maintain the action or appeal. See 28 U.S.C. 1915(b)(2)-(4). Because a prisoner's "obligation [to pay the relevant fees in full] is incurred by filing a notice of appeal," that obligation "cannot be avoided by dismissing the appeal [after IFP status is denied], or by failing to pay when the fees are due." *Newlin*, 123 F.3d at 434.

The legislative history leads to the same conclusion. The PLRA's supporters described its purpose as stemming "the flood of frivolous lawsuits brought by inmates," 141 Cong. Rec. 26,553 (1995) (statement of Sen. Hatch), and they recognized that a major cause of that "flood" was that prisoners had few (if any) reasons to refrain from filing meritless suits and appeals.[5] The PLRA's filing-fee provisions were intended to create an

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[5] See, *e.g.*, 142 Cong. Rec. 8237 (1996) (statement of Sen. Abraham) ("Under current law, there is no cost to prisoners for filing an infinite number of such suits."); 141 Cong. Rec. at 26,553 (statement of Sen. Kyl) ("Today's system seems to encourage prisoners to file with impunity. After all, it's free."); *id.* at 26,548 (statement of Sen. Dole) (indigent prisoners had "no economic disincentive to going to court").

up-front disincentive to such filings by exposing "prisoners to the same financial risks and considerations faced by other litigants." *In re Alea*, 286 F.3d 378, 380 (6th Cir.), cert. denied, 537 U.S. 895 (2002).[6] In contrast, petitioner's proposed rule would absolve an entire category of prisoner litigants—those who file a notice of appeal and a motion to proceed IFP that ultimately is denied—from any financial responsibility for having initiated even the most meritless appeals.

What is more, petitioner's approach would produce an especially "bizarre result." *Leonard* v. *Lacy*, 88 F.3d 181, 184 (2d Cir. 1996). There is no question that a prisoner who is granted IFP status on appeal must, over time, pay the full amount of the relevant filing fees, see 28 U.S.C. 1915(b)(1), and must do so "regardless of whether the appeal is later dismissed." *Williams* v. *Roberts*, 116 F.3d 1126, 1128 (5th Cir. 1997); accord *Thurman* v. *Gramley*, 97 F.3d 185, 187 (7th Cir. 1996). A prisoner may be denied IFP status because he is covered by the three-strikes bar, see 28 U.S.C. 1915(g), or because the appeal was "not taken in good faith," 28 U.S.C. 1915(a)(3).[7] Under petitioner's proposed inter-

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[6] See, *e.g.*, 142 Cong. Rec. at 8237 (statement of Sen. Abraham) (PLRA would "create disincentives for prisoners to file frivolous suits" by, *inter alia*, "requir[ing] inmates who file lawsuits to pay the full amount of their court fees and other costs"); 141 Cong. Rec. at 27,044 (statement of Sen. Reid) ("We need to make sure that the prisoners, when they file these lawsuits, they pay. There is no reason they should get the legal docket free."); *id.* at 26,548 (statement of Sen. Dole) ("[W]hen prisoners know that they will have to pay these costs—perhaps not at the time of filing, but eventually—they will be less inclined to file a lawsuit in the first place.").

[7] Section 1915(a)(3) predates the PLRA. The Sixth Circuit has concluded that the PLRA's enactment rendered Section 1915(a)(3) inapplicable to prisoners. See *McGore* v. *Wrigglesworth*, 114 F.3d 601,

pretation, therefore, the only appeals that "would escape effective collection" of the filing fees would include those filed by the most litigious prisoners and "the weakest, most malicious appeals." *Newlin*, 123 F.3d at 434. "That would not be a plausible understanding" of a statute whose aim was to curb abusive prisoner litigation. *Ibid.*; accord *Alea*, 286 F.3d at 382; *Leonard*, 88 F.3d at 184.

