No. 20-5366

IN THE

Supreme Court of the United States

ANTHONY BERNARD SMITH, JR.,
Petitioner,

v.

RON DAVIS,
Respondent.

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

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. THE PETITION PRESENTS A CLEAR CIRCUIT SPLIT	2
II. THE STATE IGNORES THE IMPORTANCE OF A UNIFORM APPROACH TO EQUITABLE TOLLING FOR FEDERAL STATUTES OF LIMITATIONS	7
III. THE QUESTION PRESENTED IS DISPOSITIVE OF THE TIMING ISSUE IN MR. SMITH'S CASE	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Burnett v. *N.Y. Cent. R.R. Co.*, 380 U.S. 424 (1965) 8
Chardon v. *Fumero Soto*, 462 U.S. 650 (1983) 7, 8
Checo v. *Shinseki*, 748 F.3d 1373 (Fed. Cir. 2014) 1, 4
Clay v. *United States*, 537 U.S. 522 (2003) 7
Coulter v. *Kelley*, 871 F.3d 612 (8th Cir. 2017) 1
Harper v. *Ercole*, 648 F.3d 132 (2d Cir. 2011) 1, 2, 3, 4
Hizbullahankhamon v. *Walker*, 255 F.3d 65 (2d Cir. 2001) 2, 3
Holland v. *Florida*, 560 U.S. 631 (2010) 1, 7, 8
Knight v. *Schofield*, 292 F.3d 709, 711 (11th Cir. 2002) 4
Lonchar v. *Thomas*, 517 U.S. 314 (1996) 8
Pace v. *DiGuglielmo*, 544 U.S. 408 (2005) ... 1
San Martin v. *McNeil*, 633 F.3d 1257 (11th Cir.) 5, 6
Simon v. *Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *rev'd sub nom.*, *Republic of Iraq* v. *Beaty*, 556 U.S. 848 (2009) 6
Socop-Gonzalez v. *I.N.S.*, 272 F.3d 1176 (9th Cir. 2001) (en banc) 6
Spottsville v. *Terry*, 476 F.3d 1241 (11th Cir. 2007) 5
Valverde v. *Stinson*, 224 F.3d 129 (2d Cir. 2000) 2

INTRODUCTION

The State does not dispute that the circuits are split on the actual question presented: whether reasonable diligence to remedy an extraordinary circumstance is sufficient for equitable tolling to stop the clock on a statute of limitations. As the State concedes, "the difference 'is that one [side] *requires* an evaluation of petitioner's diligence across *the whole time* involved, and the other conducts the same inquiry but for just *part of that time*.'" Opp. 9 n.3 (emphasis added). Exactly. This difference in approach means that Mr. Smith's habeas petition was time barred in the Ninth Circuit even though it would have been heard in two other circuits, if not more.

Nevertheless, the State contends the split petitioner identified is "substantially overstate[d]." Opp. 10. It starts by restating points the majority made below based on *Holland* v. *Florida*, 560 U.S. 631 (2010) and *Pace* v. *DiGuglielmo*, 544 U.S. 408 (2005). But the point of Mr. Smith's petition is that courts have diverged in their application of precisely those precedents. Like the dissent below, courts in other circuits read *Holland* and *Pace* as supporting a diligence standard that is directly opposed to the one the Ninth Circuit applied below. *E.g.*, *Harper* v. *Ercole*, 648 F.3d 132, 136–39 (2d Cir. 2011); see also *Coulter* v. *Kelley*, 871 F.3d 612, 624–27 (8th Cir. 2017) (Kelly, J., dissenting); *Checo* v. *Shinseki*, 748 F.3d 1373, 1380 (Fed. Cir. 2014). This fully aired debate underscores the need for this Court's review.

Congress expressly legislated a single statute of limitations that applies to cases under AEDPA. The circuit split over how to conduct equitable tolling defeats the uniformity Congress sought to achieve when it legislated a federal statute of limitation. The Brief

in Opposition disregards this statutory scheme and the enormous consequences that flow from a court's conclusion that a habeas petition is time-barred.

