No. 19-164

IN THE

Supreme Court of the United States

DAVID SAMARRIPA, ET AL.,

Petitioners,

v.

GREGORY KIZZIAH, WARDEN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICI CURIAE* OF SIXTH CIRCUIT APPOINTED COUNSEL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether federal courts are required to impose partial filing fees on prisoners appealing from the denial of their habeas petitions.

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae submit this brief in furtherance of their role as counsel appointed by the United States Court of Appeals for the Sixth Circuit. Although *Amici* disagree with Petitioners about the merits of the appeal, *Amici* agree that this case warrants review.

In proceedings before the Sixth Circuit, both Petitioners and Respondent took the position that 28 U.S.C. § 1915 does not allow district courts to impose partial filing fees on litigants appealing the denial of their habeas petitions. To ensure the effective presentation of the issues, the Sixth Circuit appointed a Jones Day attorney, James R. Saywell, to argue in support of the district courts' authority to impose partial filing fees. *See* Order, No. 17-6260 at 1 (Dec. 7, 2018) (ECF No. 34-1). Louis A. Chaiten joined Mr. Saywell as counsel before the Sixth Circuit, and, because Supreme Court Rule 7 currently bars Mr. Saywell from participating in proceedings before this Court, Mr. Chaiten has now assumed sole responsibility for the representation along with another Jones Day attorney.

Before the Sixth Circuit, *Amici* took the position that district courts not only have the authority to impose partial filing fees on prisoners appealing the denial of their habeas petitions under Section

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[1] Pursuant to Rule 37.2(a), counsel for both parties received notice of intent to file this brief at least ten days before its due date. Both parties consented to the filing. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* made a monetary contribution to the preparation or submission of this brief.

1915(a)(1) but in fact have an obligation to do so under Section 1915(b)(1). *See Amicus* Br., No. 17-6260 (Jan. 15, 2019) (ECF No. 43). Following briefing and oral argument, the Sixth Circuit agreed with *Amici* that Section 1915(a)(1) gives district courts discretion to impose partial filing fees, but the Sixth Circuit held that it "need not resolve" *Amici*'s "thoughtful" argument that partial filing fees are in fact required by Section 1915(b)(1). *See* Pet. App. 12a. *Amici* now submit this brief to advance that same position before this Court.

INTRODUCTION

The Petition correctly identifies a circuit split, but, in doing so, overlooks the fact that both sides of the split are contrary to Congress's express resolution of this question in the Prison Litigation Reform Act ("PLRA"). The fact that *no* court follows the governing law provides another reason to grant review.

Congress definitively addressed the question posed by the Petition in the PLRA, which provides that courts "shall" impose an initial partial filing fee and then collect the remaining balance of the fee in monthly installments in *every* case in which "a prisoner brings a civil action or files an appeal in forma pauperis." 28 U.S.C. § 1915(b)(1). Because Petitioners are prisoners who seek to "file[ ] an appeal in forma pauperis," the mandatory fee provision of Section 1915(b)(1) applies and courts "shall" collect these mandatory fees. In other words, while courts disagree about whether or not partial fees are allowed, under the governing law such fees are in fact *required*.

The uniform failure of the Courts of Appeals to follow Section 1915(b)(1) provides yet another basis

for review, as it presents a question of great public importance necessitating this Court's exercise of its supervisory power. Every year, the federal courts hear thousands of appeals from prisoners challenging the denial of their habeas petitions. In each of those cases, the courts are under an affirmative obligation to impose the mandatory filing fees that Congress has said "shall" be imposed. Yet the courts are ignoring that statutory command. Because courts have ignored the PLRA in different ways, this Court's review is required to resolve the split that Petitioners have identified. But, even more, this Court's review is required to address the judiciary's widespread failure to apply the law as written.

The Sixth Circuit's conclusion that it "need not resolve" whether Section 1915(b)(1) applies, Pet. App. 12a, was incorrect and is not a reason to deny review. Section 1915(b)(1) is mandatory. It sets forth specific partial fees—different in amount from the fees imposed by the district courts here—that "shall" be imposed. Courts have no discretion to ignore the statute, and the executive branch also cannot waive Congress's mandatory direction to the courts about this question of internal court administration. Two decades after the PLRA's enactment, both the executive branch and the lower courts have failed to enforce the PLRA according to its terms. The time has come for this Court to intervene.

