THE PLRA AND RULE 20 IN HARMONY: APPORTIONING A SINGLE FEE FOR MULTIPLE INDIGENT PRISONERS WHEN THEY PROCEED JOINTLY

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Suppose that fifteen indigent prisoners are suffering from an infection caused by, in their opinion, their prison's unhygienic conditions. And suppose that they want to proceed jointly under Federal Rule of Civil Procedure 20, which allows permissive joinder of plaintiffs, and sue the prison officials for violating their federal constitutional rights. The prisoners' ability to proceed, however, depends on where they are incarcerated because federal courts differ on whether prisoners can proceed jointly under Rule 20. Because they are prisoners, the Prison Litigation Reform Act (PLRA)[1] is triggered. Its fees provision, codified at 28 U.S.C. § 1915(b)(1), requires that an indigent, or *in forma pauperis* (IFP), prisoner "pay the full amount of a filing fee."[2] But the statute does not specify how multiple IFP prisoners must satisfy this requirement.[3] As a result, the federal courts have been relegated to the task of determining whether multiple IFP prisoners can proceed jointly and, if so, how to assess filing fees.[4]

Three United States Courts of Appeals—the Eleventh, Seventh, and Third Circuits—have squarely analyzed whether the PLRA's fees provision precludes IFP prisoners from proceeding jointly as plaintiffs under Rule 20. Their conclusions differ, yielding a circuit split on (1) whether prisoners can proceed jointly; and (2) for the circuits that allow joint prisoner suits, how to assess fees among the prisoners.

The United States Court of Appeals for the Eleventh Circuit bars joint prisoner suits, reasoning that § 1915(b)(1) is incongruous with, and thus repeals, Rule 20 for IFP prisoners.[5] I argue that the court erred; a cursory, incorrect review of legislative history seduced it to violate the

1. Pub. L. No. 104-134, 110 Stat. 1321 (1996).

2. 28 U.S.C. § 1915(b)(1) (2006).

3. *See id.*; *see also In re* Prison Litig. Reform Act, 105 F.3d 1131, 1137 (6th Cir. 1997) ("The statute does not specify how fees are to be assessed when multiple prisoners constitute the plaintiffs or appellants."); Clay v. Rice, No. 01-C-50203, 2001 WL 1380526, at *1 (N.D. Ill. Nov. 5, 2001) ("Probably the [PLRA's] worst provision is the fee assessment and collection procedure of 28 U.S.C. § 1915(b). Among its many other shortcomings, this provision refers only to 'the prisoner' and neglects to address the case of multiple prisoner–plaintiffs.").

4. *See Clay*, 2001 WL 1380526, at *1 (noting that, in "[a]ttempting to fill [Congress's] gap, district courts . . . have divided the filing fee among multiple plaintiffs and assessed separate initial partial payments for each plaintiff").

5. *See* Hubbard v. Haley, 262 F.3d 1194, 1197–98 (11th Cir. 2001).

sturdy principle militating against repeal by implication. If the fifteen prisoners from the hypothetical were detained in Eleventh Circuit states, they would have to file federal suits separately.[6] Alarmingly, district courts in the Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits—all circuits in which no binding precedents exist—have followed the Eleventh Circuit's incorrect conclusion.[7]

By contrast, the two other courts of appeals that have squarely analyzed the issue—the Third and Seventh Circuits—allow multiple IFP prisoners to proceed jointly.[8] They both concluded, correctly, in my view, that the PLRA does not repeal Rule 20 by implication because there is no irreconcilable conflict between the two.[9] Indeed, "[t]he PLRA does not mention Rule 20 or joint litigation."[10] In addition, the Sixth Circuit, though it did not squarely address the issue, has suggested that multiple IFP prisoners may join actions under Rule 20.[11] These three circuits, however,

6. In an attempt to avoid the PLRA's nagging fees provision and Rule 20, prisoners could file their suits in state court. Because most states have enacted a PLRA analog that regulates prisoner access to state courts, it is likely that they would, however, face the same issue in state court. *See generally* Lynn S. Branham, *Of Mice and Prisoners: The Constitutionality of Extending Prisoners' Confinement for Filing Frivolous Lawsuits*, 75 S. CAL. L. REV. 1021, 1029–30 (2002) (noting that the PLRA incited enactment of state analogs "designed to further curb prisoners filing frivolous lawsuits," which included provisions on "partial filing fees"); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1634–36 (2003) (stating that "all but a few states now have some kind of system that specially regulates inmate access to state court").

7. *See infra* notes 159–64 and accompanying text.

8. Hagan v. Rogers, 570 F.3d 146, 150 (3d Cir. 2009); Boriboune v. Berge, 391 F.3d 852, 855 (7th Cir. 2004).

9. *Hagan*, 570 F.3d at 155 (finding no irreconcilable conflict between the PLRA and Rule 20 because they can be "read in complete harmony"); *Boriboune*, 391 F.3d at 854 ("And there is no irreconcilable conflict between Rule 20 and the PLRA . . . .").

10. *Boriboune*, 391 F.3d at 854; *accord Hagan*, 570 F.3d at 155 ("[T]he PLRA does not even address permissive joinder . . . .").

11. In 1999, the Sixth Circuit affirmed the division of costs assessed between two IFP prisoners. *See* Talley-Bey v. Knebl, 168 F.3d 884, 887 (6th Cir. 1999). The question of fees was not presented. But the court "h[e]ld that each prisoner should be proportionately liable for any fees or costs that may be assessed. Thus, any fees and costs that a district court or that we may impose must be equally divided among all the participating prisoners." *Id.* The court "affirm[ed] the position that, for the purposes of the [PLRA], when a district court imposes fees and costs upon multiple prisoners, the fees are to be proportionally assessed among the prisoners." *Id.* at 885 (citation omitted). Moreover, the Sixth Circuit's chief judge, in an earlier administrative order, ordered the following:

disagree on fee assessment—should prisoners each pay the PLRA's filing fee, or should the prisoners jointly pay that filing fee?

The Third and Seventh Circuits require each prisoner to pay the full filing fee.[12] Thus, in federal district courts within these circuits, the fifteen hypothetical prisoners would proceed jointly, and each would pay the full amount of the filing fee. These courts' interpretation of the fee requirement is, in my view, incorrect. Their interpretation would yield fifteen separate filing fees, thereby ignoring the mandate of § 1915(b)(3) that "[i]n no event" shall the court assess more than one filing fee.[13] Collecting the $350 filing fee fifteen times for one district court complaint yields $5,250, which plainly violates the mandate that "the parties instituting any civil action . . . pay a filing fee of $350."[14]

By contrast, Judge Roth's reasoning and holding in her partial concurrence and dissent in the Third Circuit case of *Hagan v. Rogers*, along with the Sixth Circuit's holding in *Tally-Bey v. Knebl*,[15] gets it right—when prisoners proceed jointly, they pay an apportioned amount of the filing fee.[16] The fifteen indigent prisoners should each pay one-fifteenth of the relevant filing fee.

This result comports with the relevant statutory scheme. First, it

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> Because each prisoner chose to join in the prosecution of the case, each prisoner should be proportionally liable for any fees and costs that may be assessed. Thus, any fees and costs that the district court or the court of appeals may impose shall be equally divided among all the prisoners.

In re Prison Litig. Reform Act, 105 F.3d 1131, 1137–38 (6th Cir. 1997). That order and *Talley-Bey*'s holding thus indicate that the Sixth Circuit assumes multiple prisoners may proceed jointly from trial through their appeal. *See infra* Part IV.E.

12. *See Hagan*, 570 F.3d at 150 ("[F]iling fees should be assessed against any plaintiff permitted to join under Rule 20 as though each prisoner was proceeding individually."); *Boriboune*, 391 F.3d at 855 (holding that the PLRA requires "each prisoner seeking to litigate *in forma pauperis* to pay . . . the full filing fee" (citing Hubbard v. Haley, 262 F.3d 1194 (11th Cir. 2001))).

13. *See* 28 U.S.C. § 1915(b)(3) (2006); *see also infra* Part I.C.

14. *See* 28 U.S.C. § 1914(a).

15. Hagan v. Rogers, 570 F.3d 146 (3d Cir. 2009); Talley-Bey v. Knebl, 168 F.3d 884 (6th Cir. 1999). The Sixth Circuit's opinion in *Talley-Bey*, unlike Judge Roth's opinion in *Hagan*, did not analyze the relevant statutory framework, but its conclusion is nevertheless correct. *See supra* note 11. For an examination of the Sixth Circuit's decision, see *infra* Part IV.

16. *Hagan*, 570 F.3d at 164 (Roth, J., concurring in part and dissenting in part); *see also Talley-Bey*, 168 F.3d at 885, 887.

respects the PLRA's requirement, contained in § 1915(b)(3), that caps filing fees to one fee for multiple prisoners proceeding jointly.[17] Second, it comports with the PLRA's requirement, contained in § 1915(b)(1), that a prisoner pay "a" full fee because each prisoner in a multiple prisoner action will pay an apportioned amount of the full fee.[18] Third, interpreting the two provisions to work together both internally and with Rule 20 respects two deep-seated tenets of statutory interpretation. That is, each provision of § 1915 is interpreted to avoid rendering any word or phrase superfluous, and both provisions are interpreted to avoid an implicit repeal of Rule 20.[19] Fourth, the legislative history, which demonstrates that Congress intended to treat IFP prisoners *like* ordinary plaintiffs—not *worse* than ordinary plaintiffs—countenances apportioning one fee among joint prisoners because that is how courts assess fees in nonprisoner, multiple plaintiff actions. This last point is especially important because the offending courts have allowed a truncated view of legislative history to impel their incorrect conclusions.[20]

Furthermore, it is important that courts rule correctly on this issue not simply because joinder and apportionment comport with the statutory scheme, but because of the important rights at stake. Not allowing joinder and apportionment would mean that indigent prisoners are treated differently from nonindigent prisoners, who are not covered by § 1915. So if, in the Eleventh Circuit, fifteen prisoners who are not indigent decide to proceed jointly to seek redress from the same infection as fifteen indigent prisoners in the same facility, only the former can proceed.[21] An indigent prisoner could thus challenge § 1915 as violating his rights under the Equal Protection Clause of the Fourteenth Amendment.[22]

Therefore, the remaining courts of appeals should, when presented with an opportunity, follow Judge Roth and the Sixth Circuit. Furthermore, the Supreme Court, if it elects to decide this matter authoritatively, should adopt Judge Roth's analysis.

In Part I of this Article, I will explain Congress's motivation to enact the PLRA and assay the PLRA's provisions. Next, in Part II I will delineate Rule 20 and statutory interpretation principles that courts must

17. 28 U.S.C. § 1915(b)(3); *see also infra* Part I.D.
18. *See* 28 U.S.C. § 1915(b)(1); *see also infra* Part I.D.
19. *See infra* note 94 and accompanying text.
20. *See infra* Part I.D.
21. *See infra* Part III.
22. *See infra* Part III.

follow to determine whether the PLRA and Rule 20 can coexist. In Part III I will argue that courts should permit multiple IFP prisoners to proceed jointly and assess a single fee to be apportioned among them. Finally, in Part IV I will present the analysis of the appellate courts that have weighed in on the issue and attack anticipated counterarguments.

I. THE PRISON LITIGATION REFORM ACT

A. *The Impetus Driving the PLRA*

Prisoner suits proliferated from the 1970s to the early 1990s.[23] In introducing the PLRA, Senator Bob Dole of Kansas noted that the number of prisoner suits "has grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994."[24] Indeed, "[i]n 1995, inmates filed nearly 40,000 new federal civil lawsuits," which accounted for "nineteen percent of the federal civil docket."[25]

The proliferation produced, according to Congress, an "epidemic of frivolous inmate litigation."[26] Senator Dole noted that the frivolous prisoner suits included, for example, "such grievances as insufficient

23. *See* Schlanger, *supra* note 6, at 1557–58. The increase is tethered to the Supreme Court's 1964 decision that allowed a prisoner to bring a § 1983 action for an alleged infringement of his constitutional rights. *See* Cooper v. Pate, 378 U.S. 546 (1964). In 1966, only 218 prisoner suits were filed in federal court. James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 112 (2000) (citing JIM THOMAS, PRISONER LITIGATION 110 tbl.5d (1988)). But by 1970, because of *Cooper*, prisoner filings grew to 2,000, which was a nearly "ten-fold increase from the 218 of 1966." *Id.*

24. 141 CONG. REC. S14,413 (daily ed. Sept. 27, 1995); *see also* JUDICIAL BUS. OF THE U.S. COURTS, ADMIN. OFFICE OF THE U.S. COURTS, 1996 REPORT OF THE DIRECTOR 142 tbl.C-3 (1996) (stating that prisoner filings exceeded 39,000 in 1994); *see generally* Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519 (1996) ("In recent years, the fastest growing category of civil litigation in federal district courts has been prisoner lawsuits.").

25. Schlanger, *supra* note 6, at 1558. The percentage is a matter of dispute. Judge Newman calculates that prisoner civil rights actions accounted for 13% of all civil cases in district courts. *See* Newman, *supra* note 24, at 519. But Professor Doumar calculates that prisoner cases accounted for approximately 23% of all civil cases in district courts. Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21, 24 (1994).

