No. 16-1067

In the Supreme Court of the United States

CHARLES MURPHY, PETITIONER

v.

ROBERT SMITH AND GREGORY FULK

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

BRIEF OF AMICI CURIAE STATES OF MICHIGAN, ARIZONA, ARKANSAS, CONNECTICUT, IDAHO, INDIANA, KANSAS, NEBRASKA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, WISCONSIN, AND WYOMING IN SUPPORT OF RESPONDENTS

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Kathryn M. Dalzell
Assistant Solicitor General
Solicitor General Division

Attorneys for Amicus Curiae
State of Michigan

[additional counsel listed at the end of the brief]

QUESTION PRESENTED

The Prison Litigation Reform Act (PLRA) provides that, when a prisoner obtains a monetary judgment, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant," and that "the excess shall be paid by the defendant." 42 U.S.C. § 1997e(d)(2).

The question presented is whether § 1997e(d)(2) requires that the attorney's fee award be satisfied from the judgment, with the defendant liable for any fees in excess of 25 percent of the judgment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

As Congress recognized in enacting the Prison Litigation Reform Act, prisoner litigation against state officials is ubiquitous. While prisoners can obtain damages from state officials only in those officials' individual capacities and not directly from the State, the States frequently defend and indemnify those officials. Because it is often the States—and taxpayer dollars—that are responsible for any damages and associated awards of attorney's fees, the States have an interest in the proper interpretation of the PLRA's limitations on awards of attorney's fees. Specifically, § 1997e(d)(2) requires a prisoner who receives a money judgment to pay an award of attorney's fees in full up to the statutory cap of 25% of the judgment. 42 U.S.C. § 1997e(d)(2).

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Prison Litigation Reform Act, Congress imposed a series of limits on the amount of attorney's fees a prisoner can recover for winning a civil-rights claim. In addition to limits on the total amount and hourly rate for which a losing defendant may be held responsible, and on the type and scope of legal work that may be reimbursed, Congress required a prisoner who wins a money judgment to pay the attorney's fees by applying "a portion" of his judgment to "satisfy" the fees. 42 U.S.C. § 1997e(d)(2).

The word "satisfy" denotes full payment, meaning the statute contemplates that the prisoner will pay the fees in full. But Congress also ensured that the required offset would not swallow a prisoner's victory.

It did so by putting a ceiling—"not to exceed 25 percent" of the judgment—on the amount the prisoner can be required to contribute. Thus, a prisoner is always guaranteed to keep at least 75% of his judgment, and more if his attorney's fees do not reach the statutory ceiling (for example, if 20% of the judgment would satisfy the fees).

This reading—that a prisoner must pay an award of attorney's fees in full up to the statutory cap of 25% of the judgment—is dictated by the statutory text. It gives meaning to Congress's command that a prisoner (in contrast to other civil-rights victors) "shall" contribute regardless of his prevailing status, and to Congress's choice of the word "satisfy." And it recognizes that the lower limit is automatically set by the amount of the judgment, just as all agree the upper limit is. The petitioner's reading, in contrast, allows courts to grant themselves discretion based on the fact that the plaintiff must pay a "portion" of the judgment—even though that portion is determined by math, not discretion—and in so doing to nullify Congress's decision that prisoners must satisfy the fees.

Reading the text to require the prisoner to pay up to the 25% cap is also consistent with the policies underlying the PLRA, which include bringing prisoners' litigation incentives in line with those of non-prisoners, in part by requiring prisoners to have a financial stake when they litigate, and limiting the costs that prisoner litigation imposes on defendants and taxpayers in both meritorious and non-meritorious suits.

ARGUMENT

I. Under § 1997e(d)(2)'s plain text, a prisoner who receives a money judgment must pay attorney's fees in full, so long as the fees do not exceed 25% of the judgment.

A. The words "shall" and "satisfy" denote a mandatory payment that is to extinguish and fulfill an award of fees.

Section 1997e(d)(2)'s text makes at least two points clear: (1) a prevailing prisoner *must* pay a portion of any attorney-fee award out of his judgment; and (2) the prisoner's contribution must *satisfy* the amount of the fee award up to 25% of the judgment.

First, the court *must* apply a portion of the prisoner's judgment to any award of attorney's fees. If the court awards a prevailing prisoner attorney's fees, the PLRA mandates that, in cases in which a prisoner receives a money judgment, "a portion of the judgment . . . *shall be applied*" to satisfy the fees. § 1997e(d)(2) (emphasis added). This language denotes a mandatory action—a "command" that "normally creates an obligation impervious to judicial discretion." *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily 'the language of command.' "). The PLRA does not merely *allow for* a portion of the judgment to be applied to satisfy the attorney's fees. Contra *Siggers-El* v. *Barlow*, 433 F. Supp. 2d 811, 822 (E.D. Mich. 2006) ("The relevant portion of the PLRA allows for a portion of the plaintiff's judgment, not exceeding 25%, to be applied to satisfy the payment of attorney's fees."). It *requires* the court to apply a portion of the judgment to the fees.