STATEMENT

A. Legal Background

For centuries, courts have understood that they possess "undoubted common law authority" to allow "parties to sue in forma pauperis." *Brunt v. Wardle*,

133 Eng. Rep. 1254, 1358 (C.P. 1841) (Maule, J.). That includes authority to impose partial fees "according to [a pauper's] ability" to pay. Andrew Horne, *Mirrour of Justices* chap. 1, § 3, p. 15 (1768).

In the federal courts, this authority is codified by statute at 28 U.S.C. § 1915. The general grant of authority to waive filing fees, currently found at Section 1915(a)(1), has been in place since 1892. *See* Act of July 20, 1892, Chap. 209, 27 Stat. 252.

By the late twentieth century, the Courts of Appeals had developed "a uniform practice of permitting courts to require indigent litigants to prepay some but not all of the fee." Pet. App. 6a (citing *In re Epps*, 888 F.2d 964, 967 (2d Cir. 1989); *Bullock v. Suomela*, 710 F.2d 102, 103 (3d Cir. 1983); *Evans v. Croom*, 650 F.2d 521, 524–25 (4th Cir. 1981); *Williams v. Estelle*, 681 F.2d 946, 947 (5th Cir. 1982) (per curiam); *McMurray v. McWherter*, 19 F.3d 1433 (6th Cir. 1994) (table); *Lumbert v. Ill. Dep't of Corr.*, 827 F.2d 257, 259–60 (7th Cir. 1987); *In re Williamson*, 786 F.2d 1336, 1338 (8th Cir. 1986); *Olivares v. Marshall*, 59 F.3d 109, 111 (9th Cir. 1995); *Stack v. Stewart*, 82 F.3d 426 (10th Cir. 1996) (table); *Collier v. Tatum*, 722 F.2d 653, 655 (11th Cir. 1983)).

Then, in 1996, as part of the Prison Litigation Reform Act (PLRA), Congress supplemented this existing general grant of discretionary authority with a mandatory partial filing fee regime. *See* Pub. L. No. 104-134, § 804, 110 Stat. 1321. Congress left in place the existing grant of general discretionary authority at Section 1915(a)(1), but Congress enacted a new Section 1915(b)(1) to provide that partial prepayment of fees would be affirmatively required in any case where "a prisoner brings a civil action or files an

appeal in forma pauperis." *Id.* In such cases, courts "shall" assess an initial partial filing fee and "shall" collect the remaining amount of the fee in monthly installments. *Id.*

This mandatory filing fee regime was a key part of the PLRA, which was designed to "place[ ] a series of controls on prisoner suits," in order to "prevent sportive filings in federal court." *Skinner v. Switzer*, 562 U.S. 521, 535 (2011). Through its mandatory provisions, Congress sought to balance two competing objectives: On the one hand, Congress sought to ensure that prisoners have access to courts even if they do not have financial means, *see, e.g.*, 141 Cong. Rec. S7498-01, S7526 (May 25, 1995); but, on the other hand, Congress sought to ensure the courts are not flooded with frivolous lawsuits, or "appeals by disgruntled [ ] prisoners." *See id.* Aware that "[e]ach case can represent thousands of taxpayer dollars wasted," Testimony of Sarah Vandenbraak, Former Lead Counsel for the Philadelphia District Attorney, Before the Judiciary Comm. of the U.S. Senate, F.D.C.H., available in WESTLAW, 1996 WL 556529 (Sept. 25, 1996), Congress required all prisoners who "bring[ ] a civil action or file[ ] an appeal in forma pauperis" to make partial prepayment of the fee and pay the remainder in monthly installments. 28 U.S.C. § 1915(b)(1)–(2).

