Dear AOUSC[1] —

I have previously written to you regarding the standards for IFP status, and the improper judicial collection of and demand for information not permitted by 28 U.S.C. § 1915.[2] My understanding of the current status of my proposals is that the Civil Rules Committee recently established a sub-committee to look into it further, and that, based on other such projects, a final outcome (i.e. Supreme Court issuance of a Rules Enabling Act order) is roughly 3–5 years away.

I currently have IFP status in multiple courts.[3] Two of these appointed counsel based on the combination of my poverty and disability. I am also seeking IFP status in other pending cases.[4] I am not a prisoner.

Earlier this week, I asked my partner of 14 years whether he would marry me. He said yes.[5]

This should be an occasion for untarnished celebration. Alas…

You stand directly in the way of my prospective marriage.

As I have explained before, the IFP forms and standards in current United States federal practice, including those promulgated by the AOUSC, have multiple fundamental defects:

1. they lack *any* objective reference criteria by which an applicant can know whether they qualify, and are in fact administered in an arbitrary and capricious manner;
2. they ask for information for which there is no adequate legal definition *in this context*, exposing the affiant to liability for perjury, dismissal, or IFP denial; and
3. they ask for information which the statute does not authorize the courts to demand.

I do not wish to wait many years on the uncertain prospect of a Rules Enabling Act rulemaking before I am able to marry my fiancé; nor do I wish to give up my IFP status or appointed counsel. You are directly responsible for the harm of this dilemma, and I am therefore asking you to fix it promptly, i.e. at least as fast as it would take to litigate for an injunction. I will therefore discuss only the aspects of this issue that directly interfere with my prospective marriage.

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[1] By "AOUSC", I mean to include the Judicial Conference and its general, civil and appellate rules committees.

[2] *See* 19-AP-C/19-CR-A/19-CV-Q. *See also* briefs in *Sai v. USPS*, 135 S. Ct. 1915, No. 14-646 (2015) (BIO req'd, cert. denied):
Cert. pet. https://s.ai/ifp/Sai%20v%20USPS%20SCOTUS%20Petition%20for%20certiorari.pdf
Maryland Volunteer Lawyers Service *amicus*
https://s.ai/ifp/Sai%20v%20USPS%20SCOTUS%2014-646%20Amicus%20brief%20for%20Sai%20on%20cert%20-%20Maryland%20Volunteer%20Lawyers%20Service.pdf
Western Center on Law and Poverty & the Legal Aid Association of California *amici*
https://s.ai/ifp/Sai%20v%20USPS%20SCOTUS%2014-646%20Amicus%20brief%20for%20Sai%20on%20cert%20-%20Western%20Center%20on%20Law%20and%20Poverty%20and%20Legal%20Aid%20Association%20CA.pdf
BIO https://s.ai/ifp/Sai%20v%20USPS%20SCOTUS%2014-646%20USPS%20Brief%20in%20opposition%20to%20cert.pdf
Reply https://s.ai/ifp/Sai%20v%20USPS%20SCOTUS%20Petition%20for%20certiorari.pdf

[3] D. D.C. No. 1:14-cv-403, N.D. CA. No. 3:16-cv-1024, & 9th Cir. No. 20-15615

[4] e.g. D. D.C. No. 1:20-1314, 1st Cir. No. 15-2356, D. MA. No. 1:15-cv-13308

[5] The marriage would take place in England, where we currently live together. I am a U.S. citizen. My partner is a Canadian citizen. We have previously resided, as a couple, in multiple U.S. states. Applicable law is, thus, complex.

1. *AOUSC forms and (implied) rules unlawfully require disclosure of a spouse's financial information.*

AO 239 & FRAP Form 4[6] demand that an IFP applicant disclose, usually on public record, a wide-ranging array of information *about their spouse*, namely:

1. Last 12 months' average monthly income, and expected next month's income, from:
    a. Employment
    b. Self-employment
    c. Income from real property
    d. Interest and dividends
    e. Gifts[7]
    f. Alimony[8]
    g. Child support[9]
    h. Retirement (such as social security, pensions, annuities, insurance)
    i. Disability (such as social security, insurance payments)
    j. Unemployment payments
    k. Public-assistance (such as welfare)[10]
    l. Other (specify)[11]
2. Employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.), including
    a. Employer
    b. Address
    c. Dates of employment
    d. Gross monthly pay
3. Cash[12]

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[6] AO 240 (standard district court IFP short form) does *not* request spousal information, and I therefore do not challenge it on those grounds here.

[7] Gifts are *not* considered "income" by the LSC, 45 C.F.R. § 1611.2(i) ("Total cash receipts do not include the value of food or rent received by the applicant in lieu of wages; money withdrawn from a bank; tax refunds; gifts; compensation and/or one-time insurance payments for injuries sustained; non-cash benefits; and up to $2,000 per year of funds received by individual Native Americans that is derived from Indian trust income or other distributions exempt by statute.")
They are also not considered "income" by the IRS, 26 U.S.C. §§ 368(d)(2)(B), 911 (excluding (b) "foreign earned income"; (c) "housing cost amount". It is not "earned income", § 911(d)(2)(A). It is not taxable income, IRS Pub. 525 (2019) p. 32 § "Gifts and inheritances". Neither are, e.g., "court awards and damages", *id.* p. 30.

[8] Starting in 2019, alimony is not considered "income" by the IRS. Pub. 525 (2019), p. 1, *referencing* Pub. 504.

[9] Child support is not considered "income" by the IRS. *Id.* p. 30.

[10] Considering welfare as "income" for IFP purposes is clearly prohibited by *Adkins v. DuPont*, 335 U.S. 331, 339 (1948): "To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support."

[11] There is no definition whatsoever of "income", for IFP purposes, sufficient to give a party fair notice as to what might count as "other income". As noted above, the existing elements directly contradict the definitions of "income" by the IRS and LSC, so those standards are of no help to the affiant. This is a plain violation of constitutional due process, and is arbitrary and capricious.

[12] This question makes no distinction between separate or joint assets. For the record, I do not know how much cash my

   a. Financial institution
   b. Type of account
   c. Amount your spouse has
4. The assets, and their values, which you own or your spouse owns [(except] clothing and ordinary household furnishings[)].[13]
   a. Home (Value)
   b. Other real estate (Value)
   c. Motor vehicle (Value)
      i. Make and year
      ii. Model
      iii. Registration #
   d. Other assets (Value)
5. Every person, business, or organization owing you or your spouse money, and the amount owed.
   a. Person owing you or your spouse money
   b. Amount owed to your spouse
6. Persons who rely on you or your spouse for support.
   a. Name (or, if under 18, initials only)
   b. Relationship
   c. Age
7. Average monthly expenses
   a. Rent or home-mortgage payment (including lot rented for mobile home)
      i. Are real estate taxes included?
      ii. Is property insurance included?
   b. Utilities (electricity, heating fuel, water, sewer, and telephone)
   c. Home maintenance (repairs and upkeep)
   d. Food
   e. Clothing
   f. Laundry and dry-cleaning
   g. Medical and dental expenses
   h. Transportation (not including motor vehicle payments)
   i. Recreation, entertainment, newspapers, magazines, etc.
   j. Insurance (not deducted from wages or included in mortgage payments)
      i. Homeowner's or renter's:
      ii. Life:
      iii. Health:
      iv. Motor vehicle:
      v. Other:

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fiancé has; I don't *want* to know; and I will not make any effort whatsoever to find out in order to satisfy any court's or public's mere curiosity. As is my right, I utterly decline to act in any way as an informant on my fiancé (/ spouse).
If there is a lawful reason for a court to delve into my fiancé's finances, then it has a clearly established means to do so: by issuing a letter rogatory under the Hague Service Convention (to which the US, UK, and Canada are signatories), in compliance with all applicable Canadian, UK, and US privacy law. I do not believe any such attempt would succeed, as there is no lawful reason to demand such information from him, and such an inquiry would be unjustifiable.

[13] *Ibid.*

k. Taxes (not deducted from wages or included in mortgage payments) (specify):
l. Installment payments
    i. Motor vehicle:
    ii. Credit card (name):
    iii. Department store (name):
    iv. Other:
m. Alimony, maintenance, and support paid to others
n. Regular expenses for operation of business, profession, or farm (attach detailed statement)
o. Other (specify)[14]

Literally *none* of this disclosure of a spouse's information is authorized by law.

To the contrary, it is expressly prohibited by a wide range of privacy laws in the US, UK, and Canada (absent showings of the proportionality and necessity of invasion of the spouse's privacy, such as those required to obtain a subpoena, that are not met here).

Among other laws, it is illegal under the GDPR and the UK Data Protection Act 2018 for me to disclose such information to a third party, let alone to the public, without my partner's consent. As a matter of EU & UK law, an "consent" under coercion is invalid, and which expressly includes the threat of any negative legal repercussion from a failure to "consent". It is, therefore, illegal for me to disclose my spouse's information on an IFP application, and I absolutely refuse to do so.[15]

Even if his consent wasn't impossible as a matter of law, my fiancé is a very private person. He does not wish to be the focus of any public attention or scrutiny, nor to have his information disclosed to the public. I will not violate his trust, and I will actively assert the full extent of any spousal or other privilege, and all applicable law, that is available to me to protect his privacy.

Current AOUSC forms and rules mean that my obedience of laws protecting my spouse's privacy would result in the denial of my IFP status. This is unlawful. A court may not coerce a violation of law, nor condition a benefit on the waiver of a right.

This is, of course, in addition to the fact that there is simply no statutory basis whatsoever for this requirement, and the courts may not make a demand without a sufficient legal basis for doing so.

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[14] Again, there is *no* definition of what constitutes "expenses", and as above, the AOUSC clearly does not follow IRS or LSC definitions. Therefore, it is a violation of due process to demand an accounting of "other expenses", as there is no adequate notice (indeed, no notice *at all*) as to what is included or excluded by that term.

[15] It is completely immaterial to me whether I have a realistic risk of prosecution, civil or criminal, by the government or my partner. I will not violate laws with which I agree. I am not motivated by fear of prosecution, but rather by very deeply held principles and religious convictions. I absolutely refuse to be coerced into violating such laws or principles, and have a demonstrated history of sticking to my convictions even in the face of severe harm, difficulties to myself, and attempts at coercion. As to matters of principle, I am simply not coercible.
Moreover, I cannot respect any court or government that would actively undermine the just laws of allied nations, or disregard its own just treaties.
Contrast Aérospatiale v. S.D. Iowa, 482 US 522 (1987) (approving US courts' disregard for the Hague Evidence Convention as to corporate objectors, on the basis that the corporation was unlikely to actually be prosecuted for the court's command to violate foreign law).

2. *If my fiancé's assets were considered despite their nonavailability, I would wrongly lose IFP status.*

Although I qualify for IFP status, my intended spouse does not.[16]

If a court were to consider my spouse's financial resources as if they were my own, I would be denied IFP status, and obligated to withdraw it in all my pending cases. This could lead to severe negative repercussions for me: financially, medically, and legally.

My fiancé and I have always kept separate finances, and broadly speaking, we intend to continue doing so after marriage. We intend to sign a prenuptial agreement which would provide for us to have a mixture of separate and jointly held assets (including e.g. joint financial accounts). The prenup would expressly prohibit the use of jointly held assets to fund any litigation, unless both of us are co-parties. Therefore, any assets in such joint accounts would *not* be "actually available" to me, which is the only kind of asset that is reasonably relevant to an IFP application.

In particular, I do not wish to burden my partner with expenses related to my litigation. To my view, protecting my partner from harm is an essential aspect of marriage. Due to my strong belief in, and practice of, robust public-interest litigation, I choose to expose myself to legal liabilities. My choice to risk and endure poverty[17] where it is necessary to vindicate my other interests is *mine*, not my partner's, and I will not have it thrust upon him due to our marriage.

Simultaneously, I have my own liberty interest in being free to live and litigate as I see fit, without his direction or control (which would inevitably be involved if I were forced to use his funds); and to have access to court-appointed counsel (which I doubt he could afford).

Beyond the above, I do not wish to disclose anything further about my arrangements with my partner, nor the reasons for them. How and why we manage our private affairs is nobody's business but ours. The courts have no right to interfere with our mutually-desired private affairs, including financial contracts. To the contrary, they must *enforce* our agreements.

I admit one limited exception: for the purposes of IFP qualification, jointly held assets that are actually and currently available to me for the purposes of funding litigation[18] count towards whether I am or am not poor.[19] However, assets belonging to someone else (including my spouse), which are not liquid, or not lawfully available to me for use towards litigation expenses (e.g. due to the provisions of an LLP or prenup contract), do *not* count. I am the IFP applicant, not my spouse.

Similarly, my marital status is a protected category, and may not be used as a basis for denying me access to a statutory right.[20]

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[16] There is currently *no* publicly known standard for what the judiciary considers as sufficient, necessary, or prohibitive for IFP qualification. Therefore, I am here assuming that "qualification" follows the LSC's standards, as I set forth in 19-AP-C/19-CR-A/19-CV-Q. I will not disclose any more fine-grained detail about my spouse's finances than the mere fact of being above the disqualifying cut-offs.

[17] Obviously, I would rather not be poor, but given my present situation, I am not able to be otherwise.

[18] *Cf.* Legal Services Corporation regulations, 45 C.F.R. § 1611.2(d, i) (only household assets and income that are "currently and actually available to the applicant" may be considered).

[19] These are, and I expect will remain, zero.

