No. 19-6410

IN THE
Supreme Court of the United States

DONALD W. RAGER,

Petitioner,

v.

PAIGE AUGUSTINE, WARDEN, ET AL.,

Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

This case involves one of the most extraordinary records of diligence in exhausting administrative remedies. After being assaulted by a correctional officer, denied medical treatment for injuries to his back, wrists, and face, and placed in solitary confinement, petitioner filed grievances as required by the Prison Litigation Reform Act (PLRA). He spent years pushing them through the four-level, byzantine grievance system at FCI-Marianna, engaging in over 100 pieces of correspondence with the Bureau of Prisons (BOP), documenting each time BOP blew its own deadlines under its own policy. When BOP did not respond to his grievances at all, petitioner appealed to the next level in accordance with BOP regulations, but was told he had to wait for BOP's overdue response in the level below. In light of this galling record, respondents

never contested petitioner's diligence as to the majority of his grievances.

After years of good-faith, documented efforts to comply with the PLRA's exhaustion requirement, petitioner filed this action. When he got to federal court, he was told the clock had run—the statute of limitations was not tolled during the years he spent in *mandatory* exhaustion and therefore his claims were time-barred. This is a profoundly unjust outcome, and it is an outcome unique to the Eleventh Circuit. The Second, Fourth, Sixth and Ninth Circuits have all held that the time taken during mandatory exhaustion under the PLRA is excluded in assessing timelines, and petitioner's claims would be timely if that rule were applied here. Departing from the majority view, the Eleventh Circuit conducted an ad-hoc inquiry into petitioner's post-exhaustion diligence, and refused to toll his claims on that basis.

The government defends the Eleventh Circuit's approach here, but has repudiated it in every other setting where exhaustion of administrative remedies is a mandatory prerequisite to filing suit. In those cases, the government explained that an ad-hoc inquiry into post-exhaustion diligence distorts incentives and undermines remedial frameworks. The same is obviously true here. The Eleventh Circuit houses a disproportionate share of the country's prisoners and its longstanding approach to this tolling issue continues to leave prospective plaintiffs with substantial uncertainty regarding their legal rights.

The Court should grant certiorari.

ARGUMENT

I. This Case Involves The Most Extraordinary Diligence In Exhausting Administrative Remedies.

After suffering serious constitutional violations, petitioner filed grievances and navigated four levels of review for each one: first, presenting his grievance to staff (BP-8), 28 C.F.R. § 542.13; second, filing an administrative remedy (AR) with the Warden (BP-9), 28 C.F.R. § 542.14; third, appealing to the Regional Office (BP-10), 28 C.F.R. § 542.15; and, fourth, appealing to the Central Office (BP-11), 28 C.F.R. § 542.15.

Petitioner did not just have to navigate multiple tiers of review; he had to overcome BOP's dilatory behavior. BOP delivered many of its responses late. *See, e.g.*, 11th Cir. App'x Vol. II (Vol. II) at 21, 24, 34, 64. Other times, it did not respond at all. Pet.App.A14, G10, G14, G16-17. When BOP did respond, it often could not get its act together. For instance, one AR that petitioner mailed to the Central Office was rerouted to the Regional Office, which then rejected it because it was a Central Office appeal. Vol. II at 161; Pet.App.G16. Petitioner tirelessly documented BOP's incompetence, even getting memoranda from his unit managers attesting to delays by BOP. Vol. II at 62, 64, 72, 94. Despite BOP's own lack of diligence, petitioner continued to exhaust his administrative remedies in good faith and to document the process. Pet.App.G.

Given this record, respondents never challenged petitioner's diligence in exhausting below. In the district court, respondents challenged *one* of petitioner's several grievances, AR#604713, for failure to exhaust,

claiming he skipped a step (BP-9).[1] ECF No. 72 at 6-7, 10; ECF No. 67 (not challenging exhaustion or diligence in exhausting); ECF No. 64 (same); ECF No. 49 (same). In the Eleventh Circuit, respondents did not challenge exhaustion or diligence in exhausting as to *any* grievances, arguing instead that petitioner failed to prove diligence *post-exhaustion*. Br. Appellees 52-58.

Before this Court, respondents defend the Eleventh Circuit's assertion that petitioner "failed to prove that he diligently pursued his administrative remedies," Pet.App.A8, by arguing for the first time that petitioner did not exhaust administrative remedies in a "timely fashion." BIO 7-8. According to respondents, petitioner was not diligent insofar as he waited for BOP to respond to ARs at a particular level because BOP's policy permitted him to "consider the absence of a response to be a denial at that level." *Id*. Respondents do not specify what grievance they are referring to.

