No. _____

In the
Supreme Court of the United States

ANGEL SOTO,

Petitioner,

v.

UNKNOWN SWEETMAN, ADOC Sgt. at SMU II Browning Unit; et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a federal statute prohibits a plaintiff from filing a lawsuit until after the plaintiff completes mandatory exhaustion of administrative remedies, this Court and five Circuits hold that the plaintiff's claim does not accrue—and the statute of limitations does not begin to run—until after mandatory exhaustion is completed. This is consistent with the standard rule that a claim does not accrue until "the plaintiff can file suit and obtain relief." In this case, however, the Ninth Circuit held that the statute of limitations begins running immediately on a claim governed by the Prison Litigation Reform Act ("PLRA"), even though § 1997e(a) of the PLRA mandates that a plaintiff exhaust his administrative remedies prior to filing suit. Under the Ninth Circuit's approach, if exhaustion takes longer than the limitations period, then the limitations period expires on the plaintiff's claims before the PLRA allows him to file them in the first place.

The question presented is:

Where a federal statute—such as 42 U.S.C. § 1997e(a)—mandates that a plaintiff exhaust administrative remedies prior to filing suit, does the plaintiff's claim accrue only upon completion of mandatory exhaustion (as five circuits hold), or does it accrue before the completion of mandatory exhaustion, such that the limitations period can expire while the plaintiff is still prohibited by statute from filing his claim in court (as the Ninth Circuit held)?

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioner: *Angel Soto*

Respondents: *Unknown Sweetman, ADOC Sgt. at SMU II Browning Unit;*
Unknown Zamora, ADOC CO II at SMU II Browning Unit;
Unknown Harris, ADOC CO II at SMU II Browning Unit;
Unknown Jones, ADOC CO II at SMU II Browning Unit;
Unknown Schell, ADOC CO II at SMU II Browning Unit;
Unknown Emore, ADOC CO II at SMU II Browning Unit;
Unknown Victoria, ADOC Sgt. at SMU II Browning Unit;
Unknown Bope, ADOC CO II at SMU II Browning Unit;
Unknown Swaney, ADOC Sgt. at SMU II Browning Unit; and
Unknown McClellan, ADOC Sgt. at SMU II Browning Unit.

Soto filed this prisoner civil rights action against several employees of the Arizona Department of Corrections ("ADOC") while proceeding *pro se*. Upon information and belief, each respondent is or was an employee of ADOC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Angel Soto, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion affirming the district court's entry of summary judgment against Soto's civil rights action was issued on February 9, 2018, in Case Number 16-15497 and is published at *Soto v. Sweetman*, 882 F.3d 865 (9th Cir. 2018). Pet. App. 1a-27a. The Ninth Circuit's order denying Soto's petition for rehearing and rehearing en banc was issued on May 4, 2018. Pet. App. 35a. The district court's judgment was entered on February 25, 2016, in Case Number 2:14-cv-01323. Pet. App. 28a-34a.

JURISDICTION

The Ninth Circuit Court of Appeals' decision and opinion was entered on February 9, 2018. The Ninth Circuit denied a timely petition for rehearing on May 4, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1997e(a) provides,

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

STATEMENT OF THE CASE

1. Angel Soto, a prisoner in the custody of ADOC, was beaten and sexually assaulted by several corrections officers on April 17, 2010. Immediately after the

incident, Soto began grieving the incident through the first steps of ADOC's grievance process. Because he alleged a sexual assault, Soto was examined by the institution's Special Services Unit ("SSU") soon after the grievance process had been initiated. At that point, Soto "was told by SSU that CIU [the Criminal Investigations Unit] will be notified and once [the] CIU investigation was done he could start his grievance process." Soto was informed that he would "be seen by CIU but it would take a while." Pet. App. 13a, 16a-17a.