Petitioner contends (Pet. 4) that "when an appeal does not go forward, requiring the prisoner to pay the filing fee is more in the nature of a penalty than a user fee." As this case demonstrates, even a suit that ultimately is dismissed for failure to pay the required fees may "require a considerable amount of time and effort" by courts and court staff. *Alea*, 286 F.3d at 382. And there is nothing unfair about requiring all prisoners to pay the filing fees, regardless of whether their appeals go forward. "A solvent litigant must pay the filing and docketing fees" up front, and a later dismissal of the appeal "does not lead the court to refund the appellant's money." *Thurman*, 97 F.3d at 187. Accordingly, "[e]very fee-paying litigant who files a lawsuit or takes an appeal accepts the risk that the complaint or appeal may be determined to be frivolous, in which event the complaint or appeal will be dismissed and the filing fee will be lost." *Leonard*, 88 F.3d at 185. The rule applied

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610-611 (1997). Other circuits have rejected that view. *Henderson* v. *Norris*, 129 F.3d 481, 484 (8th Cir. 1997); *Wooten* v. *District of Columbia Metro. Police Dep't*, 129 F.3d 206, 207 (D.C. Cir. 1997); *Newlin*, 123 F.3d at 432; *Baugh* v. *Taylor*, 117 F.3d 197, 199-200 (5th Cir. 1997). That disagreement is not relevant here, however, because the courts below concluded (Pet. App. 1, 11) and petitioner acknowledges (Pet. 2) that he is ineligible for IFP status under a different provision, 28 U.S.C. 1915(g).

by the Seventh Circuit in this case thus exposes prisoner litigants to the same risks as those faced by any other fee-paying litigant.[8]

It is true that strict enforcement of the PLRA's filing-fee provisions may produce harsh results in some cases. Cf. *Henderson* v. *Norris*, 129 F.3d 481, 484 (8th Cir. 1997) (per curiam) (directing district courts to notify prisoners whose actions are dismissed that "the filing of a notice of appeal by the prisoner makes the prisoner liable for payment of the full * * * appellate filing fees regardless of the outcome of the appeal"). But the court of appeals' decision in this case worked no unfairness to petitioner. Even if it would be unreasonable to charge all prisoner litigants with detailed knowledge of the PLRA, petitioner is "scarcely a stranger to the federal courts." Pet. App. 3. Petitioner has not alleged that he was unfamiliar with the Seventh Circuit's then more than ten-year-old decision in *Newlin* when he filed his notice of appeal, nor has he denied knowing that he had, "on 3 or more prior occasions * * * brought an action or appeal * * * that was dismissed on the grounds that it [was] frivolous, malicious, or fail[ed] to state a claim," 28 U.S.C. 1915(g).

B. The Conflict In The Circuits Is Narrow

1. The majority of other circuits that have considered the question at issue here agree with the Seventh Circuit. As petitioner acknowledges (Pet. 3), the Second, Sixth, and Eighth Circuits all have held that a prisoner's "obligation to pay the [appellate] filing fee[s]" is

[8] This case raises no question about whether a non-prisoner party who files a notice of appeal and whose request for IFP status later is denied must pay the filing fees even if he chooses not to pursue the appeal.

triggered when the prisoner files a notice of appeal and that "[t]he subsequent dismissal of the action * * * for failure to pay th[ose] fee[s] does not negate or nullify the litigant's continuing obligation to pay the fee[s] in full." *Alea*, 286 F.3d at 381; accord *Henderson*, 129 F.3d at 483; *Leonard*, 88 F.3d at 184.

2. Petitioner asserts (Pet. 3) that four other circuits "do not require a prisoner denied leave to appeal in forma pauperis to pay the docketing fee." Although there is a conflict in the circuits, petitioner substantially overstates its scope; the division in the circuits is actually four to one in favor of the Seventh Circuit's reasoning below.

a. In *Smith* v. *District of Columbia*, 182 F.3d 25 (1999), the D.C. Circuit held that a prisoner who files a notice of appeal and whose request for IFP status later is denied is not liable for the amount of the appellate filing fees unless he chooses to go forward with the appeal. *Id.* at 29-30. For the reasons explained above, that holding is incorrect, and none of the reasons given in *Smith* calls that conclusion into doubt.