This new argument is incredible in light of the record in this case. When petitioner *did* "consider the absence of a response to be a denial," BOP *refused* to consider his claims at the next level. Take, for example, AR#624142. This AR languished at the second level for nearly two months. Pet.App.G19. So petitioner followed BOP's policy: he treated the non-response as a denial and appealed to the third level. *Id*. BOP rejected it because he had not attached a second-level response. Vol. II at 166. Undeterred, petitioner explained that he could not attach a document that did

[1] BOP mistakenly used this number for two ARs; in any case, petitioner filed BP-9s for both. Pet.App.G10-12.

not exist. *Id*. at 167. Months later, petitioner received another rejection because he did not attach the (non-existent) second-level response. *Id* at 171. This happened again, so petitioner appealed to the fourth level, explaining that he never received a second-level response and that the third level wrongly refused to consider his appeal. *Id*. at 173-74. The fourth level then rejected his appeal (three times) because he did not attach the second-level response. Pet.App.G19. This happened other times that petitioner attempted to appeal the BOP's non-responses, too. *E.g.*, Vol. II at 91-92, 95, 123-24.

It is absurd for respondents to now claim petitioner did not exhaust in a timely fashion given the errors and delay endemic to BOP's Kafkaesque grievance process. It is even more absurd that they make this new argument without identifying *a single grievance* to which it applies. Thus, to date, the only grievance they have identified as posing an exhaustion problem is the one identified in the district court: petitioner's alleged failure to submit a BP-9 for AR#604713. Excluding this grievance, there are six grievances for which the dispositive issue is whether petitioner was required to prove *post-exhaustion* diligence.[2]

[2] Nine ARs relate to the events at issue. Pet.App.D23. Of these, one was resolved, Pet.App.G8, and one was not pursued because BOP told petitioner to instead file a FOIA request, Pet.App.G4; Vol II at 47. Excluding AR#604713 thus leaves six fully-exhausted ARs. Per BOP policy, 28 C.F.R. § 542.18, this includes ARs that BOP never responded to at the final level, Pet.App.D24.

II. The Eleventh Circuit Is An Outlier For Leaving Tolling To Courts' Ad-Hoc Assessment Of Whether Petitioner's Time Pursuing Mandatory Exhaustion "Prevented Him From Timely Filing A Federal Claim."

The issue of post-exhaustion diligence is the one the magistrate judge accepted, reasoning that "even if [petitioner] received late responses, no responses, and unjustified rejections or denials [from BOP], he could have filed" suit within the limitations period. Pet.App.D27. The district court adopted this opinion in relevant part, Pet.App.C1-C3, and the Eleventh Circuit agreed that petitioner "does [not] meet the standard for equitable tolling" because he "failed to prove" that "the exhaustion of his administrative remedies prevented him from timely filing a federal claim," Pet.App.A8. This is where the Eleventh Circuit breaks ranks with every other circuit to consider this question.

The Second, Fourth, Sixth, and Ninth Circuits have all adopted the contrary position: the time a prisoner spends diligently pursuing mandatory administrative remedies is excluded from the statute of limitations under federal equitable tolling. These courts have rejected an approach in which the timeliness of an action turns on an ad-hoc assessment of the prisoner's post-exhaustion conduct.

The Sixth Circuit offered a straightforward rationale for the majority rule: exhaustion is "a mandatory threshold requirement in prison litigation" and "[p]risoners are therefore prevented from bringing suit in federal court for the period of time required to exhaust." *Brown v. Morgan*, 209 F.3d 595, 596 (6th

Cir. 2000). Logically, then, the statute of limitations must be tolled during exhaustion. *Id.*

The Ninth Circuit followed suit, also recognizing that "the intersection of the exhaustion and statute of limitations requirements" could "creat[e] a problem for prisoners." *Brown v. Valoff*, 422 F.3d 926, 942-43 (9th Cir. 2005). Accordingly, it held that the statute of limitations "must be tolled while a prisoner completes the mandatory exhaustion process." *Id.* at 943. It later reiterated that a prisoner is "entitled to tolling" for time spent exhausting. *Soto v. Sweetman*, 882 F.3d 865, 875 (9th Cir. 2018).

