No. 23-933

In the Supreme Court of the United States

JAY HYMAS D/B/A DOSMEN FARMS, PETITIONER

v.

DEPARTMENT OF THE INTERIOR

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the *in forma pauperis* statute, 28 U.S.C. 1915, permits a court to impose a partial filing fee on a non-prisoner litigant.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Wash.):

Hymas v. *United States Dep't of Interior*, No. 20-cv-5036 (July 27, 2020)

United States Court of Appeals (9th Cir.):

Hymas v. *U.S. Dep't of the Interior*, No. 20-35733 (July 12, 2023)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 73 F.4th 763. The order of the district court (Pet. App. 13a-14a) is unreported. The report and recommendation of the magistrate judge (*id.* at 15a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2023. A petition for rehearing was denied on September 21, 2023 (Pet. App. 11a). On December 12, 2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 18, 2024. The petition for a writ of certiorari was filed on February 20, 2024 (the first Tuesday following a holiday). See Sup. Ct. R. 30.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 28 U.S.C. 1914, district courts generally must require a party initiating a civil action to pay specified filing fees. But 28 U.S.C. 1915 provides an exception to Section 1914's mandate by authorizing a court to grant *in forma pauperis* status to litigants. Section 1915(a)(1), which applies to non-prisoner litigants, provides that:

> Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such [person] possesses that the person is unable to pay such fees or give security therefor.

28 U.S.C. 1915(a)(1).

Section 1915(b) was adopted in the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, § 101(a), Tit. VIII, 110 Stat. 1321-66, and establishes different rules for prisoner litigants:

> Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of the average monthly deposits to the prisoner's account or the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

28 U.S.C. 1915(b)(1). "After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account." 28 U.S.C. 1915(b)(2).

2. Petitioner, who is not a prisoner, filed a pro se complaint against the Department of the Interior in the United States District Court for the Eastern District of Washington. Pet. App. 2a. The complaint asserts that the Department violated certain federal contracting laws when leasing farmland. *Id.* at 2a & n.1. Invoking 28 U.S.C. 1915(a)(1), petitioner applied for a waiver of $402 in fees, which included the $350 filing fee and a $52 administrative fee set by the Judicial Conference. Pet. App. 2a. The government took no position on petitioner's *in forma pauperis* application.

After considering the financial information petitioner submitted with his application, the magistrate judge granted the application in part by setting a $100 fee. Pet. App. 2a. Petitioner sought reconsideration, arguing that he could not afford the $100 fee. The magistrate judge denied reconsideration, noting that petitioner had over $1000 in assets. *Id.* at 15a-18a. The district court adopted the report and recommendation and ordered petitioner to "pay a filing fee of $100" within 14 days. *Id.* at 14a (emphasis omitted).

3. Rather than paying, petitioner appealed the *in forma pauperis* order. The court of appeals appointed pro bono counsel to represent petitioner and asked the parties to address whether, under the court's decision in *Olivares* v. *Marshall*, 59 F.3d 109 (9th Cir. 1995), a "district court can order a non-prisoner to pay a partial filing fee." C.A. Order 2 (Sept. 22, 2021).

In response, the government explained that *Olivares* had interpreted the *in forma pauperis* statute to allow district courts to order partial fees and that the PLRA's intervening amendments to the statute provide no basis for departing from that precedent. Gov't C.A. Br. 4. The government explained that, as the Sixth and Seventh Circuits had concluded, the PLRA amendments limiting courts' preexisting authority to impose partial fees only applied to *prisoner* litigation and did not alter the language that had long been interpreted to authorize the imposition of partial filing fees in *non-prisoner* cases. *Ibid.* (citing *Samarripa* v. *Ormond*, 917 F.3d 515, 516 (6th Cir.), cert. denied, 140 S. Ct. 515 (2019), and *Longbehn* v. *United States*, 169 F.3d 1082, 1083 (7th Cir. 1999)).[1]

4. The court of appeals affirmed. Pet. App. 1a-10a. The court reaffirmed its decision in *Olivares*, which "explained that 'the greater power to waive all fees includes the lesser power to set partial fees,' and held that 'courts have discretion to impose partial filing fees under the in forma pauperis statute.'" *Id.* at 4a (quoting *Olivares*, 59 F.3d at 111) (brackets omitted). The court also emphasized that "partial filing fees serve the goals

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[1] Although the government argued in *Samarripa* that the PLRA's amendments restricted the courts' authority to impose partial fees in non-prisoner litigation, it urged this Court to deny certiorari after the Sixth Circuit rejected that view. Gov't Br. in Opp. at 10, *Samarripa* v. *Kizziah*, 140 S. Ct. 515 (2019) (No. 19-164). The government acknowledged that there is "a reasonable argument that Section 1915(a) allows for partial fees in the cases as to which it still governs." *Ibid.* The government further argued that there was no circuit conflict that warranted this Court's intervention. *Ibid.* In its brief in the court of appeals in this case, the government explained that it had reconsidered the issue and adopted the Sixth Circuit's view. Gov't C.A. Br. 13 n.4.

of the IFP statute: allowing 'equal access to the courts regardless of economic status,' minimizing judicial costs, and 'screening out frivolous claims.'" *Ibid.* (citation omitted).

The court of appeals rejected petitioner's argument that the PLRA's amendments to the *in forma pauperis* statute "superseded the holding in *Olivares*." Pet. App. 6a. The court noted that under the pre-PLRA version of the statute, "every circuit to consider the issue held that district courts could impose partial filing fees." *Ibid.* Congress "amended the IFP statute to include a carve-out for prisoners" requiring them to "'pay the full amount of a filing fee.'" *Ibid.* (quoting 28 U.S.C. 1915(b)(1)). But the "portion of the IFP statute authorizing courts to waive fees for persons 'unable to pay' remains largely unchanged from the previous version," which indicates that Congress did not intend to "alter the courts' discretion regarding filing fees as to *non*-prisoners." *Id.* at 6a-7a.

The court of appeals also disagreed with petitioner's contention that the fact that Section 1915 "expressly authorizes an initial partial filing fee for prisoners but does not expressly authorize a partial filing fee as to non-prisoners" must mean that district courts lack authority to impose partial filing fees as to non-prisoners. Pet App. 7a. The court explained that petitioner's argument failed to account for the PLRA's "structure," which "expressly requires prisoners to pay 'the full amount of a filing fee'" and thus "provides a structured timeline for collecting this fee." *Ibid.* (citing 28 U.S.C. 1915(b)(1)). In the court's view, "Congress's limit of discretion in this one area, while leaving § 1915(a)(1) substantially the same, suggests no alteration to the court's discretion to require partial prepayment in other cases

under § 1915(a)(1)." *Id.* at 7a-8a (quoting *Samarripa*, 917 F.3d at 518).

Finally, the court of appeals held that the district court did not abuse its discretion in setting a $100 partial filing fee based on petitioner's "own representations" that he had "$1,033 in cash," owned two vehicles, kept "a year-long supply of food, housing supplies, fuel, and clothing," and lived a "self-sufficient" lifestyle supported by a "2.5-acre piece of land provided by a friend," without "report[ing] any debts or financial obligations." Pet. App. 9a-10a.

5. The court of appeals denied rehearing en banc without noted dissent. Pet. App. 11a.

ARGUMENT

Petitioner renews his contention (Pet. 12-15) that Section 1915(a)(1) requires district courts to take an "all-or-nothing" approach to filing fees, depriving courts of discretion to impose partial filing fees on non-prisoner litigants. The court of appeals correctly rejected that argument, and any tension between the decision below and a per curiam decision from the Fifth Circuit does not warrant this Court's review. The Court recently denied a petition raising the same question and relying on the same asserted circuit split. See *Samarripa* v. *Kizziah*, 140 S. Ct. 515 (2019) (No. 19-164). The Court should do the same here.

1. The text, context, and history of 28 U.S.C. 1915(a) confirm that district courts may require non-prisoner litigants to pay a partial filing fee.

a. Section 1915(a) creates an exception to the default rule established by the statutory provisions that otherwise govern court fees. In general, Congress directed that that district courts "shall require" a plaintiff to pay a $350 filing fee and an administrative fee prescribed by

the Judicial Conference, which was $52 when petitioner filed this suit. 28 U.S.C. 1914(a); see 28 U.S.C. 1914(b); Pet. App. 19a. Section 1915(a)(1) allows district courts to make an exception for certain litigants: courts "may authorize" the commencement of suits "without prepayment of fees or security therefor" if a litigant shows he "is unable to pay such fees or give security therefor." 28 U.S.C. 1915(a)(1). Congress's use of the phrase "*may* authorize" indicates that Section 1915(a)(1) gives courts discretion to decide whether an exception is warranted in a particular case. See *Opati* v. *Republic of Sudan*, 590 U.S. 418, 428 (2020) ("[T]he word 'may' *clearly* connotes discretion.") (citation omitted). And in exercising such discretionary authority, courts' "greater power to waive all fees includes the lesser power to set partial fees." *Olivares* v. *Marshall*, 59 F.3d 109, 111 (9th Cir. 1995).

That conclusion is consistent with Section 1915(a)'s use of the phrase "without prepayment of fees." 28 U.S.C. 1915(a)(1). That language is naturally read to encompass exemptions from all fees or only some fees. As Judge Sutton explained for the Sixth Circuit, "[a] court order that the litigant pay 20% of the fees still amounts to an order authorizing the filing 'without prepayment of fees.'" *Samarripa* v. *Ormond*, 917 F.3d 515, 519 (6th Cir.), cert. denied, 140 S. Ct. 515 (2019).

History reinforces that understanding. The *in forma pauperis* statute was originally enacted in 1892 and contained substantially similar operative text. See Act of July 20, 1892, ch. 209, 27 Stat. 292. Before the *in forma pauperis* statute was amended by the PLRA in 1996, every court of appeals to address the question had held that it allowed courts to impose partial fees. See *Samarripa*, 917 F.3d at 518 (noting unanimity among

Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits).

b. Contrary to petitioner's arguments (Pet. 13-14), the PLRA's amendments to other portions of the *in forma pauperis* statute did not eliminate district courts' discretion to require payment of partial fees under Section 1915(a).

The purpose of the PLRA was to stem the tide of frivolous prisoner lawsuits. See *Taylor* v. *Delatoore*, 281 F.3d 844, 849 (9th Cir. 2002). Congress achieved that purpose by imposing new constraints on district courts' discretion to allow prisoners pursuing ordinary civil cases to proceed without prepayment of fees. *Ibid.* Those requirements were incorporated into the *in forma pauperis* statute in a new subsection, 28 U.S.C. 1915(b), which renders prisoner litigants ineligible for the waiver of fees available to other indigent litigants under Section 1915(a). Section 1915(b) provides, in relevant part: "if a prisoner brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of a filing fee." 28 U.S.C. 1915(b)(1).

Section 1915(b) further provides that district courts must collect that full fee by assessing an "initial partial filing fee" at the outset of the case, then requiring monthly payments until the full amount of the fee has been paid. 28 U.S.C. 1915(b)(1)-(4). Section 1915(c) likewise emphasizes that the initial partial fee must be paid by a prisoner-litigant before the court "may direct payment by the United States of [certain] expenses." 28 U.S.C. 1915(c). The PLRA amendments thus imposed a prisoner-specific limit on district courts' discretion to authorize indigent litigants to proceed without prepayment of fees.

By contrast, the PLRA did not materially change the portion of the statute at issue here. Both before and after the PLRA, Section 1915(a) granted courts broad discretion to authorize a litigant to proceed "without prepayment of fees." The only limitation the PLRA added is the caveat that this discretion is "[s]ubject to subsection [1915](b)," 28 U.S.C. 1915(a)(1), which cabins the courts' discretion solely as to prisoner litigation.[2] As the court of appeals recognized, Congress's choice to limit that discretion with respect to prisoner litigation while imposing no such limitations with respect to non-prisoner litigation is presumed to have been intentional. See Pet. App. 7a-8a; see also, *e.g.*, *Intel Corp. Inv. Policy Comm.* v. *Sulyma*, 140 S. Ct. 768, 777 (2020).

c. Allowing courts to impose partial filing fees at the outset of litigation is also consistent with courts' well-settled authority to require payment of costs at the end of litigation under 28 U.S.C. 1915(f). Section 1915(f)(1) provides, in relevant part, that "[j]udgment may be rendered for costs at the conclusion of the suit or action as in other proceedings." 28 U.S.C. 1915(f)(1). "[A]s in other proceedings" is a reference to the general costs statute, which specifies that a court "may tax" certain categories of costs. 28 U.S.C. 1920. Under that language, "courts have discretion to assess costs, including filing fees, against losing litigants after the case even if those litigants proceeded as paupers." *Samarripa*, 917

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[2] Although the PLRA amendments to subsection (a)(1) inserted the word "prisoner" for "person" in the description of the required affidavit, that appears to be a scrivener's error rather than an indication that subsection (a)(1) was only intended to apply to prisoner litigation, which (with limited exceptions) was explicitly carved out of subsection (a)(1) and addressed instead in subsection (b). See, *e.g., Andrews* v. *Cervantes,* 493 F.3d 1047, 1052 n.1 (9th Cir. 2007).

F.3d at 519. As the Sixth Circuit explained, "[i]f Congress gives courts broad discretion over fees on the back end of a pauper's case (and over cost assessments in general), it's fair to infer that it wishes equally permissive language on the front end of a pauper's case to be read in a like way." *Id.* at 518-519.[3]

2. Petitioner asserts (Pet. 6-10) that the decision below implicates a circuit conflict. But petitioner overstates the extent of the disagreement among the circuits, which this Court has already declined to address in *Samarripa*, *supra* (No. 19-164). Petitioner identifies no sound reason for a different result here.

a. As the Ninth Circuit noted, the rule it adopted in *Olivares* and reaffirmed below has long been the standard in the lower courts. Before the PLRA, the courts of appeals were unanimous that the *in forma pauperis* statute allowed district courts to impose a partial filing fee before the PLRA. Pet. App. 6a; see *Samarripa*, 917 F.3d at 518. And in the decision below, the Ninth Circuit joined Sixth and Seventh Circuits in confirming that the PLRA amendments addressing prisoner litigation did not implicitly withdraw that authority with respect to non-prisoners. See *Samarripa*, 917 F.3d at 518; *Longbehn* v. *United States*, 169 F.3d 1082, 1083-1084 (7th Cir. 1999).

b. The only decision that stands in some tension with that conclusion is the Fifth Circuit's per curiam opinion

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[3] Petitioner errs in asserting (Pet. 14-15), that the decision below is inconsistent with this Court's reasoning in *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). In that case, the Court held that district courts may not award *additional* costs to prevailing parties, beyond those permitted by Congress. That holding has no bearing on the question whether Section 1915(a)'s broad grant of discretion authorizes district courts to require only partial payment of fees.

in *Garza* v. *Thaler*, 585 F.3d 888 (2009). There, the district court granted a habeas petitioner's motion to appeal *in forma pauperis* after concluding that he "could not afford to prepay the $455 appellate filing fee," but the court ordered him to pay an initial partial fee and to pay the balance of the fee in installments under the mechanism set forth in the PLRA. *Id.* at 889. The Fifth Circuit noted that Federal Rule of Appellate Procedure 24 "provides that if the district court grants a motion to proceed IFP on appeal, 'the party may proceed on appeal *without prepaying or giving security for fees and costs, unless a statute provides otherwise*.'" *Garza*, 585 F.3d at 890 (quoting Fed. R. App. P. 24(a)(2)). The court stated that "[t]he only statute that authorizes payment of an initial partial filing fee, with the remainder in installments, is the PLRA, and it does not apply in [habeas] appeals." *Ibid.* Accordingly, the court held, "the district court did not have either the discretion or the inherent power to require [the litigant] to pay an appellate filing fee in accordance with the terms of the PLRA." *Ibid.*

For several reasons, that holding does not create a conflict warranting this Court's review. First, the Fifth Circuit focused on whether a district court could require a habeas litigant granted IFP status to pay the entire appellate filing fee through installments—not on whether a court could require an initial partial filing fee. *Garza*, 585 F.3d at 889-890. Second, the Fifth Circuit grounded its holding in part in the language of Federal Rule of Appellate Procedure 24, which does not apply here. *Id.* at 890. Third, the Fifth Circuit's decision was issued without the benefit of full briefing or oral argument and contained limited analysis. See *Samarripa*, 917 F.3d at 519 (noting that *Garza* did not "consider the

breadth of discretion in § 1915(a)(1)'s text, the history of courts interpreting it to allow partial prepayment, and the statutory context"). Finally, the Fifth Circuit did not acknowledge the Seventh Circuit's decision in *Longbehn* and did not have the benefit of the thorough analysis of the issue in the Sixth Circuit's decision in *Samarripa*, and the Ninth Circuit's decision in this case. It is thus unclear whether the Fifth Circuit would reject partial fees in a future case under these circumstances, after consideration of the decisions of the three circuits that expressly permit such fees.

3. Particularly given the absence of any developed conflict, the question presented does not raise an issue of broad importance warranting this Court's review. Any undue burden imposed by a particular imposition of a partial filing fee may be alleviated by the availability of collateral review of that fee. Indeed, petitioner pursued that avenue of relief before the court of appeals. Petitioner has not presented any evidence that this state of affairs has impeded indigent litigants' ability to bring suits in the Sixth, Seventh, and Ninth Circuits. And it is far from clear that petitioner's rule would produce better results for litigants facing economic hardship: If district courts exercising their discretion under Section 1915(a) were forced to choose between requiring prepayment of all fees or no fees, courts would likely require payment of all fees in some cases where they would have imposed only a partial fee if they were allowed to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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