26. 141 CONG. REC. S14,418 (letter from the National Association of Attorneys General (NAAG) put into the record by Sen. Bob Dole as he introduced the PLRA). The NAAG was instrumental in framing the public debate and getting Congress to pass the PLRA. *See* Schlanger, *supra* note 6, at 1558–59.

storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and . . . being served chunky peanut butter instead of the creamy variety."[27] Senator Orin Hatch added that "[i]n one frivolous case in Utah, an inmate sued demanding that he be issued Reebok or L.A. Gear brand shoes instead of the Converse brand."[28] And senators also cited, as examples of other frivolous suits, a suit in which a prisoner asked for one million dollars in damages because "his ice cream had melted,"[29] one in which a prisoner alleged that listening to a prison official's country music violated the Eighth Amendment,[30] and one in which a prisoner litigated how often he could change his underwear.[31] Frivolous prisoner suits both clogged the federal courts, because an estimated ninety-five percent were "dismissed without the inmate receiving anything,"[32] and cost states, which

27. 141 CONG. REC. S14,413.

28. *Id.* at S14,418.

29. 142 CONG. REC. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham).

30. *See id.*

31. *See id.* at S2226 (statement of Sen. Reid). Academics have criticized Congress for eschewing a balanced presentation of prisoner suits in favor of marshalling frivolous suits as the norm. *See, e.g.*, Newman, *supra* note 24, at 520–21 (criticizing NAAG, whose opinions Congress absorbed, for condemning all prisoner litigation as frivolous); Schlanger, *supra* note 6, at 1568–70. Criticizing Congress for accepting the NAAG's "misleading characterization," Judge Newman clarifies that the chunky peanut butter case really involved a prisoner's challenge to credit his prison account $2.50 for a jar of peanut butter that he did not receive. Newman, *supra* note 24, at 521–22. The prisoner had ordered and paid for two jars of peanut butter. *Id.* at 521. The one sent by the canteen was the wrong kind, and a guard had willingly returned it and assured the prisoner that the correct one would be sent the next day. *Id.* But prison authorities transferred the prisoner that night to another prison before he received the jar, and his prison account continued to show a $2.50 charge. *Id.* Several senators referred to the incorrect, exaggerated chunky peanut butter tale when providing examples of frivolous prisoner suits, which were the stimulus driving the PLRA's enactment. *E.g.*, 142 CONG. REC. S3703 (statement of Sen. Abraham) ("[A]n inmate sued because he was served chunky instead of smooth peanut butter."); *id.* at S2226 (statement of Sen. Reid) ("If somebody has a good case, a prisoner, let him file it. But not as to whether or not it should be chunky peanut butter or smooth peanut butter . . . ."); 141 CONG. REC. S14,413 (statement of Sen. Dole) ("These suits can involve such grievances as . . . being served chunky peanut butter instead of the creamy variety."). This Article's focus is not on assessing whether Congress embellished the frequency of frivolous prisoner suits in order to encourage the PLRA's passage, but rather on the effects of the PLRA's passage, specifically 28 U.S.C. §§ 1915(b)(1) and (b)(3), and on Rule 20.

32. *See* 141 CONG. REC. S14,418 (letter of NAAG); *see also id.* at S7526 (statement of Sen. Kyl) ("Statistics . . . show that inmate suits are clogging the courts

were required to defend suits against state officers for alleged federal constitutional violations, an estimated $81.3 million per year.[33]

B. *The PLRA's Legislative History and Text*

Because frivolous prisoner suits were "plaguing this country,"[34] the Republican-controlled Congress offered a legislative cure in its 1994 Contract with America.[35] The legislation—the Prison Litigation Reform Act of 1995[36]—emerged to curtail frivolous prisoner suits.[37] In his introduction, Senator Hatch stated the PLRA's goal pellucidly:

> This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation.
>
> Our legislation will also help restore balance to prison conditions litigation and will ensure that Federal court orders are limited to remedying actual violations of prisoners' rights, not letting prisoners out of jail. It is past time to slam shut the revolving door on the prison gate and to put the key safely out of reach of overzealous Federal courts.[38]

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and draining precious judicial resources.").

33. *Id.* at S14,418 (letter of NAAG); *see also id.* at S14,419 (statement of Sen. Abraham) ("People deserve to keep their tax dollars or have them spent on projects they approve. They deserve better than to have their money spent, on keeping prisoners in conditions some Federal judges feel are desirable . . . ."); *id.* at S14,418 (statement of Sen. Hatch) ("It is time to stop this ridiculous waste of the taxpayers' money.").

34. *Id.* (letter from NAAG).

35. *See* Schlanger, *supra* note 6, at 1559.

36. Pub. L. No. 104-134, 110 Stat. 1321 (1996).

37. *See* 142 CONG. REC. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham) (stating that the PLRA's goal is "to end frivolous lawsuits brought by prisoners"); 141 CONG. REC. S14,413 (statement of Sen. Dole) ("This legislation is a new and improved version of S.866, which I introduced earlier this year to address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners."); *id.* at S7526 (statement of Sen. Kyl) ("This bill will deter frivolous inmate lawsuits."); *see also Prison Litigation Reform Act: Hearing on S.3 and S.866 Before the S. Comm. on the Judiciary*, 104th Cong. 1995 WL 496909 (1995) (statement of O. Lane McCotter) ("The driving force behind this flood of litigations is that inmates have 'nothing to lose' in filing even the most frivolous case . . . .").

38. 141 CONG. REC. S14,418 (statement of Sen. Hatch). Courts have acknowledged Congress's intent in creating the PLRA. *See, e.g.*, Porter v. Nussle, 534

The PLRA contains several procedural provisions, in addition to its provision regarding fees, to help suffocate frivolous prisoner litigation.[39] First, it includes "an 'invigorated' exhaustion provision" that is the "centerpiece of the PLRA's effort to 'reduce the quantity . . . of prisoner suits.'"[40] "Before 1980, prisoners asserting [federal] claims had no obligation to exhaust administrative remedies."[41] In 1980, Congress, through the Civil Rights of Institutionalized Persons Act, "enacted a weak exhaustion provision," which authorized district courts to stay actions for a limited time while the "prisoner exhausted 'such plain, speedy, and effective remedies as are available.'"[42] Thus, "[e]xhaustion under the 1980 prescription was in large part discretionary; it could be ordered only if the State's prison grievance system met specified federal standards, and even then, only if the court believed the requirement 'appropriate and in the interests of justice'" in the particular case.[43]

But under the PLRA, exhaustion is now mandatory.[44] It requires that prisoners exhaust their administrative remedies within the prison grievance system before filing a lawsuit under 42 U.S.C. § 1983 or any other federal

U.S. 516, 524 (2002) ("Beyond doubt, Congress enacted [a provision of the PLRA] to reduce the quantity and improve the quality of prisoner suits . . . ."); Ortiz v. McBride, 380 F.3d 649, 658 (2d Cir. 2004) ("Looking at the statute's legislative history in a more general sense, the purpose of the PLRA . . . was plainly to curtail what Congress perceived to be inmate abuses of the judicial process."); Para-Professional Law Clinic at SCI-Graterford v. Beard, 334 F.3d 301, 303 (3d Cir. 2003) ("Congress enacted the PLRA in an apparent effort . . . to discourage prisoners from filing frivolous lawsuits which strain the judiciary's scarce resources . . . ."); Rumbles v. Hill, 182 F.3d 1064, 1070 (9th Cir. 1999) (quoting Sen. Kyl's introductory remarks), *overruled by* Booth v. Churner, 206 F.3d 289 (3d Cir. 2000); *In re* Smith, 114 F.3d 1247, 1249 (D.C. Cir. 1997) ("Thus, 'Congress enacted the PLRA primarily to curtail claims brought by prisoners under 42 U.S.C. § 1983 and the Federal Torts Claims Act . . . .'"); Hampton v. Hobbs, 106 F.3d 1281, 1286 (6th Cir. 1997) ("The legislation was aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts."); Ramsey v. Coughlin, 94 F.3d 71, 73 (2d Cir. 1996) (acknowledging the "congressional purposes of reducing the state's burden of responding to frivolous actions or of deterring frivolous prisoner litigation").

39. The PLRA could not change the underlying substantive law because prisoners' federal cases are usually premised on constitutional violations. Schlanger, *supra* note 6, at 1627–32 (providing a detailed account of all the PLRA's provisions).

40. Woodford v. Ngo, 548 U.S. 81, 84 (2006) (quoting *Porter*, 534 U.S. at 524).

41. *Id.* (citing Wilwording v. Swenson, 404 U.S. 249, 251 (1971)).

42. *Id.* (quoting 42 U.S.C. § 1997e(a)(1) (1994)).

43. *Porter*, 534 U.S. at 523 (quoting 42 U.S.C. §§ 1997e(a), (b)).

44. *Id.* at 524; *see also* 42 U.S.C. § 1997e(a) (2006).

law to challenge the conditions of their confinement.[45] Moreover, "[a]ll 'available' remedies must now be exhausted; yet, those remedies need not meet federal standards, nor must they be 'plain, speedy, and effective.'"[46] Finally, the Supreme Court has recently held that "the PLRA exhaustion requirement requires proper exhaustion,"[47] which includes filing grievances that comport with the prison's internal filing deadlines.[48]

Second, the PLRA requires that district courts screen all prisoner complaints, IFP or not, "before docketing, if feasible or, in any event, as soon as practicable after docketing."[49] And after doing so, the court must dismiss a complaint, even on its own motion, if the complaint is "frivolous, malicious, [or] fails to state a claim upon which relief can be granted."[50] Moreover, at least one court has decided that a district court may dismiss a complaint sua sponte if, from the face of the complaint, it is clear that the prisoner has failed to exhaust administrative remedies in violation of 42 U.S.C. § 1997e(a).[51] Dismissal often occurs without service of process or without offering the prisoner notice or a hearing.[52]

45. 42 U.S.C. § 1997e(a); *see also* Booth v. Churner, 206 F.3d 289, 291 (3d Cir. 2000). Section 1997e(a) provides in full: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a)(1).

46. *Porter*, 534 U.S. at 524 (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).

47. Woodford v. Ngo, 548 U.S. 81, 93 (2006).

48. *See id.* at 90. In *Woodford v. Ngo*, the Supreme Court overruled a Ninth Circuit decision holding that a prisoner exhausted administrative remedies—even though the prison found his grievance untimely—because he had no further appeal within the prison process. *Id.* at 87. The Court reasoned that "[t]he text of 42 U.S.C. § 1997e(a) strongly suggests that the PLRA uses the term 'exhausted' to mean what the term means in administrative law, where exhaustion means proper exhaustion." *Id.* at 93.

49. 28 U.S.C. § 1915A(a) (2006); *see also* Plunk v. Givens, 234 F.3d 1128, 1129 (10th Cir. 2000) ("'The statutory language clearly authorizes screening regardless of the prisoner litigant's fee status.' Accordingly, this court joins the Second, Fifth, Sixth, and Seventh Circuits in holding that § 1915A applies to all prison litigants, without regard to their fee status, who bring civil suits against a governmental entity, officer, or employee" (citations omitted)).

50. 42 U.S.C. § 1997e(c)(1); *accord* 28 U.S.C. § 1915A(b)(1); 28 U.S.C § 1915(e)(2) (requiring dismissal "at any time" in IFP cases).

51. *See* Pena-Ruiz v. Solorzano, 281 F. App'x 110, 112 n.3 (3d Cir. 2008).

52. *See, e.g.*, Hagan v. Rogers, 570 F.3d 146, 150 (3d Cir. 2009) (noting that the district court dismissed the plaintiffs' complaint sua sponte, without a hearing and before defendants had been served); *Plunk*, 234 F.3d at 1129 (noting that the district court dismissed Plunk's complaint under 28 U.S.C. § 1915A(b) without a hearing); Carr

Third, the Act limits the damages available to successful prisoners. Specifically, prisoners may not receive damages "for mental or emotional injury suffered while in custody without a prior showing of physical injury."[53] No provision of the PLRA received less congressional deliberation.[54] Perhaps, then, it is unsurprising that this provision, if read literally, would deprive prisoners who have suffered nonphysical injury from constitutional violations—e.g., a prisoner claiming a First Amendment violation from prison officials preventing him from reading a religious text—from damages. Courts, however, have read this provision narrowly, allowing cases alleging "constitutional violations of free speech, freedom of religion, and race discrimination to proceed."[55]

Fourth, the PLRA amended a provision on fees for IFP prisoners, which is the focus of this Article. [56]

C. *28 U.S.C. § 1915*

The filing-fee provision, codified at 28 U.S.C. § 1915, transformed "the scheme by which courts process requests for pauper status."[57] Judicial controversy has erupted from this language in § 1915(b)(1): "[I]f a prisoner brings a civil action or files an appeal in forma pauperis, *the prisoner shall*

v. Dvorin, 171 F.3d 115, 116 (2d Cir. 1999) (same); Schlanger, *supra* note 6, at 1630 (noting dismissal is often without motion, notice to plaintiff, or opportunity to respond).

