No. 03-732

# In the Supreme Court of the United States

CEDRIC JOHNSON, PETITIONER

*v.*

GEORGE M. DALEY, 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 IN OPPOSITION**

THEODORE B. OLSON
*Solicitor General*
*Counsel of Record*

PETER D. KEISLER
*Assistant Attorney General*

BARBARA L. HERWIG
JONATHAN H. LEVY
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

The Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(d), imposes two limits on attorneys' fees recoverable under 42 U.S.C. 1988 in a lawsuit filed by a prisoner. First, the fees are limited to 150% of the money judgment obtained. Second, the fees must be based on an hourly rate that does not exceed 150% of the statutory cap on the hourly rate for appointed criminal defense counsel. The question presented is whether those limits violate petitioner's equal protection rights.

TABLE OF CONTENTS



TABLE OF AUTHORITIES

Cases:

# In the Supreme Court of the United States

No. 03-732

CEDRIC JOHNSON, PETITIONER

*v.*

GEORGE M. DALEY, 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 IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-75a) is reported at 339 F.3d 582. The opinion of the district court (Pet. App. 76a-105a) is reported at 117 F. Supp. 2d 889. The opinion of the district court on remand (Pet. App. 106a-109a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 19, 2003. The petition for a writ of certiorari was filed on November 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The Prison Litigation Reform Act of 1995 (PLRA) imposes two limits on attorneys' fees recoverable by an inmate in litigation. First, the fees are limited to 150% of the money judgment obtained. Second, the fees must be based on an hourly rate that does not exceed 150% of the statutory cap on the hourly rate for appointed criminal defense counsel. 42 U.S.C. 1997e(d).

2. While incarcerated in a Wisconsin prison, Cedric Johnson (petitioner) sued prison doctor George M. Daley (respondent) under 42 U.S.C. 1983, alleging that respondent had violated his Eighth Amendment rights by failing to place his name on a waiting list for a liver transplant. Pet. App. 4a-5a. Petitioner obtained a favorable judgment on his claim and was awarded $10,000 in compensatory damages and $30,000 in punitive damages. Petitioner then moved for an award of attorney's fees pursuant to 42 U.S.C. 1988. Pet. App. 5a. Petitioner acknowledged that his fee request exceeded the PLRA's hourly and overall limits on fee awards. Petitioner asked the court to disregard those limits on the ground that they violated the Constitution's equal protection guarantee. *Id.* at 5a, 77a. Pursuant to 28 U.S.C. 2403, the United States intervened to defend the constitutionality of the fee limits. Pet. App. at 77a. The district court held the PLRA's fee limits unconstitutional and entered an order awarding attorney's fees of $80,000 (plus costs and expenses), clearly exceeding the statutory limits. The district ordered petitioner to pay $200 of that amount out of his judgment, see 42 U.S.C. 1997e(d)(2), with the remainder to be paid by respondent. Pet. App. 6a, 99a, 103a-105a.

3. The court of appeals sitting en banc reversed and remanded for entry of an award of attorneys' fees consistent with the PLRA. Pet. App. 1a-75a. The entire court agreed that, because prisoners are not a suspect classification, the PLRA's limits on attorneys' fees are constitutional so long as the distinction between prisoners and non-prisoners bears a rational relationship to any legitimate statutory goal. *Id.* at 7a-8a, 32a, 55a. 75a. A majority of the court held that there is such a rational relationship and, accordingly, that the PLRA's attorneys' fees limits are constitutional. *Id.* at 2a, 35a-36a.

A plurality of the court noted that it is difficult to determine whether to compare the PLRA's fee limits for prisoners to the fee limits for a non-prisoner under 42 U.S.C. 1988, or to some other group under a different statute, such as Medicaid beneficiaries or veterans seeking medical care. Assuming that the correct comparison is to a non-prisoner who obtains fees under 42 U.S.C. 1988, however, the plurality concluded that it is reasonable to treat prisoners differently from non-prisoners. Pet. App. 18a. The plurality listed seven differences between prisoners and non-prisoners with respect to litigation that justify that difference in treatment: (1) prisoners have free time since all their necessities are provided by the State; (2) prisoners receive free paper, postage, and legal assistance; (3) many prisoners have a high desire to exert control over and revenge upon their jailors; (4) litigation is recreation that may relieve a prisoner of the boredom inherent in prison; (5) prisoner lawsuits are particularly difficult to settle and unusually draining on the judicial system; (6) prisoners are more likely to fabricate tales of victimization; and (7) prisoners are less easily punished for (and deterred from) making false claims. *Id.*

