IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOPAZ JOHNSON, *Plaintiff-Appellant*, v. HIGH DESERT STATE PRISON, et al., *Defendants-Appellees*.	Case No. 23-15299 On Appeal from the U.S. District Court for the Eastern District of California Case No. 2:22-cv-01235 Honorable Troy L. Nunley
IAN HENDERSON, *Plaintiff-Appellant*, v. HIGH DESERT STATE PRISON, et al., *Defendants-Appellees*.	Case No. 23-15396 On Appeal from the U.S. District Court for the Eastern District of California Case No. 2:22-cv-01235 Honorable Troy L. Nunley

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a), Plaintiffs-Appellants Topaz Johnson and Ian Henderson, through *pro bono* counsel, respectfully request that this Court hold oral argument in this consolidated appeal. To the extent necessary, Plaintiffs-Appellants also respectfully request that this Court either appoint an amicus curiae to argue in support of the magistrate judge's order or request Defendants' participation in this case. *See, e.g.*, Order, *Byrd v. Phoenix Police Dep't*, No. 16-16152 (9th Cir. Sept. 21, 2016), ECF No. 7-1; Request for Response, *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721 (2020) (No. 18-8369) (calling for response in case where respondents had not appeared before district court or appellate court).

This case involves an important statutory-interpretation question of first impression in this Circuit, which impacts the ability of incarcerated persons to jointly seek relief for violations of their civil rights. The magistrate judge's order conflicts with the decisions of three Courts of Appeals that have considered this issue. Because most prisoners affected by the Prison Litigation Reform Act proceed *pro se*, the fact that Plaintiffs-Appellants are counseled on appeal makes this a

particularly appropriate vehicle for the Court to decide this question with the benefit of counsel.

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INTRODUCTION

The Supreme Court has given clear guidance to courts tasked with interpreting the Prison Litigation Reform Act: Accept what Congress said in the PLRA, but do not read in what Congress did not. In particular, judges should not infer that the PLRA altered the usual operation of the Federal Rules of Civil Procedure unless Congress explicitly communicated an intent to do so. *See Jones v. Bock*, 549 U.S. 199, 212–17 (2007).

Yet the magistrate judge drew exactly that impermissible inference when plaintiffs Kevin Jones, Jr., Topaz Johnson, and Ian Henderson brought a joint action. Rather than conducting the analysis that Rule 20 requires when deciding whether multiple "persons" can proceed jointly as plaintiffs, the magistrate judge came up with a prisoner-specific rule categorically barring joinder for *pro se* prisoners and severed Mr. Johnson and Mr. Henderson (Plaintiffs-Appellants) from the action. He imputed this rule not to any express departure from Rule 20 in the PLRA, but to the PLRA's perceived purpose and the purported "interplay" between two of the PLRA's filing-fee provisions. That is precisely what *Jones* says courts cannot do.

The magistrate judge's decision is at odds with the decisions of three other Courts of Appeals that have recognized that *in forma pauperis* prisoners can proceed jointly. *See Hagan v. Rogers*, 570 F.3d 146, 153–56 (3d Cir. 2009); *Talley-Bey v. Knebl*, 168 F.3d 884, 887 (6th Cir. 1999); *In re Prison Litig. Reform Act*, 105 F.3d 1131, 1137–38 (6th Cir. 1997); *Boriboune v. Berge*, 391 F.3d 852, 854–55 (7th Cir. 2004). The only contrary decision, *Hubbard v. Haley*, 262 F.3d 1194, 1196–98 (11th Cir. 2001), relied on intuitions about the PLRA's policy goals, rather than its plain text, in violation of *Jones*'s subsequent admonition.

The magistrate judge's decision twice violates the plain text of the PLRA: It reads a categorical rule against joinder into Congress's silence, and it rests this rule on a further misreading of the statute to require the payment of one filing fee per plaintiff, rather than one filing fee per action. The decision also substitutes general assumptions about incarceration for Rule 20's broad allowance for all "persons"—prisoners and non-prisoners alike—to join as plaintiffs. Because the magistrate judge effectively nullified Rule 20 for *in forma pauperis* prisoners, his severance and dismissal of Plaintiffs-Appellants cannot stand. This Court should reverse this decision and remand for Plaintiffs-Appellants

to jointly litigate their claims.

JURISDICTIONAL STATEMENT

Kevin Jones, Jr., Topaz Johnson, and Ian Henderson jointly filed an action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of California. ER-22. The district court had jurisdiction under 28 U.S.C. § 1331. Prior to screening, a magistrate judge severed Mr. Johnson and Mr. Henderson ("Plaintiffs-Appellants") from the original action and gave them fourteen days to proceed individually. ER-17.

Plaintiffs-Appellants chose not to proceed individually. The magistrate judge recommended that the complaint by Plaintiffs-Appellants be dismissed without prejudice because neither had notified the court that he "wished to proceed with an individual action." ER-10. The district court adopted the findings and recommendations and dismissed the complaint by Plaintiffs-Appellants without prejudice. ER-9.

On February 8, 2023, the district court entered final judgment dismissing the action. ER-3. That marks a final, appealable decision. *See Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 890 (9th Cir.

