No. 18-5487

IN THE
SUPREME COURT OF THE UNITED STATES

ANGEL SOTO,
Petitioner,

v.

UNKNOWN SWEETMAN, et al.
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit correctly hold, in agreement with all other circuits that have addressed the issue, that for § 1983 suits concerning prison conditions, courts should apply equitable tolling — not delayed accrual — to account for the time necessary for an inmate to exhaust administrative remedies under the Prison Litigation Reform Act?

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents respectfully request this Court to deny Angel Soto's Petition for Certiorari seeking review of the Ninth Circuit Court of Appeals' opinion.

STATEMENT OF THE CASE

Soto, an Arizona inmate, claimed that the Defendants, ten Arizona Department of Corrections (ADC) officers, violated his federal rights on April 17, 2010. (ER 1 at 24-53.) He alleged the following: that Sweetman, Zamora, Harris, and Jones used excessive force and assaulted him (*id.* at 30-1, 33); that Victoria, Pape, and McClellan used excessive force (*id.* at 35-37); that Swaney used excessive force and sexually assaulted him (*id.* at 36, 37); and that Schell and Emore failed to stop the others (*id.* at 34).

Following the incident, Soto started the five-step grievance process mandated by Arizona prison rules, including submission of a written grievance. (SER 62 at 7.) He then abandoned the grievance process for nearly four years, until February 19, 2014, when he submitted an inmate letter in which he claimed that he had been tortured, assaulted, and sexually assaulted back on April 17, 2010. (*Id.* at 8.) He followed

that with a written grievance. (*Id.* at 9-10.) The deputy warden responded, finding Soto's allegations unfounded. (*Id.* at 11).

Soto appealed to the warden. (*Id.* at 12-13.) After that, ADC's Criminal Investigation Unit ("CIU") notified Soto that his "claim of sexual assault by staff reported to this office on 1-23-2014 has been completed" with a finding that his claim was unfounded and there was insufficient evidence to support his allegations. (ER 1 at 42.) The warden then responded to Soto's grievance appeal, concurring with the deputy warden that the allegations were unfounded and there was no evidence to support his claim of sexual assault. (SER 62 at 14.) Soto appealed to the ADC director (*id.* at 15), who affirmed the warden's response (*id.* at 16).

Soto filed his Complaint on June 13, 2014, over four years after the alleged incident. (ER 1.) The district court screened it under the PLRA — the Prison Litigation Reform Act, 28 U.S.C. § 1915A — and ordered Soto to show cause why it should not be dismissed as untimely under Arizona's two-year statute of limitations. (SER 7.) In response, Soto wrote that he "was unable to exhaust his Administrative Remedies within the Arizona Department of Corrections until an investigation

was conducted by the Criminal Investigations [Unit] (CIU)." (SER 9 at 1.) For screening purposes, the court accepted this explanation, noting that "[a]t this stage of the proceedings, Plaintiff's allegation that his filing was delayed as the result of a protracted administrative exhaustion process will satisfy the liberal pleading standard applied to *pro se* filings." (SER 10 at 5.) The court ordered the Defendants to respond to the suit. (*Id.* at 8.)

The Defendants moved for summary judgment based on the statute of limitations. (Dkt. 61.) As mandated by Ninth Circuit precedent (*Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc)), the district court explicitly warned Soto about the requirements for responding to that Motion, including the need to provide evidence to support any factual allegations:

> [Y]ou must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the Defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you.

(Dkt. 63 at 2.)

Soto responded to the Motion. (ER 68.) In his Statement of Facts — like his response to the show-cause order — he asserted that he had been "called into [the] SSU[1] office . . . and was told by SSU that CIU will be notified and that he will be seen by CIU and once CIU investigation was done he could start his griev[a]nce process." (*Id.* at 12.) Having been alerted to the need to provide his own evidence, Soto attached two sworn Affidavits, which described the incident and later events at the hospital. (SER 68 at 1-6.) But neither affidavit mentioned his having been told to start the grievance process after the investigation was completed. In fact, he presented no evidence supporting that assertion.