Following the enactment of the PLRA, courts have failed to faithfully apply Section 1915(b)(1) to habeas appeals. Notwithstanding the fact that the mandatory partial filing fee regime of Section 1915(b)(1) applies by its terms to *any* prisoner who "files an appeal in forma pauperis," the Courts of Appeals have uniformly refused to apply that command to habeas

appeals. *See* Pet. App. 13a (citing cases). Judge Easterbrook has observed that the prevailing judicial disregard for Section 1915(b)(1) "does not take the language of § 1915(b) seriously." *Walker v. O'Brien*, 216 F.3d 626, 641 (7th Cir. 2000) (Easterbrook, J., dissenting from denial of rehearing en banc). Nonetheless, in the years since Justice Easterbrook made that observation, no Court of Appeals has applied Section 1915(b)(1) to a habeas appeal. Meanwhile, Congress has not amended Section 1915 since the PLRA, and thus has had no opportunity to endorse or rebuff the judiciary's misreading of the law.

Having disregarded Congress's clear resolution of this question, the Circuits have split about how to fill the resulting void. The Seventh Circuit has held that courts continue to enjoy their traditional discretionary authority to impose partial fees in such cases, and the Seventh Circuit has suggested that courts adopt as a matter of discretion the partial fee regime provided in Section 1915(b)(1). *See Longbehn v. United States*, 169 F.3d 1082, 1083 (7th Cir. 1999). On the other hand, the Fifth Circuit has prohibited that approach, holding that Section 1915(b)(1) is the "only statute that authorizes payment of an initial partial filing fee, with the remainder in installments" and that courts otherwise lack authority to adopt such an approach. *See Garza v. Thaler*, 585 F.3d 888, 890 (5th Cir. 2009). No court applies the PLRA's mandatory fee regime for habeas appeals.

B. The Instant Case

Petitioners are five federal prisoners who each separately sought habeas corpus relief in the Eastern District of Kentucky. *See* Pet. App. 3a. Each Petitioner paid in full the required $5 filing fee to initiate the

petition, and in each case the court then denied the petition on the merits. *Id.*

Each Petitioner filed a notice of appeal as well as a motion to proceed *in forma pauperis*, seeking to avoid paying the $505 appellate filing fee. *See* Pet. App. 3a. There was no opportunity for further briefing in the district courts; the district courts did not order the government to respond to the IFP requests or otherwise order briefing on the proper interpretation of Section 1915. Nonetheless, in several of Petitioners' cases the district courts expressly addressed the applicability of the mandatory filing fee regime set forth at Section 1915(b)(1), holding that "[h]abeas petitions are not 'civil actions' within the meaning of 28 U.S.C. § 1915(a)(2) and (b)." Pet. App. 18a, 24a; *see also id.* 26a. Rather than apply the mandatory regime of Section 1915(b)(1), the district courts exercised their traditional discretionary authority to impose partial fees. Pet. App. 18a-27a. As a result, the partial fees imposed by the district courts here are different in amount from the partial fees that are required under Section 1915(b)(1).[2]

Petitioners appealed to the Sixth Circuit, which consolidated the appeals and appointed Katherine Willington as *amicus curiae* to brief and argue for Petitioners. *See* Order, No. 17-6260 at 1–2 (Apr. 24, 2018) (ECF No. 19-1). At the same time, the Sixth Circuit asked the parties to address "whether the

[2] Most notably, none of the district courts complied with the requirement that, following the initial partial filing fee, prisoners be required to pay the "full amount of [the] filing fee" in "monthly payments of 20 percent of the preceding month's income credited to the prisoner's account." *Compare* 28 U.S.C. § 1915(b)(1), (2), *with* Pet. App. 19a, 21a, 23a, 25a, 27a.

statutes governing the payment of fees and pauper status, *including the Prison Litigation Reform Act*, authorize the imposition of a partial filing fee in an appeal of a § 2241 petition." *Id.* (emphasis added). Petitioners and the Government both filed briefs agreeing that courts lack authority to impose partial filing fees on habeas appeals.

The Sixth Circuit, in order to ensure full adversarial briefing of the issues, appointed *Amici* to argue in support of the district courts' authority to impose partial filing fees. Order, No. 17-6260 at 1 (Dec. 7, 2018) (ECF No. 34).[3] *Amici* filed a brief arguing that district courts not only retain their traditional discretionary authority to impose partial filing fees under Section 1915(a)(1) but are in fact *required* to impose partial prepayment of fees—with the remainder to be collected in monthly installments—under the mandatory regime of Section 1916(b)(1). *See Amicus* Br., No. 17-6260 (Jan. 15, 2019) (ECF No. 43).