2019). "The touchstone for finality is that the particular action filed is fully disposed of, without the possibility of being resurrected through amendment." *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1106 (9th Cir. 2018). This action has been "fully disposed of," and "whether a dismissed party to the action could litigate the same merits issue by filing a different case does not matter." *Id.*; *see also United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949). Moreover, any right to refile individual actions preserved by the dismissal without prejudice "would be of no practical benefit" to Plaintiffs-Appellants, who want to proceed jointly or not at all. *See Concha v. London*, 62 F.3d 1493, 1508–09 (9th Cir. 1995) (holding that voluntary dismissal by plaintiffs who "were unwilling to proceed in federal court" was final and appealable, where any refiling would place them "in precisely the same position in which they were prior to the dismissal").

On February 26, 2023, and March 8, 2023, respectively, Mr. Johnson and Mr. Henderson timely appealed. ER-32; ER-35; *see* Fed. R. App. P. 4(a)(1)(A), 4(c). This Court consolidated their appeals. No. 23-15299, Dkt. Entry 15. This Court has jurisdiction over their consolidated appeal under 28 U.S.C. § 1291.

ISSUE PRESENTED

1. Did the district court err in denying Plaintiffs-Appellants joinder where it performed no case-specific analysis of Federal Rule of Civil Procedure 20's requirements and instead relied on a mistaken conclusion that the PLRA categorically bars incarcerated plaintiffs from proceeding jointly and a generalized assumption that prisoners logistically cannot proceed jointly?

STATEMENT OF THE CASE

A. Statutory Background

Joinder is governed by Federal Rule of Civil Procedure 20, which allows any "persons" to "join in one action as plaintiffs" if (1) "they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences"; and (2) "any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1). Nothing in Rule 20 or its Advisory Committee Notes distinguishes incarcerated plaintiffs or limits their ability to seek permissive joinder.

The Prison Litigation Reform Act (PLRA) brought about various changes to litigation procedures for incarcerated plaintiffs, but it did not

address joinder. One of the PLRA's changes was the modification of filing fee requirements for prisoners bringing civil actions *in forma pauperis* (IFP). That provision, 28 U.S.C. § 1915(b), states 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," to be paid out in installments according to a statutory formula. 28 U.S.C. § 1915(b)(1)–(2). That section also limits the filing fee that may be collected to "the amount of fees permitted by statute for the commencement of a civil action." 28 U.S.C. § 1915(b)(3). That amount is set by a neighboring provision, § 1914, which requires "the parties instituting any civil action, suit or proceeding . . . to pay a filing fee of $350," and bars the collection of additional fees unless "prescribed by the Judicial Conference of the United States." § 1914(a)–(b). No language in the PLRA addresses multi-plaintiff actions.

B. Procedural Background

For approximately nine hours on the night of March 14, 2022, correctional officers at the High Desert State Prison kept Plaintiffs Kevin Jones, Jr., Topaz Johnson, and Ian Henderson standing in dirty, "urine smelling," 2½ foot by 2½ foot holding cages with their arms handcuffed

behind their backs. ER-24–27. Based on this incident, Mr. Jones, Mr. Johnson, and Mr. Henderson jointly filed suit *pro se* in the United States District Court for the Eastern District of California; Mr. Johnson and Mr. Henderson are Plaintiffs-Appellants here. The plaintiffs filed an accompanying motion to proceed IFP. ER-19.

Soon after, a magistrate judge entered an order in the action. With respect to Plaintiffs-Appellants, he denied permissive joinder under Federal Rule of Civil Procedure 20 and severed them from the action. ER-17. Although acknowledging that "Rule 20(a) . . . allows permissive joinder of plaintiffs when certain conditions are met," the magistrate judge said nothing more about the Rule and gave two reasons why he was requiring "each individual plaintiff [to] proceed with their own separate lawsuits." ER-12. First, he concluded that "the interplay of the filing fee provisions in the [PLRA] suggests that prisoners may not bring multi-plaintiff pro se actions." ER-13. He reasoned, based on "the PLRA's deterrent purpose," that 28 U.S.C. § 1915(b)(1) would require each incarcerated plaintiff in a multi-plaintiff action to pay the full filing fee, but that this practice would then violate § 1915(b)(3)'s requirement 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." *Id.* Second, he asserted that uncounseled multi-prisoner cases present "unique problems," such as the possibility of transfer or release and "challenges to communication among plaintiffs presented by confinement." ER-12. He did not say anything about challenges specific to the plaintiffs in this case. ER-12–13.

Following this severance, the magistrate judge ordered each of Plaintiffs-Appellants to notify the court whether he "wishe[d] to proceed with his severed claim in a separate suit." ER-17. When neither did so, the magistrate judge recommended dismissal of their complaint without prejudice, and the district court adopted this recommendation. ER-10–11, ER-8–9. Subsequently, the district court dismissed the entire action, in which Mr. Jones was the sole remaining plaintiff, after Mr. Jones failed to amend his complaint in response to the magistrate judge's order granting him leave to do so. ER-6–7, ER-4–5; *see also* ER-18 (dismissing complaint "with leave to amend by plaintiff Jones"). Because they had been severed, Mr. Johnson and Mr. Henderson were not granted any such opportunity to file an amended complaint in the action. The district court then entered final judgment. ER-3.