ARGUMENT

I. THE PETITION PRESENTS A CLEAR CIRCUIT SPLIT.

The State acknowledges that in the Second Circuit, a petitioner "is required to 'demonstrate diligence' only 'for a period warranting tolling,' and not thereafter through the date of filing.'" Opp. 10 (quoting *Harper*, 648 F.3d at 136). In the decision below, the Ninth Circuit majority took exactly the opposite approach, holding "that it is not enough for a petitioner seeking equitable tolling to attempt diligently to remedy his extraordinary circumstance[]." Pet. App. 31a.

Attempting to soften this clear contrast, the State gestures to an inapposite Second Circuit case, *Valverde* v. *Stinson*, 224 F.3d 129 (2d Cir. 2000). See Opp. 10 n.6. As *Harper* explained, and as the State recognizes (*id.*), *Valverde* involved "extraordinary circumstances that had no discernable end date." *Harper*, 648 F.3d at 140. In a scenario like *Valverde*, stop-clock courts will extend the scope of the diligence analysis, because "the amount of time a petitioner seeks to toll *extends to the date of filing*." Pet. 20. That is not this case. Mr. Smith seeks to toll a period of time with discernable start and end dates, within which he presented "convinc[ing]" evidence that he "acted diligently." Pet. App. 109a; *id.* at 62a (Berzon, J., dissenting) (noting Mr. Smith's "diligent efforts in seeking" his legal file from his former attorney).

Indeed, Mr. Smith's undisputed diligence to remedy his extraordinary circumstance separates his case from *Hizbullahankhamon* v. *Walker*, 255 F.3d 65 (2d

Cir. 2001) (Sotomayor, J.); see Opp. 11—a case that, in all events, precedes both *Pace* and *Holland*. In *Hizbullahankhamon*, the petitioner exercised essentially *no diligence* whatsoever. Moreover, the 22-day period petitioner sought to equitably toll was not dispositive. Then-Judge Sotomayor reasoned that the 22-day period was relevant to timeliness only after many assumptions were made: (1) "*assuming* that the one-year limitations period should be tolled . . . for each of the 194 days [petitioner] subsequently spent in solitary confinement," "due to his own misbehavior";(2) assuming a "substract[ion] [of] another 60 days . . . during which petitioner *hypothetically could have* moved for reargument of his [state court] *coram nobis* motions," *Hizbullahankhamon*, 255 F.3d at 75–76 (emphasis added); and (3) the court had also "assum[ed] that" the state court "permits motions to reargue *coram nobis* motions," an argument which he raised "for the first time on appeal," *id.* at 72–73. In other words, there were multiple significant periods of delay, beyond the 22-day period petitioner sought to equitably toll. *Hizbullahankhamon* is thus easily distinguishable.

By contrast, Mr. Smith falls squarely within the key holding of *Harper*, which follows *Holland*: he has "demonstrate[d] that 'he acted with reasonable diligence throughout the period he seeks to toll," 648 F.3d at 138, *i.e.*, the 66 days that his former attorney wrongfully withheld his legal file, see Pet. App. 109a (magistrate judge opinion); *id.* at 35a (majority opinion); *id.* at 62a–63a (Berzon, J., dissenting). And Mr. Smith filed his habeas petition "within the time that would have remained available to him under AEDPA" had his attorney properly returned his file. See

Harper, 648 F.3d at 138. In short, there is a split—as the State concedes—and it makes a difference.[1]

The State's further contention that the Eleventh Circuit follows the Ninth Circuit is wrong; the Eleventh Circuit applies a straightforward stop-clock approach.

In *Knight* v. *Schofield*, 292 F.3d 709, 711 (11th Cir. 2002), the court considered "litigants [who] are eligible for such extended deadlines," contra Opp. 12, as those who are diligent in remedying their extraordinary circumstances. That is, for example, a petitioner who "exercise[s] diligence in inquiring about" events that relate to their extraordinary circumstance and who "diligently seeks information about the status of [their] case." *Knight*, 292 F.3d at 711. In that case, the court explicitly adopted the stop-clock rule. *Id.* at 712 ("Tolling means just what it says—the clock is stopped while tolling is in effect."); see Pet. 8–10.