"The critical flaw in Plaintiff's argument," the district court noted in ruling on the Defendants' Motion for Summary Judgment, "is that there is no evidence establishing that he was required to wait until the CIU investigation was complete. . . . In short, there is no basis to toll the statute of limitations for nearly four years based on an alleged statement by an unnamed officer." (ER 99 at 8.) The court therefore granted summary judgment, finding the action time-barred. (*Id.* at 9.)

[1] "SSU" evidently refers to ADC's Special Services Unit.

A Ninth Circuit panel affirmed. (Pet. App. at 20a.) It unanimously held that "[w]hen, as here, the inmate knows of the acts when they occurred and knows that he was injured, the claim accrues." (*Id.* at 12a.) It acknowledged that immediate accrual is potentially unfair, given "a rule that requires the plaintiff to exhaust administrative remedies before suing on that claim." (*Id.* at 10a.) It nevertheless declined to adopt delayed accrual, opting instead for equitable tolling: "The exhaustion requirement justifies tolling the statute of limitations, but it does not justify creating a new accrual rule." (*Id.* at 12a-13a.)

The question then became whether Soto was entitled to equitable tolling based on his assertion that "a prison staff member told him that . . . 'once [the] investigation was done he could start his grievance process.'" (*Id.* at 13a.) The majority ruled that Soto was not entitled to tolling because no evidence in the record supported "an inference that he was misled by prison authorities into doing nothing to pursue his grievance for nearly four years." (*Id.* at 19a.) Judge Smith dissented from this latter ruling (*id.* at 21a), but Soto does not raise the dissent's analysis here. The Ninth Circuit denied his Petition for Rehearing, both by the panel and en banc. (*Id.* at 35a.)

REASONS TO DENY THE PETITION

This case presents no issue warranting this Court's attention. Soto first contends that the Opinion creates a circuit split. He next argues that it creates a Catch-22, asserting that inmates are barred from filing suit *until* they have exhausted their administrative remedies but the statute of limitations can run out *before* they have done so. He is wrong on both accounts.

There is no circuit split. Eight circuits have addressed the question presented here: how the delay from PLRA exhaustion should factor into the statute of limitations. They have *unanimously* applied equitable tolling.

There is no Catch-22. Soto argues that equitable tolling is inadequate because it failed to save his suit. But equitable tolling is not to blame. Rather than any inadequacy in the doctrine, Soto's problem was his own failure to prove his entitlement to its protection.

I. There Is No Circuit Conflict: In Prison Inmates' § 1983 Claims, the Universally Accepted Rule Applies Equitable Tolling — Not Delayed Accrual — to Account for PLRA Exhaustion.

Soto describes the Ninth Circuit's Opinion as holding "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." (Pet. at 4.) He asserts that this creates a Catch-22 in which "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." (*Id.*)

Soto is wrong, and his argument proceeds from a mistaken premise. In fact, the statute of limitations was *not* shorter than the time he needed to exhaust his administrative remedies. That is because the Ninth Circuit, like all other circuits that have addressed the issue presented here, has adopted equitable tolling to prevent the Catch-22 from arising. (*See* listing of cases, pp. 11-12, *infra*.) Furthermore, the equitable tolling doctrine did not fail Soto here: He simply failed to prove himself entitled to it.

As Soto notes, this Court has held generally "that a claim accrues only when 'the plaintiff has a complete and present cause of action, that is, when the plaintiff has the ability to file suit and obtain relief.'" (Pet. at 5 [quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)] [emphasis removed].) He asserts that "the universally accepted rule" is that a cause

of action does not accrue until mandatory exhaustion has been completed. (Pet. at 5.) But that is not true for cases arising under § 1983. None of the cases on which he relies[2] (Pet. at 6-7) is on-point, because none involved § 1983 claims.[3]

Soto filed suit under § 1983, for which "the statute of limitations begins to run when a potential plaintiff knows or has reason to know of the asserted injury." *Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026-27 (9th Cir. 2007) (internal quotation marks and citation omitted); *accord, e.g.*, *Wallace*, 549 U.S. at 388[4];

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[2] *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967); *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003); *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Trafalgar Capital Assocs. v. Cuomo*, 159 F.3d 21 (1st Cir. 1998); *United States v. Suntip Co.*, 82 F.3d 1468 (9th Cir. 1996); *Ortiz v. Sec'y of Def.*, 41 F.3d 738 (D.C. Cir. 1994); *Donnelly v. United States*, 850 F.2d 1313 (9th Cir. 1988); *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52 (D.C. Cir. 1987); *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987); *U.S. Dep't of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982); *Sherar v. Harless*, 561 F.2d 791 (9th Cir. 1977).