[20] I do not object to *strictly voluntary* use that would benefit the applicant, e.g. consideration of spousal support or

Relevant law

1. *Both marriage and poverty trigger strict scrutiny.*

Fundamental rights are subject to strict scrutiny. *Planned Parenthood v. Casey*, 505 U.S. 833, 929 (1992). Marriage is a fundamental right, protected by the due process clause of the 14th Amendment. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (quoting J. Stevens' dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)) & *Loving v. Virginia*, 388 U. S. 1, 12 (1967)

Most restrictions on marriage are subject to strict scrutiny; in particular, the government's interest in protecting the public fisc "cannot justify" its infringement. *Zablocki v. Redhail*, 434 U.S. 374, 383–89, 389 (1978), *citing Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942), *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974), & *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Discrimination on the basis of wealth is also subject to strict scrutiny. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973).

2. *The IFP statute does not permit any inquiry into an applicant's spouse.*

28 U.S.C. § 1915(a)(1) is the *sole* statutory basis for inquiry into non-prisoner litigants. It states:

> Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

There is not a single mention of the word "spouse", "household", or any related term in the section. Congress is extremely well versed in making such distinctions, and expressly did so in e.g. laws governing the IRS, Social Security, welfare, and numerous other areas of law. Not here.

The IFP statute's silence as to spouses is a prohibition; *incluso unius est exclusio alterius*.

3. *The IFP statute does not permit any inquiry into a non-prisoner applicant's financial details at all, absent good cause to suspect perjury.*

The awkward phrase in (a)(1), "an affidavit that includes a statement of all assets such prisoner possesses", was inserted by the Prison Litigation Reform Act of 1995, Pub. L. 104-134 title VIII, at § 804(a)(1)(C).[21] There is no textual indication that the Act was intended to alter non-prisoners'

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alimony costs as detracting from disposable income.

[21] SEC. 804. PROCEEDINGS IN FORMA PAUPERIS.

(a) FILING FEES.—Section 1915 of title 28, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "(a) Any" and inserting "(a)(1) Subject to subsection (b), any";

(B) by striking "and costs";

litigation in any way. The *entirety* of that Act is a regulation of litigation *by prisoners*. So is the awkward extra-affidavit clause in (a)(1), which refers to "such prisoner", rather than the interrupted "a person" clause which sets the requirement for IFP affidavits generally.

The pre-PLRA statute, 28 U.S.C. § 1915 (1995), was[22] as follows (in entirety):

> § 1915. Proceedings in forma pauperis
>
> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.
>
> (b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.
>
> (c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.
>
> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.
>
> (e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.
>
> (June 25, 1948, ch. 646, 62 Stat. 954; May 24, 1949, ch. 139, §98, 63 Stat. 104; Oct. 31, 1951, ch. 655, §51(b), (c), 65 Stat. 727; Sept. 21, 1959, Pub. L. 86–320, 73 Stat. 590; Oct. 10, 1979, Pub. L.

> (C) by striking "makes affidavit" and inserting "submits an affidavit that includes a statement of all assets such prisoner possesses";
> (D) by striking "such costs" and inserting "such fees";
> (E) by striking "he" each place it appears and inserting "the person" ...

[22] https://docs.uscode.justia.com/1995/title28/USCODE-1995-title28/pdf/USCODE-1995-title28-partV-chap123-sec1915.pdf

96–82, §6, 93 Stat. 645.)

The pre-PLRA statute is absolutely clear that the *only* requirements for IFP filing are that the litigant "makes affidavit that [they are] unable to pay such costs or give security therefor", and "state the nature of the action, defense or appeal and affiant's belief that [they are] entitled to redress."

There is not a single mention of any requirement for detailed financial substantiation. Indeed, doing so would go against the essential admissibility of sworn testimony. The sworn affidavit is admissible by itself, and as the *only* thing demanded by the law, it needs no further substantiation.

The purpose of a court demanding further details of an IFP applicant's finances is, in effect, to attempt to impeach the affiant.[23] A court can only do so if there is good cause to believe that the affiant has committed perjury, and even then, likely only if criminal charges are brought; a court may not act as prosecutor. It is entirely improper to, in effect, accuse *every* affiant of perjury and demand that they *prove* what they have sworn to be true, with no statutory basis for such demand.

If a court wishes to impose a standard for what does or does not count as poor, rather than leaving that up to each applicant, then it has a clearly prescribed means for doing so: the Rules Enabling Act. The judiciary can, and should, promulgate clear, specific rules that permit an applicant to determine for themselves whether or not they meet the criteria. It may not impose such criteria in secret, nor on a purely *ad hoc* basis; and it may not demand information that the IFP statute does not permit in order to substitute its own standardless decisions for what the statute explicitly dictates: namely, nothing but the non-prisoner applicant's good-faith, sworn statement.

Both the plain text of the current code, and of the linchpin PLRA amendments, indicate that *only* prisoners need to provide "a statement of all assets such prisoner possesses". Non-prisoners have no duty to provide *any* such statement at all[24], short of a perjury inquiry based on good cause.

4. *AOUSC's non-prisoner IFP forms and practices are* ultra vires*, and cannot withstand scrutiny.*

Courts must give effect to *all* words of a statute: here, "such prisoner" in (1)(a). They must do so under strict scrutiny, since this is a law that discriminates on the basis of poverty. Any additional inquiry into marriage must also survive strict scrutiny, and is utterly without statutory basis.

The statute does not permit what AOUSC-instructed courts are now doing. It is atextual, contrary to the clear language and intent of Congress, and a violation of fundamental Constitutional rights, such as the rights to privacy, marriage, and due process.

By promulgating the non-prisoner IFP rules & forms without a statutory basis for the demands made therein, the AOUSC violated the Rules Enabling Act and the Constitution.

AOUSC cannot in good faith defend them under any principled textual analysis of 28 U.S.C. § 1915, and should promptly admit and correct its error.

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[23] Or to determine a target for garnishment. This is the clear purpose of *prisoner* disclosure; *see* (b)(1, 2) & (f)(2).

[24] Let alone non-"assets", like income, expenses, employment history, or debts. And certainly not those of third parties.

Settlement demand

I am under actual, current and imminent threat of harm from the courts' current practices; namely, if I marry my fiancé, I am likely to face the severe sanction of "dismissal at any time", or simply be unable to access the courts in the first place (as has in fact happened before).[25]

This harm is the direct fault of the AOUSC, which promulgated AO 239 and FRAP Form 4 *ultra vires*. These are followed (with minor variation) by all Federal civil courts as *de facto* rules.

This harm directly interferes with, and is currently preventing, my intended marriage to my partner of 14 years, and with our private contracts. It is imposing an unconstitutional condition: that I give up one right (access to the courts) in order to assert another (marriage and freedom to contract).

I wish to marry promptly, without risk to my IFP status. AOUSC rules prevent me from doing so.

This harm can be readily remedied by the AOUSC, as follows:

1. Amend AO 239 and FRAP Form 4 to completely strike *all* questions about spouses.[26]
2. Issue explicit guidance to all Federal courts, stating that it is prohibited to make any inquiry as to an IFP applicant's spouse solely because the applicant filed for IFP status.
3. Do both of the above as quickly as is permitted by the Rules Enabling Act.

That is, therefore, precisely what I demand in order to avoid litigation.

As with any settlement discussion, your active cooperation is essential. If I do not hear back from you promptly (and regularly thereafter, to inform me of progress towards completion), I will be forced to assume that you are refusing to settle this amicably or to substantively engage in non-litigation settlement, and therefore forced to sue for declaratory and injunctive relief.

If you have any concerns, alterations to propose, practical barriers that might affect your ability to complete this in a timely manner, or indeed anything else that would affect a speedy and amicable resolution, I am very amenable to discussing and resolving them in a reasonable manner.

Please promptly tell me your point of contact for all further discussion of this matter by having your litigation counsel email me.

I hope that we can resolve this promptly, amicably, and without the need for litigation.

Respectfully,
Sai[27]
[redacted] / +1 [redacted]

[25] *See e.g. In re Sai*, No. 1:18-mc-161 (D. D.C.), No. 19-5039 (D.C. Cir.) (dismissed solely for reasons related to IFP affidavit privacy, directly contrary to prior order of D. D.C. granting seal of IFP affidavit and IFP status, 1:14-cv-403).

[26] Although I believe it is also *ultra vires* for the reasons expressed above, I do not here demand the removal of spouse-related questions about the *applicant's* finances, such as alimony; nor questions as to assets that are jointly owned, if they are actually available to the applicant. Joint ownership includes e.g. assets of an LLP, not just of marriage.

[27] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns and no title. My partner is male. I am partially blind. Please send all communications, in § 508 accessible format, by email.

From: Sai
To: RulesCommittee Secretary
Subject: Supplement for AOUSC IFP committee
Date: Wednesday, September 28, 2022 5:39:30 PM

Please add the attached records, just obtained from the 6th Circuit via the National Archives, to the record. They document that both the appellant (when given counsel) and the DOJ agreed that the IFP statement of assets clause only applies to prisoners.

Sincerely,
Sai
President, Fiat Fiendum, Inc., a 501(c)(3)

Sent from my mobile phone; please excuse the concision and autocorrect errors.

1 of 2

Case No: 96-3991

RECEIVED

North Hayes
P.O. Box 91453
Cleveland Ohio
44101

U.S. Court of Appeals Case No. 96-3991

FILED

OCT 17 1996

LEONARD GREEN, Clerk

Harold Hayes

Plaintiff - Appellant

v.

United States Postal Service; Donald Henderson - Postmaster

Defendants - Appellees

Mr. Nancy J. Barnes

On the page listing events in the proceeding I found ~~I found~~ mistake, number 2 dated 6/17/96 I filed the amended Complaint, I had additional pages to my original Complaint; The Pro Se Clerk said I should add the word amended Complaint.

And in the heading where it says Demand zero was put there. My demand was for 2 million for pain and suffering and 300,000 for punitive damages.

Originally I had put 12 million for pain and suffering and 300,000

By The Postal Service keeping me from my job, I am homeless destitute, I'm a 29 year employee who hasn't been allowed to work for over a year and nine months.

I can't get a lawyer so I going pro se, the people I'm talking to are giving me the wrong information, making me miss time deadlines.

I'm 59 yrs old and I have never seen people being treated the way we are being mistreated here in The United States of America.

I'm being treated worse than people in China.

Mr. Harold V Lloyd
P.O. Box 91053
Cleveland OH 44101
SSN 283 44 2052
NO Phone
NO ADDRESS Homeless
Oct. 11, 1996

for punitive damages. I lowered the amount after Judge Feeley B. Welch dismissed my case as frivolous.

The copy of my notice of appeal that was sent to me can barely be read so I'm putting my charges against the Postal Service and Pat Donfer on this page in case you could not read your copy.

These are the charges that Judge Feeley Welch ignored and dismissed my case.

1. Retaliation against me
2. Refusal to show me doctors reports of my mental evaluations.
3. Trying to fraudulently put me on a mental Disability Retirement.
4. Illegally keeping me from my job from Feb. 17, 1995 to the present.

The Postal Service is violating all my rights to civil, privacy citizenship and human rights.

(over)

Ms. NANCY BARNES Case No. 96-39[illegible]

PLEASE RETURN THIS DOCUMENT TO my POST OFFICE BOX LISTED BELOW!

I WANT YOU TO SEE THE MISTAKES,

TERMED APPEAL
BARTUN CAT 03

U.S. District Court
Northern District of Ohio (Cleveland) Dorothy Floyd

CIVIL DOCKET FOR CASE #: 96-CV-1305

Floyd v. USPS, et al
Assigned to: Judge Lesley Brooks Wells
Demand: $0,000 2300,000
Lead Docket: None?
Dkt # in USDC NDOH : is 1 96 mc 282

Filed: 06/17/96
Nature of Suit: 442
Jurisdiction: US Defendant

Cause: 42:1983 Civil Rights Act

DOROTHY FLOYD
plaintiff

Dorothy Floyd
[COR LD NTC] [PRO SE]
PO Box 91053
Cleveland, OH 44101

v.

UNITED STATES POSTAL SERVICE
defendant

DONALD HARANTS, Postmaster
defendant

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
Attest: Geri M. Smith, Clerk
U.S. District Court
Northern District of Ohio
By: [signature]
Deputy Clerk

12-5-H (5)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOROTHY FLOYD,)
)
Plaintiff-Appellant)
)
v.) NO. 96-3991
)
)
UNITED STATES POSTAL SERVICE,)
and DONALD HARANTS, Postmaster,)
)
Defendants-Appellees)
)

On Appeal from the United States District Court for the Northern District of Ohio

BRIEF FOR APPELLANT

David A. Friedman
Kathleen A. Pakes
TAUSTINE, POST, SOTSKY, BERMAN, FINEMAN & KOHN
812 Marion E. Taylor Building
Louisville, KY 40202
(502)589-5760

November 8, 1996

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Rule 9(d) of the Rules of the United States Court of Appeals for the Sixth Circuit, the appellant, Dorothy Floyd, respectfully requests oral argument in this case. The case involves novel and important issues. The Court must interpret newly enacted federal legislation and may have to gauge the legislation's constitutionality. The Court's decision also is likely to have far-reaching impact on all indigent non-prisoner litigants.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Jurisdiction in the district court may have been based on 28 U.S.C. §1331, which confers original district court jurisdiction over federal questions, in that the complaint may be construed to allege employment discrimination on the basis of disability, retaliation for protected speech, or discharge without due process. See 42 U.S.C. §§ 12101-12213 (Americans with Disabilities Act, prohibiting disability discrimination); U.S. Const., amend. I (speech); U.S. Const., amend. V (due process).[1] The district court entered its opinion and final judgment of dismissal on July 22, 1996. R.4: Memorandum of Opinion and Order; R.5: Judgment. The appellant tendered her timely notice of appeal, and motion to proceed on appeal in forma pauperis, on August 30, 1996. R.8: Notice of Appeal. This Court has appellate jurisdiction under 28 U.S.C. §1291, because this is an appeal from a final order disposing of all claims.