Consistent with the instructions that he had received, Soto waited for CIU to complete its investigation and for a response to the initial step of his grievance. Unbeknownst to Soto, however, CIU did not begin investigating Soto's allegations. Thus, Soto was in limbo: as far as he had been told, he could not complete his grievance process until CIU had finished investigating his complaint, but CIU was not processing the investigation. *See* Pet App. 6a-7a.

Soto continued to ask about the status of the investigation, but his requests for information were fruitless. Finally, in late 2013 or early 2014, Soto told his story to an Officer Smith, who looked into the matter on Soto's behalf and escalated it to one of the deputy wardens. Ultimately, in January 2014, CIU finally began investigating Soto's allegations—nearly 3 years after the incident had occurred. *See* Pet. App. 7a.

On April 4, 2014, CIU concluded its criminal investigation into Soto's allegations and issued a formal decision letter. After the CIU completed its

investigation in April 2014, Soto finished grieving his complaint through ADOC's grievance procedure.

Obviously aware that CIU's investigation had just been completed, ADOC did not deny Soto's grievance as untimely. Instead, ADOC resolved Soto's grievance on the merits. The final denial of his grievance occurred on May 2, 2014. *See* Pet. App. at 7a & n.1.

2. Proceeding *pro se*, Soto filed this 42 U.S.C. § 1983 lawsuit in the district court only a month later: on June 13, 2014. *See* Pet. App. 6a. The ADOC defendants conceded both in the district court and in the Ninth Circuit that Soto successfully exhausted his administrative remedies on the merits in June 2014. *See* Pet. App. at 7a n.1. Nevertheless, the district court ruled that the pertinent two-year statute of limitations had already expired on Soto's claims at some point in 2012—almost 2 years *before* he was allowed to file them in federal court under the PLRA's mandatory exhaustion provision, 42 U.S.C. § 1997e(a). *See* Pet. App. 32a-33a.

3. Undersigned counsel was appointed for Soto on appeal. On appeal, Soto argued that the statute of limitations cannot possibly have expired in 2012, given that § 1997e(a) precluded him from filing his lawsuit until his administrative remedies were exhausted two years later, in 2014. Soto also asserted that, in the alternative, he was entitled to equitable tolling due to the ADOC officers' misrepresentations that Soto could not proceed with the ordinary grievance procedure until after the CIU investigation was completed. *See Ross v. Blake*, 136 S. Ct. 1850, 1860 & n.3 (2016).

4. The majority of the Ninth Circuit panel rejected both of Soto's arguments. First, the majority rejected Soto's contention that a claim governed by the PLRA does not accrue until the plaintiff can file it in court, reasoning that the time-lag occasioned by such a rule would cause evidentiary difficulty: "[M]emories would dim, witnesses would be difficult to find, and evidence would grow stale or disappear." Pet. App. 11a. Instead, the panel majority held that a PLRA litigant may be entirely precluded from ever filing a civil-rights claim under 42 U.S.C. § 1983 if the limitations period is shorter than the length of time that it took the plaintiff to exhaust mandatory remedies. According to the Ninth Circuit, "exhaustion can take longer than the limitations period, as it did here." Pet. App. 10a. In such a scenario, the plaintiff never has the statutory right to file his § 1983 claims, because they are always prohibited by statute—first by the PLRA's mandatory exhaustion provision, and then by the statute of limitations.

Ultimately, the Ninth Circuit held that Soto's lawsuit was untimely because Soto had not filed it in 2012—despite the fact that the PLRA explicitly prohibited him from filing suit until he exhausted his administrative remedies two years later, in 2014. *See* Pet. App. 13a, 20a. The panel majority separately ruled that Soto was not entitled to equitable tolling, either, due to the fact that his explanation of the officers' misrepresentations was contained in the body of his summary-judgment brief, instead of in a separate sworn affidavit. *See* Pet. App. 13a-20a. Judge Smith dissented from the majority's decision to affirm. *See* Pet. App. 21a-27a.