[3] Only one even *mentioned* § 1983, but it addressed the statute of limitations for a claim arising under a different statute. *Ridgewood Bd. of Educ.*, 172 F.3d at 250-51.

[4] *Wallace* requires courts to look to the most analogous common-law tort to determine whether it has a distinctive accrual rule. 549 U.S. at 388. Soto does not argue that any distinctive common-law accrual rule applies to his assault claims.

Owens v. Balt. City State's Attorneys Office, 767 F.3d 379, 389 (4th Cir. 2014); *Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007). The claim accrues at that time because, as this Court has noted, that is "when the plaintiff has 'a complete and present cause of action,' that is, 'the plaintiff can file suit and obtain relief.'" *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.,* 522 U.S. 192, 201 (1997)). This general rule for § 1983 suits applies to inmates' § 1983 suits. *See, e.g.*, *Vasquez v. Davis*, 882 F.3d 1270, 1276 (10th Cir. 2018) (suit for deliberate medical indifference); *Gregg v. Haw. Dep't of Pub. Safety*, 870 F.3d 883, 885, 887 (9th Cir. 2017) (same); *Cooey*, 479 F.3d at 416 (suit challenging lethal-injection protocol); *Brown v. Ga. Bd. of Pardons & Paroles*, 335 F.3d 1259, 1261 (11th Cir. 2003) (suit challenging parole policy).

Unlike the cases on which Soto relies, the exhaustion requirement for inmates' civil-rights suits is not found in § 1983, the statute that authorizes them. It arises instead from an extraneous statute, the PLRA. That distinction underlay this Court's holding that failure to exhaust under the PLRA is an affirmative defense: "The PLRA itself is not a source of a prisoner's claim; claims covered by the PLRA are typi-

cally brought under 42 U.S.C. § 1983, *which does not require exhaustion at all*." *Jones v. Bock*, 549 U.S. 199, 212 (2007) (emphasis added). Because lack of exhaustion is an affirmative defense, not a jurisdictional requirement, defendants have the burden of raising and establishing it, *Brown v. Valoff*, 422 F.3d 926, 936 (9th Cir. 2005), and waive it if they do not timely raise it, *Lira v. Herrera*, 427 F.3d 1164, 1171 (9th Cir. 2005). Thus, because failure to exhaust is extraneous to the statute giving rise to the claim, a § 1983 cause of action is complete regardless of any external exhaustion requirement. Exhaustion does not delay accrual of a § 1983 claim, and Soto had a complete and present cause of action as soon as he knew that he allegedly had been assaulted.

It is true that "a prisoner may not proceed to federal court while exhausting administrative remedies." *Brown v. Valoff*, 422 F.3d at 942 (emphasis deleted). And as the panel recognized, it is *potentially* unfair to enforce both "a rule that a claim accrues when the plaintiff knows of the injury and a rule that requires the plaintiff to exhaust administrative remedies before suing on that claim." (Pet. App. at 10a.) But, as the panel also recognized, this is not "'a problem for prisoners,'" because

"'the applicable statute of limitations *must be tolled* while a prisoner completes the mandatory exhaustion process.'" (*Id.* at 11a [quoting *Brown v. Valoff*, 422 F.3d at 943] [emphasis added].)

As the Opinion noted, the circuits that have addressed this issue *unanimously* apply equitable tolling, not delayed accrual:

> The circuits do not ameliorate the potential unfairness that may arise from the intersection of exhaustion and limitations by delaying accrual until exhaustion is complete. . . . The courts that have addressed the issue keep the accrual trigger fixed to the inmate's knowledge of the injurious event. These courts apply equitable tolling to extend limitations while the inmate exhausts his administrative remedies.