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[1]The pleadings below do not articulate the federal jurisdictional basis. In any event, the Court has directed counsel not to address the underlying merits of the case. Order, October 16, 1996 (Merritt, C.J.).

STATEMENT OF ISSUES

1. In light of the Prison Litigation Reform Act of 1996, are indigent non-prisoners not allowed to proceed in forma pauperis under 28 U.S.C.A. § 1915(a)(1)(West Supp. 1996), or do traditional statutory construction rules and the PRLA's legislative history reflect that indigent non-prisoners may still proceed in forma pauperis under 28 U.S.C.A. § 1915(a)(1)(West Supp. 1996)?

2. If an indigent non-prisoner is no longer permitted to proceed in forma pauperis under 28 U.S.C.A. § 1915(a)(1)(West Supp. 1996), do the United States courts have the inherent power or some other source of authority to permit indigent non-prisoners to proceed in forma pauperis?

3. If the United States courts do not have the authority to permit indigent non-prisoners to proceed in forma pauperis, is it a violation of the Fifth Amendment to the United States Constitution to deny an indigent non-prisoner the right to proceed in forma pauperis, while permitting indigent prisoners that right under 28 U.S.C.A. § 1915(a)(1)(West Supp. 1996)?

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This is an action by a former postal worker, Dorothy Floyd (Floyd), challenging employment decisions and processes of the United States Postal Service and Postmaster Donald Harants (collectively the United States). Floyd tendered her pro se complaint, amended complaint and application to proceed in forma pauperis on June 17, 1996. On July 22, 1996, the United States District Court for the Northern District of Ohio entered its memorandum opinion and order dismissing Floyd's complaint as frivolous under 28 U.S.C. § 1915(e), and entered its final judgment of dismissal. R.4: Memorandum Opinion and Order; R.5: Judgment. On August 30, 1996, Floyd tendered her timely notice of appeal and application to proceed on appeal in forma pauperis. R.8: Notice of Appeal.

II. STATEMENT OF FACTS[2]

Floyd worked for the United States Postal Service for 28 years. She was removed from her position, but won reinstatement

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[2]All facts recited here have been gleaned from Floyd's handwritten pro se complaint and amended complaint. See also n.1 (Court ordered counsel not to address underlying merits of case).

through arbitration on September 8, 1994. On February 17, 1995, the Postal Service again removed Floyd from her job, allegedly because of mental illness. The Postal Service refused to place Floyd on administrative leave, failed to otherwise accommodate her disability, and retaliated against her for winning her arbitration case.

SUMMARY OF ARGUMENT

Floyd advances three arguments in support of her entitlement to proceed in forma pauperis. First, indigent non-prisoners may still proceed in forma pauperis under 28 U.S.C.A. § 1915(a)(1)(West Supp. 1996), using traditional statutory construction rules. The amended statutory text is ambiguous in its conflicting use of "person" and "prisoner". That textual ambiguity makes resort to legislative history proper. And the legislative history reflects no intent to eliminate, reduce, or otherwise affect IFP status for non-prisoners. Because the amended IFP statute can be construed not to change indigent non-prisoners' entitlement to proceed IFP (and because a contrary construction will render § 1915(a)(1)(West Supp. 1996) unconstitutional), this Court should so construe it.

Second, if the amendments to § 1915(a)(1)(West Supp. 1996) permit only non-prisoners to proceed in forma pauperis, two other

sources of authority permit the Court to grant Dorothy Floyd's IFP application. The explicit text of Fed. R. App. P. 24 permits indigent litigants to proceed without paying fees; that rule is untethered to § 1915(a)(1)(West Supp. 1996). Moreover, Floyd has a fundamental right of access to the courts to challenge unlawful or unconstitutional governmental action, and is absolutely entitled to a post-deprivation hearing to challenge the government's adverse employment decisions. The Fifth Amendment's due process clause therefore protects her right to proceed in forma pauperis.

Third, if § 1915(a)(1)(West Supp. 1996), as amended, permits indigent prisoners, but not indigent non-prisoners, to proceed IFP, the statute violates Floyd's right to equal protection. The statute flunks even the most deferential test, "rational basis" review, because there is no rational basis for treating indigent non-prisoners less favorably than indigent prisoners (particularly as a means of deterring excessive and frivolous prisoner lawsuits). And since the amended statute impinges upon a fundamental right -- the right of access to the courts -- it is subject to and fails strict scrutiny.

For these reasons, the Court should reach the merits of Floyd's application to proceed on appeal in forma pauperis.

ARGUMENT

I. INDIGENT NON-PRISONERS MAY STILL PROCEED IN FORMA PAUPERIS UNDER 28 U.S.C.A. § 1915(a)(1)(West Supp. 1996).

A. Traditional Statutory Construction Rules Reflect That Indigent Non-Prisoners May Proceed In Forma Pauperis.

1. The statute's awkward grammatical construct and inconsistent use of nouns renders it ambiguous, thus making resort to legislative history proper.

Title 28, section 1915 of the United States Code, commonly called the in forma pauperis (IFP) statute, grants the federal judiciary authority to waive the prepayment of fees for persons making an adequate showing of poverty. 28 U.S.C.A. § 1915 (West Supp. 1996). The Prison Litigation Reform Act substantially modified section 1915. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, tit. VIII, 110 Stat. 1321 (1996)(the PLRA). Among the many revisions to the IFP statute are those now requiring prisoners bringing a civil action or appeal from a civil action to pay the fees in full or make scheduled payments of fees, and barring subsequent IFP petitions from prisoners after the third dismissal of a claim for frivolousness, maliciousness or failure to state a legal claim, except under circumstances constituting "imminent danger of serious physical injury." 28 U.S.C.A. § 1915(b)(1), (g) (West Supp. 1996). At issue in this case is the meaning of section 1915(a)(1) as it

relates to non-prisoners. The statute reads as follows:

> § 1915. Proceedings in forma pauperis
>
> > (a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

28 U.S.C.A. § 1915(a)(1) (West Supp. 1996).

Statutory construction begins with the law's plain language, giving meaning to each word. Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc., 61 F.3d 473, 475 (6th Cir. 1995). But section 1915(a)(1) contains inconsistent uses of "person" and "prisoner." In seeking to give effect to "person," the Court is confronted with the question: does "prisoner" modify "person" so as to exclude non-prisoners from the statute? The answer is not clear from the text. Careful drafting reflecting that intent would have substituted "prisoner" for "person" wherever the later is found. Since the PLRA's amendments to § 1915(a)(1) retain the noun "person", it may be distinct from "prisoner". But that leaves the statute grammatically awkward, for "person" becomes

the antecedent subject for "prisoner". If "person" and "prisoner" mean the same thing, there is no need to use both. If they mean different things, the sentence does not make grammatical or logical sense (court may waive fees for "person" who submits statement of assets "such prisoner" possesses).

The plain text of section 1915 suggests three possible interpretations: (1) "persons" are prisoners throughout section 1915; (2) "persons" include prisoners and all other natural persons, and all persons must submit "affidavit[s] that includ[e] a statement of all assets such [persons] posses[s]; or (3) "persons" include prisoners and all other natural persons, but only prisoners are required to submit affidavits listing their assets. The third alternative best comports with familiar rules of statutory construction and Congress's clear intent.

Where a statute possesses inherent ambiguities, courts construe its meaning consistent with the lawmakers' intent. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 507 (1989)(court gives law "the effect which the plain meaning of its language and the legislative history require"); id. at 508 (because "the text is ambiguous ... we then seek guidance from legislative history and from the [statute's] overall structure"). See Smith v. Chater, 1996 FED App. 0340P, slip op. at 3-4, n.2 (6th Cir. October 29,

1996) (no need to consider policy where "the language of a provision is sufficiently clear in its context and not at odds with the legislative history") (quoting Rodriguez v. United States, 480 U.S. 522, 526 (1987)).

Courts must also avoid constructions that render the statute unconstitutional, United States v. Brown, 25 F.3d 307, 309 (6th Cir.), cert. denied, 115 S.Ct. 640 (1994), except that courts cannot rewrite the statute, even to avoid constitutional infirmity. Vittitow v. City of Upper Arlington, 43 F.3d 1100, 1106 (6th Cir.), cert. denied, 115 S.Ct. 2276 (1995) (citing Eubanks v. Wilkinson, 937 F.2d 1118 (6th Cir. 1991), for proposition that federal courts do not rewrite statutes to create constitutionality). While only one provision of a complex statute may be ambiguous, the ambiguity is resolved to give consistency to the entire statute. See Greenpeace Inc. v. Waste Technologies Industries, 9 F.3d 1174, 1179 (6th Cir. 1993). Conversely, the court should reject interpretations that render other portions of the statute meaningless or superfluous. Id. Because a construction of § 1915(a)(1) which permits indigent prisoners, but not indigent non-prisoners, to proceed IFP, violates equal protection principles, see §III, pgs. 27-32, this Court should strive to avoid that construction.

2. The legislative history shows a clear intent to limit only prisoners' use of IFP status.

Before ultimately becoming law in April 1996, the PLRA and the IFP statute underwent several metamorphoses in the Senate and House of Representatives. Senator Orrin Hatch introduced the first of several proposals for revising section 1915. He stated that his bill, Senate Bill 672, "requires that inmates bear at least some of the cost of initiating litigation, by enabling courts to require the payment of at least a partial fee, or the payment of court fees in installments." 141 Cong. Rec. S5150 (daily ed. Apr. 4, 1995). To aid in the court's collection efforts, a provision of Senate Bill 672 required that the prisoner "file (1) an affidavit listing the prisoner's assets, and (2) a statement ... specifying the prisoner's income and assets during the preceding year." Id. at S5151.

The next proposal for revising section 1915 appeared in Senate Bill 865, the Prison Litigation Reform Act (PLRA No. 1). S. 865, 104th Cong., 1st Sess. (1995). Citing "an alarming explosion in the number of lawsuits filed by State and Federal prisoners," PLRA No. 1 required that prisoners pay the full amount of filing fees in installments, and submit a "certified copy of the trust fund statement" from their prison, in addition to the affidavit of

poverty required under the pre-PLRA statute. Id. at § 2(F).

In September 1995, Senator Spencer Abraham introduced the third attempt at section 1915 revisions, Senate Bill 1275, the Prison Conditions Litigation Reform Act (PCLRA). S. 1275, 104th Cong., 1st Sess. (1995). Intending to "decrease the number of frivolous claims filed by prisoners," the bill included a "three strikes" provision barring further IFP petitions by prisoners suffering the dismissal of three frivolous or malicious claims. Id. at § 4. The PCLRA did not include the trust fund statement required by previous bills.

The next day, Senator Robert Dole, joined by Senator Abraham, introduced the fourth attempt at section 1915 reform, Senate Bill 1279, the Prison Litigation Reform Act (PLRA No. 2). S. 1279, 104th Cong., 1st Sess. (1995). This "new and improved version of S. 865" purportedly built upon Senator Abraham's bill. 141 Cong. Rec. S14,413 (daily ed. Sep. 27, 1995). PLRA No. 2 expanded upon PLRA No. 1, amending the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997a(c), created a new judicial screening mechanism for dismissing frivolous suits, 28 U.S.C.A. § 1915A, and amended § 1915. S. 1279, 104th Cong., 1st Sess. (1995). The revisions of section 1915 were identical to those in PLRA No. 1.

When the Conference Committee reported the Prison Litigation

Reform Act (PLRA No. 3) to the House and Senate for final passage, it revised section 1915(a)(1) by striking "makes affidavit" and inserting "submits an affidavit that includes a statement of all assets such prisoner possesses." H.R. Rep. No. 104-378, 104th Cong., 1st Sess., at pg. 167 (1995). In the conference report narrative, the committee stated that "[s]ection 804 amends 28 U.S.C. 1915 to require the prisoner to list all assets when filing *in forma pauperis* suits." Id. (emphasis added; italics in original). President Clinton vetoed H.R. 2076, an omnibus appropriations act for fiscal year 1996, which included PLRA No. 3. 1995 U.S.C.C.A.N. No. 12, D60 (West Pam. Feb. 1996), 141 Cong. Rec. H15,166 (H. Doc. No. 104-149).

President Clinton did not object to PLRA No. 3 in his veto message. PLRA No. 3 was reincorporated into another omnibus appropriations act, H.R. 3019, without revision. H.R. 3019, 104th Cong., 2nd Sess., § 804 (1996). The bill was enrolled as Public Law 104-134 and sent to President Clinton, who signed the bill into law on April 26, 1996. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321 (1996).

To return to the textual ambiguities: The first alternative interpretation suggested above -- only "prisoners" are "persons" for IFP purposes -- poses troublesome equal protection and due

process problems.[3] See § II, pp. 16-27 (due process), and § III, pp. 27-32 (equal protection). But the Court can avoid construing the statute as unconstitutional in light of the expressed intent of Congress in enacting the Prison Litigation Reform Act. The legislative history clearly shows that Congress was motivated to act solely to control and discourage frivolous prisoner lawsuits. Congressional outrage over the proliferation of federal prisoner lawsuits was so intense that Congress substituted the phrase "submits an affidavit that includes a statement of all assets such prisoner possesses" to ensure that no portion of prisoners'

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[3] The United States Supreme Court generally follows a policy of avoiding unnecessary adjudication of constitutional issues. United States v. National Treasury Employees Union, 115 S.Ct. 1003, 1019 (1995) (citing Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)) ... Justice Brandeis' most important admonition was that the 'Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.' Ashwander, 297 U.S. at 347 (Brandeis, J., concurring); see also Burton v. United States, 196 U.S. 283, 295 (1905) ('It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.')