Soto filed a timely petition for rehearing en banc. The Ninth Circuit ordered ADOC to file a response to Soto's petition, but the court ultimately denied the petition. Judge Smith again dissented. *See* Pet. App. 35a.

Soto timely files this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's holding conflicts with the First, Third, Seventh, District of Columbia, and Federal Circuits, which have held that, if administrative exhaustion is mandatory, then the plaintiff's claim does not accrue until completion of mandatory exhaustion.

The Ninth Circuit created a split over whether a plaintiff's claim accrues before or after exhaustion of administrative remedies where exhaustion is mandatory rather than merely permissive.

The universally accepted rule is that, where exhaustion is mandatory instead of permissive, the plaintiff's claim does not accrue and the limitations period does not begin to run until the mandatory prerequisite to suit is satisfied—that is, until the plaintiff is permitted to file his claim in court. This rule has been described as "virtually axiomatic." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 57 n.3 (D.C. Cir. 1987). That is because a claim accrues only when "the plaintiff has a complete and present cause of action, that is, *when the plaintiff can file suit and obtain relief*." *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (emphasis added) (internal citations and quotation marks omitted). "Tautologically, a suit cannot be maintained in court—and a cause of action does not 'first accrue'—until a party has exhausted all administrative remedies whose exhaustion is a prerequisite to suit." *Spannaus*, 824 F.2d at 56-57.

"*Spannaus*'s logic is unassailable." *Ortiz v. Sec'y of Def.*, 41 F.3d 738, 743 (D.C. Cir. 1994). Until the Ninth Circuit's decision in Soto's case, "no court has ever held that, in a case where an antecedent administrative judgment is a statutory prerequisite to the maintenance of a civil enforcement action, the limitations period on a recovery suit runs from the date of the underlying violation as opposed to the date on which the [administrative remedies were concluded]." *United States v. Meyer*, 808 F.2d 912, 916 (1st Cir. 1987).

This Court has likewise rejected the view that a claim can accrue before a plaintiff can complete an exhaustion process mandated by statute. *See Crown Coat Front Co. v. United States*, 386 U.S. 503, 511-15 (1967). The First, Third, Seventh, and Federal Circuits have similarly held that, if administrative exhaustion is mandatory, then the plaintiff's claim does not accrue until completion of mandatory exhaustion. *See, e.g., Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21, 36 (1st Cir. 1998) (if administrative remedies are mandatory, "the cause of action does not accrue until the completion of the required administrative proceedings"); *Martinez v. United States*, 333 F.3d 1295, 1304 (Fed. Cir. 2003) (same); *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 251 (3d Cir. 1999) (same); *United States Dep't of Labor v. Old Ben Coal Co.*, 676 F.2d 259, 261 (7th Cir. 1982) (same).

In fact, even the Ninth Circuit has lined up with the approach of this Court and every other circuit in every context other than the PLRA in which administrative exhaustion is mandated by statute. Every time that the issue has arisen, the Ninth Circuit ruled that the plaintiff's claim does not accrue (and the

limitations period does not begin running) until after mandatory exhaustion is completed. *See, e.g.*, *United States v. Suntip Co.*, 82 F.3d 1468, 1476 (9th Cir. 1996) (claim under Contract Disputes Act); *Donnelly v. United States*, 850 F.2d 1313, 1319 (9th Cir. 1988) (quiet-title action against the government); *Sherar v. Harless*, 561 F.2d 791, 794 (9th Cir. 1977) (federal employee's wrongful dismissal claim). Thus, the Ninth Circuit's decision in this case carves out a new, special rule that uniquely burdens only prisoner civil rights suits that are governed by the PLRA.

To Soto's knowledge, no other court has ever faulted a plaintiff for failing to file a lawsuit while he was prohibited by statute from doing so. The Ninth Circuit's decision rejected the "tautological," "unassailable," and "virtually axiomatic" rule that has been universally employed not only by this Court but also by every other court in every other case in which a plaintiff's claim is subject to mandatory exhaustion. The Ninth Circuit's decision creates a stark split on the issue of whether a claim that is subject to mandatory exhaustion of administrative remedies accrues only after mandatory exhaustion has been completed.