The Second Circuit also recognized the "catch-22" at the core of this issue: "the prisoner who files suit . . . prior to exhausting administrative remedies risks dismissal based upon § 1997e; whereas the prisoner who waits to exhaust his administrative remedies risks dismissal based upon untimeliness." *Gonzalez v. Hasty*, 651 F.3d 318, 323 (2d Cir. 2011) (alteration in original). Thus, it "join[ed] [its] sister circuits" in holding that the statute of limitations "must be tolled while a prisoner completes the mandatory exhaustion process." *Id.* at 323-24. Any other holding would "permit [prison officials] to exploit the exhaustion requirement through indefinite delay in responding to grievances." *Id.* at 323 (alteration in original).

The Fourth Circuit has joined "this consensus." *Battle v. Ledford*, 912 F.3d 708, 720 (4th Cir. 2019). "[P]risoners face a complete and absolute barrier to litigation . . . during their mandatory administrative grievance proceedings," it explained, and such a "barrier is far from ordinary." *Id.* at 719. It was "aware of no other federal statute in which a mandatory exhaustion requirement could erode a litigant's limitations

period." *Id*. Thus, it concluded that equitable tolling was necessary to "satisf[y] the goals of § 1983 and the PLRA while also comporting with principles of equity: it gives [prisoners] the benefit of the full limitations period applicable to other litigants, no more and no less." *Id*. at 720.

The Eleventh Circuit, however, has declined to provide clarity to prospective litigants on this issue for two decades. *See, e.g.*, *Leal v. Georgia Dep't of Corr.*, 254 F.3d 1276, 1280 (11th Cir. 2001) (declining to decide whether "the actual exhaustion of remedies by a prisoner will operate to toll the statute of limitations"); *Napier v. Preslicka*, 314 F.3d 528, 534 n.3 (11th Cir. 2002) (noting without deciding that "other circuits have applied [equitable tolling] to the administrative exhaustion requirement for prison condition suits"); *Zamudio v. Haskins*, 775 F. App'x 614, 616 n.2 (11th Cir. 2019) ("Although we have declined expressly to rule on the issue, we have noted that other circuits apply federal equitable tolling principles to . . . a prisoner's exhaustion of administrative remedies.").

Here, the Eleventh Circuit was forced to resolve the question presented because respondents failed to challenge diligence during exhaustion as to virtually all of petitioner's claims. And on that score, it broke from other circuits, requiring an ad-hoc analysis of whether petitioner showed that "that the exhaustion of his administrative remedies prevented him from timely filing a federal claim." Pet.App.A8.

The BIO claims that the Eleventh Circuit's ad-hoc inquiry into post-exhaustion diligence does not conflict with other courts because it did not "reject[] tolling categorically." BIO 11. It is true that the Eleventh

Circuit's ad-hoc inquiry could allow tolling for some prisoners. But that is beside the point. The split is not about whether federal equitable tolling for PLRA exhaustion is categorically off the table. The split is that four circuits always pause the clock during mandatory PLRA exhaustion while one circuit conditions tolling on an ad-hoc assessment of the prisoner's *post-exhaustion* conduct. "[N]ot one" of the other courts "require[] a claimant to prove additional extraordinary circumstances beyond the exhaustion requirement or to show constant diligence until the moment of filing." *Battle*, 912 F.3d at 719.

III. This Court's Jurisprudence Requires Reversing The Decision Below.

The Eleventh Circuit's ad-hoc approach conflicts with this Court's precedents. This Court has cautioned that "[s]tate legislatures do not devise their limitations periods with national interests in mind," so federal courts must "assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Occidental Life Ins. Co. v. E.E.O.C.*, 432 U.S. 355, 367 (1977). Thus, if a state's timing rules defeat § 1983's goals of compensation, deterrence, uniformity, and federalism, they are "inconsistent with federal law" and should not be adopted. *Hardin v. Straub*, 490 U.S. 536, 538, 539 (1989).

As the other circuits have concluded, where, as here, state law does not provide tolling during mandatory exhaustion, it frustrates § 1983's core purpose of compensating people who have sustained constitutional injuries. And contrary to the goal of deterrence, it creates "perverse incentives" for prison officials to

"extend regulatory deadlines" and "stall in their review of individual grievances." *Battle*, 912 F.3d at 716*; see also Gonzalez*, 651 F.3d at 323-24 (explaining that without tolling prison officials could "exploit the exhaustion requirement through indefinite delay in responding to grievances"). It is also inconsistent with § 1983's interest in uniformity, creating "a disparity between those who are incarcerated and those who are not," and between prisoners whose grievances are "processed with delay" and those whose grievances receive "speedy resolution." *Battle*, 912 F.3d at 716.