53. 42 U.S.C. § 1997e(e); *see also* Branham, *supra* note 6, at 1029 ("The PLRA furthermore prohibits prisoners from seeking recompense for mental or emotional injuries unless they also suffered a physical injury."); Schlanger, *supra* note 6, at 1630 (noting that courts tend to read the provision somewhat narrowly).

54. Robertson, *supra* note 23, at 114 & n.65.

55. *See generally* Schlanger, *supra* note 6, at 1630 n.251; John Boston, *The Prison Litigation Reform Act*, *in* 16TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 751 n.146 (PLI Litig. & Admin. Practice Course, Handbook Series, No. H0–007s, 2000), *available at* WL 640 PLI/Lit 687. *But see* Harper v. Showers, 174 F.3d 716, 717, 719 (5th Cir. 1999) (dismissing prisoner's claim for damages because his confinement in cells allegedly smeared with feces caused no physical injury). For a discussion that courts should apply strict scrutiny when a prisoner asserts that 28 U.S.C. § 1997e(e) violates the Equal Protection Clause, see Robertson, *supra* note 23, at 141–57.

56. *See* Leonard v. Lacy, 88 F.3d 181, 184 (2d Cir. 1996) ("The PLRA amends section 1915 by imposing additional requirements on prisoners seeking to avoid prepayment of fees in civil actions and in appeals in civil actions."); Newman, *supra* note 24, at 523 ("The PLRA amends the *in forma pauperis* provision with respect to any prisoner . . . .").

57. *In re* Prison Litig. Reform Act, 105 F.3d 1131, 1131 (6th Cir. 1997).

be required to pay the full amount of a filing fee."[58] As mentioned, some courts conclude that it categorically prevents prisoners from using Rule 20,[59] while some courts conclude that it is harmonious with Rule 20.[60] But before explaining what subsection (b) means in Part III, it is necessary to examine § 1915 in its entirety.

Section 1915 requires that all prisoners, indigent or not, pay the required fees associated with civil litigation.[61] The filing fee for district court complaints is $350,[62] and the docketing fee for appeals is $450.[63] Nonindigent prisoners must pay the fee at the suit's initiation.[64] Indigent prisoners, by contrast, pay over time under an installment plan.[65] Before the PLRA amended § 1915, indigent prisoners enjoyed an exemption from paying filing fees altogether.[66]

A prisoner who decides to proceed IFP must pay the $350 filing fee in installments.[67] The prisoner must pay an initial filing fee of twenty percent of the greater of either: (1) "the average monthly deposits to the prisoner's account;" or (2) "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."[68] To support his claim of pauper status, the prisoner is required to file an affidavit that states all his assets, which proves that he cannot pay the fee,[69] and a certified copy of a prison account statement

58. 28 U.S.C. § 1915(b)(1) (2006) (emphasis added).

59. *See, e.g.*, Hubbard v. Haley, 262 F.3d 1194, 1198 (11th Cir. 2001); *see also infra* Part IV.A.

60. *See* Hagan v. Rogers, 570 F.3d 146, 150 (3d Cir. 2009) (holding that "filing fees should be assessed against any plaintiff permitted to join under Rule 20 as though each prisoner was proceeding individually"); Boriboune v. Berge, 391 F.3d 852, 855 (7th Cir. 2004) (recognizing that requiring each prisoner to pay a separate fee does not serve to impair the financial incentives of the PLRA).

61. *In re Prison Litig. Reform Act*, 105 F.3d at 1131.

62. 28 U.S.C. § 1914(a).

63. *Id.* § 1913.

64. *See id.* §§ 1915(a)(1), (b)(1).

65. *See id.* § 1915(b)(1), (2).

66. *See* Newman, *supra* note 24, at 522–23 & n.13 (citing previous version of 28 U.S.C. § 1915(a)(2)). Indigent nonprisoner plaintiffs remain exempt from paying filing fees and costs. *See* Boston, *supra* note 55, at 772–73.

67. *See* 28 U.S.C. § 1915(b).

68. *Id.* § 1915(b)(1)(A), (B).

69. *See id.* § 1915(a)(1). All parties, not just prisoners, proceeding IFP must comply with this requirement. *See id.*

showing the activity in his prison account for the previous six months.[70] Second, the prisoner must "make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account."[71] Because IFP prisoners eventually pay the entire fee, they do not receive a monetary benefit (except the ability to pay over time), but they do get the benefit of free service of process and are excused from some costs on appeal.[72] If, however, a prisoner is without the financial resources to pay even the initial installment, the court may not dismiss his suit.[73] In that situation, the suit proceeds, and the prisoner must pay the initial filing fee when funds become available.[74]

D. *Sections 1915(b)(1), (b)(3), and Relevant Legislative History*

Before determining what § 1915(b)(1) means, the text of § 1915(b)(1) and § 1915(b)(3), and the legislative history, must be examined. Section 1915(b)(1) provides:

> [I]f 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—
>
> (A) the average monthly deposits to the prisoner's account; or
>
> (B) 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.[75]

Section 1915(b)(3) states that "[i]n no event shall the filing fee collected exceed the amount of fees permitted *by statute* for the *commencement* of a *civil action* or an *appeal of a civil action* or criminal judgment."[76] Section 1915(b)(3) thus expressly adopts its sister statutes' caps on fees: one that governs fees for a district court complaint, 28 U.S.C. § 1914, and one that governs fees for an appellate court filing, 28 U.S.C. § 1913.

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70. *Id.* § 1915(a)(2).
71. *Id.* § 1915(b)(2).
72. *See id.* § 1915(c), (d).
73. *See id.* § 1915(b)(4).
74. *In re* Prison Litig. Reform Act, 105 F.3d 1131, 1132–33 (6th Cir. 1997).
75. 28 U.S.C. § 1915(b)(1) (emphasis added).
76. *Id.* § 1915(b)(3) (emphasis added).

Turning to § 1914, that statute provides: "The clerk of each district court shall require *the parties* instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350 . . . ."[77] Congress's language—that "parties" who institute suit pay the fee—means that multiple plaintiffs filing a joint complaint pay only a single filing fee.

Examining the appellate court rule in § 1913 reveals that the same single-fee method for multiple appellants exists. In § 1913, Congress provides that "[t]he fees and costs to be charged and collected in each court of appeals shall be prescribed . . . by the Judicial Conference of the United States."[78] The Judicial Conference, in turn, prescribes a fee "for docketing a case on appeal . . . [of] $450."[79] The Fee Schedule continues: "[B]ut parties filing a joint notice of appeal in the district court are required to pay *only one fee*."[80]

Courts have given §§ 1915(b)(3), 1913, and 1914 short shrift when addressing the issue of whether multiple prisoners can proceed jointly and how to assess fees. In fact, when confronted with the issue, neither the Eleventh Circuit nor Seventh Circuit even mentioned § 1915(b)(3).[81]

The legislative history of § 1915 reveals that Congress intended to deter frivolous filings by treating IFP prisoners *like*—not *worse than*—nonprisoner, ordinary plaintiffs.[82] Courts, however, have generally engaged in a mere cursory examination of the legislative history—which reveals only that Congress intended the filing-fees provision to deter frivolous IFP prisoner suits—without exploring how Congress intended to do so. [83] Courts have wielded this cursory examination as support to

77. *Id.* § 1914(a) (emphasis added).

78. *Id.* § 1913.

79. JUDICIAL CONFERENCE OF THE UNITED STATES, COURT OF APPEALS MISCELLANEOUS FEE SCHEDULE para. 1 (2009) [hereinafter FEE SCHEDULE]. The fee schedule is issued in accordance with § 1913.

80. *Id.* para. 3 (emphasis added).

81. *See infra* Part IV.A.–B.

82. *See* 141 CONG. REC. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl).

83. *See, e.g.*, Hubbard v. Haley, 262 F.3d 1194, 1196 (11th Cir. 2001) ("This court recently noted that the intent of Congress in promulgating the PLRA was to curtail abusive prisoner tort, civil rights and conditions of confinement litigation." (citing Anderson v. Singletary, 111 F.3d 801, 805 (11th Cir. 1997))); Abdul-Akbar v. McKelvie, 239 F.3d 307, 331 (3d Cir. 2001) (stating that requiring IFP prisoners to pay filing fees was calculated to create an economic deterrent); *In re* Smith, 114 F.3d 1247,

conclude bluntly that, because Congress intended to deter suits, prisoners may not pursue joint prisoner actions.[84] Congress actually intended to remove IFP prisoners' ability to file free suits by treating them commensurate with nonprisoner plaintiffs.[85]

Consider, for example, Senator Bob Dole's introductory remarks concerning fees:

> Mr. President, I happen to believe that prisons should be just that—prisons, not law firms. That is why the Prison Litigation Reform Act proposes several important reforms that would dramatically reduce the number of meritless prisoner lawsuits.
>
> For starters, the act would require inmates who file lawsuits to pay the full amount of their court fees and other costs.
>
> Many prisoners filing lawsuits today in Federal court claim indigent status. As indigents, prisoners are generally *not required to pay the fees that normally accompany the filing of a lawsuit.* In other words, there is no economic disincentive to going to court.
>
> The Prison Litigation Reform Act would change this by establishing a

1249 (D.C. Cir. 1997) ("In enacting the PLRA in 1996, Congress 'endeavor[ed] to reduce frivolous prisoner litigation by making all prisoners seeking to bring lawsuits or appeals feel the deterrent effect created by liability for filing fees.'" (quoting Leonard v. Lacy, 88 F.3d 181, 185 (2d Cir. 1996))); Hampton v. Hobbs, 106 F.3d 1281, 1286 (6th Cir. 1997) ("Congress sought to put in place economic incentives that would prompt prisoners to 'stop and think' before filing a complaint."); Jackson v. Stinnett, 102 F.3d 132, 136–37 (5th Cir. 1996) ("The fee provisions of the PLRA were designed to deter frivolous prisoner litigation in the courts 'by making all prisoners seeking to bring lawsuits or appeals feel the deterrent effect created by liability for filing fees.'" (quoting *Leonard*, 88 F.3d at 185)); Ramsey v. Coughlin, 94 F.3d 71, 73 (2d Cir. 1996) (noting that the congressional purpose of the PLRA was to deter frivolous prisoner litigation); *Leonard*, 88 F.3d at 185 (stating that "there is abundant legislative history to indicate that Congress was endeavoring to reduce frivolous prisoner litigation by making all prisoners seeking to bring lawsuits or appeals feel the deterrent effect created by liability for filing fees" (citing 141 CONG. REC. S7526 (statement of Sen. Kyl))).

84. *See* Lawson v. Sizemore, No. Civ.A. 05-CV-108-KKC, 2005 WL 1514310, at *1 n.1 (E.D. Ky. June 24, 2005) ("Implementation of the PLRA was designed to make prisoners feel the deterrent effect of the filing fee. . . . Therefore, each separate plaintiff is individually responsible for a full filing fee . . . ." (citations omitted)); *see also Hubbard*, 262 F.3d at 1197–98 (citing 141 CONG. REC. S7526 (statement of Sen. Kyl)).

85. *See* 141 CONG. REC. S7526 (statement of Sen. Kyl).

> garnishment procedure . . . .
>
> When average law-abiding citizens file a lawsuit, they recognize that there could be an economic downside to going to court. Convicted criminals should not get preferential treatment: If a law-abiding citizen has to pay the costs associated with a lawsuit, so too should a convicted criminal.
>
> In addition, when 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.[86]

Senator John Kyl's introductory remarks also bolster that proposition:

> Section 2 will require prisoners to pay a very small share of the large burden they place on the Federal judicial system by paying a small filing fee upon commencement of lawsuits. In doing so, the provision will deter frivolous inmate lawsuits. The modest monetary outlay will force prisoners to think twice about the case and not just file reflexively. *Prisoners will have to make the same decision that law-abiding Americans must make*: Is the lawsuit worth the price? *Criminals should not be given a special privilege that other Americans do not have.* The only thing different about a criminal is that he has raped, robbed, or killed. A criminal should not be rewarded for these actions.[87]

Deterring frivolous prisoner suits, according to Senators Dole and Kyl, is accomplished by treating IFP prisoners like ordinary plaintiffs. Simply put, the provision was intended to "[*r*]*emove the ability of prisoners to file free lawsuits*, instead making them pay full filing fees and court costs."[88] It was not to treat IFP prisoners worse than nonprisoner plaintiffs.

Because the PLRA was not subject to a thorough debate,[89] senators'

86. *Id.* at S14,413–14 (statement of Sen. Dole) (emphasis added).

87. *Id.* at S7526 (statement of Sen. Kyl) (citing Lambert v. Ill. Dep't of Corr., 837 F.2d 257, 259 (7th Cir. 1987)) (emphasis added).

88. *Id.* (emphasis added). Senator Dole also suggested that deterring frivolous suits is accomplished by removing IFP prisoners' privilege to file suits for free: "20,000 prisoners in Arizona filed almost as many cases as Arizona's 3.5 million law-abiding citizens. And most of these prisoner lawsuits were filed free of charge. No court costs. No filing fees. This is outrageous and it must stop." *Id.* at S14,413 (statement of Sen. Dole).

89. *See* 142 CONG. REC. S2296 (daily ed. Mar. 19, 1996) (statement of Sen.

comments reflect the entire universe of discussion of how Congress intended the fees provision to deter frivolous prisoner litigation.

