No. 18-5487

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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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Although the Arizona Department of Corrections ("ADOC") tries to shore up the Ninth Circuit's opinion in this case, there is no way to avoid the central feature of the Ninth Circuit's ruling: it held that a plaintiff's civil-rights lawsuit may be time-barred before the plaintiff ever has the right to file it. The Ninth Circuit's holding violates the uniform rule that a cause of action does not accrue until mandatory exhaustion prerequisites are satisfied. Neither the Ninth Circuit nor ADOC has been able to identify a single case in which a court has held that a lawsuit was untimely before it could be filed in the first place. The Ninth Circuit's approach is without precedent and without peer. The petition for certiorari should be granted.

ARGUMENT

ADOC's response brief boils down to two arguments: (1) there is no circuit split on the question presented, and (2) prisoner civil-rights litigants are adequately protected by the doctrine of equitable tolling. ADOC is wrong on both counts.

I. The Ninth Circuit's holding created a circuit split.

First, the Ninth Circuit has clearly separated itself from the other circuits on the question presented in this case—that is, the question when a cause of action accrues where administrative exhaustion is a mandatory prerequisite to a lawsuit. Each and every court that has considered this issue has rejected the position adopted by the Ninth Circuit. Until the Ninth Circuit's decision in this case, "no court has ever held" that the limitations period begins to run at any point other

than the date upon which mandatory administrative remedies are exhausted. *United States v. Meyer*, 808 F.2d 912, 916 (1st Cir. 1987).

This Court has held that a claim does not accrue before a plaintiff can complete mandatory exhaustion. *See Crown Coat Front Co. v. United States*, 386 U.S. 503, 511-15 (1967). The District of Columbia Circuit has observed that this rule is so basic as to be "unassailable" and "[t]autological[ ]" and "virtually axiomatic." *Ortiz v. Sec'y of Def.*, 41 F.3d 738, 743 (D.C. Cir. 1994); *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 56 & 57 n.3 (D.C. Cir. 1987). Four other circuits have reasoned likewise. *See Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21, 36 (1st Cir. 1998); *Martinez v. United States*, 333 F.3d 1295, 1304 (Fed. Cir. 2003); *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 251 (3d Cir. 1999); *United States Dep't of Labor v. Old Ben Coal Co.*, 676 F.2d 259, 261 (7th Cir. 1982).

ADOC attempts to minimize the aberrant nature of the Ninth Circuit's ruling in this case by observing that no other circuit has specifically mentioned the *Crown Coat* rule within the context of the Prison Litigation Reform Act ("PLRA"). But, first, as noted in Soto's petition, none of these circuits rejected the *Crown Coat* analysis; they simply assumed that an equitable-tolling analysis was necessary without analyzing the question of accrual. *See* Pet. at 11-12. And second, ADOC's argument uses the wrong axis of comparison. The question presented in this petition is whether, if administrative exhaustion is mandatory as opposed to permissive, a plaintiff's claim accrues only upon completion of mandatory exhaustion—regardless of whether it is the PLRA or some other statute that

mandates administrative exhaustion. This Court and five circuits hold that a claim accrues only upon completion of mandatory exhaustion. Only the Ninth Circuit holds that it does not. Certiorari is appropriate to resolve the conflict.

Finally, regardless of how the circuit split is postured, neither ADOC nor the Ninth Circuit was able to identify any other case in which a court ruled that a lawsuit governed by the PLRA can become time-barred before the PLRA allows the plaintiff to file it. Even the Ninth Circuit does not apply the panel's illogical rule to any mandatory-exhaustion regime other than the PLRA. *See* Pet. at 6-7. Certiorari is appropriate in these circumstances as well. *Cf. Jones v. Bock*, 549 U.S. 199, 203 (2007) (granting certiorari where the Sixth Circuit had created procedural rules adapted to PLRA-governed lawsuits that were different than those adopted in any other circuit and for any other type of case).

II. ADOC cannot support the Ninth Circuit's holding on the merits.

1. On the merits, ADOC goes even further awry. Instead of directly defending the Ninth Circuit's reasoning, ADOC attempts to salvage the panel's holding by recasting its rationale and advancing different grounds for supporting the same result. But none of ADOC's attempts to shore up the panel's merits decision is successful.

For example, ADOC agrees with Soto 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." Resp. at 13. ADOC then suggests that the Ninth Circuit "did not fault Soto for not filing suit while he was statutorily prohibited from doing so." *Id*. But ADOC is mistaken. The Ninth Circuit unquestionably ruled that Soto's

claims accrued in 2010 and that his lawsuit was time-barred because it was not filed within the two-year limitations period—which, according to the Ninth Circuit, ended in 2012. Pet. App. 6a, 13a. Reasoning that "exhaustion can take longer than the limitations period," the Ninth Circuit ruled that Soto's claims were time-barred because they were not filed in 2012—even though he was prohibited by the PLRA from filing them until 2014. Pet. App. 7a, 10a. ADOC is correct that this holding is "absurd." It is incorrect that the Ninth Circuit held something different.

ADOC then suggests that claims under 42 U.S.C. § 1983 have a different claim-accrual rule than any other type of claim—namely, that they accrue "when the plaintiff knows or has reason to know of the asserted injury." Resp. Br. at 8. Immediately afterward, however, ADOC concedes that § 1983 claims ordinarily accrue at that point "because . . . that is 'when . . . the plaintiff can file suit and obtain relief.'" Resp. Br. at 9 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). In other words, § 1983 claims are no different than any other type of claim. ADOC's observations therefore support—rather than detract from—Soto's argument. As the PLRA and *Crown Coat* make clear, a prisoner like Soto cannot "file suit and obtain relief" on a § 1983 claim until after mandatory exhaustion.