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[1] The State tries to sidestep this throughout the opposition by recasting this case as one about causation and asserts that "the only way to assess" causation "'is to examine' whether the petitioner acted with reasonable diligence throughout the limitations period." Opp. 3. But the diligence required after a petitioner acts diligently to remedy an extraordinary circumstance, as in *Harper*, is that ordinarily required to file "within the time that would have remained"—that is, within the remaining time on the limitations clock after tolling. *Harper*, 648 F.3d at 138; *see* Pet. 18. *See also Checo*, 748 F.3d at 1381. But this is not a causation case, and indeed, most of the State's arguments would only become relevant on remand, where Mr. Smith also has arguments of his own. *E.g.*, *id.* (a petitioner "only need[s] to demonstrate causation between [his] [extraordinary circumstance] and the period [he] sought to be tolled"); *Harper*, 648 F.3d at 138 ("This case presents no negligence to undermine causation.").

Spottsville v. *Terry*, 476 F.3d 1241 (11th Cir. 2007) also does not help the State. Opp. 12. There, "the limitations period [had run] for 160 days" already, and then petitioner pursued relief in state court (thus statutorily pausing the limitations clock). *Spotsville*, 476 F.3d at 1243. The superior court denied relief and gave misleading instructions for appeal, contributing to petitioner's untimely state court appeal, after which he had exceeded the limitations period. *Id.* at 1243–45. But the Eleventh Circuit tolled the limitations period "during the pendency of [this] attempted appeal" because petitioner "followed the instructions of the state court to the letter"; in other words, he acted diligently even though he was misled (*i.e.* the extraordinary circumstance). *Id.* at 1245. Then the court noted that petitioner filed two months after his extraordinary circumstance ended, which was within the time he had remaining on the clock *after accounting for equitable tolling*. *Id.* at 1245–46. Under the circuit's stop-clock approach, the outer limit is easily discernable—206 days, which would have meant a total of 366 untolled days had elapsed. In the Ninth Circuit, that outer limit will shift based on the subjective views of the judge.

Further, the State incorrectly says that *San Martin* v. *McNeil*, 633 F.3d 1257 (11th Cir. 2011) "follow[s] *Pace*'s approach," Opp. 12–13, (as the State construes *Pace*). In fact, *San Martin* does not even cite *Pace*. And the petitioner there "failed to make *any* showings of 'reasonable diligence'" for *any* time period, making it an easy case to deny equitable tolling. *San Martin*, 633 F.3d at 1270 (emphasis added). *San Martin*, moreover, contrasts with *Knight*, which stands for the proposition "that a petitioner's efforts to learn the disposition of" his case "are crucial to determining whether equitable tolling is appropriate."

Id. at 1269. In so reasoning, the court relied on *Holland*'s admonition that "[t]he diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Id.* at 1267 (quoting *Holland*, 560 U.S. at 653). In all events, petitioner did not satisfy the extraordinary circumstances prong. *Id.* at 1270. Again, here, Mr. Smith was diligent during the period he seeks to toll, and the Ninth Circuit assumed he faced an extraordinary circumstance. If the State wishes to contest that assumption, the time and place is on remand.

The State's remaining attempts to minimize the circuit split miss the mark. *First*, the State asserts that "the 'inconsistency'" among the lower courts identified by the D.C. Circuit "no longer exists" because *Socop-Gonzalez* v. *I.N.S.*, 272 F.3d 1176 (9th Cir. 2001) (en banc) has been overruled by the decision below. Opp. 13 (citing *Simon* v. *Republic of Iraq*, 529 F.3d 1187, 1195 (D.C. Cir. 2008), *rev'd sub nom. on other grounds*, *Republic of Iraq* v. *Beaty*, 556 U.S. 848 (2009)). Not so. As explained, the Ninth Circuit still stands opposed to the Second and Eleventh Circuits. *Second*, the State contends that "an intra-circuit conflict is not something that would ordinarily warrant a grant of certiorari," Opp. 13, but that argument misses the point. The petition does not simply seek to resolve intra-circuit inconsistencies; it describes those inconsistencies to highlight the persistent confusion about the contours of *Holland* and *Pace*, which is an underlying cause of the circuit split that the petition identifies. See also *Simon* v. *Republic of Iraq*, 529 F.3d 1187, 1195 (D.C. Cir. 2008) (noting that the two approaches "undoubtedly conflict"), *rev'd sub nom. on other grounds*, *Republic of Iraq* v. *Beaty*, 556 U.S. 848 (2009).