Accordingly, this Court has declined to rely exclusively on state timing rules where they fail to account for federal administrative processes. In *Occidental*, for instance, this Court noted that "the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." 432 U.S. at 368. "[I]t is hardly appropriate" to rely on state timing rules because the state "could not have taken into account the decision of Congress to delay judicial action while the EEOC performs its administrative responsibilities." *Id*. The same is true here: states with no-tolling rules could not have considered the mandatory exhaustion requirement imposed by the PLRA. *C.f. Bd. of Regents v. Tomanio*, 446 U.S. 478, 490 (1980) (suggesting that tolling of § 1983 limitations may be necessary where a remedy "is structured to require previous resort to state proceedings"). Thus, federal tolling rules apply.

The BIO argues that, unlike the cases decided by the other circuits, which involved limitations periods of one to three years, "there is no similar risk of conflict between state and federal law" here because Florida has a four-year limitations period. BIO 12. But

grievance processes routinely take years to complete. *See, e.g.*, *Brown*, 422 F.3d at 932-34 (describing grievance process lasting nearly three years); *Gonzalez*, 651 F.3d at 323 ("[A] full three years could pass while an inmate exhausts his administrative remedies."). The BIO does not explain how it and courts are to draw a principled line between three-year and four-year limitations periods. Nor does it cite any authority that has adopted this abstract, probabilistic approach to determine entitlement to federal equitable tolling.

Indeed, when the United States has perceived its interests to be on the other side of this question, it has eschewed the very same inquiries into post-exhaustion diligence, explaining that such an "ad hoc approach" to tolling "would not furnish the clear, predictable rules necessary to avoid distorting the parties' incentives and undermining the remedial framework." Br. United States as Amicus Curiae, *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99 (2013) (No. 12-729), 2013 WL 3362092, at *7. Accordingly, the United States has, until now, drawn a clear distinction between tolling in the context of mandatory and optional exhaustion: where it is merely optional, the limitations period should begin to run "when suit can first be brought," whereas a claim "does not accrue until the conclusion of the administrative proceeding" if exhaustion is mandatory. Br. in Opposition, *Martinez v. United States*, 540 U.S. 1177 (2004) (No. 03-418), 2004 WL 49828, at *6-7, 11; *see also* Br. in Opposition, *Dean v. United States*, 565 U.S. 1111 (2012) (No. 11-329), 2011 WL 5548720, at *6 (explaining that analogy between Tucker Act and habeas corpus is "inapt" because the petitioner "was not required to exhaust his Board remedies before filing a

Tucker Act claim," but "an inmate is required to exhaust state-court remedies before seeking habeas relief").

IV. The BIO Does Not Contest The Importance Of The Question Presented Or Raise A Serious Vehicle Problem.

Respondents have never disputed that the majority of petitioners' claims would be timely if he is entitled to tolling during mandatory exhaustion. Moreover, untimeliness was the sole basis for the Eleventh Circuit's decision as to these claims. This case thus squarely presents the question whether federal equitable tolling turns on an ad-hoc assessment of a prisoner's post-exhaustion conduct.

The BIO's argument to the contrary is a red herring. It says "this case is a poor vehicle . . . because it involves a *Bivens* claim rather than a Section 1983 claim." BIO 14. But, as acknowledged by the court below, timing rules for *Bivens* and Section 1983 claims are identical. Pet.App.A5. The Eleventh Circuit never reached whether the claims ruled untimely stated a claim under *Bivens*. Respondents remain free to argue against the merits of petitioner's claim on remand, but it poses no obstacle to review of the tolling issue.

The question presented has immense practical significance to prisoners in the Eleventh Circuit, which

houses a disproportionate share of the country's prisoners: 13.2% of all state prisoners,[3] 11.4% of all federal prisoners in BOP custody,[4] and a staggering 36.6% of all federal inmates in private facilities.[5] Under the Eleventh Circuit's ad-hoc approach, prospective litigants are left without certainty regarding their legal rights and exposure—precisely what statute of limitations is supposed to provide.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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[3] Danielle Kaeble & Mary Cowhig, *Correctional Populations in the United States, 2016*, BUREAU OF JUSTICE STATISTICS BULLETIN 11 (Apr. 2018), https://www.bjs.gov/content/pub/pdf/cpus16.pdf.

[4] Federal Bureau of Prisons, Inmate Population Report Generator, https://www.bop.gov/about/statistics/population_statistics.jsp.

[5] *Id.*