II. The Ninth Circuit's analysis is demonstrably incorrect.

The Ninth Circuit's approach is not only unprecedented. It is also almost certainly incorrect. Under the Ninth Circuit's approach, the limitations period expired on Soto's claims before he ever had the right to file his claims in court. It cannot be true that Soto was required to file his lawsuit during the time that he was specifically prohibited by statute from doing so.

1. The Ninth Circuit's holding cannot be squared with this Court's repeated explanation that a claim accrues only when "the plaintiff has a complete and

present cause of action, that is, *when the plaintiff can file suit and obtain relief*." *Wallace*, 549 U.S. at 388 (emphasis added) (internal citations and quotation marks omitted). *See also Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) ("[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief."). Obviously, a prisoner who is prohibited under 42 U.S.C. § 1997e(a) from filing a claim until exhaustion is completed cannot "file suit and obtain relief" until that mandatory prerequisite is satisfied. *Cf. Spannaus*, 824 F.2d at 56-57. That is why, as *Crown Coat* explained, the statute of limitations does not begin running until after completion of mandatory exhaustion. 386 U.S. at 511-15.

The practical reasons for this rule are obvious. If the required administrative hurdle is mandatory, not merely permissive, then the limitations period may expire before the required administrative proceedings have drawn to a close. *See id.* at 514 (reasoning that this possibility was "not an appealing result"); *Dalton v. Southwest Marine*, 120 F.3d 1249, 1252 (Fed. Cir. 1997). Holding that the limitations period begins running before the plaintiff can file suit would penalize the plaintiff for failing to file a lawsuit during a period of time when he has no ability to do so.

Prisoner civil rights claims fall squarely within this rationale. The PLRA is clear that "no action shall be brought" until after administrative remedies have been exhausted. 42 U.S.C. § 1997e(a). A prisoner like Soto does not have the ability to "file suit and obtain relief" until after administrative exhaustion has been completed. *Wallace*, 549 U.S. at 388. The standard rules of claim accrual dictate

that a claim governed by the PLRA does not accrue until after mandatory exhaustion.

2. The Ninth Circuit's approach precludes a plaintiff like Soto from ever filing a civil rights suit where the administrative process takes longer than the pertinent statute of limitations. *See* Pet. App. 10a. If the Ninth Circuit's approach is correct, then Soto's lawsuit would never have been timely, no matter when it was filed. If filed before the completion of administrative exhaustion, it would have been too early, due to the PLRA's mandatory exhaustion requirement. If filed after administrative exhaustion, it would be too late, due to the statute of limitations. As far as Soto's claims are concerned, then, 42 U.S.C. § 1983 is an empty promise, because he has at all times been prohibited by statute from ever asserting his rights under it.

Yet the Ninth Circuit offers no satisfactory rationale for penalizing a plaintiff for failing to file his lawsuit while he was prohibited by statute from filing it. Nor did the Ninth Circuit identify any valid reason to treat the PLRA's mandatory exhaustion requirement differently than any other mandatory exhaustion requirement.

Instead, the Ninth Circuit opined that prisoner civil rights claims require a departure from the ordinary rule because the facts relevant to a prisoner civil rights case may "take place well before the inmate exhausts his administrative remedies and the district court may go well beyond the administrative record in deciding the claim." Pet. App. 12a. But this analysis fails to convince, for several reasons.

First, it strays far afield from the rules governing claim accrual. Whether the trial court needs to review an administrative record or a summary-judgment record is not—and has never been—relevant to when a cause of action accrues. *Wallace*, 549 U.S. at 388.