The Sixth Circuit affirmed the orders imposing partial filing fees. In doing so, the Sixth Circuit held that nothing in the PLRA suggested that Congress intended to disturb the existing "uniform practice" of allowing district courts discretion to impose partial fees under Section 1915(a)(1). Pet. App. 6a.

The Sixth Circuit also acknowledged *Amici*'s "thoughtful argument" regarding the applicability of the mandatory fee regime of Section 1915(b)(1). Pet.

[3] Although the Order by its terms directed *Amici* to "support the district court's ruling," the Sixth Circuit subsequently instructed *Amici* through communication from the Clerk's Office to argue in support of partial fees under both Section 1915(a)(1) and Section 1915(b)(1).

App. 12a. The Sixth Circuit acknowledged that the statute by its plain terms applies to "each and every" appeal, as there is "no modifier limiting this language to a subset of pauper appeals." *Id.* And the Sixth Circuit observed that "[c]ontext . . . offers support for this ruling," as *other* portions of Section 1915 not at issue here use "more specific language to refer to subsets of appeals." *Id.* Finally, the Sixth Circuit addressed and rebuffed various contrary arguments: The Sixth Circuit explained that this interpretation would not subject habeas appeals to the three-strikes provision of Section 1915(g) because that provision by its terms only applies to *civil* appeals, *id.* at 15a, and the Sixth Circuit explained that this interpretation would not unduly limit criminal appeals because (among other things) the Criminal Justice Act exempts indigent criminal defendants from the fee provisions of the PLRA, *id.* at 16a.

Nonetheless, the Sixth Circuit declined to actually address the applicability of Section 1915(b)(1). Although IFP petitions do not normally occasion adversarial briefing in the district courts, and although several of the district courts here expressly addressed the applicability of Section 1915(b)(1), the Sixth Circuit stated that the interpretation of Section 1915(b)(1) would have to "await another . . . case . . . in which the parties squarely present the arguments below." Pet. App. 17a. The Sixth Circuit did not identify any "parties" with an interest in enforcing the PLRA's mandatory fee requirements and did not identify any procedures that would provide for adversarial briefing on the issue in the district courts. Nor did the Sixth Circuit offer any other justification

for disregarding Congress's direction about the fees that "shall" be imposed.

ARGUMENT

I. THERE IS A SPLIT, BUT COURTS ON BOTH SIDES ARE FAILING TO APPLY THE GOVERNING STATUTE.

Petitioners contend that certiorari is warranted because the Fifth, Sixth, and Seventh Circuits disagree about whether courts have discretion to impose partial filing fees on prisoners appealing the denial of their habeas petitions. Pet. 5. There is indeed a split, but *both* sides are wrong: Partial filing fees are neither discretionary nor prohibited, and are in fact required by the governing statute.

The Petition frames this as a case about the interpretation of Section 1915(a)(1), resting its argument against partial fees on the fact that the "text of Section 1915(a) nowhere mentions partial filing fees." Pet. 21. But this argument overlooks the fact that Section 1915(a)(1) says that its provisions apply "[s]ubject to subsection (b)," while Section 1915(b)(1) in turn provides that courts "shall" impose partial filing fees in any case where "a prisoner brings a civil action or files an appeal in forma pauperis." As *Amici* explained in the Sixth Circuit, this language is naturally read to apply to *any* IFP appeal—whether civil, criminal, or somewhere in between. *See* Pet. App. 12a (acknowledging that there is "no modifier limiting this language to a subset of pauper appeals"). Partial filing fees are not just permitted by Section 1915(a)(1); they are required by Section 1915(b)(1).