First, *Smith* invoked the D.C. Circuit's own past "practice" of not requiring payment when a prisoner abandons his appeal. 182 F.3d at 29. Prior circuit practice cannot legitimize a departure from the text of the governing federal statutes and rules.

Second, the D.C. Circuit relied on a purported textual difference between two provisions of 28 U.S.C. 1915. According to *Smith*, Subsection (b)(1) "imposes fee liability when 'a prisoner brings a civil action or files an appeal in forma pauperis,'" whereas Subsection (a)(2) "requires a prisoner to file an affidavit of poverty and certified copy of his prison trust fund account whenever '*seeking* to bring a civil action or appeal a judgment in a

civil action' *in forma pauperis*." 182 F.3d at 29. *Smith* stated that although a prisoner who files a notice of appeal and a request for IFP status "is clearly *seeking* to proceed *in forma pauperis*," it would "not treat [the prisoner] as having 'filed an appeal in forma pauperis' when he has not been granted *in forma pauperis* status and his appeal has not been considered." *Ibid.*

The D.C. Circuit's analysis, however, rests on an inaccurate paraphrase of Subsection (a)(2). If the PLRA used the phrase "*files an appeal* in forma pauperis" in close juxtaposition with the phrase "*seeking to* * * * appeal a judgment in forma pauperis," that contrast might support an inference that the two provisions described different stages of the litigation process. That inference, in turn, might be thought to support the further inference that a prisoner should not be deemed to have "br[ought] a civil action or file[d] an appeal in forma pauperis" for purposes of Subsection (b)(1) until after the prisoner's request for IFP status has been *granted*. See *Smith*, 182 F.3d at 29.

The flaw in the D.C. Circuit's analysis, however, is that this is not how the statute reads. The D.C. Circuit is correct that Subsection (b)(1) states that a prisoner who "brings a civil action or files an appeal in forma pauperis * * * shall be required to pay the full amount of a filing fee." 28 U.S.C. 1915(b)(1). Subsection (a)(2), in contrast, provides that "[a] prisoner" who is "seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor" must file certain documents with the court. 28 U.S.C. 1915(a)(2). Accordingly, not only do the two provisions address entirely different issues, but also the parallel structure upon which the D.C. Circuit's analysis was premised does not actually exist. And, for

the reasons explained above, "[t]he phrase 'brings a civil action or files an appeal in forma pauperis'" in Subsection (b)(1) is best "read to include both prisoners who have been granted i.f.p. status and those who seek such status." *Leonard*, 88 F.3d at 184.

Third, *Smith* stated that "requiring prisoners to pay the full fees [even though their appeal is not considered] would create either administrative difficulty or an incentive for the prisoners to continue to pursue their appeals" notwithstanding the denial of their request for IFP status. 182 F.3d at 30. With respect to a prisoner who lacks "sufficient funds to pay the fees," *Smith* reasoned that "requiring immediate payment in full would result primarily in an ongoing collection effort for the office of the clerk." *Ibid.* In contrast, *Smith* stated that if "a prisoner was able to pay the fees in full, our requiring him to do so whether or not he proceeded with his appeal would leave him no disincentive to proceeding." *Ibid.*

These practical considerations likewise cannot justify the D.C. Circuit's rule. To be sure, the process of collecting fees from a prisoner who has allowed his appeal to be dismissed can create logistical challenges, and the courts of appeals have adopted various approaches for addressing them.[9] But this petition for a writ of certio-

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[9] Compare *Newlin*, 123 F.3d at 434, with *Henderson*, 129 F.3d at 484 (instructing district courts to inform prisoners whose civil actions are dismissed that "by filing a notice of appeal the prisoner consents to the deduction of [an] initial partial appellate filing fee and the remaining installments from the prisoner's prison account by prison officials"), and *Leonard*, 88 F.3d at 187 & n.3 (requiring every prisoner who files a notice of appeal to submit "a signed statement authorizing the agency holding the prisoner * * * to calculate and disburse funds from the prison account" and providing a sample form).