Sistrunk v. City of Strongsville, 1996 FED App. 0342P, slip op. at 12 (6th Cir. October. 29, 1996) (Spiegel, D. J., dissenting).

institutional or external assets would be overlooked during the judicial screening process of their IFP petitions. Cf. H.R. Rep. No. 104-378, 104th Cong., 1st Sess., at pg. 167 (1995). Moreover, interpreting the revised section 1915 to exclude persons other than prisoners would achieve an unreasonable and absurd result, precluding court access to a class of persons wholly ignored during Congressional consideration of the PLRA.

Likewise, requiring all non-prisoners to submit affidavits including a declaration of all their assets creates an additional burden unintended by Congress, and rewrites "prisoner" so that it reads "person." See Vittitow, 43 F.3d at 1106 (court will not rewrite statute to ensure its constitutionality).

The third alternative interpretation -- "persons" includes prisoners and all other natural persons, but only prisoners are required to submit affidavits listing their assets -- fits most comfortably with Congressional intent to control and discourage frivolous prisoner lawsuits. This interpretation also does the least violence to the plain text.[4]

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[4]The Second Circuit suggests that the second alternative interpretation -- "persons" include prisoners and all other natural persons, and all persons must submit "affidavit[s] that includ[e] a statement of all assets such [persons] posses[s]" -- is the correct interpretation. Leonard v. Lacy, 88 F.3d 181 (2d Cir. 1996). In analyzing the PLRA on a prisoner's appeal from the

II. EVEN IF 28 U.S.C.A. § 1915(a)(1)(West Supp. 1996) PERMITS ONLY PRISONERS TO PROCEED IFP, THE COURT HAS OTHER SOURCES OF AUTHORITY TO PERMIT INDIGENT NON-PRISONERS TO PROCEED IFP.

A. Indigent Non-Prisoners May Proceed In Forma Pauperis Under Fed. R. App.P. 24.

While indigent non-prisoners may not proceed IFP under § 1915(a)(1), they may proceed IFP under Fed. R. App. P. 24(a). That rule provides that "[a] party to an action ... who desires to proceed on appeal in forma pauperis shall file ... a motion for leave so to proceed together with an affidavit, showing ... the party's inability to pay fees and costs[.]"

There is no doubt as to Congress' plenary power to statutorily

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district court's denial of an IFP petition and dismissal of the prisoner's complaint for frivolousness, the court reproduced the amended statute as follows:

> § 1915. Proceedings in forma pauperis
>
> > (a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner *[sic]* possesses *[and]* that the person is unable to pay such fees or give security therefor ...

Id. at 183. The court thus suggests that "prisoner" was an error in the text of the statute.

supersede procedural rules. United States v. Gustin-Bacon Div. Certain-Teed Prod. 426 F.2d 539, 542 (1970); Traverse Bay Area Sch. Dist. v. Hitco, Inc., 762 F. Supp. 1298, 1301 (W.D. Mich. 1991). But unless the Congressional intent to do so clearly appears, subsequently enacted statutes are to be construed to harmonize with those rules, if possible. Gustin, 426 F.2d at 542 (citing Moore's Fed. Practice § 86.04[4]).

No language in the PLRA indicates Congressional intent to supersede Fed. R. App. P. 24(a) as it applies to indigent non-prisoners. Thus, allowing Floyd to proceed IFP would not violate §1915(a)(1)(West Supp. 1996).

B. The Fifth Amendment's Due Process Clause Requires Courts To Permit Indigent Non-Prisoners To Proceed IFP When Challenging the Lawfulness of Government Actions.

1. Floyd has protected liberty and property interests in her employment and her causes of action, requiring the United States to afford her process.

The Fifth Amendment to the United States Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests without the opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319 (1976).

Determining whether process is constitutionally adequate involves two steps: First, the court must determine whether an individual has a protected liberty or property interest. Second, the court must determine what process is due. Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1349 (6th Cir. 1992).

Floyd has a protected property interest in her means of livelihood. Sutton, 958 F.2d at 1349 (person's livelihood is one of the most significant interests individual can possess)(citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985)). See also Board of Regents v. Roth, 408 U.S. 564, 577 (1972)(property interest in public employment); Collyer v. Darling, 1996 FED App. 0317P (6th Cir. September 30, 1996).

Due process requires that a deprivation of Floyd's property interest "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Loudermill, 470 U.S. at 542 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)). In the employment context, this pre-termination hearing, while necessary, need not be elaborate. Loudermill, 470 U.S. at 545. It must afford the employee an opportunity to present reasons, either in person or writing, why the adverse action should not be taken. Id. at 546. To satisfy due process, the employee must also receive a post-termination hearing. Id. at 547; see

also Parratt v. Taylor, 451 U.S. 526, 538 (1981)(in case of random or unauthorized deprivation, post-deprivation remedies made available by the state can satisfy due process).

Floyd also has a protected property interest in her right to use adjudicatory procedures. Logan v. Zimmerman, 455 U.S. 422 (1982). In Logan, an employee brought a claim against his employer under the Illinois Fair Employment Practices Act. Under the Act, the Illinois Fair Employment Commission (Commission) had 120 days to convene a fact finding conference. After the Commission failed to convene the conference, the employer persuaded the Illinois Supreme Court that the failure to convene the conference within 120 days deprived the Commission of jurisdiction over the claim.

The U.S. Supreme Court reversed, holding that a cause of action is a species of property protected by the due process clause. "The Court traditionally has held that the Due Process Clause protects civil litigants who seek recourse in the courts, whether as defendants ... or as plaintiffs attempting to redress grievances." Id. at 429 (citing Societe Inter. v. Rogers, 357 U.S. 197 (1958)). The property component of the Fifth Amendment's due process clause imposes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on

the merits of his cause." Id. at 209.

Due process thus affords an aggrieved party an opportunity to present her case and have its merits fairly judged. Logan, 455 U.S. at 433. "To put it as plainly as possible, the state may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." Id. at 434. While a post-termination hearing may sometimes satisfy due process, that would not be meaningful where the property interest [a cause of action] is destroyed prior to the hearing. Id. at 434 n.8.

It is unconstitutional to condition Floyd's post-termination hearing on her ability to pay a "fee." The United States has the affirmative obligation to furnish Floyd a post-termination hearing. She is deprived of due process when she is required to pay for her opportunity to be heard. Rankin v. Indep. Sch. Dist. No. 1-3, 876 F.2d 838, 840 (10th Cir. 1989)(statute requiring teachers to pay costs of hearing for nonrenewal of their contracts unconstitutional because it imposes penalty on an exercise of constitutional rights). See also Little v. Streater, 452 U.S. 1 (1981)(statute requiring indigent alleged father to pay cost of blood test in paternity defense offends due process because it forecloses his opportunity to be heard).

Here, as in Logan, an established governmental procedure destroys Floyd's cause of action. Floyd's ability to exercise her right (cause of action) is conditioned on her payment of court access fees. Where, as here, she is unable to pay the fee, she suffers the irrevocable destruction of her property interest without any due process.

2. Floyd has a fundamental right of access to the courts to challenge governmental actions as unlawful or unconstitutional.

The Supreme Court has considered in three cases the constitutionality of judicial system access fees. Boddie v. Connecticut, 401 U.S. 371 (1973); U.S. v. Kras, 409 U.S. 434 (1973); Ortwein v. Schwab, 410 U.S. 656, 659 (1973).

In Boddie, a welfare recipient challenged state procedures requiring her to pay court fees and costs before she could file a divorce. In finding that these fees violated due process, the Supreme Court focused on the fundamental human relationship involved and that the state's bar on access to its courts deprived Boddie of the sole means for obtaining a divorce. This violated her procedural due process right to be heard. Id. at 383.

Kras was a bankruptcy case. Kras had filed a bankruptcy petition accompanied by a motion to proceed without payment of filing fees. Citing Boddie, Kras argued that the filing fee

unconstitutionally barred indigents' access to the bankruptcy court. The district court, relying on Boddie, held that the filing fee violated Kras's right to due process. The Supreme Court reversed, holding that Kras had other means to resolve his debts and that elimination of a debt burden did not rise to the same constitutional level as a married person's interest in divorce.

Ortwein was a welfare benefits case. There, a welfare recipient appealed the county's benefits decision to an administrative agency, which held a hearing and affirmed the county's decision. Ortwein unsuccessfully applied to proceed IFP in seeking judicial review. The Supreme Court, largely deferring to its decision in Kras, rejected Ortwein's argument that the filing fee deprived him of due process. It noted that Boddie emphasized the special nature of the marital relationship and that welfare benefits had far less constitutional significance. Furthermore, the Court found that Ortwein was afforded an administrative hearing consistent with due process. Ortwein, 410 U.S. at 659-660.

Kras, Boddie, and Ortwein are all distinct from this case. Unlike those litigants, Floyd seeks redress for government actions directed against her. By contrast, Kras and Boddie were not seeking relief from governmental actions but from the acts of third parties. Neither Kras nor Boddie brought an independent cause of

action against the government. Ortwein is distinct because he was afforded a post-deprivation hearing comporting with due process.

This case is most similar to Boddie, which focused on the fundamental nature of the relief sought and the government's monopoly over the judicial process. Both those concerns are present here. The fundamental nature of the relief Floyd seeks, discussed below, is protection from governmental deprivation.[5]

While it is difficult to define precisely whether a right is "fundamental" for substantive procedural due process purposes, this court has recognized those rights enumerated in the Bill of Rights as fundamental. See, e.g., Haag v. Cuyahoga County, 619 F. Supp. 262, 275 (N.D. Ohio), aff'd, 798 F.2d 1413 (6th Cir. 1985). Other

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[5]See Michelman, THE SUPREME COURT AND LITIGATION ACCESS FEES: THE RIGHT TO PROTECT ONE'S RIGHTS -- PARTS I & II, 1973 Duke L.J. 1153, and 1974 Duke L.J. 527. Professor Michelman argues that there is a substantive due process right of access to the court system in all cases. See also Kras 409 U.S. at 462 (case should have been viewed as involving the right of access to the courts, for "when a person raises a claim of right or entitlement under the laws, the only forum in our legal system empowered to determine that claim is a court")(Marshall, J., dissenting); Ortwein, 410 U.S. at 662 ("access to the courts before a person is deprived of valuable interests ... seems to me to be the essence of due process ..." (Douglas, J., dissenting); id. (state's interest in offsetting the expenses of its court system fell "far short of the 'compelling interest' required to justify discrimination which infringes on fundamental rights")(Douglas, J., dissenting). While Supreme Court precedent bars this Court from holding that all indigent litigants have a due process right to proceed IFP, Floyd makes the point here to preserve it.

fundamental substantive rights not explicit in the Constitution include the right to travel, id. 619 F. Supp. at 275 (citing U.S. v. Guest, 383 U.S. 745 (1966)), the freedom to choose and pursue a career, id. (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)), the right to vote, Burdick v. Takushi, 504 U.S. 428 (1992), and those interests associated with familial relationships. Griswold v. Connecticut, 381 U.S. 479 (1965).

While a "right of access" is not specifically mentioned in the Constitution, due process will protect those "unenumerated" liberties that are so rooted in the traditions and conscience of our people as to be ranked fundamental. Griswold, 381 U.S. at 487 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). "The inquiry is whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Griswold, 381 U.S. at 493 (citing Powell v. Alabama, 287 U.S. 45, 67 (1932)).

Supreme Court decisions have identified three main principles underlying a fundamental right of access. Like the right to vote, the right to file actions is fundamental because it is the means by which all other rights are preserved. McCarthy v. Madigan, 503 U.S. 153 (1992)(citing Yick Wo v. Hopkins, 118 U.S. 356, 370

(1886)); accord Chambers v. Baltimore and Ohio Railroad, 207 U.S. 132, 146-47 (1907)("In an organized society, it is the right conservative of all other rights"). While private structuring of individual relationships and repair of their breach is encouraged, the formal judicial process is paramount. Boddie v. Connecticut, 401 U.S. at 375.

Second, the right to file an action is the quid pro quo for which the citizens of "free government" have bargained in return for giving up a natural right to self help. "The right to sue and defend in the courts is the alternative of force. In an organized society, it ... lies at the foundation of orderly government." Chambers, 207 U.S. at 148. "[I]t is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the 'state of nature.'" Boddie, 401 U.S. at 375; see also Michelman, Part I at 534.

Finally, a right of access legitimizes the state's monopoly over the judicial system. "Without the guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things." Boddie 401 U.S. at 375. See also Little, 452 U.S. at 12 (where state is inextricably involved in

litigation and responsible for imbalance between the parties, it violates due process to require father to pay cost of blood test).

The right to institute and maintain an action against the government is fundamental. The "fundamentalness" of the right of access has been defined best in those cases interpreting the scope of the privileges and immunities clause of the Fourth Amendment. The core case, to which the Supreme Court has often cited[6], is Corfield v. Coryell, 6 Fed. Cas. page 546 (Cir. Ct. E.D. Penn. 1823):

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have at all times, been enjoyed by the citizens ... from the time of their becoming free, independent, and sovereign ... They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety ... the right ... to pass through or reside in any other state ... to claim the benefit of the writ of habeas corpus; [and the right] to institute and maintain actions of any kind ... may be mentioned as ... clearly embraced by the general description of privileges deemed

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[6] See, e.g., Blake v. McClung, 172 U.S. 239, 257 (1898); Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 155 (1907).