This conclusion is confirmed by simple rules of grammar. Courts have read Section 1915(b)(1)'s use of

the word "civil" to modify the word "appeal" as well as "action," and it is true that an adjective may sometimes modify a series of nouns. But the interjection of "files an" before "appeal" shows that nothing of the sort was intended here. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 148 (2012) (explaining that where "a determiner (*a, the, some,* etc.) [is] repeated before the second element," this syntax "suggest[s] no carryover modification" from the adjective to the second noun). Thus in the phrase "a solid wall or *a* fence" the "fence need not be solid," *id.* at 149, and in the phrase "the young men and *the* women," the women need not be young, Randolph Quirk & Sydney Greenbaum, *A University Grammar of English*, § 9.37, at 270 (1973). As *Amici* put it in the Sixth Circuit: "If someone invites you to their house and asks if you could 'make a hot appetizer or bring a dessert,' the host will surely not be upset if you bring a few pints of frozen Graeter's ice cream." *Amicus* Br., No 17-6048, at 13. So, too, the phrase "brings a civil action or files an appeal" cannot be limited to *civil* appeals.[4]

[4] To the extent that the case does turn on Section 1915(a)(1), the Sixth Circuit correctly interpreted that provision. The Petition argues that Section 1915(a)(1) supposedly "permits courts to grant in forma pauperis status to habeas petitioners—or to deny them that status—but it does not provide for the collection of any fees that fall in-between," Pet. 23, but the power to waive the entire fee necessarily includes the lesser power to waive part of the fee. *See, e.g., United States v. O'Neil*, 11 F.3d 292, 296 (1st Cir. 1993) (applying this "bit of common sense that has been recognized in virtually every legal code from time immemorial"); *see also Miller v. McClain*, 249 U.S. 308, 312 (1919) ("the greater power includes the lesser"). Moreover, as the Sixth Circuit explained, the PLRA "did not meaningfully change

II. THE COURT SHOULD GRANT REVIEW TO CORRECT THE JUDICIARY'S WIDESPREAD FAILURE TO IMPOSE MANDATORY FEES.

The Petition buries any mention of Section 1915(b)(1) in a footnote, observing that the "courts of appeals have universally held that the PLRA does not apply to habeas cases." Pet. 9-10 n.2. In the Petition's view, this uniform agreement is a reason to ignore Section 1915(b)(1) entirely. But in fact the opposite is true: The judiciary's widespread disregard for the plain text of Section 1915(b)(1) provides yet another reason for this Court to grant review.

The proper treatment of habeas appeals under Section 1915 is an issue of great public importance, with implications for thousands of cases nationwide. In one year, from July 2018 through July 2019 alone, 4,026 prisoners filed new habeas corpus appeals in the federal courts of appeals. WestLaw, Litigation Analytics Report for Prisoner Rights Habeas Corpus. Congress's mandatory fee regime applies to practically every single one of those appeals, and yet the statute is routinely ignored.

For all those cases, the PLRA strives to achieve a delicate balance between permitting liberal filings and deterring frivolous appeals. Congress in the PLRA sought to ensure that "prisoners with meritorious claims will not be shut out from the court for lack of sufficient money," 141 Cong. Rec. S7526,

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the text of § 1915(a)(1)," which "permits the inference that Congress did not wish to change what had become a uniform practice of permitting courts to require indigent litigants to prepay some but not all of the fee." Pet. App. 6a.

but Congress also sought to balance that interest against the need to deter frivolous filings by the nation's prisoners. *See, e.g.*, *id.* at S7524 ("Over the past two decades, we have witnessed an alarming explosion in the number of lawsuits filed by State and Federal prisoners."); *id.* at S7525 ("[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."). In the habeas context, the text of the PLRA strikes this balance by allowing district courts complete discretion to waive all or some of the filing fee for the initial petition, while providing for mandatory fees for *all* appeals.

Certiorari is necessary to restore the balance that Congress struck in the text of the law. The Petition observes that, "[a]s a matter of practice, numerous . . . circuits permit habeas petitioners to appeal without paying a partial filing fee." Pet. 5 (citing cases from the Third, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits). That widespread practice cannot be squared with the law that Congress wrote, which, it bears repeating, directs that fees "shall" be imposed whenever a prisoner "files an appeal in forma pauperis." 28 U.S.C. § 1915(b)(1). Given the judiciary's widespread failure to follow Congress's mandatory command, exercise of this Court's supervisory power is required.

III. THE SIXTH CIRCUIT'S FAILURE TO ADDRESS CONGRESS'S MANDATORY FEE PROVISION IS A REASON TO GRANT REVIEW, NOT A VEHICLE PROBLEM.