Plaintiffs-Appellants timely appealed. ER-32–38.[1]

SUMMARY OF THE ARGUMENT

I. The magistrate judge did not, and could not, dispute that Plaintiffs met the requirements for joinder under Rule 20: Plaintiffs' claims arise out of the same "occurrence"—their confinement in holding cages for the same nine-hour period—and implicate common "question[s] of law or fact" about the conditions of these holding cages and whether Defendants could lawfully subject Plaintiffs to such conditions for hours. Fed. R. Civ. P. 20(a)(1). In fact, the magistrate judge engaged in no individualized analysis of Plaintiffs' claims or circumstances at all.

A. Rather than applying Rule 20 to these specific Plaintiffs, the magistrate judge erroneously imputed a categorical ban on "multi-plaintiff pro se actions" by prisoners to the perceived "interplay" between two filing-fee provisions of the PLRA. This was twofold error.

1. The IFP statute cited by the magistrate judge, 28 U.S.C. § 1915, says nothing about joinder. Neither does any other provision of the PLRA. As the Supreme Court explained in *Jones v. Bock*, that silence is "strong evidence that the usual practice should be followed," because "when

[1] This Court consolidated their appeals. No. 23-15299, Dkt. Entry 15.

Congress meant to depart from the usual procedural requirements, it did so expressly." 549 U.S. 199, 212, 216 (2007). All but one of the Courts of Appeals to have addressed this issue agree. The one circuit to conclude otherwise did so years before *Jones* and did not hold that the PLRA expressly overruled Rule 20, instead invoking the PLRA's policy goal of reducing the number of frivolous prisoner filings. *See Hubbard v. Haley*, 262 F.3d 1194, 1196–98 (11th Cir. 2001). But courts "should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns," and there is no basis for *Hubbard*'s or the magistrate judge's conclusion that Congress silently abrogated Rule 20 for incarcerated plaintiffs by "the curiously indirect route" of modifying the fee obligations of incarcerated plaintiffs who proceed IFP. *See Jones*, 549 U.S. at 212, 216.

2. Moreover, the "interplay" between two provisions of § 1915 on which this purported abrogation rests is premised on a misreading of § 1915(b)(1). The magistrate judge believed that § 1915(b)(1) requires that "prisoner-plaintiffs who proceed together in one action must *each* pay the full filing fee," and that this would exceed § 1915(b)(3)'s limit on "the filing fee collected." But, reading the statutory text in the context of

neighboring provisions and applying the basic principle of statutory interpretation that "words importing the singular include and apply to several persons," 1 U.S.C. § 1, § 1915(b)(1) requires one full filing fee for an action, whether brought by one plaintiff or multiple.

B. The magistrate judge bolstered his mistaken view that the PLRA categorically forecloses joinder for incarcerated plaintiffs by relying on general assumptions about incarcerated plaintiffs, rather than any analysis specific to *these* Plaintiffs. The magistrate judge's assumptions cannot override Rule 20's broad scope of applicability to all "[p]ersons," nor can it substitute for the requisite application of Rule 20's requirements to this specific case. *See Hagan v. Rogers*, 570 F.3d 146, 157 & n.5 (3d Cir. 2009).

STANDARD OF REVIEW

This Court reviews the district court's ultimate decision to sever and dismiss parties for abuse of discretion. *Rush v. Sport Chalet, Inc.*, 779 F.3d 973, 974 (9th Cir. 2015). A district court abuses its discretion if it "base[s] its decision on an erroneous legal standard or clearly erroneous finding of fact." *Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 753 (9th Cir. 2022) (en banc) (internal quotation marks omitted) (quoting *All. for Wild*

Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011)); *see also Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law. . . . The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.").

This Court reviews the district court's underlying legal conclusions de novo. *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999). The underlying legal questions to which de novo review applies include the interpretation of both the PLRA and Rule 20(a). *Talamantes v. Leyva*, 575 F.3d 1021, 1023 (9th Cir. 2009) (PLRA); *Rush*, 779 F.3d at 974 (Rule 20(a)); *see also Dorsey v. Varga*, 55 F.4th 1094, 1103 & n.4 (7th Cir. 2022) (same).

ARGUMENT

I. The magistrate judge erred by adopting a blanket rule barring *pro se* incarcerated plaintiffs from joining their claims under Rule 20.

Rule 20 allows any "persons" to join in one action as plaintiffs if (1) they assert a right to relief "arising out of the same transaction, occurrence, or series of transactions or occurrences," and (2) the case involves at least one "question of law or fact common to all plaintiffs."

Fed. R. Civ. P. 20(a)(1). The magistrate judge here did not dispute that Plaintiffs met the requirements of Rule 20. He did not, and could not, find that Plaintiffs were not "persons." *See Cruz v. Beto*, 405 U.S. 319, 321 (1972) ("Federal courts sit . . . to enforce the constitutional rights of all 'persons,' including prisoners."). Plaintiffs' claims also unquestionably arise out of the same "occurrence" or "series of occurrences": their protracted confinement under the same conditions, in the same place, at the same time. ER-24–27. Likewise, Plaintiffs' claims necessarily present common "questions of fact"—about the conditions of their holding cages and about Defendants' responsibility for subjecting them to those conditions—and a common "question of law"—about whether the imposition of those conditions amounts to cruel and unusual punishment under the Eighth Amendment. ER-24–27. The Plaintiffs plainly satisfied Rule 20(a)'s requirements.

The magistrate judge did not analyze the requirements of Rule 20 at all, let alone find that Plaintiffs failed to satisfy them. Nor did he consider Plaintiffs' individual circumstances beyond the mere fact of their incarceration. Instead, he denied joinder for two erroneous reasons: (1) "[T]he interplay of the filing fee provisions in the [PLRA] suggests

that prisoners may not bring multi-plaintiff pro se actions"; and (2) joint litigation by incarcerated *pro se* plaintiffs generally presents "unique problems not presented by ordinary civil litigation." ER-12. The first conclusion is legally erroneous and contrary to decisions from the Third, Sixth, and Seventh Circuits. *See Hagan v. Rogers*, 570 F.3d 146, 153–56 (3d Cir. 2009); *Talley-Bey v. Knebl*, 168 F.3d 884, 887 (6th Cir. 1999); *In re Prison Litig. Reform Act*, 105 F.3d 1131, 1137–38 (6th Cir. 1997); *Boriboune v. Berge*, 391 F.3d 852, 854–55 (7th Cir. 2004). And the second relies on general assumptions about prisoners rather than the circumstances of *these* plaintiffs. Each error constitutes an abuse of discretion; together, they leave no doubt that the decision denying joinder must be reversed. *See Rush v. Sport Chalet, Inc.*, 779 F.3d 973, 974–75 (9th Cir. 2015); *League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 558 F.2d 914, 917–18 (9th Cir. 1977); *Williams v. Cal. Dep't of Corr. & Rehab.*, 467 F. App'x 672, 674 (9th Cir. 2012) (mem.) (reversing dismissals of defendants who were properly joined under Rule 20).

A. The PLRA does not foreclose incarcerated plaintiffs from proceeding jointly.

Rather than analyzing whether *these* Plaintiffs and their claims met the requirements for joinder under Rule 20, the magistrate judge

erroneously interpreted two filing-fee provisions of the PLRA, 28 U.S.C. §§ 1915(b)(1) and 1915(b)(3), to categorically prohibit "multi-plaintiff pro se actions" by prisoners. ER-13. Relying on his impression of "the PLRA's deterrent purpose," the magistrate judge thought that these provisions foreclosed joinder *sub silentio* through their "interplay." ER-13.

This was twofold legal error. First, in interpreting the PLRA, the Supreme Court has admonished that "when Congress meant to depart from the usual procedural requirements, it did so expressly." *Jones v. Bock*, 549 U.S. 199, 216 (2007). It did not do so here. Second, the very conflict between § 1915(b)(1) and § 1915(b)(3) on which the magistrate judge relied stems from a misreading of § 1915(b)(1), based on nothing more than a general assertion of "the PLRA's deterrent purpose." ER-13.

1. The PLRA's filing-fee provisions do not expressly depart from Rule 20's usual joinder principles.

Section 1915 does not categorically prohibit the joinder of incarcerated IFP plaintiffs. Had Congress intended the PLRA to so radically alter Rule 20's usual operation, it would have done so expressly. As all but one of the circuits to address this issue have held, Congress did no such thing. *See Hagan*, 570 F.3d at 154–56; *Talley-Bey*, 168 F.3d at 887; *In re Prison Litig. Reform Act*, 105 F.3d at 1137–38; *Boriboune*, 391

F.3d at 854; *but see Hubbard v. Haley*, 262 F.3d 1194, 1198 (11th Cir. 2001).

To begin, the usual operation of Rule 20 plainly permits any "[p]ersons" to bring a joint action when certain conditions are met. Fed. R. Civ. P. 20(a)(1); *see also United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) (observing that, under the Federal Rules, "joinder of claims, parties and remedies is strongly encouraged"). Prior to the enactment of the PLRA, courts readily understood that *pro se* prisoners proceeding IFP under § 1915 were such "persons" who could bring an action jointly as co-plaintiffs.[2] This proposition was so unremarkable that courts often gave only passing mention to the fact that a case involved multiple incarcerated co-plaintiffs proceeding IFP. *See, e.g.*, *Johnson v. Reagan*, 524 F.2d 1123, 1124 (9th Cir. 1975) (noting that *pro se* incarcerated co-plaintiffs had been granted IFP status); *Moore v. Mabus*,

[2] *See, e.g.*, *Bagguley v. Barr*, 893 F. Supp. 967, 968 (D. Kan. 1995); *Kurtz v. Denniston*, 872 F. Supp. 631, 633–34 (N.D. Iowa 1994); *Lester v. Clymer*, No. 89-cv-4287, 1989 WL 66621, at *3 (E.D. Pa. June 19, 1989); *Chatman-El v. Thompson*, No. 83-c-25, 1986 WL 2050, at *2 (N.D. Ill. Feb. 4, 1986); *Tate v. Werner*, 68 F.R.D. 513, 516 (E.D. Pa. 1975); *Kennedy v. Meacham*, 382 F. Supp. 996, 997 (D. Wyo. 1974), *rev'd on other grounds*, 540 F.2d 1057 (10th Cir. 1976); *McClelland v. Sigler*, 327 F. Supp. 829, 829 (D. Neb. 1971).

976 F.2d 268, 269 (5th Cir. 1992) (remanding for further proceedings in *pro se*, IFP action brought by multiple incarcerated plaintiffs); *In re Funkhouser*, 873 F.2d 1076, 1077–78 (8th Cir. 1989) (granting writ of mandamus with respect to incarcerated co-plaintiffs' pending IFP petition, and rejecting magistrate's reasoning that the parties "may dismiss their case and file individual cases" as an "interfere[nce] with the prisoner's right to proceed in federal court with a non-frivolous complaint"); *Madyun v. Thompson*, 657 F.2d 868, 870 (7th Cir. 1981) (noting that the Court had reversed denial of leave to proceed IFP to incarcerated co-plaintiffs then proceeding *pro se*); *Sinwell v. Shapp*, 536 F.2d 15, 18–19 (3d Cir. 1976) (reversing denial of leave to proceed IFP to *pro se* incarcerated co-plaintiffs); *Bonner v. Circuit Court of City of St. Louis*, 526 F.2d 1331, 1334 n.2 (8th Cir. 1975) (en banc) (noting that the Court had allowed incarcerated co-plaintiffs, then proceeding *pro se*, to appeal IFP).

That understanding—that prisoners proceeding IFP, no less than other persons, can proceed jointly—traces back centuries to the English codification of the right to proceed IFP. *See* An Act to Admit Such Persons as Are Poor to Sue In Forma Pauperis, 11 Hen. 7 c.12 (1495) (affording

the right to proceed *in forma pauperis* to "every poor person *or persons* which have and hereafter shall have cause of action or actions against any person or persons within the realm" (spelling modernized) (emphasis added)); Annie Prossnitz, *A Comprehensive Procedural Mechanism for the Poor: Reconceptualizing the Right to In Forma Pauperis in Early Modern England*, 114 Nw. U. L. Rev. 1673, 1691 n.109, 1693 n.119, 1719 (2020) (citing *Poole v. Nicholson*, TNA, REQ 2/166/143 (Nov. 23, 1598), in which the Master of Requests granted the joint petition to proceed IFP of two co-plaintiffs incarcerated in debtors' prison).

Against that backdrop, Congress's silence about multi-plaintiff actions in the PLRA is telling. The Supreme Court has instructed that courts must not read the PLRA to alter the Federal Rules of Civil Procedure where Congress did not explicitly communicate an intent to do so. *See Jones*, 549 U.S. at 216 ("[W]hen Congress meant to depart from the usual procedural requirements, it did so expressly."). When the PLRA is "silent" on a procedural issue, that is "strong evidence that the usual practice should be followed." *Id.* at 212.

Nothing in the PLRA meets *Jones*'s exacting standard for modifying Rule 20's "usual practice" of joinder. The plain text of §§ 1915(b)(1) and

1915(b)(3) says nothing about overruling Rule 20. In fact, there is no language in all of § 1915 that addresses multi-plaintiff actions or prevents plaintiffs from proceeding jointly. The rest of the PLRA is similarly silent on joinder. Under *Jones*, this strongly indicates that "the usual practice should be followed"—namely, that incarcerated plaintiffs are subject to the same Rule 20 requirements as nonincarcerated plaintiffs. *Jones*, 549 U.S. at 212.

The Third, Sixth, and Seventh Circuits understood this. As the Third Circuit in *Hagan* explained, "[t]he PLRA did not alter the text of Rule 20, or make any reference to the Rule." 570 F.3d at 154. "[T]he PLRA does not even address permissive joinder, much less cover the whole subject area . . . ." *Id.* at 155. Absent an express directive, § 1915 could not be read to override the usual operation of Rule 20 unless the two were in "irreconcilable conflict." *Id.* at 155. But no such conflict exists; indeed, Rule 20 and the PLRA "can be read in complete harmony." *Id.* And as the Seventh Circuit observed, Congress had a template for barring joinder if it wanted to—procedural rules forbid joinder in the habeas context, and those rules existed at the time Congress passed the PLRA. *See Boriboune*, 391 F.3d at 854. "Courts must honor the difference" between the

prohibition on joinder in the habeas context and the silence as to joinder in the PLRA context. *Id.*

In a statute in which Congress directly modified certain requirements for incarcerated plaintiffs, "there is no basis for concluding" that it silently prohibited incarcerated plaintiffs from proceeding jointly through "the curiously indirect route" of modifying the fee obligations of incarcerated plaintiffs who proceed IFP. *See Jones*, 549 U.S. at 216. The magistrate judge was wrong to conclude otherwise, as was the only circuit ever to reach the same conclusion. In both instances, each court erroneously relied on the PLRA's goal of curtailing abusive prisoner litigation. ER-13; *Hubbard*, 262 F.3d at 1196–98. As an initial matter, neither court made any effort to tie this purpose to reduce the volume of frivolous litigation to their ultimate conclusion that Congress implicitly intended to force incarcerated plaintiffs who otherwise satisfy Rule 20's requirements for joinder to proceed in separate actions. More importantly, both courts appear to have improperly "depart[ed] from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Jones*, 549 U.S. at 212. And most importantly, for the reasons below, their premise that § 1915(b)(1) requires *each* incarcerated co-

plaintiff in a multi-plaintiff IFP action to pay the full statutory filing fee is wrong on the text, its context, and the legislative history.

2. Assessing one filing fee for a multi-plaintiff action, divided among the incarcerated co-plaintiffs, is most consistent with the statutory text and ordinary joinder principles.

In addition to its faulty conclusion that the PLRA completely rewrote the usual procedural rules in an area on which Congress was silent, the magistrate judge's order started from a faulty premise. The magistrate judge believed §§ 1915(b)(1) and 1915(b)(3) to pose a "problem[]" for multi-plaintiff actions because he read § 1915(b)(1) to require that "prisoner-plaintiffs who proceed together in one action must *each* pay the full filing fee," ER-13 (emphasis added), and then determined that this per-plaintiff collection of "the full filing fee" would violate § 1915(b)(3)'s requirement 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." This is a misreading of the statutory text. Section 1915(b)(1) requires the assessment of one full filing fee for the *action*, whether brought by one plaintiff or multiple, and the "problem" that the magistrate judge imputed to the statute is nonexistent.

Section 1915(b)(1) states that "if *a prisoner* brings a civil action . . . in forma pauperis, *the prisoner* shall be required to pay the full amount of a filing fee." (emphasis added). The text says nothing about multi-plaintiff actions; as stated above, it certainly does not prohibit them outright. And a basic principle of statutory interpretation, codified in the Dictionary Act for decades prior to the PLRA, establishes how to read the statute as applied to multi-plaintiff actions. "In determining the meaning of any Act of Congress, unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things[.]" 1 U.S.C. § 1.

Courts have long interpreted § 1915 in accordance with this principle of the Dictionary Act. Prior to the enactment of the PLRA, § 1915(a) read, "Any court of the United States may authorize the commencement . . . of any suit, action or proceeding . . . or appeal therein, without prepayment of fees and costs or security therefor, by *a person* who makes affidavit that he is unable to pay such costs or give security therefor." 28 U.S.C. § 1915(a) (1979) (emphasis added). Courts widely understood that "a person" included *persons* proceeding jointly, and routinely afforded IFP status to co-plaintiffs accordingly. *See supra* pp.

16–17.

The magistrate judge's interpretation of § 1915(b)(1) fails in the application of this fundamental principle. "[S]ince a term preceded by an indefinite article can inherently carry a plural meaning under the Dictionary Act, any subsequent reference to that term—which grammatically has to be preceded by a definite article or its equivalent (e.g., such)—inherits the same inherent plurality." *Fairchild v. Sec'y of Dep't of Health & Human Servs.*, 138 Fed. Cl. 29, 31 (Cl. Ct. 2018). In § 1915(b)(1), the shift from the indefinite article ("a prisoner") to the definite article ("the prisoner") establishes such an identity between the second "prisoner" mentioned in the statute and the first. *See Schroeder v. United States*, 793 F.3d 1080, 1084–85 (9th Cir. 2015) ("[T]he use of a definite article preceded by an indefinite article can be persuasive evidence that Congress intended to link two clauses."). Applying § 1915(b)(1) to plural "prisoners" in a joint action, while retaining the identity between the first and second reference to "prisoner," the statute is best read, "if [*prisoners*] bring[] a civil action . . . in forma pauperis, [*the prisoners*] shall be required to pay the full amount of a filing fee."

To read the statute differently, and thereby manufacture the

conflict between §§ 1915(b)(1) and 1915(b)(3) that purportedly overrode Rule 20, the magistrate judge effectively broke the statute in half and, with it, the identity between "a prisoner" and "the prisoner." To discern how § 1915(b)(1) would apply to a multi-plaintiff action, the magistrate judge changed the first half of the provision to fit the context of a multi-plaintiff action while keeping the second half fixed—in effect, rewriting the statute to say, "if [*prisoners*] bring[] a civil action . . . in forma pauperis, [*each prisoner*] shall be required to pay the full amount of a filing fee." Such a reconstruction of the statute is impermissible.

To be sure, the Dictionary Act allows for deviation from the number canon where "the context indicates otherwise." 1 U.S.C. § 1. But far from "indicating otherwise," the context of neighboring provisions and neighboring statutes confirms that the textualist interpretation of § 1915(b)(1) to assess one filing fee for an action, whether brought by multiple incarcerated plaintiffs or one, is correct. To start, § 1915(b) is a modification of § 1915(a), which provides the overarching framework for IFP actions. Section 1915(a) ties the filing fee to the action, not the litigant. Section 1915(a)(1), which substantially mirrors the previous language of § 1915(a), states that courts may authorize "the

commencement . . . of any suit, action or proceeding . . . or appeal therein, without prepayment of fees or security *therefor*, by a person . . . ." (emphasis added); *see also* 28 U.S.C. § 1915(a)(2) ("A prisoner seeking to bring a civil action . . . without prepayment of fees or security *therefor* . . . ." (emphasis added)). At the very outset of establishing the procedure for IFP actions, the statute twice ties the fee to the action, not the prisoner: The fee is "for" the action. *See Therefor*, Black's Law Dictionary (6th ed. 1990) ("For that thing: for it, or them."). When multiple plaintiffs jointly bring one action, the action remains singular, so the filing fee does as well.

Section 1915(b)(3) confirms this result. It 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." Again, the statute ties "the filing fee collected" to the "action" or "appeal," rather than each plaintiff or appellant. Section 1915(b)(3) further directs courts to reference the "statute for the commencement of a civil action or an appeal." Those statutes, in turn, confirm that Congress intended the collection of one fee for one action or appeal, even if multiple litigants bring a joint action or

appeal. The "statute for the commencement of a civil action," 28 U.S.C. § 1914, requires "the *parties* instituting any civil action . . . to pay *a filing fee* of $350." (emphasis added). The statutes setting the fee to notice an appeal are similarly explicit that the fee is assessed per notice, not per appellant. 28 U.S.C. § 1917 (requiring the payment of $5 "by the appellant" "[u]pon the filing of any separate *or joint* notice of appeal" (emphasis added)); Judicial Conference Schedule of Fees, *Court of Appeals Miscellaneous Fee Schedule* ¶ 1 (issued in accordance with 28 U.S.C. § 1913) ("Each party filing a notice of appeal pays a separate fee to the district court, but parties filing a joint notice of appeal pay only one fee.").

Parallel language in 28 U.S.C. § 1915(f)(2) offers even more support for the per-action assessment of the filing fee. The provisions authorizing the taxation of costs against prisoners in § 1915(f)(2)(A)–(C) copy the corresponding provisions for the collection of the filing fee in § 1915(b)(1)–(3). "If the judgment against *a prisoner* includes the payment of costs under this subsection, *the prisoner* shall be required to pay the full amount of the costs ordered." 28 U.S.C. § 1915(f)(2)(A) (emphasis added). Payments are to be collected "in the same manner as is provided for filing

fees under subsection [(b)(2)]," 28 U.S.C. § 1915(f)(2)(B); *see also Draper v. Rosario*, 836 F.3d 1072, 1087 n. 10 (9th Cir. 2016) (citing *Talley-Bey*, 168 F.3d at 887) (noting the statute's mistaken reference), and "[i]n no event shall the costs collected exceed the amount of the costs ordered by the court," 28 U.S.C. § 1915(f)(2)(C).

Read in the context of the Dictionary Act, these provisions apply to multi-plaintiff actions in a sensible manner: "If the judgment against [*prisoners*] includes the payment of costs under this subsection, [*the prisoners*] shall be required to pay the full amount of the costs ordered." By the magistrate judge's erroneous reading of § 1915(b)(1), however, these analogous provisions in § 1915(f)(2) would require "[*each prisoner*] to pay the full amount of the costs ordered," 28 U.S.C. § 1915(f)(2)(A); *see supra* pp. 23–24. That duplication of recovery is surely incorrect. A defendant who spends $100 on copying costs does not recover $200, $300, or more simply because the opponents are prisoners proceeding jointly.

Together, the statutory text and its context make clear that § 1915 preserved the "usual practice" for the apportionment of a filing fee among co-plaintiffs. *Jones*, 549 U.S. at 212. The legislative history still further confirms this. In enacting the PLRA, lawmakers communicated an intent

to treat indigent, IFP prisoners *like*—not *worse* than—ordinary, non-indigent plaintiffs for fee purposes. *See* 141 Cong. Rec. S7526 (statement of Sen. Jon Kyl) (stating the PLRA's fee provision was designed so prisoners would "have to make *the same decision* that law-abiding Americans must make: Is the lawsuit worth the price?" (emphasis added)); 141 Cong. Rec. S14, 413–14 (statement of Sen. Bob Dole) (explaining that the PLRA was intended to correct the perceived unfairness of indigent prisoners not being "required to pay *the fees that normally accompany* the filing of a lawsuit" (emphasis added)). The "normal[]" decision that nonincarcerated, nonindigent co-plaintiffs make is whether to pay one filing fee for the action, as prescribed by § 1914.

By giving dispositive weight to general notions of "the PLRA's deterrent purpose," ER-13, the magistrate judge gave short shrift to the choices that Congress wrote into the text. "If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, [they] would risk failing to 'take account of' legislative compromises essential to a law's passage and, in that way, thwart rather than honor 'the effectuation of congressional intent.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019) (citation and alterations omitted).

Further upsetting the balance written into the statute, the magistrate judge's interpretation of § 1915(b)(1) would produce the absurd result that the PLRA requires indigent prisoner-plaintiffs in a joint action to pay *more* than non-indigent prisoner-plaintiffs. Section 1915 applies only to prisoners proceeding IFP. The section is entitled "Proceedings in forma pauperis," and the provision originally appeared in a section of the PLRA with the same title. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 804, 110 Stat. 1321 (1996); *see Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (noting that "the title of a statute and the heading of a section" are "tools" to resolve "the meaning of a statute"). And, of course, the text of § 1915(b)(1) applies only "if a prisoner brings a civil action or files an appeal in forma pauperis." The magistrate judge's reading of § 1915(b)(1) would thus present no obstacle to non-indigent incarcerated co-plaintiffs, who could bring a joint action by paying a single filing fee, divided among them. Yet indigent incarcerated co-plaintiffs, after sufficiently proving that they are "unable to pay such fees" upfront, § 1915(a)(1), would counterintuitively be required to pay several times more than their more affluent counterparts just to bring the same joint action.

This Court should thus join the Sixth Circuit, reject the magistrate judge's erroneous reading of § 1915(b), and hold that incarcerated IFP plaintiffs may bring a joint action and incur a single filing fee for the action, to be apportioned among them. *Talley-Bey*, 168 F.3d at 887; *In re Prison Litig. Reform Act*, 105 F.3d at 1137–38; *see also Hagan*, 570 F.3d at 164–65 (Roth, J., concurring in part and dissenting in part).[3] Apportioning this filing fee for the action among the co-plaintiffs and then collecting partial payments from each in the manner prescribed by § 1915(b)(2), as the Sixth Circuit has done for decades, fully comports with the text of the statute and the legislative purpose to treat indigent prisoners like, not worse than, other litigants.

* * *

In sum, the magistrate judge categorically barred the Plaintiffs from proceeding jointly based on a presumed departure from Rule 20 that

[3] Even if this Court were to read § 1915(b)(1) to require the assessment of a full filing fee per plaintiff, it would still be required to reverse, because, as explained *supra*, § I.A.1, the statute still does not expressly depart from Rule 20. The Third and Seventh Circuits have recognized as much: Although both circuits incorrectly determined that § 1915(b)(1) requires a full filing fee from each plaintiff, they nonetheless allow incarcerated IFP plaintiffs to proceed jointly. *See Hagan*, 570 F.3d at 155; *Boriboune*, 391 F.3d at 855.

Congress did not enact, and a reading of § 1915(b)(1) that is incorrect. Given Congress's complete silence on joinder of incarcerated plaintiffs, *Jones* makes clear that "the usual practice" under Rule 20 should be followed. 549 U.S. at 212. And the application of § 1915(b)(1) that is faithful to the text, its context, and the legislative history is consistent with that "usual practice": Incarcerated co-plaintiffs who bring a joint action are together responsible for a single filing fee.

B. The district court abused its discretion in denying joinder based on generalized assumptions about prisoners, rather than Rule 20 analysis specific to *these* plaintiffs and *this* case.

The magistrate judge's second reason for severing Plaintiffs' cases was equally flawed. The magistrate judge did not assess whether the Plaintiffs and claims before him satisfied Rule 20's "liberal[]" requirements. *Cuprite Mine Partners LLC v. Anderson*, 809 F.3d 548, 552 (9th Cir. 2015). Instead, he apparently applied a blanket rule against joinder of "multiple prisoners proceeding without counsel," citing only general assumptions about incarceration, namely the possibility of "transfer" or "release" and "the challenges to communication . . . presented by confinement." ER-12.

These nonspecific assumptions about incarceration cannot trump

the broad scope of Rule 20. "Under the [Federal Rules of Civil Procedure], 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." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966); *see also League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977) (Rule 20 should be "construed liberally" to "promote trial convenience" and "prevent[] multiple lawsuits"). And Rule 20's language is "clear and unambiguous": It allows *all* "persons"—incarcerated or not—to litigate jointly. *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540–41 (1991) (the Rules are given their "plain meaning").

The magistrate judge's general reasoning about *all* prisoners undermines Rule 20's "clear and unambiguous" "use of the term 'persons'" to define its scope. *Hagan*, 570 F.3d at 157. As explained above, the PLRA does not alter the ordinary operation of Rule 20, nor is there any other legal basis for excluding all prisoners from the category of "[p]ersons" who may join in one action under Rule 20. "While a judge may well identify credible reasons why joint litigation of prisoner suits might not generally be a good idea, such opinions cannot be used to defeat

congressional intent by disregarding the plain language of Rule 20." *Hagan*, 570 F.3d at 157 n.5.

As with any decision entrusted to a court's discretion, the court must provide "a reasoned analysis that comports with the requirements of the Rule, and that is based on the specific fact pattern presented by the plaintiffs and claims before the court." *Id.* at 157. As this Court explained in *League to Save Lake Tahoe*, one of the purposes behind the modern joinder rules was to "eliminate formalistic labels that restricted many courts from an examination of the practical factors of individual cases." 558 F.2d at 918 (quoting Wright & Miller, Fed. Prac. & Proc. Civ. § 1601). The magistrate judge declined to conduct any such individualized assessment here, instead applying a formalistic rule that would bar all prisoners from proceeding jointly under Rule 20. The failure to conduct any reasoned analysis specific to *these* Plaintiffs was an abuse of discretion.

* * *

Without giving any particularized consideration to the Plaintiffs' claims and circumstances under Rule 20, the magistrate judge instead asserted two sweeping grounds that would categorically bar incarcerated

IFP plaintiffs from proceeding jointly. Neither holds up. The first substitutes one court's impression of the PLRA's policy goals for the choices that Congress wrote into the statute itself. And the second substitutes the court's general assumptions about prisoners generally for the broadly inclusive scope of the Federal Rules. Because these errors are not a permissible exercise of the discretion afforded by the Rules, the magistrate judge's decision to sever Plaintiffs-Appellants must be reversed.

CONCLUSION

This Court should reverse the judgment of the district court and remand for further proceedings on Mr. Johnson's and Mr. Henderson's joint complaint.

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Respectfully Submitted,

/s/ Benjamin Gunning

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 and 9th Circuit Rule 32, I certify that:

This brief complies with the type-volume limitation of 9th Circuit Rule 32-1(a) because this brief contains 6,950 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

s/ Benjamin Gunning
Benjamin Gunning

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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