> to be fundamental ... to which may be added, the elective franchise[.]

Id. at 552 (emphasis added).

This right of access is most important when a civil litigant seeks redress against the government. Here, unlike in Boddie, it is the adverse party that has an absolute monopoly over the techniques for binding conflict resolution. Thus, not only is the government in control of the forum in which Floyd must bring her action, it is also her adversary in that action. It has no incentive to negotiate or settle her claim if it can effectively keep her from filing suit. See Michelman, Part I at 1179. And, unlike Boddie, where divorce litigants faced no statute of limitations, delay in civil lawsuits against the United States will forever defeat viable claims.

For all these reasons, due process forbids imposing a filing fee on an indigent litigant with a federal cause of action against the United States.

III. PRINCIPLES OF EQUAL PROTECTION PRECLUDE PERMITTING INDIGENT PRISONERS, BUT NOT INDIGENT NON-PRISONERS, TO PROCEED IN FORMA PAUPERIS.

A. Even Under The Most Deferential Test, The PLRA Amendments To § 1915(a)(1) Violate Equal Protection, Because There Is No Rational Basis For Treating Indigent Non-Prisoners Less Favorably Than Indigent Prisoners.

Principles of equal protection apply to the United States through the Fifth Amendment's due process clause. Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954)(even though Fourteenth Amendment equal protection clause has no counterpart applicable to the United States, Court will apply its reasoning and analysis through the Fifth Amendment's due process clause).[7] Equal protection prohibits governmental "intentiona[l] discriminat[ion] ... because of membership in a protected class." LRL Properties v. Portage Metro Housing Authority, 55 F. 3d 1097, 1111 (6th Cir. 1995) (quoting Henry v. Metropolitan Sewer District, 922 F. 2d 332, 341 (6th Cir. 1990)). Intent to discriminate against a disfavored class can be established by showing that a law creates the class "on its face". International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991); see Copeland v. Machulis, 57 F.3d 476, 480-81 (6th Cir. 1995) (equal protection requires proof of discriminatory intent, not just disparate impact).

If the Court construes § 1915(a)(1), as amended by the PLRA,

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[7]The Court has directed counsel to address whether the disparate treatment of indigent prisoners and indigent non-prisoners violates the equal protection clause of the Fourteenth Amendment. Because Floyd's case involves the unconstitutionality of a federal statute's limits on access to the federal courts in litigation against the federal government, her equal protection claim arises under the Fifth Amendment.

to permit only indigent prisoners, but not indigent non-prisoners, to proceed IFP, the statute will create, and mandate disparate treatment of, two classes. The intentional disparate treatment of indigent prisoners and indigent non-prisoners must then be subjected to equal protection scrutiny.

To survive scrutiny, disparate treatment of protected classes[8] must "'rationally furthe[r]' a legitimate [governmental] purpose," Doe v. Wigginton, 21 F.3d 733, 739 (6th Cir. 1994) (quoting San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973)), unless it singles out a suspect class or impinges upon a fundamental right. See Romer v. Evans, 116 S. Ct. 1620, 1628 (1996)("if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"); Eastman v. University of Michigan, 30 F.3d 670, 672 (6th Cir. 1994)(applying rational basis scrutiny to non-suspect class).

In § III(B), pp. 31-32, Floyd argues that §1915(a)(1), as amended by the PLRA, is subject to heightened scrutiny because it impairs her fundamental right of access to the courts. But even if

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[8]Equal protection bars discrimination against groups, or classes, not unfairness to individuals. Booher v. United Postal Service, 843 F.2d 943, 944 (6th Cir. 1988); Joyce v. Mauromatis, 783 F.2d 56, 57 (6th Cir. 1986).

the amended statute is subject to the deferential "rational basis" review, it flunks that test. Simply put, there is no "legitimate [governmental] purpose" which § 1915(a)(1), as amended, "rationally further[s]," Wigginton, 21 F. 3d at 739, by treating indigent non-prisoners worse than indigent prisoners.

Congress was clear about its purpose in amending § 1915(a)(1): it wanted to deter prisoner suits, which it deemed to be too plentiful, too easy and too frivolous. See §I, pp. 7-15. As Senator Dole, who sponsored two versions of the bill, put it, "when prisoners know that they will have to pay these costs ... they will be less inclined to file a lawsuit in the first place." 141 Cong. Rec. S7525 (daily ed. May 25, 1995). Senator Hatch, who sponsored another version, claimed that "frivolous prisoner suits are reaching crisis proportions." Senate Judiciary Committee Hearing on Prison Reform, 104th Cong., 1st Sess. (July 27, 1995).

Assuming that this governmental purpose is legitimate, it is not rationally furthered by favoring indigent prisoners over indigent non-prisoners. But the statute does just that. It eliminates IFP status for all indigent non-prisoners, but allows indigent prisoners to pay filing fees in installments. Because this does not rationally further Congress's articulated purpose, it cannot justify the disparate treatment afforded indigent non-

prisoners.

Nor does the amended IFP statute rationally further any other legitimate governmental purpose. First, Congress suggested no other purpose; its sole purpose was to deter frivolous prisoner lawsuits. Nor -- especially in light of Congress's true purpose -- can Floyd even conceive of a legitimate governmental purpose in disfavoring indigent non-prisoners to benefit prisoners.[9] For these reasons, § 1915(a)(1), as amended by the PLRA, deprives Floyd of her Fifth Amendment equal protection rights, even under rational basis review.

B. The Statute Is Subject To, And Fails To Meet, Strict Scrutiny.

Moreover, § 1915(a)(1), as amended by the PLRA, is subject to heightened scrutiny. Statutes which classify groups in terms of their exercise of fundamental rights are subject to strict scrutiny. Romer, 116 S. Ct. at 1628[10] And, a detailed in § II(B),

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[9]If the United States is able to articulate such a purpose, Floyd will address it in her reply brief.

[10]Statutes which classify on the basis of "suspect" classes such as race or national origin are also subject to strict scrutiny. Johnson Controls, 499 U.S. at 199. Those classifying on the basis of gender are subject to intermediate scrutiny, which requires the governments to establish an "exceedingly persuasive justification" for that classification. United States v. Virginia, 116 S. Ct. 2264, 2271 (1996)(citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

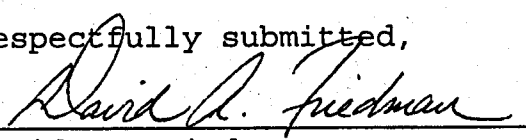
pp. 17-27, Floyd enjoys a fundamental right of access to the courts. The amended IFP statute classifies groups (indigent prisoners and indigent non-prisoners) in terms of their exercise of that fundamental right -- that is, whether they seek to file federal lawsuits or appeals. Strict scrutiny requires legislation to serve a compelling governmental purpose and be narrowly tailored to achieve that purpose. Lyng v. Castillo, 477 U.S. 635, 638 (1986); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973). And for the same reason that the classification cannot survive rational basis review, it cannot survive strict scrutiny.

CONCLUSION

For these reasons, the Court should construe 28 U.S.C.A. § 1915(a)(1)(West Supp. 1996), as amended by the PLRA, still to permit indigent non-prisoners to proceed in forma pauperis. In the alternative, the Court should hold that Fed. R. App. P. 28 permits, and the Fifth Amendment's due process clause requires, courts to allow litigants against the United States to proceed in forma pauperis. Finally, in the alternative, the Court should hold that the amended IFP statute violates indigent non-prisoners' right to equal protection and thus is unconstitutitutional.

For all or any of these reasons, the Court should reach the merits of Dorothy Floyd's application to proceed on appeal in forma pauperis.

Respectfully submitted,



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* Counsel express their appreciation to Matthew Grant, a University of Louisville law student, for his significant contributions to this brief.

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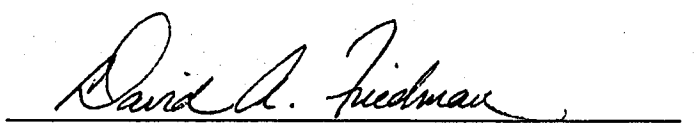

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13-3-41

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ORIGINAL

CALENDAR

No. 96-3991

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOROTHY FLOYD,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE;
DONALD HARANTS, Postmaster,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF OHIO

RESPONSIVE BRIEF FOR THE APPELLEES ON THE THE PRISON LITIGATION REFORM ACT

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IN THE UNITED STATES COURT OF APPEALS
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No. 96-3991

DOROTHY FLOYD,

Plaintiff-Appellant,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

RESPONSIVE BRIEF FOR THE APPELLEES ON THE PRISON LITIGATION REFORM ACT

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1. As plaintiff's brief makes clear, both sides agree on the answer to the first question posed by this Court in this case: Section 804 of the Prison Litigation Reform Act of 1996, Pub. L. 104-134, Title VIII, 110 Stat. 1321 (the "PLRA"), does not withdraw the ability of indigent non-prisoners to proceed in forma pauperis under 28 U.S.C. § 1915.

Plaintiff recognizes that the relevant statutory language -- which refers to "a person who submits an affidavit that includes a statement of all assets such prisoner possesses," 28 U.S.C.A. § 1915(a) (West Supp. 1996) (emphasis added) -- presents "inherent ambiguities." Floyd Br. 9. As she explains, while it is possible to read the term "prisoner" to modify the term "person," "so as to exclude non-prisoners from the statute" (Floyd Br. 8), that is not the only possible reading; the statute can also be

interpreted to mean that "only prisoners are required to submit affidavits listing their assets." Floyd Br. 9.

In this case, the PLRA's legislative history clearly demonstrates that Congress's attention was directed to deterring in forma pauperis lawsuits instituted by prisoners, and not in limiting such suits by non-prisoners. See Floyd Br. 11-15; Gov't Br. 18-19. Plaintiff thus correctly concludes that interpreting the statute to require only prisoners to submit asset statements "fits most comfortably with Congressional intent to control and discourage prisoner lawsuits." Floyd Br. 15 (emphasis in original). It also comports with the well-settled canon of construction disfavoring repeals by implication. See, e.g., United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1976).[1] So interpreted, 28 U.S.C § 1915, even as amended, continues to provide the federal courts with the authority to permit indigent non-prisoners to proceed in forma pauperis.[2]

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[1]Plaintiff also contends (Floyd Br. 13-14) that this Court should construe the statute not to repeal in forma pauperis authority for non-prisoners in order to avoid constitutional problems that would be associated with a contrary interpretation. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Eubanks v. Wilkinson, 937 F.2d 1118, 1122 (6th Cir. 1991). However, although Congress has not done so, there would be no constitutional impediment to its withdrawing in forma pauperis authority under 28 U.S.C. § 1915 for non-prisoners alone. See Gov't Br. 33-35, 38-39; pp. 4-9 infra. This canon of construction is therefore inapplicable.

[2] Contrary to plaintiff's statement (Floyd Br. 15 n.4), the Second Circuit in Leonard v. Lacy, 88 F.3d 181 (2d Cir. 1996), did not suggest that 28 U.S.C. § 1915(a) should be read to impose the assets statement requirement on all persons applying for in forma pauperis status. The opinion in Leonard simply noted the (continued...)

2. Because the authority for non-prisoners to proceed in forma pauperis under 28 U.S.C. § 1915 has not been repealed, there is no need for this Court to address the question of whether there might be additional sources of in forma pauperis authority available to the federal courts. Nonetheless, as we pointed out in our opening brief (Gov't Br. 28-32), while the federal courts have no inherent power to waive statutorily-imposed filing fees, there are a number of enactments that provide the courts with the authority to grant in forma pauperis status outside the confines of 28 U.S.C. § 1915. See, e.g., 42 U.S.C. § 2000e-5(f).[3]

Plaintiff contends that Fed. R. App. P. 24 provide the federal courts with an additional grant of authority to permit in forma pauperis proceedings by indigent non-prisoners. Floyd Br. 16-17. But as the Advisory Committee Notes make clear, Fed. R.

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[2](...continued)
grammatical ambiguity in amended section 1915(a) by placing the bracketed term "sic" after the appearance of the word "prisoner" in reprinting the statutory phrase describing the assets statement requirement. See Floyd Br. 16 n.4 (quoting 88 F.3d at 183). Because Leonard involved an in forma pauperis application by a prisoner, the Second Circuit had no occasion to address the effect of the amended language on suits by non-prisoners.

[3] In our opening brief, we observed that while the amount of the fee for commencing a civil action in district court is generally set at $120, see 28 U.S.C. § 1914(a), the fees in the courts of appeals are simply required to be "reasonable and uniform," 28 U.S.C. § 1913, and those in the Supreme Court are set by its clerk without specific limitation. 28 U.S.C. § 1911. See Gov't Br. at 27-28. We should also have noted that the district courts are additionally entitled by statute to a fee of $5 upon the filing of a notice of appeal or an application for appeal, or upon the allowance of an appeal or certiorari. 28 U.S.C. § 1917. See Leonard, 88 F.3d at 186.