at 19a-21a. Based on those considerations, the plurality concluded, a rational legislature could believe that fee limits can reduce the number of "weak, trivial, or bogus suits" filed by prisoners, *id.* at 27a, and that because "prisoners litigate even frivolous claims to excess, they do not need any extra incentive to litigate meritorious claims." *Id.* at 23a. The plurality also concluded that a rational legislature could believe that attorneys' fees awarded under Section 1988 are generally too high and that capping those fees in prisoner-filed cases is a logical first step in reducing them. *Id.* at 28a-30a.

Judge Ripple concurred in the judgment. Pet. App 32a-36a. He concluded that the PLRA attorneys' fees caps are rationally related to the goals of decreasing meritless prisoner lawsuits and protecting the public fisc. *Id.* at 33a. Judge Ripple concluded that it is rational to treat prisoners differently from non- prisoners with respect to these goals, because prisoners "see high potential gains from bringing litigation and low opportunity costs associated with the venture." *Id.* at 34a.

Judge Rovner, joined by three other judges, dissented. Pet. App. 36a-75a. The dissenters concluded that fee limitations could not have any effect on the filing of frivolous, trivial, insubstantial, or low-value claims, because "the PLRA adds no restriction on fees that was not already present under § 1988." *Id.* at 61a. The dissenters also concluded that protecting the public fisc is unrelated to the distinction between prisoners and non-prisoners. *Id.* at 70a-71a. Chief Judge Flaum filed a separate one-paragraph dissent. *Id.* at 74a-75a.

On remand, the district court ordered respondent to pay $36,439 in attorneys' fees (plus costs and expenses). Pet. App. 106a-109a. The court ordered the plaintiff to pay $200 towards the attorneys' fees under 42 U.S.C.

1997e(d)(2). Pet. App. 108a. Petitioner did not appeal from that judgment.

**ARGUMENT**

Petitioner contends that the Court should grant review to decide whether the PLRA's limits on attorneys' fees are constitutional. Review of that question is unwarranted. All six courts of appeals to address the constitutionality of the PLRA's fee limitations have upheld them. Those decisions are correct and consistent with the decisions of this Court. This Court has denied review on the question presented several times, and there is no reason for a different outcome here.

1. All six courts of appeals to address the constitutionality of the PLRA's attorneys' fees limitations have held that those limitations are consistent with equal protection requirements. *Jackson* v. *State Bd. of Pardons & Paroles*, 331 F.3d 790 (11th Cir.), cert. denied, 124 S. Ct. 319 (2003); *Foulk* v. *Charrier*, 262 F.3d 687 (8th Cir. 2001); *Walker* v. *Bain*, 257 F.3d 660 (6th Cir. 2001), cert. denied, 535 U.S. 1095 (2002); *Hadix* v. *Johnson*, 230 F.3d 840 (6th Cir. 2000); *Boivin* v. *Black*, 225 F.3d 36 (1st Cir. 2000); *Madrid* v. *Gomez*, 190 F.3d 990 (9th Cir. 1999); Pet. App. 1a-75a. This Court has already declined three requests to grant review to decide the constitutionality of the PLRA's limits on attorneys' fees, most recently just several months ago. See *Jackson* v. *State Bd. of Pardons & Paroles*, 124 S. Ct. 319 (2003) (petition for a writ of certiorari denied); *McLindon* v. *Russel*, 537 U.S. 830 (2002) (same); *Walker* v. *Bain*, 535 U.S. 1095 (2002) (same). There is no basis for reaching a different outcome here. There is no conflict in the circuits, and petitioner offers no other basis for granting review.

2. The unanimous view of the circuits that have addressed the question is also clearly correct. Because the PLRA's fee limitations do not involve a suspect classification or impinge upon any fundamental right, the rational basis test applies. Under that test, the PLRA attorneys' fees caps enjoy a "strong presumption of validity," *Heller* v. *Doe*, 509 U.S. 312, 319 (1993), and petitioner bears the burden "to negative every conceivable basis which might support [them]." *Id.* at 320. A statute "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification * * * whether or not the basis has a foundation in the record." *Ibid.* (internal quotation marks and citation omitted).