(*Id.* at 11a.) The panel cited opinions from seven circuits, all applying equitable tolling — not delayed accrual — to prison inmates' § 1983 suits:

- *Gonzalez v. Hasty*, 651 F.3d 318, 324 (2d Cir. 2011);
- *Pearson v. Sec'y Dep't of Corr.*, 775 F.3d 598, 603 (3d Cir. 2015);
- *Clifford v. Gibbs*, 298 F.3d 328, 333 (5th Cir. 2002);
- *Harris v. Hegmann*, 198 F.3d 153, 158 (5th Cir. 1999);
- *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000);
- *Johnson v. Rivera*, 272 F.3d 519, 522 (7th Cir. 2001);
- *Brown v. Valoff*, 422 F.3d 926, 936 (9th Cir. 2005);

- *Napier v. Preslicka*, 314 F.3d 528, 534 n.3 (11th Cir. 2002);
- *Leal v. Ga. Dep't of Corr.*, 254 F.3d 1276, 1280 (11th Cir. 2001).

(Pet. App. at 11a.) In another case, not cited in the Opinion, the Tenth Circuit joined the others in applying equitable tolling to PLRA exhaustion of inmates' claims. *Braxton v. Zavaras*, 614 F.3d 1156, 1160 (10th Cir. 2010).

Soto completely ignores this unanimous body of authority. He even recognizes that his cases do not address the issue raised here: "[T]he 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." (Pet. at 6 [emphasis added].)

There is no reason to grant certiorari, because there is no circuit split on the actual question presented here. The Panel simply added its voice to the unanimous chorus of opinions applying equitable tolling — not delayed accrual — to PLRA exhaustion.

II. Soto's Failure to Qualify for Equitable Tolling in His Case Does Not Make It an Inadequate Remedy.

Having failed to demonstrate a circuit split, Soto argues that it is unfair in general to apply equitable tolling in inmates' § 1983 actions:

> Thus, the Ninth Circuit's decision in this case carves out a new, special rule[5] 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 when he was prohibited by statute from doing so.
>
> . . . .
>
> In circumstances like Soto's, it causes the limitations period to expire before the prisoner ever had the right to bring the claim — an absurdity.

(Pet. at 7, 11.) Respondents agree that it would be absurd to prohibit plaintiffs from filing suit until after they could no longer file because the statute of limitations has expired. But no such Catch-22 happened here: The Panel did not fault Soto for not filing suit while he was statutorily prohibited from doing so, and his claim that inmates are being treated unfairly is mistaken.

Soto's argument rests on circular logic: He asserts that equitable tolling is an insufficient remedy *because it did not work for him*. He thereby assuming that he was entitled to have the statute of limitations tolled. He was not. In a ruling that Soto does not challenge, the major-

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[5] As noted in the previous section, the Panel did not carve out a new rule: it applied a well-established, unanimous rule dating back more than eighteen years.

ity held that he had not proved any basis for tolling. (Pet. App. at 13a-20a.) For example, he had not provided any proof, through "declaration, affidavit, authenticated document, or other competent evidence," that "he could not proceed with the grievance process until the Criminal Investigation Unit completed its investigation." (*Id.* at 16a.) Nor had he provided any proof "that, during the three years and nine months [he] stated that he was waiting to hear from the Criminal Investigation Unit, he took any steps to follow up on his claim or ask about the delay in the investigation." (*Id.* at 17a.) In short, as the majority held, "Soto offers *no* evidence that during the almost four-year delay, he 'took reasonable and appropriate steps to exhaust his . . . claim,' but 'was precluded from exhausting' by misinformation from prison staff." (*Id.* at 19a [quoting *Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010)].)

By not challenging this ruling, Soto concedes that he was ineligible for equitable tolling, a concession that refutes his accusation that the doctrine is inadequate. Equitable tolling *is* adequate . . . *if* the inmate proves that his delay in filing suit resulted from PLRA exhaustion and not his own failure to act promptly. Equitable tolling did not help Soto only because he failed to provide the proof necessary to invoke it.

There is nothing unfair about requiring inmates to offer the evidence necessary to qualify for any doctrine, equitable tolling included. Soto's failure to do so here is no reason for this Court to grant certiorari to consider disapproving the unanimous line of authority applying equitable tolling — not delayed accrual — to PLRA exhaustion in inmates' § 1983 claims.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted this 5th day of October, 2018.

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