App. P. 24 implements 28 U.S.C. § 1915; it is not meant to operate independently of that statute. See 1967 Note to Fed. R. App. P. 24(a) (observing that "[a]uthority to allow prosecution of an appeal in forma pauperis is vested in '[a]ny court of the United States by 28 U.S.C. § 1915(a)'"). Thus, if Congress had in fact repealed 28 U.S.C. § 1915 with regard to non-prisoners, Fed. R. App. P. 24 would be limited to the same extent. As plaintiff concedes (Floyd Br. 16-17), "Congress' plenary power to statutorily supersede procedural rules" is beyond dispute.[4]

3. There is also no need to consider whether there would be any constitutional impediment to repealing 28 U.S.C. § 1915 for non-prisoners but not for prisoners, because no such repeal has been effected.

a. Nonetheless, plaintiff contends that eliminating her ability to proceed in forma pauperis against the federal government for wrongful termination would deprive her of the hearing to which she is entitled as a matter of constitutional due process. Floyd Br. 17-21. It is settled, however, that due process does not invariably require a judicial hearing when the government deprives a person of a protected property interest.

As plaintiff acknowledges, the Fifth Amendment's due process clause simply requires government to afford persons being deprived of a protected interest "the opportunity to be heard at a

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[4] In addition, Fed. R. App. P. 24 only governs in forma pauperis proceedings in the federal courts of appeals. See Fed. R. App. P. 1 (scope of rules). Rule 24 therefore has no application to in forma pauperis proceedings in district court.

meaningful time and in a meaningful manner." Floyd Br. 17 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). "The formality and procedural prerequisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Boddie v. Connecticut, 401 U.S. 371 378 (1971), quoted in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985). See Cremeans v. City of Roseville, 861 F.2d 878, 882 (6th Cir. 1988), cert. denied, 490 U.S. 1066 (1989).

In particular, as the Supreme Court made clear in Ortwein v. Schwab, 410 U.S. 656 (1973), due process does not generally prohibit a filing fee requirement prior to obtaining judicial review of agency action, even if such a requirement might wholly foreclose indigent persons from obtaining such review. Ortwein upheld Oregon's $25 appellate court filing fee as applied to indigent litigants seeking judicial review of state determinations to reduce their welfare benefits. Because the state determinations were reviewable only in the state appellate courts, 410 U.S. at 658, the filing fee amounted to a condition on all judicial review of the state agency determinations. The Court nonetheless held that the indigent litigants "were not denied due process" simply because they could not afford the fee required to obtain review of the agency decisions by the courts. Id. at 661.[5]

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[5] Plaintiff cites Rankin v. Independent Schl. Dist. No. I-3, 876 F.2d 838, 840 (10th Cir. 1989), cert. denied, 498 U.S. 1068 (continued...)

Plaintiff attempts to distinguish Ortwein on the ground that the litigants in that case had been "afforded a post-deprivation hearing comporting with due process" by the state agencies in making their adverse determination. Floyd Br. 23. But plaintiff also has the opportunity to obtain a due process hearing. As the district court recognized (D.E. 4, at 2-3), most federal employees -- including many Postal Service employees -- are entitled to a hearing before being removed from their jobs, see 5 U.S.C. § 7513(b), and they may appeal any such decision to the Merit Systems Protection Board ("MSPB"), see id. § 7513(d), with judicial review generally in the Federal Circuit. Id. § 7703. See id. § 7511(a)(1)(B)(ii); id. § 7511(b)(8); 39 U.S.C. § 1005(a)(4)(A).

Most other postal employees -- including plaintiff -- are covered by collective bargaining agreements with the Postal Service which permits employees to appeal their removal administratively by way of grievance, and allows their unions to seek arbitration on the employee's behalf. **In this case, we are informed, plaintiff has taken advantage of her grievance rights under the applicable collective bargaining agreement, and the matter has gone to arbitration. (A copy of the scheduling order is attached to this brief.) The arbitration hearing, which began**

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[5](...continued)
(1991), for the proposition that "[s]he is deprived of due process when she is required to pay for her opportunity to be heard." Floyd Br. 20. But Rankin invalidated a state rule requiring discharged teachers to bear half the costs of their initial hearings at the administrative level. 876 F.2d at 839. The decision has no bearing on the issue of whether due process precludes a reasonable filing fee as a condition of obtaining a subsequent judicial hearing.

last week, is scheduled to be completed by November 19. The comprehensive scheme negotiated between the Postal Service and plaintiff's union, which gives employees the right to file grievances and the opportunity to seek arbitration, unquestionably satisfies the dictates of due process. Winston v. United States Postal Service, 585 F.2d 198, 209-210 (7th Cir. 1978).[6]

Relying on Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), plaintiff also contends that she has "a protected property interest in her right to use adjudicatory procedures," of which she would be deprived if Congress eliminated her ability to obtain a waiver of the filing fee requirement. Floyd Br. 19-20. But Logan involved a situation in which plaintiff's cause of action had been terminated because of failures on the part of state officials. See 455 U.S. at 424. Nothing in the decision, the Court emphasized, "entitles every civil litigant to a hearing on the merits in every case." 455 U.S. at 437. Indeed, the Court stated expressly that government "may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitation * * * , or, in an appropriate case, filing fees." Ibid. (emphasis added) (citing United States v. Kras, 409 U.S. 434 (1973). Thus, Logan in no way supports plaintiff's con-

[6] The district court's suggestion (D.E. 4, at 2-3) that plaintiff was entitled to challenge her dismissal before the MSPB and, if dissatisfied, file an appeal with the Federal Circuit, was incorrect. It is settled that Postal Service employees in plaintiff's position are limited to their collective bargaining rights; so far as the civil service laws are concerned, they are generally not entitled to judicial review of their discharge from employment at all. Yokum v. United States Postal Service, 877 F.2d 276, 279-81 (4th Cir. 1989) (collecting cases).

tention that she has a fundamental right of access to the courts that cannot be overridden by a reasonable filing fee requirement.[7]

b. Finally, plaintiff contends that it would violate equal protection for Congress to withdraw in forma pauperis authority under 28 U.S.C. § 1915 for non-prisoners alone, because "there is no rational basis for treating indigent non-prisoners less favorably than indigent prisoners." Floyd Br. 27.[8]

We agree with plaintiff that Congress in the PLRA sought to "deter prisoner suits, which it deemed to be too plentiful, too easy, and too frivolous." Floyd Br. 30. As we have explained, Congress's evident concern with abuse of in forma pauperis proceedings by prisoners, not non-prisoners, provides a strong basis

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[7] In this case, moreover, plaintiff seeks to recover damages as a result of her termination. But there is plainly no constitutional right to bring such a damages suit against the federal government, which can be sued for damages only if it has waived its sovereign immunity. Loeffler v. Frank, 486 U.S. 549, 554 (1988); United States v. Testan, 424 U.S. 392, 399 (1976); McGinness v. United States Internal Revenue Service, 90 F.3d 143, 145 (6th Cir. 1996); Young v. United States, 71 F.3d 1238, 1244 (6th Cir. 1995). It is difficult to see how plaintiff's due process rights can be violated by the obstacle a filing fee might pose to her damages suit if she has no constitutional right to sue the federal government for damages in the first place. See Ortwein, 410 U.S. at 660 (noting, in upholding the constitutionality of an appellate filing fee, that due process does not require an appellate system at all).

[8] Plaintiff also contends that any such repeal of in forma pauperis authority for non-prisoners should be subject to strict equal protection scrutiny because it would have an adverse impact on her "fundamental right of access to the courts." Floyd Br. at 32. But as we have explained (Gov't Br. 38), there is no such fundamental right in civil litigation for non-prisoners. See generally Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973).

for this Court to conclude that the PLRA did not withdraw in forma pauperis authority under 28 U.S.C. § 1915 for persons who are not incarcerated in prison. See Gov't Br. 18-19.

The fact that the PLRA places greater restrictions on prisoner in forma pauperis suits does not mean, however, that it would be irrational for Congress to determine that prisoners should be able to sue in forma pauperis in situations where non-prisoners cannot. As we explained in our opening brief (Gov't Br. 38-39), there are obvious differences between prisoners and non-prisoners, and the cases have recognized that the two groups are not similarly situated with respect to their right to access the courts. See, e.g., Lewis v. Casey, 116 S. Ct. 2174, 2179-81 (1996).

It is well settled that Congress need not "actually articulate at any time the purpose or rationale supporting its classification." Heller v. Doe, 509 U.S. 312, 320 (1993) (citing Nordlinger v. Hahn, 505 U.S. 1, 15 (1992)). Instead, a legislative classification must be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." Heller, 509 U.S. at 320 (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)). Here, there are sufficient differences between prisoners and non-prisoners with regard to in forma pauperis litigation that Congress could have, consistent with equal protection principles, withdrawn in forma pauperis authority under 28 U.S.C. § 1915 from non-prisoners while regulating but not eliminating such authority

for prisoners. However, because Congress did not in fact withdraw that authority for non-prisoners, there is no need for this Court to reach this issue.

CONCLUSION

For the foregoing reasons, as well as those set forth in our opening brief, this Court should conclude that the Prison Litigation Reform Act of 1996 has not withdrawn the authority of the federal courts to permit indigent non-prisoners to proceed in forma pauperis under 28 U.S.C. § 1915, and should decline to address the second and third questions posed to counsel.

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ALIQUIPPA, PA 15001-9425

10-10-96

Pursuant to Article 15, Section 4, B.2, of the 1990 National Agreement, the following arbitration case(s) has been scheduled before this arbitrator on the Regular Regional Arbitration Panel. The hearing will begin at 9:00 a.m. on November 13, 1996 at the postal facility located at 2200 ORANGE AVE RM 107 CLEVELAND, OH 44101.

C90S-1C-D	95061106	CL5819	BRANDON	DISC CLEVELAND P&DC	____ __/__/__
C90C-1C-D	96006935	CL51415	MCMICHAEL	DISC CLEVELAND P&DC	____ __/__/__
C94C-1C-D	96017122	CL51722	WHITE	DISC CLEVELAND P&DC	____ __/__/__
C90C-1C-D	96017055	CL5916	FLOYD	EMER CLEVELAND P&DC	____ __/__/__
C94C-1C-D	96060595	CL52266	FLOYD	DISC CLEVELAND P&DC	____ __/__/__

Where more than one case is scheduled at a location, cases will be heard in the order listed unless the parties mutually agree to present the cases in a different order.

This letter does not constitute a waiver by either party of any issue of arbitrability or timeliness as it relates to the processing of the grievances, as it merely serves to confirm to the arbitrator the location, date and time, pursuant to the terms of Article 15, Section 4,B.2 of the 1990 National Agreement and the back-up case(s) pursuant to Article 15, Section 4,A.4 of the 1990 National Agreement.

Olivia A. Bodner
Arbitration Scheduling Coord.
USPS Allegheny Area

Leo Persails
Regional Coordinator APWU

cc: Labor Relations, 440 (3B1670)
APWU - Leo Persails

Disposition Abbreviations: HRD - HEARD
PRE - PRE-ARB
RES - RESCHEDULE
A4 - APPEALED TO STEP 4
WIT - WITHDRAWN

13-5-AL

5

CALENDAR

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOROTHY FLOYD,

Plaintiff-Appellant

v.

UNITED STATES POSTAL SERVICE, and DONALD HARANTS, Postmaster

Defendants-Appellees

No. 96-3991

On Appeal from the United States District Court for the Northern District of Ohio

REPLY BRIEF FOR APPELLANT

David A. Friedman
Kathleen A. Pakes
TAUSTINE, POST, SOTSKY, BERMAN, FINEMAN & KOHN
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November 18, 1996

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOROTHY FLOYD, Plaintiff-Appellant v. UNITED STATES POSTAL SERVICE, and DONALD HARANTS, Postmaster Defendants-Appellees	)	No. 96-3991

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INTRODUCTION

Appellant Dorothy Floyd (Floyd) and appellees United States Postal Service and Donald Harants, Postmaster (collectively the United States), agree on the proper statutory construction of 28 U.S.C. § 1915(a)(1)(West Supp. 1996): the Prison Litigation Reform Act's (PLRA) amendments to § 1915 do not limit an indigent non-prisoner's entitlement to proceed in forma pauperis (IFP). The Court can decide the pending matters on these grounds, without reaching other issues.

If the Court declines to adopt the statutory construction urged by all parties, it must address the remaining questions. As to those, the United States makes two arguments why the Court cannot otherwise permit Floyd to proceed IFP: first, the Court lacks the inherent authority to permit Floyd to proceed IFP (but could defer payment of filing fees), unless she asserts claims under statutes containing specific grants of IFP authority; and second, Floyd does not have a fundamental right of access, under the Fifth Amendment due process clause, to pursue her claims IFP.

The United States also makes two arguments why allowing indigent prisoners, but not indigent non-prisoners, to proceed IFP, does not violate equal protection: first, the statute is subject to rational basis review because it does not impair a fundamental right; and second, Congress could have had a rational basis for favoring indigent prisoners over indigent non-prisoners.

Floyd now replies to those arguments.

ARGUMENT

I. THIS COURT SHOULD CONSTRUE THE STATUTE TO ALLOW INDIGENT NON-PRISONERS TO PROCEED IFP, AS ALL PARTIES ARGUE.

The parties agree on the rules governing statutory construction and on their application to § 1915(a), as amended by the PLRA. See Brief for Appellant (Floyd Br.) at 7-15; Brief for Appellees (U.S. Br.) at 15-26. The Court should give the statutory text its plain meaning. Floyd Br. at 8. It should construe specific provisions in harmony with the larger statutory scheme. Floyd Br. at 10. It should construe ambiguities consistent with legislative intent. Floyd Br. at 9-10. And it should strive to avoid constructions which render the statute unconstitutional.[1] Floyd Br. at 10.[2]

The traditional statutory construction rules lead inevitably to one conclusion: the PLRA's amendments to § 1915(a) did not

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[1] The United States surely agrees with this principle of statutory construction. It likely does not recite it because it argues that § 1915(a)(West Supp. 1996) is constitutional under a contrary construction. See U.S. Br. at 33-35 (due process), 35-40 (equal protection).