When Congress wants the courts to have discretion in shifting fees, it has said so expressly. As this Court has observed, "Congress has specifically provided in the statutes allowing awards of fees whether such awards are mandatory under particular conditions or whether the court's discretion governs." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 264 n.38 (1975). Indeed, Congress has expressly conferred discretion on courts in many statutes. E.g., 15 U.S.C. § 77k(e) ("[T]he court *may*, *in its discretion*, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and . . . such costs *may* be assessed in favor of [a prevailing] party litigant . . . if the court believes the suit or the defense to have been without merit . . . ."); 15 U.S.C. § 77www(a) ("[T]he court *may*, *in its discretion*, require an undertaking for the payment of the costs of such suit and assess reasonable costs, including reasonable attorneys' fees, against either party litigant, having due regard to the merits and good faith of the suit or defense."); 15 U.S.C. § 78i(f) ("[T]he court *may*, *in its discretion*, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant."); 15 U.S.C. § 78r(a) (same); 42 U.S.C. § 2000e-5(k) ("[T]he court, *in its discretion*, *may* allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs . . . ."); 42 U.S.C. § 7604(d) ("The court . . . *may* award costs of litigation (including reasonable attorney and expert witness fees) to any party, *whenever the court determines such award is appropriate*."); 42 U.S.C. § 4911(d) (same) (all emphasis added).

But Congress did not include discretion-granting language in § 1997e(d)(2). In fact, § 1997e(d) provides particularly direct evidence that Congress chose not to grant discretion: § 1997e(d)(1) directly refers to § 1988, a provision that contains discretion-granting language, yet § 1997e(d) does not mirror § 1988's language. In § 1988, Congress expressly gave the courts discretion whether to shift fees: "the court, *in its discretion*, *may* allow the prevailing party . . . a reasonable attorney's fee[.]" § 1988(b) (emphasis added). That is, Congress read § 1988 when it was drafting the PLRA's fee-shifting statute and could easily have incorporated similar discretion-granting language into the PLRA, had it wanted to. But it did not. Cf. *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2165 (2015) (noting that Congress's choice of fee-shifting language in a statute was "particularly telling" in light of "other provisions of the Bankruptcy Code" that "expressly" shift fees in a different way). Instead, if fees "are authorized under section 1988," § 1997e(d)(1)—that is, if the prisoner is "the prevailing party" and the fees are "reasonable," § 1988(b)—then the prevailing prisoner must pay § 1997e(d)(2)'s mandatory fee-contribution.

The fact that Congress instructed courts to apply "a portion" of the judgment to satisfy an award of attorney's fees also does not imply that courts have discretion to define the amount of the portion. It makes sense that Congress chose an indeterminate word such as "portion" here. "Portion" is defined as "a part of a whole." THE AMERICAN HERITAGE DICTIONARY, SECOND COLLEGE EDITION (1982). Congress has required a prisoner to contribute "a part" of his whole judgment to an award of attorney's fees, but only a

part, as Congress has set the ceiling of the required contribution so that a prevailing prisoner is always guaranteed to keep at least 75% of any money judgment he receives (and possibly more, if the fees do not reach 25% of the judgment). The fact that the prisoner is required to contribute "a portion," or a part, of his judgment does not say anything about *the amount* of that part, or how it is to be determined. Instead, it simply reflects that the prisoner is not required to contribute his whole judgment.

Second, the prisoner's contribution must pay the fee award in full, up to the statutory ceiling of 25% of the judgment. That is because the PLRA requires the court to apply a portion of the prisoner's judgment "to satisfy" the amount of the attorney's fees. § 1997e(d)(2). The word "satisfy" denotes full payment. Black's Law Dictionary, for example, defines "satisfaction" in relevant part to mean to "extinguish" or "fulfill[ ]" a legal or moral obligation; for example, "the payment *in full* of a debt." BLACK'S LAW DICTIONARY (9th ed. 2009) (emphasis added). It similarly defines "satisfaction of judgment" as "[t]he *complete* discharge of obligations under a judgment," defines "satisfaction of lien" as "[t]he fulfillment of *all* obligations made the subject of a lien," and defines "satisfaction of mortgage" as "[t]he *complete* payment of a mortgage." *Id*. (emphasis added); accord THE SHORTER OXFORD ENGLISH DICTIONARY (3d ed. 1955) (defining "satisfy," with reference to a debt or obligation, as "[t]o pay off or discharge fully"; "[t]o pay"); THE AMERICAN HERITAGE DICTIONARY, SECOND COLLEGE EDITION (1982) (defining satisfy in relevant part as "[t]o discharge an obligation"). While it is true that Congress capped at 25% of the judgment the amount a prisoner

must contribute to fees, its use of the word "satisfy" indicates that, subject to that cap, a prisoner's judgment is to "extinguish," "fulfill[ ]," or "complete[ly] discharge" any attorney-fee award.