rari provides no opportunity for the Court to determine whether the PLRA requires any particular approach to collection, and concerns about either *ex ante* incentives or *ex post* collection provide no justification for releasing prisoners from an obligation imposed by Congress. In addition, the D.C. Circuit's analysis of the relevant incentives overlooks the flaw in its own approach: it provides prisoners with no *ex ante* incentives against filing even completely meritless appeals, so long as the notice of appeal is accompanied by an equally meritless request to proceed IFP on appeal.

b. The remaining decisions did not consider the question presented here. Each of those decisions first rejected some other claim about the PLRA and held that the prisoner litigant was not eligible to proceed IFP. Then—like the Seventh Circuits's first order in this case—those decisions observed that, because the prisoner was ineligible for IFP status, the case could not go forward *unless* the prisoner paid all of the relevant filing fees up front. See Pet. App. 1 ("Appellant shall pay the required docketing fees, or else this appeal will be dismissed[.]"). Petitioner did not pay the fees and his appeal was dismissed as a result. See *id.* at 2. Accordingly, this petition for a writ of certiorari raises a separate and subsequently arising question: Whether a prisoner who fails to pay the filing fees within the time necessary to preserve his appeal remain obligated to pay the fees, at least in installments, notwithstanding the dismissal of the appeal. See *Newlin*, 123 F.3d at 434 (distinguishing between whether a prisoner pays the fees in a sufficiently timely fashion to avoid dismissal and whether the prisoner is obligated to pay the fees notwithstanding such a dismissal). Other than the D.C. Circuit's decision in *Smith*, the decisions on which peti-

tioner relies do not address, much less purport to resolve, that issue.

In *Keener* v. *Pennsylvania Board of Probation & Parole*, 128 F.3d 143 (3d Cir. 1997) (per curiam), the district court denied Keener's motion to proceed IFP because it concluded that he had three strikes. *Id.* at 144. Keener appealed and sought IFP status, arguing that actions dismissed before the PLRA's enactment could not be counted. *Ibid.* The Third Circuit rejected that argument on the merits. *Id.* at 144-145. In the last sentence of its opinion, the court also "den[ied] Keener's motion to proceed *in forma pauperis*, and dismiss[ed] the appeal without prejudice to Keener's right to reinstitute his action in the district court upon payment of full docketing fees." *Id.* at 145.

The Fifth Circuit's decision in *Baños* v. *O'Guin*, 144 F.3d 883 (1998) (per curiam), considered the meaning of 28 U.S.C. 1915(g)'s final clause, which provides that even a prisoner who has three strikes may be granted IFP status if he "is under imminent danger of serious physical injury." The Fifth Circuit concluded that Baños did not satisfy that standard and thus was "not entitled to proceed with this appeal IFP." *Baños*, 144 F.3d at 885. The court revoked Baños's "IFP status and dismiss[ed] his appeal," but stated that "[t]he appeal may be reinstated if Baños pays the appeal fees within thirty days of this dismissal." *Ibid.*

Petitioner also cites *Rodriguez* v. *Cook*, 169 F.3d 1176 (9th Cir. 1999), which rejected various constitutional challenges to Section 1915(g)'s three-strikes rule. *Id.* at 1179-1182. There was no question that Rodriguez had more than three strikes, and he made no allegation that he satisfied the clause discussed in *Baños*. *Id.* at 1178. Accordingly, the Ninth Circuit determined that

Rodriguez was ineligible for IFP status and dismissed his appeal for failure to pay the filing fees. *Id.* at 1178, 1182. The court specified that its dismissal was "without prejudice" and that "Rodriguez may resume this appeal upon prepaying the filing fee." *Id.* at 1182. Like *Keener* and *Baños,* however, *Rodriguez* never considered, much less resolved, whether the prisoner would still be obligated to pay the fee, at least over time, whether or not he choose to go forward with the appeal. Cf. *Newlin*, 123 F.3d at 434 (stating that "[w]hether or not the appeal is dismissed" for failure to pay the fee in a timely fashion, the prisoner still "*owes* $105 to the United States").