[2] The United States also recites the familiar principle disfavoring repeals by implication. See U.S. Br. at 17-18. Floyd does not dispute the rule. She did not recite it here because the PLRA expressly repealed some of § 1915(a)'s text. At issue here is the meaning of one amended statute, not whether "earlier and later statutes are irreconcilable." U.S. Br. at 17 (quoting TVA v. Hill, 437 U.S. 153, 190 (1978)).

eliminate an indigent non-prisoner's entitlement to proceed IFP.[3] The amended text of § 1915(a) does not make grammatical or logical sense. Floyd Br. at 8-9; U.S. Br. at 15. It can be understood only by referring to legislative history and the PLRA statutory scheme as a whole. Floyd Br. at 9-10; U.S. Br. at 15-18. And those extrinsic sources are silent about any desire to alter indigent non-prisoners' entitlement to proceed IFP; to the contrary, Congress's sole motivation was to deter frivolous prisoner litigation and every legislative proposal — culminating in the PLRA — sought to do just that. Floyd Br. at 11-15; U.S. Br. at 21-26. There is absolutely no evidence of Congressional intent to repeal, diminish or otherwise affect non-prisoners, and defects in drafting should not lead to that unintended — and quite radical, see U.S. Br. at 16-17 — result.

II. EVEN IF THE COURT CONSTRUES § 1915 OTHERWISE, THE COURT MAY PERMIT FLOYD TO PROCEED IFP.

A. Floyd May Proceed IFP Under Fed. R. App. P. 24.

Fed R. App. P. 24(a) governs a party's entitlement to proceed IFP on appeal. It provides that a party who was granted IFP status for proceedings in the district court ordinarily "may proceed on

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[3] Floyd does not use the shorthand phrase "entitlement to proceed IFP" to imply an unqualified statutory right to proceed IFP. Rather, she uses it to mean a statutory right to proceed IFP upon a showing of poverty and the filing of an adequate complaint. See 28 U.S.C. § 1915(a)(1)(West Supp. 1996)(requiring affidavit showing inability "to pay ... fees or give security therefor"); 28 U.S.C. § 1915(e)(2)(requiring dismissal of frivolous or malicious complaint, one that fails to state a claim upon which relief may be granted, or one that seeks monetary relief against an immune defendant).

appeal in forma pauperis without further authorization." Ibid.[4] Otherwise, a party seeking to proceed on appeal IFP must file a motion to that effect in the district court. If the district court grants the motion, the party may proceed on appeal IFP. Ibid. If the district court denies the motion, the party may renew her motion in the appellate court. Ibid. Floyd has renewed her unsuccessful IFP motion here and that is the only matter now before this Court.

Floyd contends that this Court may grant her IFP status, under Fed. R. App. P. 24(a), notwithstanding the PLRA's amendments to § 1915(a). See Floyd Br. at 16-17. The United States argues, however, that federal courts have no inherent power to "refuse to enforce the statutes requiring the collection of federal court filing fees by permitting litigants to proceed" IFP. U.S. Br. at 26. True enough. But the United States applies that principle to 28 U.S.C. § 1914(a), which sets a $120 filing fee in district courts. Id. at 27-28. Although the United States acknowledges that appellate courts may have greater "leeway" with respect to appellate fees, id. at 28, its argument focuses on district court fees. This Court need not and should not address the federal courts' inherent power to grant IFP status in the district courts for three reasons. First, the only motion pending before this Court is Floyd's motion to proceed on appeal IFP; she does not

[4] This continuing authorization does not apply if the district court "certif[ies] that the appeal is not taken in good faith or ... [that] the party is otherwise not entitled so to proceed ..." Fed. R. App. P. 24(a).

present any case or controversy as to district court fees. Second, the district court denied IFP status and dismissed Floyd's complaint below because it was frivolous; the district court never reached the inherent authority issue. R.4: Memorandum Opinion and Order; R.5: Judgment (July 22, 1996). Third, if this Court reaches the merits of the case and ultimately remands it to the district court, that court will then have the opportunity to address in the first instance whether it has the inherent authority to grant IFP status.[5]

Turning to the Court's inherent authority to grant IFP status on appeal: The United States cites Bradford v. Southern Railway Co., 195 U.S. 243, 251-52 (1904), for the proposition that the federal courts may not waive statutory filing fees in the absence of an applicable statute. U.S. Br. at 28-29. But appellate filing fees, unlike district court fees, are not set by statute. Federal law specifically sets a $120 filing fee for civil actions filed in district court. 29 U.S.C. § 1914(a).[6] By contrast, 28 U.S.C. § 1913 delegates the setting of appellate fees to the Judicial Conference of the United States:

> The fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and uniform in all the circuits.

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[5] It will also have the opportunity to consider whether Floyd is entitled to proceed IFP under a statute-specific grant of authority. See U.S. Br. at 31-32 (citing examples).

[6] Section 1914(a) sets a $5 filing fee for habeas corpus applications.

Ibid. And the Supreme Court may unilaterally "fix the fees to be charged by its clerk." 28 U.S.C. § 1911.

Thus, the issue here is whether the federal appeals courts have the authority, consistent with Congressional delegation of fee-setting power, to establish a "reasonable" entitlement to proceed IFP, which is "uniform in all the circuits".[7] That authority derives from the Rules Enabling Act, 28 U.S.C. § 2071 et seq. Under 28 U.S.C. § 2072(a), the Supreme Court has the "power to prescribe general rules of practice and procedure ... in the United States ... courts of appeals." Those rules supercede laws in conflict with them. 28 U.S.C. § 2072(b); Griffith Co. v. N.L.R.B., 545 F.2d 1194 (9th Cir.), cert. denied, 434 U.S. 854 (1976). And the Judicial Conference — to which Congress delegated appellate fee-setting discretion — prescribes and oversees the procedure for adopting the appellate rules. 28 U.S.C. § 2073.

Consistent with 28 U.S.C. § 1913 and 28 U.S.C. § 2071 et seq., the Federal Rules of Appellate Procedure provide that filing and docket fees must be paid "upon the filing of any ... notice of appeal", Fed. R. App. P. 3(e), that the district court clerks will receive fees "on behalf of the court of appeals," ibid., and that the appeals courts may grant leave to proceed on appeal IFP. Fed. R. App. P. 24(a). Thus, there is no conflict between any statute

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[7] Because the issue here is the Court's inherent authority to waive appellate fees, which are not expressly set by statute, the Unites States' reliance on Bradford, Weller v. Dickson, 314 F.2d 598 (9th Cir.), cert. denied, 375 U.S. 845 (1963), and Roy v. Louisville N. O. & T. R. Co., 34 Fed. 276 (C.C.W.D. Tenn. 1888), is misplaced. See U.S. Br. at 28. Those cases all involved the federal courts' inherent authority to waive express statutory fees.

and the federal appellate rules: the statute delegates appellate fee-setting power to the courts, which have set fees as detailed in the appellate rules. See also United States v. Gustin-Bacon Div. Certain-Teed Prod., 426 F.2d 539, 542 (10th Cir. 1970) (subsequently enacted statutes should be construed, if possible, in harmony with procedural rules).

B. As An Indigent Non-Prisoner, Floyd Has A Due Process Right To Proceed IFP.

1. Floyd has a fundamental right of access to the courts to litigate this case.

Floyd has argued that she has a fundamental right to litigate this claim of unlawful or unconstitutional governmental conduct. See Floyd Br. At 21-27. The United States responds that the Supreme Court does not now recognize a fundamental right of access for all indigent civil litigants. See U.S. Br. at 33-35. True enough. But the right of access is not an all-or-nothing proposition. And Floyd's synthesis of the Supreme Court cases supports her claim to a fundamental right to proceed IFP here.

The United States rightly reads Boddie v. Connecticut, 401 U.S. 371 (1971), U.S. v. Kras, 409 U.S. 434 (1973), and Ortwein v. Schwab, 410 U.S. 656 (1973), to mean that due process limits the government's power to impose filing fees only where the rights at issue are fundamental and resort to litigation is essential. U.S. Br. at 33-34. It deems the cases to say that intimate family relations (divorce) are fundamental and can be obtained only through litigation; on the other hand, bankruptcy and welfare benefits are not fundamental or can be acheived through other

forums. Ibid. But it then concludes that Floyd's employment claims are more like bankruptcy or welfare cases than divorce, so Floyd does not have a due process right of access here. Ibid.

Floyd believes the Supreme Court cases are better grouped in a slightly, but quite significantly, different way. As Floyd has argued, see Floyd Br. at 21-24, bankruptcy involves common law or statutory debts owed primarily to private entities, not the government, and relief afforded solely at Congress's discretion. And judicial review of an administrative welfare benefits decision necessarily implies a prior, presumably full and fair, evidentiary hearing and decision by an impartial judge or referee. Unlike a bankruptcy claim, Floyd's claim is against the United States, not private entities. And unlike a bankruptcy claim, it may involve constitutional limits (free speech or due process) on governmental conduct. Moreover, unlike judicial review of a welfare benefits determination, Floyd has not had a prior hearing; indeed, no administrative forum could adequately substitute for the courts to hear her constitutional claims. Floyd's claims here also share attributes of Boddie's divorce case. Floyd seeks relief in an arena where the government enjoys a monopoly on power. Moreover, Floyd's free speech and due process claims -- rights expressly conferred by constitutional text -- are surely as intimate, as fundamental, in the legal sense, as divorce is in the personal sense.

Floyd's clustering of the cases is preferable to the United States' because it more faithfully tracks other fundamental rights

decisions. As Floyd has argued, see Floyd Br. at 23-27, access to the court system to challenge the legality of governmental conduct implicates rights secured by the Bill of Rights. This Court has recognized, of course, that rights enumerated in the Bill of Rights are fundamental. See Haag v. Cuyahoga County, 619 F. Supp. 262, 275 (N.D. Ohio), aff'd, 798 F.2d 1413 (6th Cir. 1985). The right to challenge the constitutionality of governmental actions is also so rooted in the traditions of the American people as to be ranked fundamental. See Griswold v. Connecticut, 381 U.S. 479, 487 (1965). And the right to challenge the constitutionality of governmental conduct contains the three attributes that Supreme Court cases have identified as underlying a fundamental right of access: it is the means by which all other rights (i.e., free speech and due process) are preserved, see McCarthy v. Madigan, 503 U.S. 153 (1992); it is the quid pro quo for giving up citizens' natural right to self help, see Chambers v. Baltimore & Ohio R.R., 207 U.S. 132, 148 (1907); and it legitimizes the government's monopoly over the judicial system. See Boddie, 401 U.S. at 375; Little v. Streater, 425 U.S. 1, 12 (1981).

For these reasons, due process forbids imposing a filing fee on an indigent litigant with a federal constitutional claim against the United States.[8]

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[8]The United States cites a number of cases for the proposition that the ability to file suit IFP is a privilege, not a right. See U.S. Br. at 33 (collecting cases). While this is surely true when a litigant contests her statutory ability to proceed IFP, it merely begs the question of when the absence of a statutory "privilege" offends due process.

2. Floyd has a procedural right to a post-deprivation hearing without paying an access fee.

Floyd also has argued that principles of procedural due process protect her right of access in this case. See Floyd Br. at 17-21. Because the United States did not address this issue in its initial brief, Floyd can only summarize her argument here. Floyd argued that she has a protected property interest in her job, citing Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1349 (6th Cir. 1992), Board of Regents v. Roth, 408 U.S. 564, 577 (1972), and Collyer v. Darling, 1996 FED App. 0317P (6th Cir. September 30, 1996), and a protected property interest in her use of adjudicatory procedures, citing Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). The United States may not deprive Floyd of those protected liberty and property interests without at least a post-deprivation hearing. Logan, 455 U.S. at 433, 434 n.8; Loudermill, 470 U.S. at 542, 547. And because the United States has an affirmative obligation to furnish Floyd the post-termination hearing she seeks here, it cannot require her to pay for her opportunity to be heard. Rankin v. Indep. Sch. Dist. No. 1-3, 876 F.2d 838, 840 (10th Cir. 1989); see also Little v. Streater, 452 U.S. 1 (1981).

III. EQUAL PROTECTION PROHIBITS § 1915(a)(1) FROM ALLOWING INDIGENT PRISONERS, BUT NOT INDIGENT NON-PRISONERS, TO PROCEED IFP.

Floyd has argued that § 1915(a)(1)(West Supp. 1986) is subject to strict scrutiny because it impairs her fundamental right of access to the courts. See Floyd Br. at 31-32. The United States disagrees, arguing that the statute is subject to deferential review because Floyd does not have a fundamental right of access.

See U.S. Br. at 35-37.[9] The level of review dovetails, of course, with the parties' due process arguments. Thus, if the Court concludes that Floyd has a fundamental right of access to the courts, protected by due process, it must also subject the statute to strict equal protection scrutiny. See Romer v. Evans, 116 S. Ct. 1620, 1628 (1996) (statutes which classify in terms of exercise of fundamental rights are subject to strict scrutiny). If, however, the Court concludes that Floyd does not have a fundamental right of access, the statute will survive equal protection review if it is rationally related to a legitimate governmental interest. Doe v. Wigginton, 21 F.3d 733, 739 (6th Cir. 1994) (statute must "rationally furthe[r] a legitimate [governmental] purpose") (internal quote omitted).