One more point confirms the mandatory nature of the plaintiff's contribution: there is no indication in the text that Congress intended to treat the *upper limit* on the plaintiff's contribution as *mandatory* while treating the *lower limit* as *discretionary*. All agree that the upper limit is mandatory—a plaintiff could not be required to pay more than 25% of the judgment to his attorneys. And nothing in the text treats the lower limit any differently. Rather, the lower limit is automatically set by the actual numbers of the judgment and the attorney's fees.

For example, if the prisoner wins a $100,000 judgment and is granted $20,000 in attorney's fees, then the "portion" of the judgment that will be applied to "satisfy" the amount of the fee award will be 20%, or $20,000. And where the fee award can be fully satisfied, as in this example, without requiring the plaintiff's payment to exceed 25%, there is no excess that needs to be paid by the defendant. If, on the other hand, the fees exceed 25% of the judgment—say the fees are $30,000 instead of $20,000—then the "portion" of the judgment that will be applied to "satisfy" the fees will be 25% of the judgment (the statutorily capped percentage), or $25,000, and the defendant will be responsible for "the excess" of $5,000.

As these examples show, the amount of the "portion" of the judgment that a plaintiff must pay is an automatic, mathematical function of the percentage that the fee award is of the judgment itself. This is

consistent with how the rest of § 1997e(d) works: just as the plaintiff's fee-contribution cap is a function of the amount of the judgment, § 1997e(d)(2) ("a portion of the judgment (not to exceed 25 percent)"), and just as the defendant's fee-contribution cap is a function of the amount of the judgment, § 1997e(d)(2) ("not greater than 150 percent of the judgment"), and just as the fees allowable in the first place are a function of the judgment, § 1997e(d)(1)(B)(i) (they must be "proportionally related to" it), it makes sense that the plaintiff's minimum contribution is also a function of the judgment. In short, both the upper limit *and* the lower limit are mandatory, not discretionary.

B. The words "exceed" and "excess" confirm that the prisoner is the first line of payment up to 25% of the judgment.

The words "exceed" and "excess" point to the same conclusion. Congress instructed that a prevailing prisoner's required contribution to a fee award is not to "exceed" 25% of the judgment, and then, in the next sentence, instructed that the defendant is to pay "the excess" (so long as the fees are not greater than 150% of the judgment). § 1997e(d)(2); BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "excess" as "[t]he amount or degree by which something is greater than another"). By choosing these words, Congress indicated that the defendant's obligation to pay "the excess" refers to the figure that the prisoner's fee contribution may not "exceed"—that is, to the amount exceeding 25% of the judgment. Up until that 25% point, the prisoner's judgment "shall" "satisfy" the fees.

Limiting the defendant's obligation to "the excess" shows Congress's intention that a prevailing prisoner

be the first line of payment for his own attorneys. After the court "satisf[ies]" the fee award with a portion of the judgment not exceeding 25%, the PLRA provides that the defendant shall pay "the excess" (up to 150% of the judgment). That is to say, a defendant's obligation to pay the attorney's fees does not kick in until after the prevailing plaintiff's initial contribution. Thus, the PLRA requires prisoner plaintiffs to remain the first line of payment for their attorneys, even when the court chooses under § 1988(b) and § 1997e(d) to require the losing defendant to pay the "excess" of the prisoner's attorney's fees that exceed 25% of the judgment.

And the prisoner may also be the *last* line of payment: If the fees exceed 150% of the judgment or otherwise exceed the limits § 1997e(d) sets on the type or hourly rate of work that may be reimbursed, the prisoner is free to pay his attorney the difference, so long as he uses his own money and not the defendant's. § 1997e(d)(4).

C. Requiring a prisoner to pay fees in full up to the statutory cap is necessary to give meaning to the words of the statute.

If courts have discretion to require a prisoner to contribute less than the full amount of his attorney's fees when the fees do not exceed 25% of the judgment, that necessarily means that a court could require the prisoner to contribute only a nominal, or *de minimis*, amount toward his fees. Indeed, that is exactly what a number of courts have done. E.g., *Boesing* v. *Spiess*, 540 F.3d 886, 892 (8th Cir. 2008) (applying 1% of prisoner's $25,000 judgment toward attorney's fees); *Johnson* v. *Daley*, 339 F.3d 582, 585 (7th Cir. 2003)

(en banc) (district court ordered prisoner to pay only $200 (or 0.005%) of $40,000 judgment toward fees); *Rodriguez* v. *Cty. of Los Angeles*, 96 F. Supp. 3d 1012, 1026 (C.D. Cal. 2014) (requiring prisoner to pay 1%); *Siggers-El*, 433 F. Supp. 2d at 822–23 (requiring prisoner to pay $1 from $219,000 judgment toward $90,875.95 fee award). Reading the PLRA this way nullifies the text of the statute in at least two ways.

First, it nullifies Congress's mandate that the court "shall" apply a portion of the judgment to "satisfy" the attorney's fees. A court has no discretion under the PLRA *not* to require a prisoner to pay a portion from his judgment to satisfy the fees—but that is effectively what courts do when they require a prevailing prisoner to contribute only a nominal amount of the judgment toward fees, such as 1% or $1. "Nominal" is defined in relevant part as "[e]xisting in name only," or "trifling, esp[ecially] as compared to what would be expected." BLACK'S LAW DICTIONARY (10th ed. 2014). Even courts that have read § 1997e(d)(2) as granting discretion to set the amount have understood that requiring only a nominal contribution does not "honor[ ] [Congress's] intent to hold the plaintiff responsible for a portion of the attorneys' fees awarded." *Farella* v. *Hockaday*, 304 F. Supp. 2d 1076, 1081 (C.D. Ill. 2004) (requiring prisoner to contribute 10% of judgment toward attorney's fees, noting that 10% is "more than a de minimis amount"). By allowing prevailing prisoners to make "trifling" contributions toward attorney's fees—contributions that "[e]xist[ ] in name only"—courts have nullified Congress's choice of the words "shall" and "satisfy."

Second, allowing a prisoner to contribute only a nominal amount nullifies Congress's instruction to treat prevailing prisoners *differently* than prevailing non-prisoners. Congress, through the PLRA, has expressed a judgment that, *in contrast to § 1988(b)*, a court *may not* pay a prevailing prisoner's attorney solely through funds of the defendant. § 1997e(d)(2). No corresponding provision in § 1988(b) requires a prevailing non-prisoner to pay a portion of his own attorney's fees. This shows that Congress wanted courts to treat prevailing prisoners differently than other prevailing plaintiffs under § 1988(b). This Court must presume that Congress intended this difference to be meaningful, *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (statutes construed to give effect to all provisions); *Stone* v. *INS*, 514 U.S. 386, 397 (1995) (Congress intends amendments to have "real and substantial effect")—but the difference evaporates if a court has discretion to require only a nominal contribution from the prisoner under § 1997e(d)(2).

D. In contrast to § 1988, which allows a plaintiff to pay no fees, § 1997e(d)(2) does not allow fully setting aside the American Rule.

The usual rule for litigation is this country is that "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts*, 135 S. Ct. at 2164 (quoting *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53 (2010)). This "bedrock principle," known as the "American Rule," has deep roots in our common law. *Id.* at 2164, 2169. Accordingly, this Court "will not deviate from the American Rule absent explicit statutory au-

thority." *Id*. at 2164 (internal quotations omitted). Instead, this Court reads any fee-shifting statutes with a presumption favoring the American Rule that each litigant pays his own fees. *Baker Botts*, 135 S. Ct. at 2164.

While Congress has permitted full fee-shifting for prevailing civil-rights plaintiffs, it has forbidden full fee-shifting for prevailing prisoners. In civil-rights cases, Congress has given courts discretion to "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," with certain limited exceptions. § 1988(b). A party seeking attorney's fees must show (1) that it is a prevailing party, and (2) that the request is reasonable. *Farrar* v. *Hobby*, 506 U.S. 103, 109–14 (1992). In fact, the default expectation is that a prevailing civil-rights plaintiff *will* have attorney's fees shifted to the defendant: this Court has held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," reasoning that "[t]he purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (citations and quotations omitted). A prevailing defendant, in contrast, "may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Id*. at 429 n.2.

But for prisoner litigation, Congress created a different rule. Instead of expressly permitting full deviation from the American Rule, as it had in civil-rights cases generally, Congress in the PLRA placed a num-

ber of limits on the fees that courts may award to prevailing prisoner plaintiffs. § 1997e(d). As detailed in Part II.A, the PLRA limits the scope of legal work that may be reimbursed, § 1997e(d)(1); caps at 150% of the judgment the total amount a losing defendant can be required to pay, § 1997e(d)(2); and caps the hourly rate a defendant can be required to cover at no greater than 150% of the statutory hourly rate for court-appointed counsel, § 1997e(d)(3). Section §1997e(d)(2)'s limitation on fee shifting—i.e., requiring a prisoner who wins a money judgment to contribute to any attorney's fee award—is consistent with these other limits. Adopting the petitioner's interpretation, in contrast, would allow a court to award fees just as if the American Rule had been fully eliminated, by allowing a prisoner to shift all but a nominal amount onto the losing defendant.

II. The statutory context further confirms this reading.

Examining § 1997e(d)(2) in its statutory context further confirms that Congress expected prevailing prisoners to pay in full an award of attorney's fees up to the statutory cap of 25% of the judgment.

A. Multiple parts of § 1997e(d) *limit* the amount of attorney's fees for which a defendant may be held responsible.

The language requiring prisoners to put "a portion" of the judgment toward fees exists in a subsection that sets out a series of *limitations* on the amount a losing defendant can be required to contribute to the prisoner's attorney fees. Each part of subsection (d) limits the fees a defendant must pay:

- Subsection (d)(1) limits the type and scope of legal work that a defendant must reimburse, requiring the fee to be "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" and be either "proportionately related to the court ordered relief" or "directly and reasonably incurred" in enforcing the court-ordered relief.

- Subsection (d)(2) caps the total amount a defendant must reimburse, limiting an award of attorney's fees to 150% of the judgment.

- Subsection (d)(3) caps the hourly rate for which a defendant is responsible, specifying that an attorney's hourly rate can be no greater than 150% of the statutory hourly rate for court-appointed counsel.

- Subsection (d)(4) allows a prisoner to pay his attorney a higher fee than is permitted under Subsection (d), but only if he uses his own money and not the defendant's.

Within this subsection that imposes solely limitations on the amount of fees for which a losing defendant may be held responsible, subsection (d)(2) reads most naturally as requiring the prevailing prisoner to pay as much of his own fees as possible up to the statutory cap of 25% of the judgment. *Jackson* v. *Austin*, 267 F. Supp. 2d 1059, 1071 (D. Kan. 2003) (holding that this is the most plausible interpretation, "especially given the other limits that Section 1997e places on both prisoners and the courts"); *Searles* v. *Van Bebber*, 64 F. Supp. 2d 1033, 1042 (D. Kan. 1999) (same),

vacated and remanded on other grounds, 251 F.3d 869 (10th Cir. 2001).

B. The petitioner's proposed reading allows a form of double-counting.

Reading the PLRA to give courts discretion to set the amount of a prisoner's required fees contribution allows courts to treat prisoners the same as non-prisoners—it allows courts to use considerations that already factored into the amount of the *judgment* to also increase the percentage of *fees* that the defendant must pay, in spite of Congress's intent in the Prison Litigation Reform Act to treat prisoners differently from non-prisoners.

Consider, for example, a prisoner and a non-prisoner who won identical judgments for an identically severe civil-rights violation. The non-prisoner would "ordinarily recover" all of the fees, "unless special circumstances would render such an award unjust," *Hensley*, 461 U.S. at 429 (quotations omitted), which means the non-prisoner would pay 0% of the fees and the non-prisoner's defendant would pay 100% of the fees. But as explained above, § 1997e(d) shows that prisoners are supposed to be treated differently from non-prisoners, even after proving a constitutional violation. So if a court factors, for example, the egregiousness of the constitutional violation into the fee-shifting and allocates the fees on that basis, then the court effects a form of double-counting: it uses a factor already accounted for in the judgment (the egregiousness of the constitutional violation) to allocate fees, overriding Congress's decision to treat prisoners *and their judgments* differently.

Numerous courts have cited the severity of the constitutional violation or the existence of punitive damages as a reason to lower the prisoner's mandatory contribution under Section 1997e(d)(2). E.g., Pet. Br. 22–23 (collecting cases); *Siggers-El*, 433 F. Supp. 2d at 822–23; *Farella*, 304 F. Supp. 2d at 1081–82; *Morrison* v. *Davis*, 88 F. Supp. 2d 799, 811 (S.D. Ohio 2000); *Johnson* v. *Daley*, 117 F. Supp. 2d 889, 905 (W.D. Wis. 2000), rev'd, 339 F.3d 582 (7th Cir. 2003). But Congress presumably was well aware that the severity of the constitutional violation would be factored into the underlying judgment, including via punitive damages, yet Congress still chose to require the prevailing prisoner to contribute to his own legal fees, without qualification. *Miles* v. *Apex Marine Corp*., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