After examining the legislative history regarding the IFP fees provisions, two propositions emerge: (1) Congress did not discuss how to assess fees in cases involving multiple prisoners proceeding jointly; and (2) Congress intended to remove the advantage that IFP prisoners had over ordinary plaintiffs and thus treat the two groups equally. Because Congress intended to treat a single IFP prisoner like an ordinary plaintiff, it is logical to assume that Congress intended to treat multiple IFP prisoners like multiple ordinary plaintiffs. However, to conclude that § 1915 reflects Congress's intent, the relevant texts must be examined.

II. FEDERAL RULE 20 AND STATUTORY INTERPRETATION

A. *Federal Rule of Civil Procedure 20*

Rule 20 states that "[p]ersons may join in one action as plaintiffs if" (1) "they assert any right to relief jointly . . . arising out of the same transaction[] [or] occurrence[]" and (2) "any question of law or fact common to all plaintiffs will arise in the action."[90] Joinder allows the "adjudicat[ion of] all appropriately brought claims and causes, between all appropriate parties, in one suit."[91] Its aim is to simplify and expedite the litigation process by avoiding a multiplicity of actions that involve identical or similar issues.[92] The Supreme Court requires courts to apply Rule 20 liberally: under Rule 20, "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[93]

Kennedy) ("The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves.").

90. FED. R. CIV. P. 20(a)(1).

91. *E.g.*, Basham v. Jackson, 367 N.E.2d 66, 69 (Ohio Ct. App. 1977).

92. *See, e.g.*, Goodman v. H. Hentz & Co., 265 F. Supp. 440, 443 (N.D. Ill. 1967) ("This rule should be given the liberal interpretation needed to implement its apparent purpose: the avoidance of multiple trials involving many similar or identical issues."); Bartholomew v. Bartholomew, 548 P.2d 238, 241 (Utah 1976) (stating that the policy of Utah's Rule 20 counterpart is "to simplify and expedite procedure and to avoid a multiplicity of lawsuits"); Kluth v. Gen. Cas. Co. of Wis., 505 N.W.2d 442, 446 (Wis. Ct. App. 1993) ("The purpose of the [Wisconsin] permissive joinder statute is to avoid multiple trials involving identical or similar issues." (citing *Goodman*, 265 F. Supp. at 443)).

93. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966).

B. *Statutory Interpretation*

Whether multiple prisoners can proceed jointly requires a determination of whether the statute and the rule can coexist, implicating statutory interpretation principles. Naturally, all three courts of appeals that have squarely analyzed this issue have reached for those principles.[94] To determine whether multiple prisoners can proceed jointly, courts must actually engage in two types of statutory interpretation. First, courts must determine whether § 1915 can coexist with Rule 20. Second, they must interpret § 1915 and Rule 20 individually to determine what each provision requires. Each task presents different statutory interpretation issues.

First, because Congress did not explicitly repeal Rule 20 for IFP prisoners, courts must use repeal-by-implication principles to determine whether § 1915, a statute enacted subsequent to Rule 20, can coexist with Rule 20, an earlier-enacted rule. There is a high hurdle to surmount before a court can find a repeal by implication. "While a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision[,] . . . 'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'"[95] So courts can find a statutory repeal only if: (1) "the later statute 'expressly contradict[s] the original act'"[96] or (2) "such a

94. *See* Hagan v. Rogers, 570 F.3d 146, 157 (3d Cir. 2009) ("The Court's inquiry is complete if we find the text of the Rule to be clear and unambiguous." (quoting Berckeley Inv. Group, Ltd., v. Colkitt, 259 F.3d 135, 142 n.7 (3d Cir. 2001))); Boriboune v. Berge, 391 F.3d 852, 854 (7th Cir. 2004) (applying repeal-by-implication tenets); Hubbard v. Haley, 262 F.3d 1194, 1197 (11th Cir. 2001) ("This court has repeatedly stated that [w]e begin our construction of [a statutory provision] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." (quoting Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000)) (internal quotation marks omitted)).

95. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007) (quoting Watt v. Alaska, 451 U.S. 259, 267 (1981)); *accord* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436, 1445 (2009); Branch v. Smith, 538 U.S. 254, 273 (2003) ("[A]bsent a clearly expressed congressional intention, repeals by implication are not favored." (citations and internal quotation marks omitted)); Morton v. Mancari, 417 U.S. 535, 551 (1974) (citing United States v. Borden Co., 308 U.S. 188, 198 (1939)); Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm'n, 393 U.S. 186, 193 (1968); Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936) ("[T]he intention of the legislature to repeal must be clear and manifest . . . ."); United States v. Wasserson, 418 F.3d 225, 235 n.7 (3d Cir. 2005) (quoting *Posadas*, 296 U.S. at 503).

96. *Nat'l Ass'n of Home Builders*, 551 U.S. at 662 (quoting Traynor v.

construction 'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.'"[97] "Outside these limited circumstances, 'a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.'"[98] Indeed, repeals by implication are so disfavored that the rules or statutes should be construed to coexist even where the subsequent statute is not entirely consistent with the first.[99] Repeals by implication thus occur sparingly, only when the newer rule is "logically incompatible" with the older one.[100]

Second, when interpreting § 1915 and Rule 20 individually, several steps are relevant. The familiar first step in interpreting an act of Congress is to "begin with the text of the . . . [a]ct itself."[101] The "task is to give effect

Turnage, 485 U.S. 535, 548 (1988)).

97. *Id.* (quoting *Traynor*, 485 U.S. at 548); *accord Branch*, 538 U.S. at 273 ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" (quoting *Posadas*, 296 U.S. at 503)).

98. *Nat'l Ass'n of Home Builders*, 551 U.S. at 663 (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976)).

99. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984) ("[W]here two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" (quoting Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 133–34 (1974))); Tineo v. Ashcroft, 350 F.3d 382, 391 (3d Cir. 2003) ("[T]here is a strong presumption against repeal by implication, even where the subsequent statute is not entirely consistent with the former." (citation omitted)).

100. *Branch*, 538 U.S. at 273 (citing *Posadas*, 296 U.S. at 503); *see also* 7 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 86.04(4) (2d ed. 1996) ("[A] subsequently enacted statute should be construed as to harmonize with the Federal Rules if that is at all feasible.").

101. Negonsott v. Samuels, 507 U.S. 99, 104–05 (1993); *see also* BedRoc Ltd. v. United States, 541 U.S. 176, 177 (2004) (stating that the statutory interpretation "inquiry begins with the statutory text"); N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. 645, 655 (1995) ("[W]e begin as we do in any exercise of statutory construction with the text of the provision in question . . . ."); Norfolk & W. Ry. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 128 (1991) ("As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us."); Bd. of Educ. of the Westside Cmty. Sch. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 237 (1990) ("Our immediate task is therefore one of statutory interpretation. We begin, of course, with the language of the statute."); 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8382 (3d ed. 2004) ("[T]he Supreme Court has admonished courts for years to give effect to statutory language. . . . Questions of statutory interpretation should be resolved from the legislative language if possible.").

to the will of Congress, and where its will has been expressed in reasonably plain terms [in the statutory language], that language must ordinarily be regarded as conclusive."[102] The "plainness" of the at-issue statutory language is determined by examining "the language itself, the specific context in which that language is used, and the broader context of the statute."[103]

When interpreting statutory language during step one, courts should construe statutory language to avoid interpretations that would render any phrase superfluous.[104] Indeed, "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"[105] Courts "must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,'[106] and 'fit, if possible, all parts into an harmonious whole.'"[107] Relatedly, courts must interpret subsections of a statute in the context of the whole enactment.[108] Therefore, "[w]hen 'interpreting a statute, the court will not look merely to

102. *Negonsott*, 507 U.S. at 104 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) (internal quotation marks omitted)); *see also* Valansi v. Ashcroft, 278 F.3d 203, 209 (3d Cir. 2002) ("The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." (quoting Marshak v. Treadwell, 240 F.3d 184, 192 (3d Cir. 2001) (internal quotation marks omitted))).

103. *Marshak*, 240 F.3d at 192 (quoting Robinson v. Shell Oil Co., 514 U.S. 337, 341 (1997)).

104. *E.g.*, TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001).

105. *Id.* (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)); *see also* Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 236 (2008) (Kennedy, J., dissenting) (quoting *Duncan*, 553 U.S. at 174) (acknowledging "our duty to give effect, if possible, to every clause and word of a statute." (citation and internal quotation marks omitted)); Rake v. Wade, 508 U.S. 464, 471 (1993); United States v. Menasche, 348 U.S. 528, 538–39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute . . . ." (citation and internal quotation marks omitted)); United States v. Fisher, 109 U.S. 143, 146 (1883). But courts may not, in pursuit of giving effect to every word, "virtually destroy the meaning of the entire context" by giving the words "significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent." Van Dyke v. Cordova Copper Co., 234 U.S. 188, 191 (1914).

106. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995)).

107. *Id.* (quoting FTC v. Mandel Bros., 359 U.S. 385, 389 (1959)).

108. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ."). *See generally* 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.02 (Norman Singer ed., 5th ed. 1992).

a particular clause in which general words may be used, but will take in connection with it the whole statute . . . .'"[109] If the statute's language is unambiguous, that language governs, and the court's inquiry is thus complete.[110]

If, however, the language is unclear, courts will progress to step two and attempt to discern Congress's intent using canons of statutory interpretation.[111] The goal is to determine Congress's intent as embodied in particular statutory language.[112] Not surprisingly, to determine congressional intent, courts usually resort to legislative history.[113]

109. Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (quoting Brown v. Duchesne, 19 U.S. 183, 194 (1857)).

110. *See, e.g.*, BedRoc Ltd. v. United States, 541 U.S. 176, 177 (2004) ("The inquiry begins with the statutory text, and ends there as the text is unambiguous."); United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989) ("[The] inquiry should end . . . [when] the statute's language is plain . . . ."); Steele v. Blackman, 236 F.3d 130, 133 (3d Cir. 2001) (citing Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993)) ("Where the language of a statute is clear, however, the text of the statute is the end of the matter.").

111. *See* Chickasaw Nation v. United States, 534 U.S. 84, 85 (2001); INS v. Cardoza-Fonseca, 480 U.S. 421, 447–48 (1987); United States v. Cooper, 396 F.3d 308, 310 (3d Cir. 2005) (stating that step two requires courts to "attempt to discern Congress'[s] intent using the canons of statutory construction." (citing Ki Se Lee v. Ashcroft, 368 F.3d 218, 222 (3d Cir. 2004)).

112. *See, e.g.*, *Chickasaw Nation*, 534 U.S. at 85.

113. *See* Bd. of Educ. of Westside Cmty. Schs. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 238 (1990) (stating that the Court would "normally resort to legislative history" to interpret an ambiguous phrase (citing United States v. James, 478 U.S. 597, 606 (1986))); *see also* Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 462 (1999) (Thomas, J., concurring) (stating that if a statute's language is ambiguous, the legislative history should be examined); Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 433 (1987) (O'Connor, J., dissenting) (stating that if the text is unclear, "[w]e then . . . review[] the legislative history of the statute and other traditional aids of statutory interpretation to determine congressional intent to create enforceable rights"); United States v. Vogel Fertilizer Co., 455 U.S. 16, 26 (1982) (resorting to legislative history to determine congressional intent of ambiguous statutory text); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) (noting that after reviewing statutory text, "we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent"). At least one member of the Court, Justice Scalia, finds resorting to legislative history unproductive in determining congressional intent. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 617 (1991) (Scalia, J., concurring) (stating that legislative history is "unreliable . . . as a genuine indicator of congressional intent"). Justice Breyer, in contrast, has attempted to demonstrate legislative history's propriety and usefulness. *See generally* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). Academics have argued

Applying those principles of statutory interpretation, I will now explain how § 1915 and Rule 20 work in harmony.

III. PERMITTING MULTIPLE IFP PRISONERS TO PROCEED JOINTLY AND APPORTIONING FEES

The view that the PLRA, through § 1915(b)(1), repeals Rule 20 is wrong. Instead, district courts should permit multiple IFP prisoners to proceed jointly if Rule 20 is satisfied and assess one filing fee to be apportioned among the prisoner-plaintiffs. Similarly, appellate courts should permit joint appeals from those cases and levy one appellate docketing fee to be apportioned among the prisoner-appellants. This result comports with the clear language of §§ 1915(b)(1), (b)(3), and Rule 20. It also avoids rendering any word or phrase in the statute or rule superfluous. In addition, § 1915 is interpreted to respect Rule 20, avoiding an implicit repeal of Rule 20. Moreover, although resorting to legislative history is unnecessary (because the texts are clear), this interpretation fits with the legislative history, which reveals that Congress intended to treat IFP prisoners like ordinary plaintiffs, not worse than ordinary plaintiffs. In sum, the text of the statute and the text of the rule do not suggest conflict or repeal and, guided by the presumption to harmonize, courts can require joint-litigation prisoners proceeding jointly to satisfy the requirements of both provisions.