There are entirely rational grounds for treating prisoners differently from non-prisoners in establishing the amount of attorneys' fees that they may recover. Unlike non-inmates, inmates have unlimited free time, the State pays for all their necessities, the State pays for legal materials and assistance, and inmates have added motivation to inflict harm on the State and its officials. Because of those significant differences, inmates have more incentives to file frivolous and unimportant claims than non-inmates, and they do not have as much need for the extra incentive supplied by awards of attorneys' fees to file important and meritorious claims. Placing special limits on the amount of attorneys' fees that inmates may recover is rational in light of those differences. In particular, such limits (1) reduce the extra incentive to file frivolous lawsuits, Pet. App. 26a, 35a-36a; *Jackson*, 331 F.3d at 798; *Boivin*, 225 F.3d at 44; *Madrid*, 190 F.3d at 996; (2) reduce the extra incentive to file suits over trivial harms, Pet. App. 23a; *Jackson*, 331 F.3d at 798; *Walker* v. *Bain*, 257 F.3d 660,

668-669 (6th Cir. 2001), cert. denied, 535 U.S. 1095 (2002); *Hadix*, 230 F.3d at 844-845; (3) bring prisoner incentives to litigate more in line with non-prisoner incentives, *id.* at 845; *Boivin*, 225 F.3d at 44; (4) reduce excessive fee awards, Pet. App. 27a-28a; *Hadix*, 230 F.3d at 845-846; and (5) protect the public fisc, *Jackson*, 331 F.3d at 798; *Walker*, 257 F.3d at 669; *Hadix*, 230 F.3d at 845; *Boivin*, 225 F.3d at 44; *Madrid*, 190 F.3d at 996.

To sustain the constitutionality of the PLRA's limits on attorneys' fees, it is only necessary to find a rational connection to one of those objectives. In fact, however, the PLRA's limits are rationally connected to all five. The PLRA's limits on attorneys' fees are therefore constitutional.

Petitioner contends that the plurality chose the wrong comparison for purposes of its equal protection analysis. Pet. 5- 10. Specifically, petitioner argues that the plurality compared prisoners otherwise entitled to Section 1988 attorneys' fees to Medicaid beneficiaries, veterans seeking medical care, Social Security beneficiaries, and school children seeking Individuals with Disabilities Education Act benefits, when it should have compared prisoners to non-prisoners filing similar claims. Pet. 5- 6. That argument misreads the plurality opinion. The plurality discussed the entitlement to attorneys' fees of the various groups noted above to demonstrate that the PLRA attorneys' fees limitations are not the result of irrational antipathy towards prisoners. Pet. App. 11a-18a. But the plurality's analysis and application of the rational basis test assumed that the correct comparison is between "prisoners and other persons covered by civil rights statutes," *id.* at 18a, just as petitioner suggests is appropriate. Indeed, the centerpiece of the plurality's analysis is its con-

clusion "that prisoners differ from free persons in ways relevant to litigation." *Id.* at 19a.

In any event, the question is not whether the plurality engaged in the right analysis, but whether the PLRA rationally distinguishes between prisoners and non-prisoners in imposing limits on attorneys' fees. See *Johnson* v. *De Grandy*, 512 U.S. 997, 1003 n.5 (1994) (Court reviews judgments, not statements in opinions). For the reasons discussed above, that standard is easily satisfied, as every court of appeals to consider the question has concluded, notwithstanding any slight differences in reasoning or methodology in reaching that conclusion.

3. Petitioner asserts that the PLRA's limits on attorneys' fees violate the equal protection principles established in *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966), *Lindsey* v. *Normet*, 405 U.S. 56 (1972), and *Romer* v. *Evans*, 517 U.S. 620 (1996). Pet. 8-14. The PLRA's limitations, however, are fully consistent with those decisions. In each of those three cases, this Court concluded that a *different* statutory distinction was not rationally related to *different* purported governmental goals.