Other factors might be double counted in a similar way. For example, the main reason to grant a prevailing plaintiff attorney's fees under § 1988(b) is that Congress intended the fee-shifting to encourage civil-rights enforcement: "[t]he purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley*, 461 U.S. at 429 (citations and quotations omitted); accord *Blanchard* v. *Bergeron*, 489 U.S. 87, 95 (1989) ("The intention of Congress was to encourage successful civil rights litigation . . . ."). But even though the existence of a civil-right violation is already included in the threshold calculus whether to award fees *at all* under § 1988(b), courts have relied *again* on the existence of a constitutional violation to lower the amount a prevailing prisoner will contribute to his fee award under § 1997e(d)(2). E.g., *Morrison*, 88 F. Supp. 2d at 811;

(considering among other factors "the constitutional rights implicated"), amended in part, 195 F. Supp. 2d 1019 (S.D. Ohio 2001); *Siggers-El*, 433 F. Supp. 2d at 822–23 (same); *Lawrence* v. *Bowersox*, No. 4:97-cv-1135-CEJ, Dkt. 204 (E.D. Mo. Oct. 2, 2002) (same); *Farella*, 304 F. Supp. 2d at 1081–82 (considering "the seriousness of the constitutional violation"); *Cornell* v. *Gubbles*, No. 05-1389, 2010 WL 3937597, at *2 (C.D. Ill. Sept. 29, 2010) (same); cf. *Kahle* v. *Leonard*, 563 F.3d 736, 743 (8th Cir. 2009) (importing standards used "for determining *whether* and to what extent a prevailing party should receive attorneys' fees in ERISA cases" (emphasis added)).

In other words, despite Congress's deliberate policy choice that even prisoners who genuinely suffered a constitutional violation must be required to satisfy their own fees with a portion of the judgment, the courts above have cited the existence of a constitutional violation as a reason to lower the amount the prisoner must contribute to fees under § 1997e(d)(2). This makes little sense, as literally every prisoner who receives an award of attorney's fees—and whom Congress, in the PLRA, has required to contribute to those fees—will have suffered a constitutional violation.

Courts have struggled expressly with the competing policy considerations at play. In *Livingston* v. *Lee*, 2007 WL 4440933 (N.D.N.Y. Dec. 17, 2007), for example, the court first noted that "[i]t would be somewhat incongruous for a court to effectively reduce the punitive effect of punitive damages by reducing the amount the wrongdoer otherwise has to pay by offsetting a portion of the punitive damages award against

the attorney's fees to be paid by the defendant." *Id*. at *2. On the other hand, the court recognized that "the clear purpose of § 1997e(d)(2) . . . is to compel the prisoner to bear some of the burden of the cost of litigation." *Id*. "Balancing these countervailing policy considerations," the court ultimately honored Congress's policy choice by requiring the prevailing prisoner to pay 25% of his judgment toward his attorney's fees. *Id*. In contrast, other courts have appeared to expressly reject Congress's policy choice. E.g., *Shatner* v. *Cowan*, 2009 WL 5210528, at *4 (S.D. Ill. Dec. 28, 2009) ("[T]he Court finds that requiring Sha[tn]er to pay more than a $1.00 would also defeat the purpose of awarding him compensatory and punitive damages.").

The courts' struggles with policy considerations highlight another quandary that arises when courts read the PLRA as providing discretion to set the prisoner's mandatory contribution to fees anywhere from one cent to 25% of the judgment. Unless the court assumes a default contribution of 25% and exercises its discretion only to reduce that percentage (which results in the double-counting described above), it is unclear what would motivate the court to exercise its discretion to require the prisoner to contribute a full 25% of the judgment toward fees—other than the simple policy conclusion that Congress wanted the prisoner to contribute. E.g., *Farella*, 304 F. Supp. 2d at 1081–82 (contribution of 10% "honor[s] [Congress's] intent to hold the plaintiff responsible for a portion" of the fees); *Livingston*, 2007 WL 4440933, at *2 (similar); cf. *Shepherd* v. *Wenderlich*, 746 F. Supp. 2d 430, 433 (N.D.N.Y. 2010) (requiring prisoner to contribute 10% of judgment "[f]or purposes of simplicity"); *Clark* v.