Rather than address the interpretation of Section 1915(b)(1), the Sixth Circuit concluded that it "need

not resolve the point," as the "parties [did not] squarely present the arguments below." Pet. App. 12a, 17a. The Sixth Circuit's refusal to grapple with Section 1915(b)(1) dovetails with the judiciary's larger failure to apply the statute. That unjustified refusal provides yet another basis for review, and, in fact, gives rise to an additional circuit split.

The Sixth Circuit was not at liberty to set aside Section 1915(b)(1), which provides for mandatory fees that courts "shall" impose, and by doing so the Sixth Circuit split with decisions from other Circuits holding that Section 1915(b)(1) is mandatory where it applies. So, for instance, when a prisoner asked the Third Circuit to waive fees required under Section 1915(b)(1), that court explained that "the PLRA plainly requires a prisoner to pay the fees if he 'brings a civil action or files an appeal,'" and that "even if [the prisoner] obtains IFP status, we have *no authority to waive* his fees under the PLRA." *Porter v. Dep't of Treasury*, 564 F.3d 176, 180 (3d Cir. 2009) (emphasis added); *see also Miller v. Lincoln Cty.*, 171 F.3d 595, 596 (8th Cir. 1999); *Reid v. United States*, 740 F. App'x 656, 656 (10th Cir. 2018). The Sixth Circuit's determination that it "need not" apply the mandatory language of Section 1915(b)(1) is irreconcilable with this precedent from other Courts of Appeals.[5]

[5] Notably, the partial fees required under Section 1915(b) are different from the partial fees imposed here. The district courts did not follow the formula set forth in Section 1915(b)(1) to determine the amount of the initial partial fee, and the district courts also did not comply with the direction to require payment of the balance of the fee in monthly installments. The application of Section 1915(b) to this case is therefore in no sense a purely academic question.

The Sixth Circuit's suggestion that this issue was somehow waived by the parties fares no better. Just as the government cannot waive jurisdictional limitations imposed by statute, *see, e.g., Munro v. United States*, 303 U.S. 36, 41 (1938), the government has no power to waive Congress's direction that courts "shall" impose filing fees. A filing fee requirement is a directive addressed to the courts, in order to govern the internal procedures of the courts, and it binds the courts irrespective of the actions of any particular litigant. It is not clear that the executive branch even has an interest in whether a filing fee is paid, and the litigating position of the executive branch certainly cannot be allowed to determine this question of internal court administration.

Moreover, the parties cannot possibly have waived this issue before the district court, as the imposition of a filing fee is not a stage of the proceedings that requires adversarial briefing, and no such briefing was called for in these cases. *See*, *e.g.*, *Baumann v. Savers Fed. Savs. & Loan Ass'n*, 934 F.2d 1506, 1509–10 (11th Cir. 1991) (issue not waived where there was "no opportunity to present" the argument); *Union Fed. Bank of Ind. v. Minyard*, 919 F.2d 335, 335 (5th Cir. 1990) (similar); *Clayton Brokerage Co. of St. Louis, Inc. v. Commodity Futures Trading Comm'n*, 794 F.2d 573, 583 (11th Cir. 1986) (similar). The parties cannot have "waived" an issue they had no opportunity to raise.

For similar reasons, this is not an issue that would benefit from further percolation in the lower courts. Over two decades have passed since Congress enacted the mandatory fee provisions set forth at Section 1915(b)(1). Yet the executive branch has failed

to push the courts to faithfully apply the PLRA's mandatory filing fee provisions to habeas appeals, and the lower courts in turn have failed to apply those provisions according to their text. Neither the executive branch nor any other litigant has any particular incentive to fully litigate this issue, and there is no procedure in place to ensure enforcement of Section 1915(b)(1) in the lower courts. In this context, the Court's exercise of its supervisory authority is required to ensure that the courts follow the law that Congress has passed.

CONCLUSION

The petition for a writ of certiorari should be granted, and this Court should decide whether federal courts are not merely permitted, but *required*, to impose partial filing fees on prisoners appealing from the denial of their habeas petitions.

September 4, 2019

Respectfully submitted,

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