A. *Repeal by Implication*

Rule 20 is clear: it allows all persons to join actions as plaintiffs.[114] Rule 20's language thus applies to both prisoners and nonprisoners. Not a word in Rule 20 suggests that prisoners are excluded from the definition of "persons."[115] Moreover, nothing in Rule 20's Advisory Committee Notes intimates that prisoners should be treated differently than any other litigant.[116]

against courts resorting to legislative history. *See, e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998) (arguing against the use of legislative history because legislative history is more likely to lead a court to inaccurate judgments about legislative intent than concentrating solely on the statutory language).

114. FED. R. CIV. P. 20(a)(1).

115. FED. R. CIV. P. 20; *see also* Hagan v. Rogers, 570 F.3d 146, 153 (3d Cir. 2009) ("Nothing in the plain language of the Rule indicates that prisoners are excluded as 'persons' permitted to join as plaintiffs.").

116. *See* FED. R. CIV. P. 20 advisory committee's notes.

The text of § 1915 does not state that prisoners may not use Rule 20.[117] Indeed, § 1915 does not even mention Rule 20 or joint litigation.[118] Furthermore, when examining all of § 1915's neighboring statutes (§ 1913, § 1914, and § 1917) to determine the broader context of the statute, there is still no suggestion that prisoners cannot use the joinder rules.[119] Finally, even the PLRA's legislative history does not mention Rule 20.

Repeal by implication's high hurdle is thus not satisfied by § 1915's effect on Rule 20.[120] Applying repeal by implication to this situation would transform the little-used doctrine into a common principle because Congress often "enacts legislation with provisions that do not neatly coexist with existing statutes."[121] Thus, since the two texts at issue are facially compatible, courts must attempt to construe them to coexist, even if the subsequent statute is not entirely consistent with the first.[122]

B. *Section 1915*

Two subsections of § 1915—(b)(1) and (b)(3)—interplay with §§ 1913 and 1914. First, as mentioned, § 1915(b)(1) requires "the prisoner . . . to pay the full amount of *a* filing fee."[123] All three circuit courts that have considered the issue have concluded that such language precludes fee apportionment because each prisoner "must pay the full filing fee."[124]

117. *See* 28 U.S.C. § 1915 (2006).

118. Boriboune v. Berge, 391 F.3d 852, 854 (7th Cir. 2004).

119. *See* 28 U.S.C. §§ 1913, 1914, 1916, 1917.

120. *See Hagan*, 570 F.3d at 155 (stating that there is no irreconcilable conflict between §1915 and Rule 20 because they "can be read in complete harmony"); *see also Boriboune*, 391 F.3d at 854 ("[T]here is no irreconcilable conflict between Rule 20 and the PLRA . . . .").

121. *See Hagan*, 570 F.3d at 156.

122. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984) ("[W]here two statutes are *capable of co-existence*, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, *to regard each as effective*." (emphasis added and internal quotation marks omitted)); *see also* Tineo v. Ashcroft, 350 F.3d 382, 391 (3d Cir. 2003) (stating that the rules or statutes should be construed to coexist "*even* where the subsequent statute is not entirely consistent with the former" (emphasis added and citations omitted)).

123. 28 U.S.C. § 1915(b)(1) (emphasis added); *see also supra* Part I.C.

124. *See Hagan*, 570 F.3d at 154 (citing *Boriboune*, 391 F.3d at 854–56); *Boriboune*, 391 F.3d at 855 ("*Hubbard* concluded that [§ 1915(b)(1)] requires each prisoner . . . to pay . . . the full filing fee, whether or not anyone else is a co-plaintiff. It is hard to read this language any other way."); Hubbard v. Haley, 262 F.3d 1194, 1198 (11th Cir. 2001) ("[T]he plain language of the PLRA requires that each prisoner proceeding IFP pay the full filing fee . . . .").

However, reading § 1915(b)(1) in that way would violate the remaining intersecting statutory sections—§§ 1915(b)(3), 1913, and 1914—by: (1) not giving effect to the three provisions' words; (2) adopting interpretations that would render statutory clauses and sentences superfluous, void, or insignificant; and (3) not interpreting subsections in the context of the whole enactment.[125] Courts, given the clear Supreme Court mandate, must instead respect the text of §§ 1915(b)(3), 1913, and 1914.

Section 1915(b)(3) proscribes the collection of filing fees in excess of "the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment."[126] Section 1915(b)(3) adopts § 1913's cap on appellate filing fees.[127] It thus requires a $450 docketing fee for appeals and commands that parties filing a joint appeal pay only a *single* filing fee.[128] Simply put, § 1913 unambiguously prescribes a fee of $450 to file any one notice of appeal—whether that appeal is filed individually or jointly.

Likewise, § 1915(b)(3) adopts a sister statute's cap on district court filing fees.[129] That sister statute, § 1914(a), provides that multiple plaintiffs filing a joint complaint pay only a single filing fee.[130] Congress's language that "parties" who institute a suit pay the fee must mean that, under the statute, multiple plaintiffs who commence one suit are responsible for paying a single fee. Moreover, the language in § 1915(b)(3)—"the fee *collected*"—indicates that § 1915(b)(3) is not to be viewed solely on a prisoner-by-prisoner basis; rather, the fee for the case itself, in total, ought not exceed the standard fee in any similar action."[131]

Requiring each prisoner in a joint prisoner action to pay the entire fee would thus plainly violate § 1915(b)(3). If, for instance, each prisoner in a two-prisoner suit paid the full joint appellate filing fee of $455 (§ 1917 adds $5 for a joint appeal),[132] the $910 intake would violate § 1915(b)(3) because

125. *See supra* Part II.B (listing statutory-interpretation principles).

126. 28 U.S.C. § 1915(b)(3).

127. *See id.* § 1913; *see also* FEE SCHEDULE, *supra* Part I.D.

128. FEE SCHEDULE, *supra* note 79, para. 3 ("[P]arties filing a joint notice of appeal in the district court are required to pay *only one fee*." (emphasis added)).

129. 28 U.S.C. § 1915(b)(3).

130. *Id.* § 1914(a). The statute provides: "The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350 . . . ." *Id.*

131. Hagan v. Rogers, 570 F.3d 146, 160 (3d Cir. 2009) (Jordan, J., concurring in part and dissenting in part).

132. 28 U.S.C. § 1917 (2006).

that subsection adopts § 1913's cap of $455. If, however, only $455 is collected proportionately from the two prisoners, § 1915(b)(3) is satisfied. Under the Seventh and Third Circuits' interpretations, the fifteen prisoners from the earlier hypothetical would each pay installments until the district court collected $5,250 in fees and the appellate court collected $6,825 in fees.[133] An apportioned fee among inmates, however, will satisfy § 1915(b)(3)'s requirement of a single fee for any jointly filed complaint or appeal.

But what about § 1915(b)(1)? Can it also be read consistently with § 1915(b)(3)'s requirements? It can; in fact, simply respecting its text reveals that it fits with § 1915(b)(3)'s caps. Section 1915(b)(1) is satisfied when multiple IFP prisoners apportion one fee because each "prisoner" has "pa[id] the full amount of *a* filing fee."[134] The word "a" is important: Congress's use of "a" makes the fee requirement vary depending on whether a single prisoner or multiple prisoners brought suit. So the full amount of the filing fee changes from $455 in single-prisoner appeals to a proportionate one-half share of $455 ($222.50) in two-prisoner appeals. In either appeal, the full docketing fee is paid. Section 1915(b)(1)'s use of the word "a" allows the filing fee to depend on the number of joint litigants. It requires only that multiple prisoners apportion the filing fee. Once they do that, they will have paid "a" full filing fee.[135]

Concededly, the courts' interpretation of § 1915(b)(1) does not leap eagerly from the pages of the United States Code, unlike § 1915(b)(3)'s clear interpretation. But the interpretation respects § 1915(b)(1)'s *text* while also respecting § 1915(b)(3)'s text. Given the Supreme Court's clear mandate, courts cannot read § 1915(b)(1) so as to ignore § 1915(b)(3).

133. Section 1915(b)(1) requires full collection of fees at some point during the litigation. *See id.* § 1915(b)(1), (2).

134. *Id.* § 1915(b)(1) (emphasis added).

135. It is unclear why Congress wrote only in the singular. This shortcoming was more likely a product of quick work, because the PLRA did not receive much debate. *See* Clay v. Rice, No. 01 C 50203, 2001 WL 1380526, at *1 (N.D. Ill. Nov. 5, 2001) ("Among [§ 1915's] many other shortcomings, this provision refers only to 'the prisoner' and neglects to address the case of multiple prisoner–plaintiffs."); 142 CONG. REC., S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) ("The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves."). Hasty work and inattention to detail are easier to accept than the notion that Congress intended to treat multiple IFP prisoners differently from both multiple IFP nonprisoners and multiple non-IFP prisoners, because Congress expressed its intention to treat IFP prisoners like ordinary plaintiffs.

Rather, § 1913(b)(3) bolsters reading § 1915(b)(1) to require apportionment by explicitly adopting the requirement that multiple plaintiffs pay only one fee. Concluding the opposite, that § 1915(b)(1) requires multiple IFP prisoners to *each* pay a full fee, would not only violate § 1915(b)(3), but would mean that multiple IFP prisoners are treated differently (fifteen prisoners paying $5,250 total) vis-à-vis multiple non-IFP prisoners (fifteen prisoners splitting $350). Nothing in § 1915 supports that bizarre dichotomy. Finally, the legislative history supports the proposition that multiple IFP prisoners should proportionately split one fee because that is what ordinary plaintiffs do, and Congress desired to treat IFP prisoners like ordinary plaintiffs.[136]

C. *Section 1915 and Rule 20*

There is no conflict between § 1915 and Rule 20. And the requirements of both are satisfied if multiple IFP prisoners proceed jointly. So courts should allow them to: (1) proceed jointly, and (2) pay a single, apportioned fee. First, allowing IFP prisoners to proceed jointly comports with Rule 20's text and its goal of furthering judicial economy. Second, allowing IFP prisoners to join suits allows them to vindicate their rights using legal tools that are available to similar groups. For instance, nonprisoner plaintiffs suffering can freely use Rule 20, and proceed jointly, because § 1915(b)(1)'s troublesome language does not affect them. So fifteen indigent plaintiffs who were suffering from an infection due to conditions at a local school, for instance, could proceed jointly. Similarly, prisoners who are not indigent may proceed jointly because § 1915 does not affect them, either. So, for example, fifteen nonindigent prisoners could proceed jointly to seek redress from the same infection that the fifteen indigent prisoners from the hypothetical could not. Although this treatment is clearly unequal, courts have universally held that neither prisoners nor indigents are suspect classes;[137] thus neither group gets the benefit of strict scrutiny analysis in judicial actions alleging equal

136. Resorting to legislative history is of course unnecessary because the texts are clear. *See* Blum v. Stenson, 465 U.S. 886, 896 (1984) ("[W]e look first to the statutory language and then to the legislative history if the statutory language is unclear.").

137. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323 (1980) ("[P]overty, standing alone, is not a suspect classification."); Tucker v. Branker, 142 F.3d 1294, 1300 (D.C. Cir. 1998) ("Nor do prisoners or indigents constitute a suspect class." (citations omitted)); Nicholas v. Tucker, 114 F.3d 17, 20 (2d Cir. 1997) (holding that prisoners are not a suspect class); Roller v. Gunn, 107 F.3d 227, 233 (4th Cir. 1997) (holding that neither prisoners nor indigents are a suspect class).

protection violations under the Fourteenth Amendment.[138] And although a group of indigent prisoners could argue that even under a rational basis inquiry, the statute violates the Equal Protection Clause because there is no rational basis to treat them differently from nonindigent prisoners, such a suit is unlikely to succeed.[139] Additionally, it is unlikely that Congress wanted to treat types of the same class differently; if Congress intended to treat two types of prisoners or two types of indigents differently in regard to proceeding jointly, it is likely that it would have said so either in the text of § 1915 or, at a minimum, in its legislative history.

In addition, IFP prisoners who proceed jointly should pay an apportioned amount of a single fee. As previously discussed, apportionment among IFP prisoners harmonizes the requirements of §§ 1915(b)(1) and (b)(3), and also comports with the requirements of a single fee for any jointly filed complaint or appeal in §§ 1913 and 1914.

IV. FEDERAL JURISPRUDENCE

Three courts of appeals—the Eleventh Circuit, the Seventh Circuit, and the Third Circuit—have squarely addressed whether prisoners can join as plaintiffs under Rule 20. All three have gotten it wrong, causing indigent prisoners to be treated differently than nonindigent prisoners. In this Part I will identify how those courts were mistaken. Contrasting their views with mine will, I hope, further persuade that my interpretation is correct.

Only the Sixth Circuit has arrived at the correct holding on fees after addressing a similar question of how to assess costs in a two-prisoner suit.[140] But the Sixth Circuit's view is not being followed by district courts within

138. *See, e.g.*, *Tucker*, 142 F.3d at 1300 (applying rational basis review, not strict scrutiny, to an equal protection challenge brought by an indigent prisoner challenging a filing-fee provision).