Thus, *Rinaldi* addressed a statute that required unsuccessful criminal appellants sentenced to imprisonment to repay the State for the cost of their transcripts, while not imposing a similar requirement on unsuccessful criminal appellants sentenced to other forms of punishment. This Court held that the distinction drawn by the statute was "not related to the fiscal objectives of the statute and rested on no administrative convenience." *Schilb* v. *Kuebel*, 404 U.S. 357, 369 (1971) (describing *Rinaldi*); accord *Rinaldi*, 384 U.S. at 309-310. Similarly, in *Lindsey*, this Court invalidated a state law requiring tenants challenging certain eviction

decisions to post a bond of twice the rent expected to accrue pending appellate review. This Court reasoned that the double bond requirement was irrational because it burdened only tenants, was "unrelated to actual rent accrued or to specific damage sustained by the landlord," and created a unique "barrier to appeal." 405 U.S. at 77-79. Finally, *Romer* held that a state constitutional amendment that provided that "gays and lesbians shall not have any particular protections from the law," did not "bear a rational relationship" to the proffered governmental purposes—"respect for other citizens' freedom of association * * * [and] conserving resources to fight discrimination against other groups," because "[t]he breadth of the amendment is so far removed from [those purposes]." 517 U.S. at 635.

None of those three cases is instructive here, because this case involves a *different* statutory distinction—between prisoners and non-prisoners, and *different* governmental purposes—deterring frivolous lawsuits, deterring lawsuits over trivial harms, making prisoner incentives to litigate similar to non-prisoner incentives, reducing excessive attorney fee awards, and protecting the public fisc. As discussed above, there is a rational connection between the distinction drawn by the PLRA and the legitimate governmental goals furthered by the statute. Nothing in *Rinaldi*, *Lindsey*, or *Romer* casts any doubt on that conclusion. See Pet. App. 30a-32a (*Rinaldi* and *Lindsey* do not mandate invalidation of PLRA fee limits); *Hadix*, 230 F.3d at 844-845 (same for *Rinaldi*); *Boivin*, 225 F.3d at 45 (same for *Lindsey*); *Zehner* v. *Trigg*, 133 F.3d 459, 463-464 (7th Cir. 1999) (*Romer* does not require invalidation of PLRA provision that precludes prisoners from recovering for custodial mental or emotional damages without proof of physical harm).

4. Petitioner hypothesizes that the PLRA attorneys' fees limits will make it impossible for courts to secure representation for prisoners with meritorious claims, thus rendering those prisoners without a "meaningful remedy." Pet. 15. But plaintiffs filing federal civil rights actions—whether prisoners or non-prisoners—have no constitutional right to counsel, and, accordingly, have no right to attorneys' fees. See, *e.g.*, *Romero* v. *Becken*, 256 F.3d 349, 353-354 (5th Cir. 2001); *Stevens* v. *Redwing*, 146 F.3d 538, 546 (8th Cir. 1998). Indeed, this Court has held that even in criminal cases, "the right to appointed counsel extends to the first appeal of right, and no further." *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987).

Furthermore, limitations on fees do not leave plaintiffs without a remedy. They may proceed pro se and obtain a judicial remedy. The judicial system provides a number of safeguards to protect pro se litigants' rights. *Haines* v. *Kerner*, 404 U.S. 519, 520-521 (1972). And inmates may recover the fees authorized by the PLRA, just as petitioner did here. Notwithstanding the PLRA, a large number of inmates have continued to seek judicial remedies, see Pet. App. 26a-27a, and courts have continued to appoint counsel to assist in the presentation of their claims. See, *e.g.*, *Walker*, 257 F.3d at 664 (post-PLRA appointment of counsel in case involving a total of $426 in damages); *McLindon* v. *Russel*, 108 F. Supp. 2d 842 (S.D. Ohio 1999) (same in case involving a total of $201 in damages), rev'd based on failure to apply PLRA attorneys' fees limits, 19 Fed. Appx. 349 (6th Cir. 2001), cert. denied, 537 U.S. 830 (2002). Petitioner offers no evidence to support his speculation that the PLRA's fee limits will significantly affect the ability of inmates with meritorious cases to obtain judicial remedies.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*

PETER D. KEISLER
*Assistant Attorney General*

BARBARA L. HERWIG
JONATHAN H. LEVY
*Attorneys*

FEBRUARY 2004