Phillips, 965 F. Supp. 331, 338 (N.D.N.Y. 1997) (requiring prisoner to contribute 25% due to lack of objection); *Gevas* v. *Harrington*, No. 10-CV-493-SCW, 2014 WL 4627616, at *3 (S.D. Ill. Sept. 16, 2014) (requiring prisoner to contribute 10% in part because prisoner benefitted from counsel); *Jellis* v. *Veath*, No. 3:10-CV-91-DGW, 2013 WL 1689061, at *2 (S.D. Ill. Apr. 18, 2013) (same, requiring 5% contribution). But see *Hall* v. *Terrell*, 648 F. Supp. 2d 1229, 1237 (D. Colo. 2009) (considering defendant's ability to pay fees); *Kemp* v. *Webster*, No. CV 09-295-KHV, 2013 WL 6068344, at *5 (D. Colo. Nov. 18, 2013) (same); Pet. Br. 23 n.3 (acknowledging that other factors considered in *Hall* and *Kemp* "are just different ways of restating" a culpability assessment). Indeed, many courts that have required a prevailing prisoner to cover the full fee award up to 25% of the judgment have thought that they had no discretion under § 1997e(d)(2) to require a lesser amount, or at least have not indicated a belief that they had discretion. E.g., App. 1a; *Johnson*, 339 F.3d at 584–85; *Jackson*, 267 F. Supp. 2d at 1071–72; *Spruytte* v. *Hoffner*, 197 F. Supp. 2d 931, 934 (W.D. Mich. 2001); *Searles*, 64 F. Supp. 2d at 1042, vacated and remanded on other grounds, 251 F.3d 869 (10th Cir. 2001); *Beckford* v. *Irvin*, 60 F. Supp. 2d 85, 89–90 (W.D.N.Y. 1999); *Roberson* v. *Brassell*, 29 F. Supp. 2d 346, 355 (S.D. Tex. 1998).

If the court wanted to exercise its discretion to require the prisoner to pay 25% for some reason other than Congress's policy choice to require a prevailing prisoner to contribute—say based on bad behavior or litigation decisions by the prisoner plaintiff, or the fact that the prisoner won only a fraction of the relief

he sought—then many such reasons would probably also be reasons to deny fee-shifting altogether under § 1988(b).

III. The PLRA's policy supports this plain-text reading.

The PLRA's policy also supports requiring prevailing prisoners to satisfy any award of attorney's fees up to the statutory cap of 25% of the judgment. In particular, through the PLRA Congress sought to bring prisoners' litigation incentives in line with those of non-prisoners, in part by requiring prisoners to have a financial stake in the litigation, and to limit the costs that prisoner litigation—both frivolous *and* meritorious—imposes on defendants and taxpayers.

Congress enacted the PLRA to bring prisoner litigation "under control" "in the wake of a sharp rise in prisoner litigation in the federal courts." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006). As courts have noted, "the very nature of incarceration" had "fostered a 'nothing to lose and everything to gain' environment" in which inmates "indiscriminately [ ] file suit at taxpayers' expense." *Nicholas* v. *Tucker*, 114 F.3d 17, 20–21 (2d Cir. 1997). That is because "prisoners have substantial free time on their hands, their basic living expenses are paid by the state[,] and they are provided free of charge the essential resources needed to file actions and appeals, such as paper, pens, envelopes and legal materials." *Id.*; accord *Boivin* v. *Black*, 225 F.3d 36, 44 (1st Cir. 2000); *Johnson*, 339 F.3d at 592.

To control the inordinate amount of prisoner suits, many of which were meritless, Congress sought to bring prisoners' litigation incentives more in line with

the incentives that non-prisoners face. *Nicholas*, 114 F.3d at 20–21. One way to do that is to require prisoners to have a financial stake in the litigation. "By making prisoners at least partially responsible for the costs of their suits, the Act undoubtedly will discourage frivolous filings." *Id*. Prisoners "have to make the same decision that law-abiding Americans must make: Is the lawsuit worth the price?" *Id*. (quoting Senator Kyl).

Several PLRA provisions require prisoners to have a financial stake in the case. For example, one PLRA provision requires prisoners (even those bringing meritorious claims) to pay court filing fees in full, either up front or in monthly installments (for *in forma pauperis* prisoners). 28 U.S.C. § 1915(b).

And, as relevant here, the PLRA requires prisoners to have a financial stake by capping the attorney's fees they may recover from defendants, if successful, and by requiring them to bear their own attorney's fees with a portion of the judgment. 42 U.S.C. § 1997e(d). As multiple courts have noted, Congress's policy decision to limit attorney's fees even for successful prisoners with meritorious claims makes sense: it "forces both lawyer and client, out of self-interest, to assess likely outcomes with greater care before filing a suit that, even if nominally successful, might leave them holding a nearly empty bag." *Boivin*, 225 F.3d at 45. Making prisoners aware ex ante that they will be required to contribute a portion of any judgment to their own attorney's fees "may create a disincentive to filing lawsuits in general and frivolous lawsuits in particular." *Collins* v. *Algarin*, No. CIV. A. 95-4220, 1998 WL 10234, at *9 (E.D. Pa. Jan. 9, 1998); accord

Morrison, 88 F. Supp. 2d at 808 ("Filing fees and attorney fees are both elements of the calculus that any potential litigant undertakes in deciding whether litigation is worth the economic risk."); *Johnson*, 339 F.3d at 594 (explaining why "a law reducing fees in successful suits also affects the filing of weak claims").