139. The focus of this Article is not to assess the viability of such a suit, but simply to note that the possibility of such a suit is indicia that Congress did not intend to prevent multiple indigent prisoners from proceeding jointly when it wrote § 1915. If a group of indigent prisoners did file suit under the Equal Protection Clause, the resulting rational basis inquiry would determine whether "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *See, e.g.*, Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 320 (1993) (citations omitted). The odds though, would be against the indigent prisoners: "Even if the legislature does not articulate the purpose underlying the distinction, we must uphold it 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Tucker*, 142 F.3d at 1300 (quoting *Heller*, 509 U.S. at 320).

140. *See* Talley-Bey v. Knebl, 168 F.3d 884 (6th Cir. 1999).

that circuit because those courts believe that "[n]o panel of the Sixth Circuit has yet squarely addressed the . . . issue." Instead, those district courts are following the Eleventh Circuit's view.[141]

The correct approach—allowing multiple prisoners to proceed jointly and assessing an apportioned fee—comports with § 1915(b)(3), a section ignored by the courts, and the statutory scheme. Contrary to the Eleventh Circuit's view, the PLRA does not irreconcilably conflict with Rule 20. And contrary to the Seventh and Third Circuit's views, the PLRA's text does not compel courts to assess a complete filing fee for each prisoner. Instead, the PLRA unambiguously proscribes that approach. If, as the Seventh and Third Circuit decided, Congress desired to treat IFP prisoners worse than ordinary plaintiffs, notwithstanding the legislative history, Congress should amend the PLRA because the law, as is, does not support those courts' conclusions.

A. *Eleventh Circuit*

The Eleventh Circuit has held that prisoners cannot bring joint prisoner actions because "the [PLRA] repeals . . . Rule [20]."[142] In *Hubbard v. Haley*, Earnest Hubbard and seventeen fellow Alabama state prisoners filed suit under 42 U.S.C. § 1983 asserting Eighth Amendment violations by numerous prison officials.[143] The eighteen plaintiffs, all of whom were dialysis patients, "allege[d] that the medical care and diet provided at [the jail fell] below . . . constitutional standards . . . ."[144] The court characterized the issue as "whether multiple prisoners, proceeding IFP, are entitled to join their claims and thus pro-rate the mandatory filing fees among the group instead of individually paying the full fee."[145]

The analysis began by noting the PLRA's intent to curtail abusive prisoner suits.[146] But the court gave the legislative history regarding filing

141. Jones v. Fletcher, No. Civ.A.05CV07-JMH, 2005 WL 1175960, at *6 n.5, 7 (E.D. Ky. May 5, 2005); *accord* Lawson v. Sizemore, No. Civ.A. 05-CV-108-KKC, 2005 WL 1514310, at *1 n.1 (E.D. Ky. June 24, 2005) (noting that the issue is "unsettled" within the Sixth Circuit and following the approach used by Hubbard v. Haley, 262 F.3d 1194 (11th Cir. 2001)).

142. Hubbard v. Haley, 262 F.3d 1194, 1198 (11th Cir. 2001) (citing Mitchell v. Farcass, 112 F.3d 1483, 1489 (11th Cir. 1997)).

143. Hubbard v. Haley, 262 F.3d 1194, 1195 (11th Cir. 2001).

144. *Id.*

145. *Id.*

146. *Id.* at 1196 (citing Anderson v. Singletary, 111 F.3d 801, 805 (11th Cir. 1997)).

fees only cursory consideration. That is, it noted that "the Congressional purpose in promulgating the PLRA enforces an interpretation that each prisoner pay the full filing fee,"[147] and cited for that proposition only Senator Kyl's first paragraph of introductory remarks.[148] That cited segment of the remarks simply states that one goal of the fees provision is to deter frivolous suits,[149] but the rest of the remarks explain that Congress intended to deter these suits by treating IFP prisoners like ordinary plaintiffs.[150] The court's view of the legislative history related to § 1915(b)(1) was wrong. In fact, the court should not have resorted to the legislative history in the first place, because the text allows for a reading that comports with the statutory scheme.

The *Hubbard* court then acknowledged the tenet of statutory interpretation that advocates harmonizing a subsequently enacted statute with the Federal Rules.[151] It noted that the prisoners' argument, based on that principle, would yield "a harmonious reading of the PLRA [that] would allow multiple prisoners to bring an IFP civil action in accordance with Rule 20 and still require the prisoners to pay the filing fee, albeit shared among the several plaintiffs."[152] Nevertheless, the court then "conclude[d] . . . that the PLRA *clearly* and *unambiguously* requires that '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*.'"[153] It added that "to the extent that . . . Rule 20[] actually conflicts with the PLRA . . . the statute repeals the Rule."[154] Thus, the court stated, because the PLRA's "plain language" requires that each prisoner proceeding IFP pay the full filing fee, prisoners cannot bring joint suits under Rule 20 in the Eleventh Circuit.[155]

The Eleventh Circuit erred in *Hubbard* by violating the strong presumption against repeal by implication. The "plain language" that it

147. *Id.* at 1197–98 (citing 141 CONG. REC. S7526 (daily ed. May 25, 1995)).

148. *See id.* at 1198.

149. *Id.*

150. *See supra* Part I.D.

151. *Hubbard*, 262 F.3d at 1197 (citing Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000)).

152. *Id.*

153. *Id.* (quoting 28 U.S.C. § 1915(b)(1) (2006)) (emphasis added).

154. *Id.* at 1198 (citing Mitchell v. Farcass, 112 F.3d 1483, 1489 (11th Cir. 1997)).

155. *See id.*

relied upon—"the full amount of *a* filing fee"[156]—does not explicitly deal with joinder under Rule 20. The Eleventh Circuit should have followed the principle that, when dealing with repeal-by-implication issues, the presumption is to find compatibility, not incompatibility.[157] If it did so, it would have concluded that joinder is allowed and that an apportionment of the fee among the prisoner–plaintiffs harmonizes all the relevant statutory requirements. The court also relied on a blunted view of legislative history to drive its analysis. And disturbingly, the Eleventh Circuit did not analyze the other statutory sections necessary to complete the analysis—it did not even mention §§ 1913, 1914, or 1915(b)(3).[158]

Alarmingly, district courts from the Fourth,[159] Fifth,[160] Sixth,[161] Eighth,[162] Ninth,[163] and Tenth[164] Circuits have either explicitly adopted

156. 28 U.S.C. § 1915(b)(1) (emphasis added).

157. *See* Branch v. Smith, 538 U.S. 254, 273 (2003) (stating that "absent a clearly expressed congressional intention," "repeals by implication are not favored" (citations and internal quotation marks omitted)); United States v. Wasserson, 418 F.3d 225, 235 n.7 (3d Cir. 2005) (citing Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503 (1936)).

158. *See Hubbard*, 262 F.3d 1194.

159. Lilly v. Ozmint, No. 2:07–1700–JFA–RSC, 2007 WL 2021874, at *1 (D.S.C. July 6, 2007) ("Finding no binding precedent, this Court is persuaded by the reasoning of the Eleventh Circuit in *Hubbard v. Haley* . . . . Multiple filing fees cannot be collected for one case filed by multiple plaintiffs, thus the PLRA's requirement that a prisoner pay the full fee for filing a lawsuit would be circumvented in a multiple plaintiff case subject to the PLRA.").

160. Amir-Sharif v. Dallas County, No. 3:06-CV-0143-K ECF, 2006 WL 2860552, at *3–4 (N.D. Tex. Oct. 5, 2006) (denying nine prisoner–plaintiffs the right to a joint suit because the PLRA requires each to pay the full fee under *Hubbard* or *Boriboune* and because of the "impracticalities inherent in multiple-prisoner litigation" (internal quotation omitted)).

161. Jones v. Fletcher, No. Civ.A.05CV07-JMH, 2005 WL 1175960, at *6–7 (E.D. Ky. May 5, 2005) (denying four IFP prisoners' motion to join and severing their claims into four separate cases because the PLRA's intent would be "circumvented" if prisoners were permitted to proceed jointly). The *Jones* court distinguished the Sixth Circuit's earlier decision in *Talley-Bey v. Knebl* as follows: "So far, the Sixth Circuit has only decided that, at the end of a multiple prisoner plaintiff action, costs, as opposed to filing fees, may be equally divided among all participating indigent prisoners." *Id.* at *6 n.5 (citing Talley-Bey v. Knebl, 169 F.3d 884 (6th Cir. 1999)). Having determined that "[n]o panel of the Sixth Circuit has yet squarely addressed the multiple-*in forma pauperis*-prisoner-plaintiff-PLRA filing fee issue," the court followed *Hubbard*'s approach. *Id.* at *6.

162. Jones v. Abby, No. 4:09CV1089 AGF, 2009 WL 2169894, at *1 (E.D. Mo. July 17, 2009) ("Multiple prisoners may not join together in a single lawsuit under Rule 20 of the Federal Rules of Civil Procedure.") (citing Georgeoff v. Barnes, No.

Hubbard or followed its reasoning.

B. *Seventh Circuit*

The Seventh Circuit, in contrast to the Eleventh Circuit, has held that prisoners can proceed in one action if they each meet the requirements for permissive joinder in Rule 20.[165] In *Boriboune v. Berge*, four inmates in Wisconsin's top-security prison filed suit under 42 U.S.C. § 1983 and asked the district court to proceed IFP.[166] The district court judge dismissed the complaint, holding that despite "Rule 20, she would not allow prisoners to litigate jointly *in forma pauperis*."[167] Her reasoning mirrored that of the Eleventh Circuit—"the need to apportion one filing fee among multiple plaintiffs and collect small sums under § 1915(b)(1) not only would produce an administrative headache but also would reduce the deterrence to frivolous litigation that the enactment of that provision . . . was supposed to produce."[168] She also noted that it would "be hard to know which plaintiffs should be assessed 'strikes' under § 1915(g) when some but not all of the claims are frivolous . . . ."[169]

The Seventh Circuit reversed. It first acknowledged that "[j]oint litigation could undermine the system of financial incentives created by the PLRA."[170] But it concluded that "[i]t does not follow . . . that § 1915 has superseded Rule 20."[171] It began its reasoning by noting that "[r]epeal by

2:09CV00014 ERW, 2009 WL 1405497, at *1 (E.D. Mo. May 18, 2009). *But see* Cole v. Houston, No. 4:06CV3314, 2007 WL 1309821, at *2 (D. Neb. Mar. 30, 2007) ("The judges of this district have decided to follow the lead of the Seventh Circuit until the Eighth Circuit Court of Appeals addresses the issue.").

163. Swenson v. MacDonald, No. CV 05-93-GF-CSO, 2006 WL 240233, at *1–2 (D. Mont. Jan. 30, 2006) (concluding that "*Hubbard* presents the stronger argument" and requiring the two prisoner-plaintiffs to proceed in separate actions).

164. *See* Hershberger v. Evercom, Inc., No. 07-3152-SAC, 2008 WL 45693, at *1 (D. Kan. Jan. 2, 2008) (stating that "[t]he court also is persuaded that the *Hubbard* approach to an action filed by multiple prisoner plaintiffs is more suited to the realities of prisoner litigation" and severing the second prisoner from suit); Pinson v. Whetsel, No. CIV-06-1372-F, 2007 WL 428191, at *1 (W.D. Okla. Feb. 1, 2007) (stating that "joinder is complicated by the Prison Litigation Reform Act" and citing *Hubbard* to support its decision to deny five prisoners from joining this single-prisoner action).

165. Boriboune v. Berge, 391 F.3d 852 (7th Cir. 2004).

166. *Id.* at 853.

167. *Id.* at 854.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

implication occurs only when the newer rule is logically incompatible with the older one."[172] It then noted that joint prisoner litigation is not incompatible with the PLRA because "joint litigation does not relieve prisoners of any duties under the more recent statute."[173] It conceded that Congress may have "want[ed] to curtail joinder in prisoners' civil litigation," but that it did not actually do so.[174] Indeed, it noted, "[t]he PLRA *does not* mention Rule 20."[175] Before turning to the issue of fees, the court held that, "[b]ecause the PLRA does not repeal or modify Rule 20, district courts [in that circuit] must accept complaints filed by multiple prisoners if the criteria for permissive joinder are satisfied."[176]

The Seventh Circuit thus avoided the Eleventh Circuit's mistake of holding that, because the PLRA repealed Rule 20, multiple prisoners could not proceed jointly. But its holding faltered on the filing-fee issue nonetheless.

Specifically, on "the question [of] how much each plaintiff owes,"[177] the *Boriboune* court acknowledged that "one filing fee per suit, rather than per litigant—reflects the norm in civil litigation."[178] But it concluded "that *Hubbard* got this right."[179] The court agreed with the Eleventh Circuit's approach "that the PLRA *modified* [the one-filing-fee norm] and obliges prisoners seeking to proceed *in forma pauperis* to pay one fee apiece."[180] Its reasoning, which completely ignored § 1915(b)(3), was blunt:

> Section 1915(b)(1) says, among other things, that "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." *Hubbard* concluded that this language requires each prisoner seeking to litigate *in forma pauperis* to pay (or arrange to pay in installments) the full filing fee, whether or not anyone else is a co-plaintiff. It is hard to read this language any other way.[181]

The court took § 1915(b)(1) "at face value" and held "that one price

172. *Id.* (citation omitted).
173. *Id.*
174. *Id.*
175. *Id.* (emphasis added).
176. *Id.* at 855.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* (emphasis added).
181. *Id.*

of *forma pauperis* status is each prisoner's responsibility to pay the full fee in installments (or in advance, if § 1915(g) applies) no matter how many other plaintiffs join the complaint."[182] The district court should therefore have ensured that each of the four prisoners was assessed a full filing fee.[183]

The Seventh Circuit's holding on fees violated "the emphatic mandate in section 1915(b)(3) that 'in no event' may the fee collected in a prisoner case exceed that collected in any other civil action or appeal."[184] Indeed, the Seventh Circuit *never addressed,* nor even mentioned, § 1915(b)(3).[185] By not respecting § 1915(b)(3)'s plain language, it ended up repeating the Eleventh Circuit's mistake. That is, the court concluded that the PLRA modified the one-filing-fee-per-suit norm, even though the language in § 1915 does not require such a result. The *Boriboune* court presumably relied on an assumption of what Congress intended. But, as I have shown previously, Congress in fact intended only to treat IFP prisoners like ordinary plaintiffs, which would mean that they too would split one fee among multiple prisoners.

C. *Third Circuit*

Scabies spawned the Third Circuit case.[186] In *Hagan v. Rogers*, fourteen inmates at the Adult Diagnostic & Treatment Center (ADTC) in New Jersey jointly filed a pro se action under 42 U.S.C. § 1983 in the United States District Court for the District of New Jersey on behalf of themselves and a purported class.[187] They alleged that prison officials violated their Eighth and Fourteenth Amendment rights by failing to contain the spread of scabies.[188] The fourteen prisoners requested IFP status and moved for appointment of counsel.[189] After raising the issue sua sponte, the district court issued an order concluding that permissive joinder

182. *Id.* at 856.

183. *Id.*

184. *See* Hagan v. Rogers, 570 F.3d 146, 160 (3d Cir. 2009) (Jordan, J., concurring in part and dissenting in part).

185. *See Boriboune*, 391 F.3d 852.

186. Scabies is an infestation of the skin with the microscopic mite *sarcoptes scabei*. Scabies spreads rapidly in crowded conditions where there is frequent skin-to-skin contact, such as in hospitals, child-care facilities, and nursing homes. Centers for Disease Control and Prevention, *Scabies*, http://www.cdc.gov/scabies/ (last updated Nov. 10, 2008).

187. *Hagan*, 570 F.3d at 149–50.

188. *Id.* at 150.

189. *Id.*

was unavailable to IFP prisoners and dismissing thirteen of the prisoner–plaintiffs from the suit.[190] The district court suggested that Rule 20 joinder may be preempted by certain provisions of the PLRA.[191] The Third Circuit assigned the prisoners pro bono counsel and asked her to address, inter alia, the following questions: (1) "whether prisoners are barred from Rule 20 joinder as a matter of law;" and, if so, (2) "how court fees should be assessed among the joint plaintiffs."[192]

The Third Circuit reversed the district court, concluding "that nothing in the PLRA demonstrates that Congress intended to alter the plain language of Rule 20."[193] "Accordingly," in the Third Circuit, "prisoner litigants may not be categorically precluded from joining as plaintiffs under Rule 20."[194] But the Third Circuit, like the Seventh Circuit, got it only half right.

The Third Circuit held, correctly, "that the PLRA did not repeal Rule 20 joinder as to IFP prisoner litigants."[195] It found the Seventh Circuit's reasoning "compelling" and essentially adopted it.[196] That is, it noted that repeal by implication establishes a high standard that was not satisfied because "the PLRA does not even address permissive joinder, much less cover the whole subject area," and the two provisions are not in irreconcilable conflict.[197] In fact, "[t]he plain language of § 1915(b)(1) can be read in complete harmony with Rule 20 by requiring each joined prisoner to pay *the* full individual filing fee."[198] This is where the Third Circuit erred. The statute uses the word "a," not "the." The Third Circuit adopted the Seventh Circuit's reasoning for this faulty holding: "As the Seventh Circuit reasoned, taking '§ 1915(b)(1) at face value,' the requirement for each prisoner to pay a full fee is simply one price that a prisoner must pay for IFP status under the PLRA."[199]

But the Third Circuit, unlike the Seventh Circuit, at least attempted to analyze § 1915(b)(3). It stated that its interpretation—each joint

190. *Id.*
191. *Id.*
192. *Id.* at 151.
193. *Id.* at 152.
194. *Id.*
195. *Id.* at 156.
196. *See id.* at 154–57.
197. *See id.* at 155.
198. *Id.* (emphasis added).
199. *Id.* (citing Boriboune v. Berge, 391 F.3d 852, 856 (7th Cir. 2004)).

prisoner pays the full individual fee—"can also be read in harmony with § 1915(b)(3)."[200] It reasoned that this section must be read in "the context of § 1915(b) as a whole."[201] And, when "[r]ead in sequence, *common sense* indicates that § 1915(b)(3) merely ensures that an IFP prisoner's fees, when paid by installment, will not exceed the standard individual filing fee paid in full."[202] According to the court, "[r]eading the PLRA as requiring each joined IFP litigant to pay a full individual filing fee by installment, and no more, harmonizes the PLRA with Rule 20, and internally harmonizes the various provisions of § 1915(b)."[203] It noted that "[*n*]*othing in § 1915(b)* mentions joinder or indicates that Congress intended *§ 1915(b)(3) to serve as a bar* to the collection of multiple individual fees from individual plaintiffs in a joint litigation."[204]

This statement is baffling because § 1915(b)(3) does exactly that: it adopts a sister statute's bar to the collection of multiple individual fees. The Third Circuit's interpretation of § 1915(b)(3)—ensuring that an IFP prisoner's fees will not exceed the standard individual filing fee paid in full—ignores completely that subsection's reference to the statutes governing fees for commencement of civil actions or appeals.

Contrary to the Seventh Circuit's and Third Circuit's views, the PLRA's text does not compel courts to assess a complete filing fee for each prisoner. Instead, the PLRA unambiguously adopts statutes that proscribe that approach. If, as those two courts propounded, Congress wanted to treat IFP prisoners worse than ordinary plaintiffs—notwithstanding the legislative history that does not support such a reading—it should amend the PLRA, because the PLRA does not support the circuit courts' reading of the law.

D. *Judge Roth's Third Circuit Concurrence and Dissent*

Judge Roth's partial concurrence and partial dissent in *Hagan* got it right. She agreed with the majority that prisoners may join cases as plaintiffs under Rule 20, but she rightly disagreed with the majority because she "would require that each prisoner pay an apportioned amount of a single appellate-docketing fee."[205]

200. *Id.*
201. *Id.*
202. *Id.* (emphasis added).
203. *Id.* at 155–56.
204. *Id.* at 155 (emphasis added).
205. *Id.* at 164 (Roth, J., concurring in part and dissenting in part).

She disagreed with the majority's holding "because it violates 28 U.S.C. § 1915(b)(3) and misconstrues 28 U.S.C. § 1915(b)(1)."[206] The majority, according to Judge Roth, violated § 1915(b)(3) because the statute adopts § 1913's cap on appellate-docketing fees.[207] That statute "prescribes a $450 fee for docketing a case on appeal" and notes that the "parties filing a joint notice of appeal in the district court are required to pay *only one fee*."[208] Thus, she concluded, "the fourteen prisoners cannot each pay $450 (yielding a $6300 intake) because 'parties filing a joint notice of appeal . . . are required to pay only one [$450] fee.'"[209]

Judge Roth also criticized the majority for believing "that the 'plain language of § 1915(b)(1)' requires each prisoner to 'pay the full individual fee.'"[210] She stated:

> [Section] 1915(b)(1) does not impel that result. It, instead, requires each party—or each prisoner—"to pay the full amount of *a* filing fee." 28 U.S.C. § 1915(b)(1). This subtle difference, Congress's use of "a" instead of "the," illustrates that the $450 fee requirement varies depending on whether a single party—or a single prisoner—or multiple parties—or multiple prisoners—bring suit. When one prisoner brings suit, he satisfies § 1915(b)(1) by paying $450; when multiple prisoners bring suit under Federal Rule of Civil Procedure 20, they satisfy § 1915(b)(1) by paying the apportioned amount of $450. In either situation, the full amount of *a* filing fee is paid. Each prisoner here thus should pay a one-fourteenth share of $450.[211]

Judge Jordan, in his separate partial concurrence and partial dissent, criticized Judge Roth's approach by noting that "a reader must stumble over the word 'full.' There is nothing 'full' about paying a partial fee."[212] But Judge Jordan is wrong; the words "a full filing fee," require *apportionment*. "Full" does not mean an inflexible amount. If it did—that is, if § 1915(b)(1) were read to require that each joined prisoner would pay the fee himself—then § 1915(b)(3) would be violated. After criticizing Judge Roth's approach, Judge Jordan himself conceded as much:

206. *Id.*
207. *Id.*
208. *Id.* (quoting FEE SCHEDULE, *supra* note 79, para. 3) (internal quotation marks omitted).
209. *Id.* (quoting FEE SCHEDULE, *supra* note 79).
210. *Id.*
211. *Id.*
212. *Id.* at 161 (Jordan, J., concurring in part and dissenting in part).

> The language of the PLRA [in § 1915(b)(3)] is reasonably plain in this regard. It says, without qualification, that a full filing fee must be collected from a litigating prisoner and, again, that "*in no event* shall the fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action." Having multiple prisoners in a single suit, each paying a full fee creates an "event" that we are instructed should in no event be created. For example, in this case, collecting a full filing fee on appeal from each prisoner will result in a total fee of approximately $6300, far in excess of the $450 fee collected in the filing of any other civil appeal. As Judge Roth points out, that result "is incongruous with the relevant statutory scheme . . . ."[213]

Principles of statutory interpretation militate against reading a subsection in a way that violates another subsection. Moreover, § 1915(b)(1), most notably through the word "a," facially requires an apportioned fee.

E. *Sixth Circuit*

The Sixth Circuit offers support for assessing a proportionate share of filing fees in joint prisoner litigation. In *Talley-Bey v. Knebl*, Randolph Talley-Bey and Robert Nelson, both Michigan state prisoners, filed suit under 42 U.S.C. § 1983, arguing that defendants violated their federal constitutional right to court access.[214] The district court dismissed the prisoners' complaint under Federal Rule of Civil Procedure 12(b)(6) and "taxed Nelson and Talley-Bey $41 for costs in proportional amounts," with each being assessed $20.50.[215] Talley-Bey alone appealed from the district court's dismissal, arguing "that he was denied access to the courts . . . and that he should not have been taxed costs."[216] The Sixth Circuit affirmed the district court's judgment on liability in favor of defendants.[217] It then noted that "Talley Bey's argument regarding costs must be examined under the PLRA."[218]

The court used the opportunity to address the issue of how to assess costs *and fees* in a multiple prisoner suit.[219] It took "th[e] occasion to affirm

213. *Id.*
214. Talley-Bey v. Knebl, 168 F.3d 884, 885 (6th Cir. 1999).
215. *Id.* at 885–86.
216. *Id.* at 885.
217. *See id.* at 887.
218. *Id.* at 886.
219. *See id.* at 885.

the position that, for the purposes of the [PLRA], when a district court imposes fees and costs upon multiple prisoners, the fees and costs are to be proportionally assessed among the prisoners."[220] The allusion to reaffirming its position refers to an administrative order two years before, in which the Sixth Circuit's chief judge required that "any fees and costs that the district court or the court of appeals may impose shall be equally divided among all the prisoners."[221]

The *Talley-Bey* court concluded that "when a district court imposes fees and costs upon multiple prisoners, the fees and costs are to be proportionally assessed among the prisoners."[222] The court reasoned that the PLRA superseded an earlier Sixth Circuit case that held that courts had "discretion in assessing costs against an unsuccessful prisoner who prosecuted his or her case in forma pauperis."[223] After the PLRA, however, "the prisoner's ability to pay the costs is no longer an issue."[224] Thus, because the district court chose to tax costs to Talley-Bey, he was required to pay in accordance with the formula provided in § 1915(b)(2).[225] As far as assessing costs when multiple prisoners are involved, the court noted that "[t]he statute does not specify how fees are to be assessed when multiple prisoners constitute the plaintiffs or appellants."[226] The court concluded: "Because each prisoner chose to prosecute the case, we hold that each prisoner should be proportionately liable for any fees or costs that may be assessed. Thus, any fees and costs that a district court or that we may impose must be *equally divided among all the participating prisoners*."[227]

The Sixth Circuit's decision does not analyze the language contained in §§ 1915(b)(1) and (b)(3), but its holding on fees is the right one. It assumes that multiple prisoners can proceed jointly from trial through appeal and that, in those situations, courts must assess a single filing fee to be apportioned equally among the litigants.[228]

But one district court within the Sixth Circuit, notwithstanding *Talley-*

220. *Id.*
221. *See In re* Prison Litig. Reform Act, 105 F.3d 1131, 1138 (6th Cir. 1997).
222. *Talley-Bey*, 168 F.3d at 885.
223. *Id.* at 886.
224. *Id.*
225. *Id.*
226. *Id.* at 887.
227. *Id.* (emphasis added).
228. *Id.*

Bey, has denied a group of prisoners' motion to join, severing their claims into four separate cases because the PLRA's intent would be "circumvented" if prisoners were permitted to proceed jointly.[229] The court distinguished *Talley-Bey* because it "only decided that, at the end of a multiple prisoner plaintiff action, costs, as opposed to filing fees, may be equally divided among all participating indigent prisoners."[230] Having determined that "[n]o panel of the Sixth Circuit has yet squarely addressed the . . . issue," the court followed *Hubbard*'s approach.[231]

F. *Counterarguments*

One argument contrary to my position is that permitting multiple prisoner suits with one apportioned fee violates § 1915(b)(1)'s plain language. The Eleventh Circuit used this reasoning to deny multiple prisoners from proceeding jointly altogether,[232] and the Seventh Circuit used it to prevent multiple prisoners from apportioning one fee.[233] But this reasoning ignores § 1915(b)(3). Moreover, § 1915(b)(1), by itself (through the word "a") and in conjunction with the rest of the relevant sections respecting statutory interpretation tenets, supports proportionate fee sharing.

Another common counterargument is that an apportioned fee violates the PLRA's legislative history.[234] This argument fails because, as mentioned, the legislative history reveals that the PLRA was intended to deter frivolous suits by requiring a filing-fee system that treats IFP

229. Jones v. Fletcher, No. Civ.A.05CV07–JMH, 2005 WL 1175960, at *6–7 (E.D. Ky. May 5, 2005).

230. *Id.* at *6 n.5 (citing *Talley-Bey*, 168 F.3d 884 (6th Cir. 1999)).

231. *Id.* at *6. The district court followed the *Hubbard* court's conclusion that the legislative history impelled this conclusion. *See id.*; *see also* Hubbard v. Haley, 262 F.3d 1194, 1195 (11th Cir. 2001). In doing so, it incorrectly followed a decision based on a mere cursory examination of the legislative history of the PLRA, without considering Congress's explanation that the PLRA would deter frivolous filings by treating IFP prisoners like ordinary plaintiffs. *See Jones*, 2005 WL 1175960, at *6; *see also Hubbard*, 262 F.3d at 1196–98; Lawson v. Sizemore, No. Civ.A 05-CV-108-KKC, 2005 WL 1514310, at *1 n.1 (E.D. Ky. June 24, 2005) (noting that the issue is "unsettled" within the Sixth Circuit and following *Hubbard*'s approach).

232. *Hubbard*, 262 F.3d at 1197–98.

233. Boriboune v. Berge, 391 F.3d 852, 855 (7th Cir. 2004).

234. *See Jones*, 2005 WL 1175960, at *6 ("Implementation of the PLRA was designed to make prisoners feel the deterrent effect of the filing fee. Individual prisoner plaintiffs must experience the full financial implication of filing suit. Therefore, each separate plaintiff is individually responsible for a full filing fee of $150." (footnote and citations omitted)).

prisoners like ordinary plaintiffs.[235] Moreover, IFP prisoners must still pay filing fees when pursuing litigation jointly. More importantly, this counterargument cannot surmount a threshold hurdle: even assuming that the statute's language completely undercuts its policy goals, the language would still control.[236] Assuming arguendo that some deterrence might be diluted because prisoners pay less money when proceeding jointly, deterrence is still refortified by other provisions, such as the heightened three-strikes rule, outlined below.

A third plausible counterargument is that apportioning a single fee among multiple IFP prisoners proceeding jointly would conflict with the related "three-strikes" and "screening" provisions contained in §§ 1915(g) and 1915A, respectively. The so-called three-strikes[237] provision in § 1915(g) proscribes a prisoner from proceeding IFP if he has had three or more prior actions or appeals when the suit was "dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted."[238] A prisoner who has had three strikes called against him would therefore have to pay the entire filing fee up front for any future suit.[239]

Courts assess strikes after screening a complaint under § 1915A, which requires courts, if feasible, to review the complaint before docketing.[240] The § 1915A screening process follows § 1915(g)'s language—if a court "dismiss[es] the complaint, or any portion of the complaint," because it is "frivolous, malicious, or fails to state a claim upon which relief may be granted," [241] the prisoner incurs a strike.[242] So a

235. *See supra* Part I.D.

236. *See supra* Part II.B.

237. *See* Hagan v. Rogers, 570 F.3d 146, 153 (3d Cir. 2009) (referring to § 1915(g) containing a "'three strike'" rule); *Boriboune*, 391 F.3d at 854 (noting that a prisoner can "'str[ike] out'" under § 1915(g)); Abdul-Akbar v. McKelvie, 239 F.3d 307, 310 (3d Cir. 2001) (stating that § 1915(g) is "popularly known as the 'three strikes' rule"); Boston, *supra* note 55, at 780 (titling his section describing § 1915(g) as "[t]he three strikes prohibition").

238. 28 U.S.C. § 1915(g) (2006).

239. There is one exception: a prisoner may proceed with his fourth (or more) suit if he "is under imminent danger of serious physical injury." *Id.* Courts, incidentally, have interpreted this as imminent danger at the time of the prisoner's complaint—not at some time in the past. *See, e.g.*, *Abdul-Akbar*, 239 F.3d at 311; Medberry v. Butler, 185 F.3d 1189, 1193 n.2 (11th Cir. 1999); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998); Banos v. O'Guin, 144 F.3d 883, 884–85 (5th Cir. 1998).

240. 28 U.S.C. § 1915A.

241. *Id.*

prisoner incurs a strike if his complaint, or any single claim within his complaint, is dismissed for being frivolous or malicious or is dismissed under Federal Rule of Civil Procedure 12.[243]

Courts have speculated that joint litigation might make the "screening" requirement more difficult.[244] But because the inquiry is complaint-focused—not prisoner–plaintiff-focused—screening is not more difficult in joint prisoner litigation. A district court examines a joint prisoner complaint in exactly the same manner that it does a single prisoner complaint. In both situations, the court examines the complaint. Similarly, assessing strikes under § 1915(g) is not more difficult if multiple prisoners join a complaint. Section 1915(g) limits the number of IFP complaints or appeals.[245] Thus, because § 1915(g) refers to the complaint as a whole, when any claim in a joint complaint fails to state a claim, or if the complaint is frivolous or malicious, each joined prisoner incurs a strike.

Indeed, § 1915(g) might dissuade multiple IFP prisoners from proceeding jointly because of the risk attendant in being responsible for all the claims in the action.[246] Prisoners must beware of piggybacking onto frivolous or malicious joint litigation because they could suffer a strike. Moreover, joint litigation does not relieve prisoners of any duties under § 1915(g).[247]

Even if screening were more difficult in these types of cases (and it is not), there is a more damaging response to this counterargument. Namely,

242. *See id.* § 1915(g).

243. *Id.* § 1915A.

244. *See, e.g.*, Hagan v. Rogers, 570 F.3d 146, 153 (3d Cir. 2009) (stating that § 1915(g) has troubled "other courts in the context of joinder"); Boriboune v. Berge, 391 F.3d 852, 855 (7th Cir. 2004) (noting that the district court believed that allowing prisoners to proceed jointly would make it difficult to know which plaintiffs should be assessed strikes under § 1915(g)).

245. 28 U.S.C. § 1915(g); *see also Boriboune*, 391 F.3d at 854 (noting the administrative difficulties in determining which plaintiffs would be assessed strikes and which would not if a complaint were not taken as a whole).

246. *See Hagan*, 570 F.3d at 156 ("[Section] 1915(g) may actually dissuade joint litigation since a court could hold that, reading the PLRA and Rule 20 together, a plaintiff is accountable for the dismissal of a co-plaintiff's claims."); *see also Boriboune*, 391 F.3d at 855 (stating that a prisoner proceeding in a joint action takes the "risks for *all* claims in the complaint").

247. One troubling issue does exist: what if a prisoner who has incurred three strikes attempts to join a multiple prisoner action in which the other prisoners have less than three strikes? Courts could address this by dismissing the struck-out prisoner under Rule 20's requirements.

a putative policy concern—additional screening difficulty—cannot trump the clear language of both the statute and the rule.[248]

The fourth reason courts assert in support of disallowing joint prisoner litigation is that it presents inherent difficulties. Thus far, a splattering of district courts have rejected joint prisoner litigation because of "the impracticalities inherent in multiple-prisoner litigation," which "militate against the permissive joinder allowed by Rule 20."[249] These courts have sidestepped the question of whether there is an inherent conflict between § 1915(b) and Rule 20.[250] The difficulties noted by courts include "the need for each plaintiff to sign the pleadings, and the consequent possibilities that documents may be changed as they are circulated."[251] Moreover, "jail populations are notably transitory, making joint litigation difficult."[252] So repeated questions of standing and mootness may arise from the ever-changing list of prisoner-plaintiffs.[253] Finally, and "[p]erhaps of greatest concern," is that prisoners may be compelled through threats, physical force, or more subtle forms of duress to join lawsuits in which they would otherwise have no interest.[254] Joining a

248. *See, e.g.*, United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989) (stating that when a statute's language is unambiguous, that language governs); Steele v. Blackman, 236 F.3d 130, 133 (3d Cir. 2001) (citing Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993)) (same).

249. Hagwood v. Warden, No. 08-0610, 2009 WL 427396, at *2 (D.N.J. Feb. 19, 2009), *overruled by Hagan*, 570 F.3d at 152; *see also* Georgeoff v. Barnes, No. 2:09CV00014 ERW, 2009 WL 1405497, at *1 (E.D. Mo. May 18, 2009) ("In addition, 'the impracticalities inherent in multiple-prisoner litigation militate against the permissive joinder allowed by Rule 20.'" (citations omitted)); Beaird v. Lappin, No. 3:06-CV-0967-L, 2006 WL 2051034, at *4 (N.D. Tex. July 24, 2006) (stating that the court need not decide "[w]hether there is an inherent conflict between the latter-enacted § 1915(b) of the PLRA . . . and the earlier-enacted permissive joinder rules set forth in" Rule 20 because of "the impracticalities and inherent difficulties of allowing Plaintiffs to proceed jointly").

250. *See, e.g.*, *Hagwood*, 2009 WL 427396, at *2; *Beaird*, 2006 WL 2051034, at *4.

251. *Hagwood*, 2009 WL 427396, at *2; *see also* Wasko v. Allen County Jail, No. 1:06-CV-085 TLS, 2006 WL 978956, at *1 (N.D. Ind. Apr. 12, 2006) (noting the difficulties in having all co-plaintiffs sign a complaint).

252. *Hagwood*, 2009 WL 427396, at *2; *see also Hagan*, 570 F.3d at 163 (Jordan, J., concurring in part and dissenting in part) (noting the transitory nature of the prisoner population); *Wasko*, 2006 WL 978956, at *1 (noting that "jail populations are . . . transitory").

253. *See Hagan*, 570 F.3d at 163 (Jordan, J., concurring in part and dissenting in part).

254. *See id.*; *see also* Swenson v. MacDonald, No. 05-93-GF-CSO, 2006 WL

complaint alleging improper prison conditions may seem like a good idea when "the alternative is presented by a fellow inmate with a record for assault."[255]

All of these concerns do not suggest that prisoners categorically cannot use Rule 20 or that the PLRA preempts it. These alleged difficulties cannot authorize a court to ignore the language of the relevant texts at issue. A court should deny a prisoner's Rule 20 joinder motion only if a particular case presents these difficulties.[256]

V. CONCLUSION

District courts in circuits that lack binding authority have adopted the Eleventh Circuit's decision holding that the PLRA's provision on fees for IFP prisoners preempts their right to join actions as plaintiffs. This is alarming because, in my view, the Eleventh Circuit answered the issue even more incorrectly than its sister circuits. That is, the Eleventh Circuit found that Rule 20 was repealed by implication, even though the high standard for repeal by implication was not satisfied. The Seventh Circuit and Third Circuit noted the Eleventh Circuit's mistake in that regard, but they both violated § 1915(b)(3) by holding that each joint prisoner in a multiple-prisoner action must pay the full, individual filing fee. Future federal courts should instead follow Judge Roth's concurrence and dissent in *Hagan* because its analysis comports with the relevant statutory scheme. First, it respects § 1915(b)(3)'s cap on filing fees to one fee for multiple prisoner–plaintiffs proceeding jointly. Second, it comports with § 1915(b)(1)'s requirement that a prisoner pay a full fee because each joint prisoner in a multiple prisoner action will pay an *apportioned* amount—thus, the *full* amount given the number of prisoner–plaintiffs. Third, interpreting the two provisions as such respects two deep-seated statutory interpretation tenets: each provision is interpreted to avoid rendering any word or phrase superfluous, and each is interpreted to avoid an implicit repeal of Rule 20. Finally, the legislative history, which demonstrates that Congress intended to treat IFP prisoners no worse than ordinary plaintiffs, countenances apportioning one fee among joint prisoners.

240233, at *4 (D. Mont. Jan. 30, 2006).

255. *See Hagan*, 570 F.3d at 163 (Jordan, J., concurring in part and dissenting in part).

256. *See Wasko*, 2006 WL 978956, at *1 (denying prisoners' request to join and severing them into separate actions because the "permissive joinder requirements of Rule 20 are" unsatisfied).