ADOC next advances a new argument, contending that, because exhaustion under the PLRA is an affirmative defense, *see Jones*, 549 U.S. at 216, prisoner civil-rights claims like Soto's accrue immediately, on the off chance that a defendant might waive the exhaustion requirement. But there are good reasons why the Ninth Circuit never relied on this argument to support its holding. First, it does not

appear to be relevant to any other claim-accrual case whether mandatory exhaustion was technically postured as an affirmative defense or could theoretically be waived by the defendant. In *Crown Coat*, for example, the exhaustion requirement was contained in a contractual provision, not the statutory scheme under which the plaintiff's cause of action arose. 386 U.S. at 509. Presumably, the relevant exhaustion requirement was as waivable as PLRA-mandated exhaustion is. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought . . . until such administrative remedies as are available are exhausted."). This Court nevertheless held that the claim did not accrue until after the conclusion of the contractually required exhaustion. 386 U.S. at 514. ADOC's novel argument therefore cannot be accepted without causing serious conflict with *Crown Coat*.

Second, ADOC's proposed rule would require prisoners like Soto to file protective federal lawsuits within the limitations period in an attempt to preserve the timeliness of their claims—despite the fact that the PLRA expressly forbids such a tactic, *see* 42 U.S.C. § 1997e(a), and despite the fact that any such lawsuit would be dismissed for failure to exhaust anyway, thereby failing to successfully preserve a timely claim in federal court. *See Jones*, 549 U.S. at 223. Not for nothing did this Court in *Crown Coat*, when confronted with an argument that would require plaintiffs to file protective suits, reject such an approach: "[T]he protective suit would be a sheer formality in any event—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts." 386 U.S. at 515.

2. Finally, ADOC argues that the *Crown Coat* rule is not necessary in the PLRA context because the doctrine of equitable tolling suffices to remedy any inequity. But ADOC's argument misses the point.

First, the question of claim accrual is not a question of equity. It is simply a question of whether the toggle switch is "on" or "off"—that is, whether the plaintiff can or cannot "file suit and obtain relief." *Wallace*, 549 U.S. at 388. Equitable considerations are irrelevant. Soto was entitled as a matter of right to file his lawsuit within two years after the PLRA first allowed him to do so, because he never had a "complete and present cause of action" until mandatory exhaustion was completed. *Id*. There is no need to resort to equity in order to delay a clock that has not yet started ticking.

Second, ADOC is incorrect that Soto believes that "equitable tolling is an insufficient remedy *because it did not work for him*." (Resp. Br. at 13). The reason that equitable tolling is insufficient is because it is under-inclusive: in cases like Soto's, it permits the statute of limitations to expire before the plaintiff has the ability to file the claim in the first place. Further, it results in scenarios where a prisoner's potential claim under 42 U.S.C. § 1983 can never be timely, because the claim is either too early (*i.e.*, before the completion of exhaustion and therefore barred by the PLRA) or too late (*i.e.*, after the completion of exhaustion and barred by the statute of limitations). In this case, for example, the Ninth Circuit held that Soto *never* had a timely civil-rights claim under § 1983, even though he successfully exhausted his administrative remedies on the merits, as the PLRA required. Soto's

case illustrates a significant short-coming in the equitable-tolling approach. Contrary to ADOC's suggestion, it is not sour grapes for him to point that out.

ADOC's response brief fails to explain away the flaws of the Ninth Circuit's holding. Instead, it adds to them. The Ninth Circuit demonstrably erred in holding that a plaintiff's claim can be untimely before he has the right to file it in the first place.

III. The question presented has significant implications for a substantial number of prisoner civil-rights cases.

ADOC's response does not dispute that the question presented in this petition is of substantial importance and potentially affects numerous prisoner civil-rights cases. The published opinion that the Ninth Circuit issued in Soto's case is already being relied upon by the lower courts to support the proposition that the statute of limitations on a prisoner's claim can run even before mandatory exhaustion is completed. *See, e.g.*, *Bonelli v. Mulla*, 735 F. App'x 433, 434 (9th Cir. 2018); *Wilkins v. Vancott*, No. 17-CV-00340-YGR (PR), 2018 WL 3763316, at *5 (N.D. Cal. Aug. 7, 2018); *McGinnis v. Ramos*, No. 15-CV-2812 JLS (JLB), 2018 WL 3104307, at *5 (S.D. Cal. June 25, 2018), report and recommendation adopted, No. 15-CV-2812 JLS (JLB), 2018 WL 4092041 (S.D. Cal. Aug. 28, 2018); *Jensen v. Washington*, No. C16-1963-MJP, 2018 WL 3019000, at *1 (W.D. Wash. June 18, 2018); *Aplin v. Oregon Dep't of Corr.*, No. 6:17-CV-01222-MO, 2018 WL 2144348, at *3 (D. Or. May 8, 2018). If this Court leaves the Ninth Circuit's opinion untouched, this troubling trend will only continue, with potentially broad implications.

IV. This petition is an excellent vehicle.

Finally, this petition is the ideal vehicle on which to resolve the relevant question. Soto exhausted administrative remedies, and his grievance was adjudicated on the merits. There is no dispute that Soto properly preserved the issue on appeal. The Ninth Circuit issued a reasoned, published opinion in which it squarely held that Soto's federal lawsuit was time-barred before he had the right to file it. There are no other threshold issues that could complicate the analysis or prevent this Court from resolving the merits. If this Court chooses to address this important question, Soto's case is the ideal case in which to do so.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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