Section 1997e(d)(2)'s text requiring a prevailing prisoner to "satisfy"—i.e., pay in full—any award of attorney's fees up to a statutory cap is in full accord with this policy. It requires the prisoner to evaluate the cost, telling him that if he incurs high legal fees, he will need to satisfy them with not more than 25% of his judgment. In contrast, giving courts discretion to require only a nominal attorney's-fee contribution from the prevailing prisoner dilutes that disciplining effect.

Requiring a prisoner to bear his own costs is related to another policy goal of the PLRA, which is to limit the costs that prisoner litigation imposes on defendants and taxpayers. This goal is reflected in numerous PLRA provisions, which reduce costs even for *meritorious* claims. For example, the PLRA:

- Requires exhaustion of administrative remedies, 42 U.S.C. § 1997e(a);

- Allows defendants to waive the right to reply to a complaint without admitting to its allegations, 42 U.S.C. § 1997e(g);

- Requires, to the extent practicable, pretrial proceedings to be conducted by telephone, video conference, or other technology without

removing the prisoner from confinement, 42 U.S.C. § 1997e(f);

- Prohibits recovery for mental or emotional injury in the absence of physical injury or a sexual act, 42 U.S.C. § 1997e(e), 28 U.S.C. § 1346(b);

- Limits prospective relief and preliminary injunctions that can be awarded ("no further than necessary to correct the violation"), 18 U.S.C. § 3626(a)(1)(A); *id*. § 3626(a)(2);

- Provides for an "automatic stay" in response to a motion to terminate expensive remedial actions, 18 U.S.C. § 3626(e)(2);

- Limits the permissible scope of consent decrees, 18 U.S.C. § 3626(c);

- Provides for the appointment of special masters, 18 U.S.C. § 3626(f);

- Precludes the discharge of a prisoner's court fees in bankruptcy, 11 U.S.C. § 523(a)(17).

Requiring a prevailing prisoner to "satisfy" an award of attorney's fees up to 25% of his judgment furthers this policy goal of limiting the costs that prisoner litigation imposes on defendants and taxpayers. And a defendant's losing status—and the prisoner's winning status—did not change Congress's calculus in this regard: all of the limitations that Congress imposed on attorney's fees in Section 1997e(d) (e.g., limiting a defendant's responsibility to 150% of the judg-

ment, to 150% of the statutory hourly rate for appointed counsel, and to fees "directly and reasonably incurred in proving an actual violation") apply to *prevailing* prisoners and *losing* defendants. In this broader policy context of the PLRA, it makes sense that Congress would require a prevailing prisoner to "satisfy" his own attorney's fees, up to a statutory cap that preserves the bulk of his money judgment.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the Seventh Circuit.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record

Kathryn M. Dalzell
Assistant Solicitor General
Solicitor General Division

Attorneys for Amicus Curiae
State of Michigan

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ADDITIONAL COUNSEL

Mark Brnovich
Attorney General
State of Arizona
1275 W. Washington St.
Phoenix, AZ 85007

Leslie Rutledge
Attorney General
State of Arkansas
323 Center St.
Ste. 200
Little Rock, AR 72201

George Jepsen
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

Lawrence G. Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

Curtis T. Hill, Jr.
Attorney General
State of Indiana
200 W. Washington St.
Rm. 219
Indianapolis, IN 46204

Derek Schmidt
Attorney General
State of Kansas
120 S.W. 10th Ave.
2nd Fl.
Topeka, KS 66612

Douglas J. Peterson
Attorney General
State of Nebraska
2115 State Capitol Bldg.
Lincoln, NE 68509

Adam Paul Laxalt
Attorney General
State of Nevada
100 N. Carson St.
Carson City, NV 89701

Michael DeWine
Attorney General
State of Ohio
30 E. Broad St.
17th Fl.
Columbus, OH 43215

Mike Hunter
Attorney General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK
73105

Alan Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

Herbert H. Slatery III
Attorney General and
Reporter
State of Tennessee
500 Charlotte Avenue
Nashville, TN 37202

Sean D. Reyes
Attorney General
State of Utah
P.O. Box 142320
Salt Lake City, UT
84114

Brad Schimel
Attorney General
State of Wisconsin
P.O. Box 7857
Madison, WI 53707

Peter K. Michael
Attorney General
State of Wyoming
2320 Capitol Ave.
Cheyenne, WY 82002