C. The Narrow Conflict Does Not Warrant This Court's Review

As the previous Section explained, there is a four-to-one division among the courts of appeals about the question on which petitioner seeks review. That lopsided conflict does not merit the Court's intervention at this time.

1. The existing conflict has little real-world significance. As noted, the outlier is the D.C. Circuit. Statistics compiled by the Administrative Office of United States Courts (AO) show that the D.C. Circuit hears approximately 1.4% of all non-habeas litigation brought by prisoners (the lowest of any circuit) and less than 5% of all non-habeas litigation brought by prisoners against federal defendants.[10]

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[10] The relevant statistics are contained in Table B-7 of the Administrative Office of the U.S. Courts, *2008 Annual Report of the Director: Judicial Business of the United States Courts* 123-124 (2009), which was prepared by the Statistics Division of the AO's Office of Judges Programs and is available at <http://www.uscourts.gov/judbus2008/

2. This case also would be a poor vehicle for resolving the question on which petitioner seeks review. Petitioner certainly raises a genuine case or controversy within the meaning of Article III. The court of appeals ordered the district court clerk to obtain funds from petitioner's prison trust account to satisfy an obligation that petitioner asserts does not exist, and there is no reason to doubt that the district court clerk will comply with the Seventh Circuit's instructions.

At the same time, is not clear that petitioner has named the proper respondent or sought the right writ. The petition for a writ of certiorari identifies the respondent as Wilvis Harris. Mr. Harris was the first putative defendant named in the complaint, which describes him as "a correctional officer of the Illinois Department of Corrections." Br. in Opp. App. 5a. As the brief in opposition explains (at 3), neither Mr. Harris nor any of the other putative defendants ever was served with process in this case because the district court dismissed the complaint without issuing a summons. Moreover, none of the putative defendants ever will become a party to the underlying action because petitioner does not seek review of the portion of the Seventh Circuit's September 10, 2008 order that dismissed his appeal. Pet. App. 2. Finally, the putative defendants have no concrete interest in the issues raised by this petition for a writ of certiorari because they will neither collect nor receive the

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appendices/B07Sep08.pdf>. During the 12-month period ending September 30, 2008, the D.C. Circuit heard 97 cases categorized as "prisoner civil rights," "prison conditions," and "other prisoner petitions"; 83 of those cases also were categorized as "U.S. Defendant." The relevant totals for all circuits during the same period were 6769 and 1705, respectively. We have been advised that the AO does not maintain statistics about the number of appellate proceedings in which a prisoners seeks but is denied IFP status.

fees. Cf. Fed. R. App. P. 3(e) (stating that "[t]he district clerk receives the appellate docket fee on behalf of the court of appeals").

Under the circumstances, it appears that the proper respondent would have been either the Seventh Circuit (which ordered the district court clerk to collect the fees) or the district court clerk (to whom the Seventh Circuit's order is directed).[11] In addition, because neither the Seventh Circuit nor the district court clerk was a party to the underlying litigation, it appears that mandamus, rather than certiorari, may have been the proper manner for petitioner to have raised his current claim. Cf. Sup. Ct. R. 20.3(a) (stating that a mandamus petition "shall state the name and office or function of every person against whom relief is sought" and shall include "[a] copy of the judgment with respect to which the writ is sought").

Neither of these issues would necessarily prevent this Court from reaching the merits if it granted plenary review. But petitioner is now represented by counsel, and his failure to address them in his petition for a writ of certiorari—especially when coupled with petitioner's failure to file a reply brief in order to respond to the brief in opposition's argument that "it is doubtful whether there is a justificiable controversy here" (Br. in Opp. 6)—warrants denial of the petition.

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[11] If petitioner had named either the Seventh Circuit or the district court clerk as respondents in this Court, it appears that the case would have constituted one "in which the United States is interested" for purposes of triggering this Office's exclusive litigating authority under 28 U.S.C. 518(a). See *United States* v. *Providence Journal Co.*, 485 U.S. 693 (1988).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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