II. THE STATE IGNORES THE IMPORTANCE OF A UNIFORM APPROACH TO EQUITABLE TOLLING FOR FEDERAL STATUTES OF LIMITATIONS.

The State has little to say in response to the argument about the importance of the question presented. *Compare* Pet. 20–23, *with* Opp. 15. Primarily, it suggests it is unnecessary to resolve the circuit split because *Chardon* v. *Fumero Soto*, 462 U.S. 650 (1983), purportedly rejected the need for uniform application of equitable tolling principles. Opp. 15. That argument ignores critically important context, which makes clear *Chardon* did no such thing.

Chardon involved Section 1983 claims. As this Court explained, "there is no federal statute of limitations applicable to § 1983 claims." *Chardon*, 462 U.S. at 654. The reasoning in that case flowed directly from the Court's observation that "[t]he federal civil rights statutes do not provide for a specific statute of limitations, establish rules regarding the tolling of the limitations period, or prescribe the effect of tolling." *Id.* at 655. Instead, "[i]n a § 1983 action . . . Congress has specifically directed the courts, in the absence of controlling federal law, to apply state statutes of limitations and state tolling rules." *Id.* at 661.

In this respect, AEDPA is on the opposite end of the statutory spectrum. AEDPA specifically brought habeas petitions within "a uniform federal rule," following a period when "no statute of limitations governed requests for federal habeas corpus or § 2255 habeas-like relief." *Clay* v. *United States*, 537 U.S. 522, 528, 531 (2003); see also *Holland*, 560 U.S. at 650 ("Equitable tolling . . . asks whether federal courts may excuse a petitioner's failure to comply with *federal* timing rules, an inquiry that does not implicate a state

court's interpretation of state law."). AEDPA has precisely the kind of "federal statute of limitations," *Chardon*, 462 U.S. at 662, that was absent in *Chardon*.

For AEDPA cases in particular, as well as other cases involving federal statutes of limitations, Pet. 20—which the State completely ignores—a consistent approach to equitable tolling is essential to achieving legislative goals of "national uniformity." *Burnett* v. *N.Y. Cent. R.R. Co.*, 380 U.S. 424, 434 (1965). Anything less undermines congressional authority and disrupts the delicate balance of power between the judiciary and the legislature. Pet. 21 (citing *Scoop-Gonzalez*, 272 F.3d at 1196). With AEDPA, moreover, fairness concerns are sharpened by "[t]he importance of the Great Writ," *Holland*, 560 U.S. at 649, and the "risk[ ] [of] injury to an important interest in human liberty," *Lonchar* v. *Thomas*, 517 U.S. 314, 324 (1996). See also Pet. 22–23.

III. THE QUESTION PRESENTED IS DISPOSITIVE OF THE TIMING ISSUE IN MR. SMITH'S CASE.

The State contends Mr. Smith is "unlikely to benefit from the rule he asks the Court to adopt." Opp. 14. Yet that position is premised solely on the dissenting opinion of the lower court, which noted a "factual ambiguity" related to causation. *Id.* As the State must acknowledge, the lower court presumed that Mr. Smith satisfied the "extraordinary circumstance" standard. *Id.* The magistrate judge opined that Mr. Smith presented "convinc[ing]" evidence that Mr. Smith had "acted diligently" to obtain the legal file his attorney wrongfully withheld, Pet. App. 109a, and the majority opinion did not contest this finding. And as Judge Berzon remarked, "[i]t is undisputed that Smith's lawyer wrongfully withhold

Smith's appellate record, despite Smith's diligent efforts in seeking it, for 66 days." *Id.* at 62a. Meanwhile, the circumstances show that Mr. Smith did make use of his file. See Pet. 24; Pet. App. 111a–179a.

If this Court were to endorse the stop-clock approach to equitable tolling, Mr. Smith would surely benefit from the ruling. The tolling question was the sole dispositive issue as to whether his habeas petition was time-barred. The fact that both the majority and dissent below assumed Mr. Smith satisfied the "extraordinary circumstances" prong of equitable tolling is not a reason to deny this petition for certiorari. Contra Opp. 14. Rather, it makes this an unusually clean case for resolution of the circuit split presented by the petition.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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