Second, every mandatory-exhaustion regime necessarily delays the point at which a complaint must be filed. That delay therefore does not distinguish a prisoner's claim from anyone else's. In fact, giving prison officials the first chance to adjudicate the issue (which necessarily introduces some delay) is the whole point of the PLRA's exhaustion requirement. *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). Using that delay as the basis for preventing a prisoner from subsequently filing his claim in court impermissibly turns the exhaustion requirement into a "dead end." *Ross*, 136 S. Ct. at 1859.

And third, the Ninth Circuit's concerns about a stale record are inapplicable where the administrative process is resolved on the merits. In Soto's case, for example, ADOC resolved Soto's grievance on the merits only a month before he filed his federal lawsuit. *See* Pet. App. 7a. If a PLRA litigant is able to administratively exhaust his claims on the merits, then the prison administrative system has recognized that the relevant facts are not too stale to warrant merits adjudication. The Ninth Circuit's hypotheses to the contrary cannot withstand examination.

3. Nor is it enough for the Ninth Circuit to depend upon equitable tolling to address the tension between statutes of limitations and the PLRA's mandatory exhaustion requirement. First, to Soto's knowledge, no court has subjected plaintiffs

to an equitable-tolling approach in any other mandatory-exhaustion context. Instead, the courts have simply applied the ordinary rules of claim accrual. The Ninth Circuit fails to explain why prisoner-plaintiffs are differently situated in this respect than any other type of plaintiffs, such that a different and more stringent accrual standard should apply. And second, as Soto's case makes clear, the equitable-tolling approach is under-inclusive. In circumstances like Soto's, it causes the limitations period to expire before the prisoner ever had the right to bring the claim in the first place—an absurdity.

In truth, the equitable-tolling approach was adopted by the circuits in the PLRA context in an attempt to eliminate the possibility that a PLRA plaintiff would be impermissibly caught between the horns of mandatory exhaustion and the statute of limitations. The etiology of the equitable-tolling approach makes this clear. Exhaustion of prisoner civil-rights claims became mandatory only when the PLRA was enacted in 1996. *See Woodford v. Ngo*, 548 U.S. 81, 85 (2006). The circuits soon recognized that mandatory exhaustion would pose a "catch-22" if the limitations period could expire before the plaintiff was allowed to file his claim in court. *Johnson v. Rivera*, 272 F.3d 519, 522 (7th Cir. 2001). The question of claim accrual does not seem to have been raised in any of the seminal cases. Instead, most of the circuits assumed that the claim accrued at the moment of injury and ruled that the limitations period should be equitably tolled while a prisoner is pursuing administrative remedies. *See Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000);

Harris v. Hegmann, 198 F.3d 153, 158 (5th Cir. 1999). *See also Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005).

Thus, the equitable-tolling approach was based solely on the courts' attempts to guard against the very same catch-22 in which Soto finds himself in this case: being penalized for failing to file a claim even though he was prohibited by statute from doing so. But the equitable-tolling regime is under-inclusive, as Soto's case demonstrates, because it still allows for a plaintiff like Soto to be statutorily prohibited from ever filing a § 1983 suit. By contrast, this Court's approach in *Crown Coat* would eliminate this under-inclusiveness by applying the ordinary principles of claim accrual to PLRA lawsuits in the same way that they apply to any other type of claim where mandatory exhaustion is required. Under *Wallace* and *Crown Coat*, the statute of limitations does not cut off the plaintiff's claim during mandatory exhaustion, because the plaintiff's claim accrues only once the plaintiff has the right to file it—*i.e.*, after exhaustion. *Wallace*, 549 U.S. at 388; *see also Crown Coat*, 386 U.S. at 514.

To the extent that the Ninth Circuit believed that applying the ordinary claim-accrual rule in the PLRA context would improperly reward non-diligent litigants, it is mistaken. If a prisoner does not timely pursue his remedies under the prison grievance process, then he will have failed to exhaust his mandatory administrative remedies. Any subsequent civil-rights suit could be dismissed for failure to exhaust. *Woodford*, 548 U.S. at 95. Only where prison officials have waived adherence to their procedural rules and have decided an untimely grievance

on its merits will a prisoner be deemed to have properly exhausted his administrative remedies despite an initially untimely grievance. *See Reyes v. Smith*, 810 F.3d 654, 658 (9th Cir. 2016). "[T]he State's decision to review a claim on the merits gives [the Court] a warrant to do so as well." *Reed-Bey v. Pramstaller*, 603 F.3d 322, 325 (6th Cir. 2010). Because an untimely grievance would be reviewed on the merits only if prison officials waived its untimeliness, applying the ordinary claim-accrual rule in the PLRA context would not allow non-diligent prisoners an improper second bite at the apple.

The Ninth Circuit's decision singles out PLRA plaintiffs and subjects them to a different claim-accrual rule than applies to every other litigant, including every other litigant in every other mandatory-exhaustion context. The result of the Ninth Circuit's approach is that plaintiffs like Soto are penalized for not filing their lawsuits even though they are statutorily prohibited from doing so: the time runs out for them to file their complaint before they are permitted to file it in the first place. That approach is almost certainly incorrect.

III. The issues presented are important and recurring.

The Ninth Circuit's decision has extremely significant potential consequences. According to the Administrative Office of the United States Courts, more than 31,500 prisoner civil-rights lawsuits are filed in federal district courts each year, comprising approximately 10.8% of all the cases that are filed annually,

nationwide.[1] Almost 5,000 such cases are filed each year in district courts within the Ninth Circuit alone.[2]

If the Ninth Circuit's holding is left intact, its analysis may be incorporated into each of these cases. In fact, the Ninth Circuit's opinion has already begun being deployed in district courts' analyses, to the detriment of plaintiffs in PLRA cases. *See, e.g.*, *Aplin v. Oregon Dep't of Corr.*, No. 6:17-CV-01222-MO, 2018 WL 2144348, at *3 (D. Or. May 8, 2018) ("The fact that grievance procedures remain available does not necessarily mean that the statute of limitations has not run.").

The Ninth Circuit's reasoning in this case is also a rejection of this Court's approach in both *Wallace* and *Crown Coat*. Due to the large number of PLRA-governed lawsuits, the Ninth Circuit's flawed reasoning will very likely be applied in numerous cases, allowing a substantial body of law that is contrary to both *Wallace* and *Crown Coat* to speedily metastasize. Absent action from this Court, the Ninth Circuit's rationale may have implications for claims arising in other mandatory-exhaustion contexts—a result that would erode the continued vitality of the positions that this Court already staked out in *Wallace* and *Crown Coat*.

The significant implications of the Ninth Circuit's decision warrant relief from this Court.

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[1] Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics 2017*, "Table C-2, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2016 and 2017," available at http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2017.pdf (last accessed July 9, 2018).

[2] Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics 2017*, "Table C-3, U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending March 31, 2017," available at http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c3_0331.2017.pdf (last accessed July 9, 2018).

IV. This case is an excellent vehicle for resolving the split of authority on this issue.

This case squarely presents the question whether a claim that is subject to mandatory administrative exhaustion—such as a claimed governed by 42 U.S.C. § 1997e(a)—accrues before mandatory exhaustion has been completed. The answer to that question is dispositive of this case.

This case is an ideal vehicle for this Court to resolve the split of authority on this issue. Soto is the rare *pro se* prisoner litigant who has managed to preserve this argument in a fulsome way before the court of appeals. There is no doubt that the issue was fully preserved at each stage in the lower courts. Soto also has obtained a fully reasoned opinion from the Ninth Circuit addressing at length the merits of the issue. Finally, the Ninth Circuit removed the question of equitable tolling from this case, meaning that the claim-accrual issue is squarely before this Court and is dispositive of this case. This petition is an excellent vehicle for resolving it.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

Dated: August 1, 2018

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