The United States argues that Congress could have a rational basis for favoring indigent prisoners over indigent non-prisoners. U.S. Br. at 38-39. It recites two: (1) indigent non-prisoners have a greater ability to obtain outside employment to fund litigation; and (2) prisoners, but not non-prisoners, need access to the courts to challenge the conditions of their confinement, or to attack the convictions resulting in that confinement. Ibid.

Floyd recognizes that rational basis review imposes a heavy burden of persuasion on her. See U.S. Br. at 36-37 (citing cases). But neither justification advanced by the United States is adequate to survive even deferential review, because there is no rational

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[9] The United States does not argue that these statutory classifications — prisoner and non-prisoner — can survive strict scrutiny.

relation between the asserted governmental interest and the statutory classifications. To be sure, a non-prisoner's greater employment prospects affect the likelihood that the non-prisoner will be indigent: a far higher percentage of prisoners will be poor than non-prisoners, for the latter have greater employment prospects. But that distinction is accounted for by requiring IFP applicants to establish their poverty by affidavit. See 28 U.S.C. § 1915(a)(1)(West Supp. 1996) (requiring affidavit); 28 U.S.C. § 1915(e)(2)(A) (requiring dismissal if allegation of poverty is untrue). "Greater employment prospects" affords no rational reason to distinguish in favor of a poor prisoner (whose necessities are furnished) and an equally poor non-prisoner (who, like Floyd, may be homeless and destitute).

Nor is the distinction rationally related to prisoners' need to file suits challenging convictions or conditions of confinement. That governmental interest would be furthered by treating conditions suits and attacks on convictions more favorably than other lawsuits. But § 1915(a)(1)(West Supp. 1996) does not do this; it simply prefers poor prisoners over poor non-prisoners. Several examples suffice to show that the United States' proffered purpose is not rationally related to the prisoner/non-prisoner classification. Under the statute, a recently released inmate seeking damages in a conditions of confinement case — say, a prison official's deliberate indifference to serious medical need, see Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) — is treated differently from a current inmate seeking damages for the same

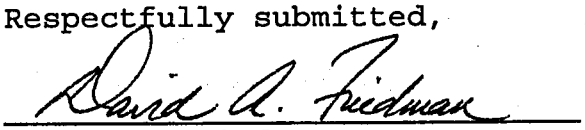
constitutional injury. Similarly, an imprisoned felon challenging his conviction is favored over an unincarcerated co-defendant challenging the same conviction. And a prisoner filing a diversity suit for negligence (unrelated to prison or prison officials) is favored over a non-prisoner filing the same diversity suit.

Thus, the reasons offered by the United States cannot satisfy even the deferential rational basis review. (Nor can Floyd conceive of better reasons.) Absent some rational reason for treating indigent prisoners more favorably than indigent non-prisoners, § 1915(a)(1)(West Supp. 1996) violates equal protection.

CONCLUSION

For all these reasons, and those contained in Floyd's initial brief, the Court should reach the merits of Dorothy Floyd's application to proceed on appeal in forma pauperis.

Respectfully submitted,



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I hereby certify that I have served this brief upon opposing counsel by mailing two copies, first class postage prepaid, on November 18, 1996, to:

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Case No. 96-3991

DOROTHY FLOYD

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-v.-

UNITED STATES POSTAL SERVICE,
DONALD HARANTS, POSTMASTER

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Federal Rules of Appellate Procedure 40, the plaintiff-appellant, Dorothy Floyd, hereby petitions for rehearing from the Court's January 23, 1997 decision.

STATEMENT OF THE CASE

The Court's opinion addresses two in forma pauperis (IFP) issues. First, it agrees with the parties that Congress did not intend for the Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, Title VIII, 110 Stat. 1321-66 (PLRA), to prohibit indigent nonprisoners from litigating their cases without prepaying filing fees. Floyd v. United States Postal Serv., 1997 FED App. 0031P, slip op. at 1-6 (6th Cir.).

Second, the Court's opinion addresses an issue which the parties did not brief (and on which the Court did not request briefs): whether an appeals court can grant IFP status after the district court certifies that an appeal is not in good faith. The Court concluded that it could not. Floyd, slip op. at 6-9. But because the Court's conclusion rests on a erroneous proposition — that "[t]he PLRA has changed the process for appeals which are not taken in good faith," id., slip op. at 6 — its decision is flawed. The Court therefore should grant rehearing.

ARGUMENT

I. THE PLRA DID NOT CHANGE THE PROCESS FOR APPEALS.

Central to the Court's resolution of this issue is its perceived conflict between a statute and a rule. As the Court

notes, the IFP "statute states that '[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith.'" Id., slip op at 6 (quoting 28 U.S.C.A. § 1915(a)(3)). By contrast, Rule 24(a) furnishes a mechanism for an appeals court to consider such an IFP motion:

> If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in district court, and by a copy of the statement of reasons given by the district court for its action.

Fed. R. App. P. 24(a), quoted in Floyd, slip op. at 6.

The Court also has correctly articulated the general rule for resolving conflicts between statutes and federal procedural rules. Under the Rules Enabling Act, statutes which conflict with procedural rules "shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b), quoted in Floyd, slip op. at 7. Thus, statutes which predate the effective date of a procedural rule are abrogated to the extent of any conflict. This requires, of course, "that the offending statute have some effect before the rule's enacting date." Floyd, slip op. at 7 (citing Jackson v. Stinnett, 102 F.3d 132, 134 (5th Cir. 1996). "By contrast, a statute passed after the effective date of a

federal rule repeals the rule to the extent of the actual conflict." Floyd, slip op. at 8 (citing Autoskill Inc. v. National Educ. Support Sys., Inc., 994 F.2d 1476, 1485 (10th Cir.), cert. denied, 510 U.S. 916 (1993)). In other words, procedural rules trump earlier conflicting statutes, but are in turn trumped by later conflicting statutes.

This Court concluded that the statute trumps the rule because the PLRA, enacted in 1996, postdates Fed. R. App. P. 24(a), which the Supreme Court last amended in 1986. See Floyd, slip op. at 8. Its conclusion rests on the assumption that "[t]he PLRA has changed the process for appeals which are not taken in good faith." Floyd, slip op. at 6.

But the PLRA has not changed the appellate process. The PLRA did not even re-enact previous statutory language.[1] The IFP statute has long contained the precise language governing IFP appeals. See Floyd, slip op. at 8 (noting that the Supreme Court last amended Rule 24 effective July 1, 1986). All that the PLRA did was move the provision from 28 U.S.C.A. § 1915(a) to §1915(a)(3) (West Supp. 1996).[2]

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[1] Thus, the Court does not have to reach the issue posed by reenactment: what results when a statute is abrogated in part by a federal rule, then later reenacted verbatim by Congress (with no legislative history reflecting Congressional intent). Moreover, as described in § II, this statute and rule can co-exist and have been interpreted as not in conflict.

[2] Section 804. "Proceedings in Forma Pauperis" reads in relevant part: "(a) FILING FEES. — Section 1915 of title 28, United States Code, is amended —
(1) in subsection (a)—
***
(G) by striking "An Appeal" and inserting "(3) An Appeal."

The PLRA amended the IFP statute in several ways. It made §1915 gender-neutral. It established a mechanism for indigent prisoners to pay filing fees over time. See 28 U.S.C. § 1915(b). It required all IFP applicants to submit affidavits of indigency (and prisoners to submit prison trust account statements). See 28 U.S.C. § 1915 (a)(1) and (2), (b).[3] And, it moved the "not in good faith" appeals provision from its prior location in § 1915(a) to a newly numbered § 1915(a)(3).

Nor does the legislative history — which is silent on the issue — suggest that Congress intended to do more than move the statutory text. Congress' clear intent in enacting the PLRA was to limit prisoner lawsuits. Moving the appeal provision to a location after § 1915(a)(2) thus can be seen as organizational, not substantive. Given that "[r]epeals by implication are not favored by the courts", Floyd, slip op. at 8 (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987); Posadas v. National City Bank, 296 U.S. 497, 503 (1936)), there is no reason to construe textual movement as a "ratification" of the pre-Rule statute. Congress is presumed to know the background against which it legislates and knew that the appeal statute had been construed to harmonize with Fed. R. App. P. 24(a). See § II. It should not be presumed to repeal Rule 24 by implication without any indication

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Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, Title VIII, 110 State. 1321-66.

[3] This Court so construed § 1915(a) here. See Floyd, slip op. at 1-6.

of its intent to do so.

In reaching its contrary conclusion, the Court cites Jackson v. Stinnett, 102 F.3d 132 (5th Cir. 1996), for the broad rule that "Congress maintains the power to appeal, amend, or supersede the delegation of authority or the rules of procedure." Floyd, slip op. at 7. And after discussing the abrogation clause in the Rules Enabling Act, the Court cites Jackson for the notion that the PLRA repeals the inconsistent provisions of Rule 24(a). Floyd, slip op. at 8.

True enough. But Jackson's facts, and the procedural mechanism evaluated by the Fifth Circuit, are readily distinguishable from those here. Jackson involved a prisoner whose affidavit of poverty, prepared in accordance with Rule 24(a), did not comport with the new requirements of the PLRA-amended section 1915(a). In Jackson, the district court did not decertify the prisoner's IFP status, but simply dismissed the case on its merits. Id. at 134. Under Rule 24(a), the prisoner could appeal without further application to the Court of Appeals for IFP status. Fed. R. App. P. 24(a); Jackson, 102 F.3d at 134. In contrast, the PLRA requires a substantially different affidavit attaching the prisoner's trust account statement. 28 U.S.C.A. Section 1915(a)(2)(West Supp. 1996). The narrow question confronting the Fifth Circuit was whether the prisoner would be required to complete the new affidavit of poverty (with attached trust fund statement) despite his present pre-PLRA IFP status. Jackson, 102 F.3d at 136. The Jackson court thus faced a direct conflict

between Rule 24(a) and the new IFP requirements imposed by the PLRA; it never considered the issue decided by this Court.

Jackson's facts and applicable law were fundamentally different from those here. The PLRA contained new substantive provisions governing Jackson's IFP status. Here, the Act's provisions governing Floyd's IFP application are identical to those predating Rule 24(a). The PLRA did not modify or amend the relevant portion of section 1915(a), except to add a "3" prior to the first words, "An appeal". For these reasons, Jackson does not dispose of the issue here. And, for the reasons detailed above, the PLRA's movement of longstanding statutory text should not be construed to conflict with or repeal Rule 24(a).

II. THE STATUTE AND RULE ARE NOT IN CONFLICT.

Even if the PLRA were deemed to "ratify" the pre-Rule statute, the statute trumps the rule only "to the extent of the actual conflict." Floyd, slip op. at 8. And prior case law deemed section 1915(a) and Rule 24(a) not to conflict with one another. See Moore, Federal Practice (Moore), para. 224.01 and 224.02.

To the contrary, the statute and rule have been read in harmony. Under section 1915, the district court's initial grant of an IFP motion entitles the litigant to proceed IFP through all stages of a case. See Moore, para. 224.02 n.6 (and text), n.10. IFP status is rescinded only if, under the statute, the district court certifies that the appeal is not in good faith. Id., n.10 (and text). That decision -- which effectively denies leave to

proceed IFP on appeal -- requires a litigant to seek appellate approval, under the rule, for IFP status on appeal. Id., n.13 (and text). The rule thus effectively provides a mechanism for appellate review of a district court's adverse IFP decision.[4] As the Advisory Committee described the process:

> The second paragraph [of the pre-PLRA section 1915(a), now codified at section 1915(a)(3)] permits one whose indigency has been previously determined by the district court to proceed on appeal in forma pauperis without the necessity of redetermination of indigency, while reserving to the district court its statutory authority to certify that the appeal is not taken in good faith ... and permitting an inquiry into whether the circumstances of the party who was originally entitled to proceed in forma pauperis have changed during the course of litigation.

Advisory Committee Note to Rule 24 (citing former Sixth Circuit Rule 26).

Because the PLRA did not change the relevant statutory text, and because that text has been construed in harmony with Rule 24(a), the rule remains harmonious with the PLRA.

CONCLUSION

Thus, the PLRA did not "chang[e] the process for appeals which are not taken in good faith." Floyd, slip op. at 6. And the longstanding appellate process has construed § 1915(a) and Rule 24 to be in harmony. The Court's contrary conclusion and resulting analysis, see id., slip op. at 6-9, should be rescinded. This Court should then address the merits of Ms. Floyd's IFP motion, as

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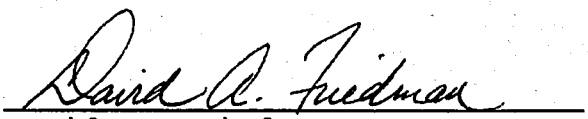
[4]Before enactment of the Federal Rules of Appellate Procedure, IFP denials were deemed appealable interlocutory orders. Moore, para. 224.02 n.13.

provided in Fed. R. App. P. 24(a).

Respectfully submitted,



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I hereby certify that I have served this document to the opposing counsel by mailing two copies, first class postage prepaid, on January 31, 1997, to:

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Case No: 96-3991

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LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

O R D E R

DOROTHY FLOYD

Plaintiff - Appellant

v.

UNITED STATES POSTAL SERVICE; DONALD HARANTS, Postmaster

Defendants - Appellees

BEFORE: MARTIN, Chief Circuit Judge; ENGEL and COLE, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk