

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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CURTIS CHUN,

*Petitioner,*

v.

CITY AND COUNTY OF HONOLULU,

*Respondents.*

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**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**

Whether the District Court and the Court of Appeals failed to properly consider the full extent of Petitioner's lack of fitness to proceed in unrelated State of Hawaii Criminal Proceedings in determining whether the applicable Statute of Limitations was tolled in Petitioner's Civil Rights Employment Lawsuit against the City and County of Honolulu?

**STATEMENT OF RELATED CASES**

Chun v. City and County of Honolulu, No. 18-00131  
JMS-RT

United States District Court  
For the District of Hawai'i  
Judgment entered July 13, 2020

Chun v. City and County of Honolulu, No. 20-16558  
United States Court of Appeals  
For the Ninth Circuit  
Opinion entered February 18, 2022

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
STATEMENT OF RELATED CASES.....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES.....	iv
PETITION FOR A WRIT OF CERTIORARI .....	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTES AND CONSTITUTIONAL PROVI- SIONS INVOLVED.....	2
INTRODUCTION AND STATEMENT OF THE CASE .....	2
REASONS FOR GRANTING THE WRIT.....	5
CONCLUSION.....	16

## APPENDIX

United States Court of Appeals for the Ninth Circuit, Memorandum, February 18, 2022.....	App. 1
United States District Court for the District of Hawaii, Order, July 13, 2020 .....	App. 5
United States District Court for the District of Hawaii, Judgment, July 13, 2020 .....	App. 20

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Bills v. Clark</i> , 628 F.3d 1092 (9th Cir. 2010) .....	6
<i>Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC</i> , 753 F.3d 862 (9th Cir. 2014) .....	2, 5
<i>Gordon v. County of Orange</i> , 888 F.3d 1118 (9th Cir. 2018) .....	5
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986) .....	8
<i>Miller v. Runyon</i> , 77 F.3d 189 (7th Cir. 1996) .....	16
<i>Office of Hawaiian Affairs v. State</i> , 133 P.3d 767 (Haw. 2006) .....	6
<i>Posey v. Lake Pend Oreille Sch. Dist. No. 84</i> , 546 F.3d 1121 (9th Cir. 2008) .....	9
<i>State v. Castro</i> , 93 Haw. 424 (2000) .....	8
<i>State v. Tierney</i> , 127 Haw. 157, 277 P.3d 251 (2012) .....	8
STATUTES	
28 U.S.C. § 1254(1) .....	2
Haw. Rev. Stat. § 378-63(a) .....	2, 5
Haw. Rev. Stat. § 657-7 .....	2, 5
Haw. Rev. Stat. §§ 704-403 to -405 .....	8
Rehabilitation Act and Hawaii Whistleblower Protection Act, § 540 .....	2, 5, 6
Safe Water Act .....	7

## TABLE OF AUTHORITIES – Continued

	Page
RULES	
Sup. Ct. R. 13.1 .....	2
Sup. Ct. R. 13.3 .....	2

**PETITION FOR A WRIT OF CERTIORARI**

Petitioner CURTIS CHUN (hereinafter “CHUN”), the Plaintiff in the United States District Court, for the District of Hawaii and the Plaintiff-Appellant in the United States Court of Appeals for the Ninth Circuit, respectfully petitions for a Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

**OPINIONS BELOW**

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, filed February 18, 2022, is unreported and reproduced at App. 1-4. The Order Granting Defendant’s Motion for Summary Judgment of the United States District Court for the District of Hawaii, filed July 13, 2020, is unreported and reproduced at App. 5-19. The Judgment of the United States District Court for the District of Hawaii, filed July 13, 2020, is reproduced at App. 20.

**JURISDICTION**

The Court of Appeals entered judgment on February 18, 2022. App. 1-4. This Petition to the Supreme Court is timely if filed on or before May 19, 2022. This

Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.1 and 13.3.

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**STATUTES AND CONSTITUTIONAL  
PROVISIONS INVOLVED**

This case does not involve interpretation of statutory or constitutional provisions.

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**INTRODUCTION AND  
STATEMENT OF THE CASE**

This case raises issues of exceptional importance of equitable tolling in the context of a statute of limitations in a civil rights lawsuit.

Chun appealed the adverse grant of summary judgment in his employment discrimination action brought against the City and County of Honolulu (the "City") pursuant to § 504 of the Rehabilitation Act and the Hawaii Whistleblower Protection Act ("HWPB").

A two-year statute of limitations applied to Chun's claims under the Rehabilitation Act and HWPB. *See* Haw. Rev. Stat. § 378-63(a), 657-7; *Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC*, 753 F.3d 862, 869 (9th Cir. 2014). Chun's claims accrued no later than August 6, 2012, his last day of employment with the City. Chun did not file his complaint until April 10,



2018. Thus, absent equitable tolling, Chun's claims were time-barred.

Importantly, Chun submitted evidence that he was deemed unfit to stand trial on unrelated criminal charges at various times in 2012, 2014, and 2015. The record in the District Court established that Chun was first deemed fit to proceed on a criminal charge on February 21, 2018. The record was silent as to any showing of Chun's fitness to proceed from 2012 until February 21, 2018. Conversely, the record affirmatively established that Chun was not fit to proceed in 2012, 2014, and 2015.

Looking in a light most favorable, and drawing all reasonable inferences in favor of Chun, the non-moving party, based on the procedural posture of the case (summary judgment proceedings pursuant to Federal Rules of Civil Procedure, Rule 56), the record established that Chun's mental impairment persisted until February 21, 2018, when Chun was found fit to proceed for the first time since 2012.

The evidence that Chun submitted in opposing the City's Motion for Summary Judgment, raised a triable issue of fact that Chun's mental impairment made it impossible to meet the filing deadline in his employment discrimination/retaliation case.

The 2015 mental evaluation report on which Chun primarily relied showed that Chun was not fit to proceed in legal proceedings, would not regain fitness anytime soon, and was unable to participate in his own legal defense or to cooperate with his own defense

counsel in the criminal proceedings. The foregoing evidence raised a triable issue of fact that the applicable statute of limitations in the case at bar, was tolled from 2012 until February 21, 2018, when the record established for the first time that Chun was found fit to proceed in a legal proceeding of any kind.

The United States District Court for the District of Hawaii granted the City's Motion for Summary Judgment on July 13, 2020. The Order Granting Defendant's Motion for Summary Judgment of the United States District Court for the District of Hawaii, filed July 13, 2020, is unreported and reproduced at App. 5-19.

The United States District Court for the District of Hawaii also entered Judgment on July 13, 2020. The Judgment of the United States District Court for the District of Hawaii, filed July 13, 2020, is reproduced at App. 20.

On February 18, 2022, the United States Court of Appeals for the Ninth Circuit entered its Memorandum Opinion affirming the District Court's Grant of Summary Judgement in favor of the City. The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, filed February 18, 2022, is unreported and reproduced at App. 1-4.



### REASONS FOR GRANTING THE WRIT

This case raises issues of exceptional importance namely, whether Petitioner raised a triable issue of fact that he was mentally unfit to proceed in criminal cases that established Chun's applicable Statute of Limitations in Chun's Civil Rights Employment lawsuit should have been tolled in opposing the City's Motion for Summary Judgment.

Curtis Chun appealed the adverse grant of summary judgment in his employment discrimination action which he brought pursuant to § 504 of the Rehabilitation Act and the Hawaii Whistleblower Protection Act ("HWPA") to the Ninth Circuit Court of Appeals. The Court of Appeals reviewed the District Court's Grant of Summary Judgment de novo pursuant to *Gordon v. County of Orange*, 888 F.3d 1118, 1122 (9th Cir. 2018).

Chun conceded to the Court of Appeals that a two-year statute of limitations applied to his claims under the Rehabilitation Act and HWPA. *See* Haw. Rev. Stat. §§ 378-63(a), 657-7; *Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC*, 753 F.3d 862, 869 (9th Cir. 2014). Chun also conceded that his claims accrued no later than August 6, 2012, which was his last day of employment with the City and he did not file his complaint until April 10, 2018. Thus, absent equitable tolling, Chun's claims would be time-barred which is why the issue of equitable tolling was the deciding factor in Chun's two count Complaint that held the keys to whether his lawsuit would proceed or not.

Chun made the requisite showing of eligibility for equitable tolling to withstand summary judgment. To demonstrate eligibility for equitable tolling as a result of a mental impairment, Chun had to show: (1) “his mental impairment was an extraordinary circumstance beyond his control”; and (2) he exercised “diligence in pursuing the claims to the extent he could understand them, but that the mental impairment made it impossible to meet the filing deadline under the totality of the circumstances, including reasonably available access to assistance.” *Bills v. Clark*, 628 F.3d 1092, 1099–100 (9th Cir. 2010) (internal quotation marks omitted); *see also Office of Hawaiian Affairs v. State*, 133 P.3d 767, 789 (Haw. 2006) (applying federal equitable tolling principles).

Chun proved he was indeed entitled to equitable tolling to allow his claims to proceed. Chun’s diminished mental state was acknowledged by numerous State Court criminal proceedings for the pertinent years in questions. As pointed out in his Opening Brief to the Court of Appeals, by the time Chun filed and commenced this lawsuit (April 10, 2018) and pursued his Rehabilitation Act of 1973 discrimination claim and his State of Hawaii Whistleblower Protection Act claims (with a two year statute of limitations), by subtracting all the periods of time that Chun was not fit to proceed and contrasting that with when a State Court finally declared Chun competent and fit to proceed for the first time in six years, the total time elapsed added up to less than two years during the applicable time period of August 6, 2012 to April 10, 2018.

It was reversible error for the District Court to not take judicial notice and adopt the State Court rulings and honor the full import of their significance, which were final judgments, and give them full consideration and give the final judgments the full weight they were entitled to in proceedings before the District Court.

Equitable tolling abounded in this case. Chun should have been allowed to proceed to trial as he raised triable issues of fact that the City failed to reasonably accommodate him in his employment after they knew or should have known of his qualifying disabilities and enter the interactive process in good faith instead of accusing him of insubordination for acts which were out of his control as they were based on his disability, not intentional and willful disregard of his employer's interests. Moreover, Chun raised a triable issue of fact that he was retaliated against and ultimately terminated for raising repeated violations of the Safe Water Act.

The fact that Chun filed *pro se* legal claims, complaints, and motions in various forums, and retained an attorney to represent him are not dispositive of the issue at hand. *Pro Se* detainees of the Hawaii State Hospital engage in similar filings and actions, and it does not take away from the fact that the State Hospital Detainees are not fit to proceed and unable to assist in their own defense. That was the case here as well. Chun was not found competent to proceed until February 21, 2018 in any court of law. That is the first time a Court of competent jurisdiction found Chun fit to proceed in any court related proceeding.

The Court of Appeals, below, overlooked Dr. Likewise's 01/19/2016 neuropsychological report citing 5/12/15 unfitness. The evidence in the record stated that Chun is unlikely to regain fitness and that it was not until February 21, 2018, that the first court order showing Chun regained fitness occurred. Moreover, Dr. Dennis Donovan found Plaintiff unfit to proceed in 2012 and March and May of 2014, 2015 and unlikely to regain fitness in the future.

Plaintiff was adjudicated as "not fit to proceed in unrelated criminal cases." In 2012 and March and May of 2014, Dr. Dennis Donovan Ph.D. opined that Plaintiff was not fit to proceed. Dr. Donovan also found Plaintiff unfit to proceed in 2015. Dr. Donovan finally opined that Plaintiff is unlikely to regain fitness in the future. Plaintiff was also recognized in 2011 and 2012, as disabled by another federal branch of government, the Social Security Administration.

Importantly, in Hawaii state court, a defendant found "unfit" to proceed to trial is the equivalent of finding of a lack of competence to stand trial in federal court. See Haw. Rev. Stat. ("HRS") §§ 704-403 to -405; *State v. Tierney*, 127 Haw. 157, 277 P.3d 251 (2012); *State v. Castro*, 93 Haw. 424, 426 (2000). The District Court failed to properly consider this important principle of law as did the Court of Appeals in affirming the District Court's grant of Summary Judgment.

Moreover, the District Court failed to properly draw all reasonable inferences on behalf of Chun, the nonmoving party. See *Matsushita Elec. Indus. Co. v.*

*Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see also Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir. 2008) (stating that “the evidence of [the nonmovant] is to be believed, and all justifiable inferences are to be drawn in his favor.”)

Chun presented evidence that he had the requisite level and type of mental incompetence to toll the statute of limitations for his claims to proceed.

Chun indeed produced evidence that his alleged mental impairment was so debilitating from 2012 to February 2018 that it caused the delay. Additionally, there were times that Chun was adjudicated as “not fit to proceed in unrelated criminal cases.” In 2012 and March and May of 2014, Dr. Dennis Donovan Ph.D. opined that Chun was not fit to proceed. Dr. Donovan also found Chun unfit to proceed in 2015. Dr. Donovan finally opined that Chun is unlikely to regain fitness in the future. Chun was also recognized in 2011 and 2012, as disabled by another federal branch of government, the Social Security Administration. As there were times where Chun could not participate in litigation based on mental disability, the statutes of limitations may be tolled in this matter to preserve Chun’s claims for adjudication.

Equitable tolling is based on the Chun’s alleged mental or physical defect(s) to participate in legal proceedings. Chun was unable to obtain vital information because a mental or physical condition affected his legal competency. Chun was incapable of competently filing with the District Court for the majority of the filing

period. Chun was mentally impaired, and his condition prevented him from filing during the statutory period. Chun's illness in fact prevents him from managing his affairs and thus from understanding his legal rights and acting upon them. Dr. Dennis Donovan found Chun unfit to proceed in 2012 and March of 2014, in May of 2014, in 2015 and unlikely to regain fitness in the future.

Contrary to the City's assertion and looking in a light most favorable to the non-moving party, Chun, the records established that Chun was not fit to proceed and unlikely to regain fitness and did not in fact gain fitness until February 21, 2018. Chun thus raised a triable issue of fact that he was not fit to participate in legal proceedings on a competent level recognized by a court of competent jurisdiction specifically determining Chun's level of fitness until February 21, 2018.

The District Court overlooked the significance that Dr. Donovan ultimately concluded that Chun was "not fit to proceed" in his criminal cases and unlikely to regain fitness and did in fact not do so from 2012 until February 21, 2018.

Chun argued before the District Court in his Opposition to the City's Motion for Summary Judgment that the court should equitably toll the statute of limitations as to both claims from 2012 until February 2018 because the expert evidence of the examining official showed that Chun was mentally impaired until February 2018 when a court for the first time found him fit to stand trial since 2012, which was



approximately two months before his initial complaint was filed.

The District Court ignored the direct evidence set forth in Dr. Donovan's reports and then erroneously and in a prejudicial manner to Chun, adopted the speculative argument of the City that because Chun had an attorney assist him with a worker's compensation case in 2015, ergo, Chun was fit beginning at least in 2015 when no court had so found to take away from the conclusion of Dr. Donovan in his fitness to proceed expert opinions.

Chun's case is a rare case as there are unrelated State Court proceedings that establish Chun's lack of mental capacity (Chun was found unfit to proceed in State Court Criminal proceedings) during the same time period where the trial court and the Court of Appeals, concluded he was fit and competent to pursue his case.

In State Court proceedings, Dr. Donovan opined that Chun was incapable of understanding the proceedings or assisting defense counsel in his defense and thus was unfit to stand trial. The City failed to produce any evidence to the contrary until February of 2018. Thus, Chun established in opposing the City's Motion for Summary Judgment that he was unfit from 2012 until at least February of 2018, when Chun was in fact found fit to proceed and could then assist in his own legal proceedings for the first time in over five years.

Chun submitted evidence such as: (1) an April 17, 2015, report by Dr. Dennis Donovan, a State of Hawaii psychological consultant, regarding Plaintiff's lack of competency to stand trial in state criminal proceedings, and (2) a January 19, 2016, forensic neuropsychological evaluation report prepared by Dr. Roger L. Likewise ("Likewise Report") relating to Plaintiff's workers' compensation claim.

In his April 17, 2015, report, Dr. Donovan noted that he had seen Plaintiff "several times for similar cases" including in August 2012, and March and May of 2014. Dr. Donovan's 2015 report found that Plaintiff may suffer from a "psychotic disorder [not otherwise specified]" and possibly "delusional disorder or paranoia schizophrenia."

Based on the review of Plaintiff's file, his interview with Plaintiff, and his "overall impression of [Plaintiff] as well as [Dr. Donovan's] discussion with the leader of the fitness restoration program," Dr. Donovan concluded that Plaintiff was "not fit to proceed" in his criminal case.

Chun's evidence shows that in September 2012, Dr. Donovan opined that Chun was unfit to stand trial (Dr. Donovan's Sept. 24, 2012, letter for Case No. 1P511-487; Oct. 12, 2012, court order finding Plaintiff unfit to proceed and seeking reexamination).

Chun's evidence showed that in September 2012, Dr. Donovan opined that Chun was unfit to stand trial. This was one month after his termination (August 6, 2012), when Chun was first determined unfit to stand

trial. Chun's mental incompetency prohibited him from pursuing his present claims, and accordingly, he is entitled to equitable tolling.

The Likewise Report sets forth in detail Plaintiff's history of mental health issues. The Likewise Report cited excerpts of Dr. Donovan's April 17, 2015, letter, noting that Dr. Donovan "evaluated [Plaintiff] on 1/5/15 and previously, in March and May of 2014."

Each time, Dr. Donovan opined that "Mr. Chun was not fit to proceed and this remained his opinion today."

In another entry, the Likewise Report states that on May 12, 2015, "[c]ourt was extended as Mr. Chun was unfit." *Id.* The record before the court established that the first time a court found Chun fit (following Dr. Donovan's 2015 expert opinion that Chun was unlikely to regain fitness) was in February of 2018.

On February 21, 2018, Plaintiff was determined by the state court to be "fit to proceed" on a pending criminal charge and that pursuant HRS § 704-411(1)(c), he "is no longer affected by physical or mental disease, disorder or defect. . . ."

Chun argued appropriately that the fact that he was found incompetent (unfit) to stand trial in several criminal cases entitled him to equitable tolling of the statute of limitations.

Thus, the record established that the entire duration between September of 2012 until February 21, 2018, should be tolled.

Chun submitted evidence that he was mentally incompetent from September 2012 through February 21, 2018.

Chun came forward with evidence showing that his mental incompetence prohibited him from filing the present action within the two-year statute of limitations.

If Chun was unfit to participate in criminal proceedings, Chun was likewise unfit to participate in civil proceedings.

The State criminal cases established that Chun was unable to assist in his defense.

The State criminal matter orders finding Chun unfit meaning he was unable to participate in court proceedings. It is ludicrous to conclude that Chun is able to participate in civil cases when he has been unfit to proceed in criminal proceedings during that same time period.

The fact that Chun filed a *pro se* worker's compensation case on June 29, 2015, does not establish fitness to proceed in any event. It is not uncommon for individuals who have been found unfit in State Court proceedings and admitted to the Hawaii State Hospital to write letters to their own counsel and the court. For example, during this same period Chun was in fact found incompetent to stand trial. Thus, speculating that Chun was fit to have filed this current lawsuit years earlier lacks any evidentiary support. For example, the District Court would be within its discretion to

find Chun was incompetent to file his civil case pursuant to taking judicial notice of Chun's lack of fitness having been found unfit in State Court proceedings.

In its order granting Summary Judgement the District Court relied on the fact that Plaintiff filed two other actions in 2015, *pro se*. But the fact that Chun may have filed two cases in 2015, a worker's compensation case and another civil case regarding his environmental disputes with his neighbors is not dispositive of Chun's fitness to proceed. Many criminal defendants who are found unfit to proceed in State Court, nonetheless, continue to send documents, letters and file things with the court claiming such things as they are not unfit and arguing with their own attorney and the court as to fitness Chun's 2015 filings in two forums are no different.

Chun set forth specific evidence raising a genuine factual question, when considering the evidence in the light most favorable to Chun and when believing the evidence Chun submitted, the standard for analyzing the Motion.

Chun respectfully requests that the District Court's Judgment and Order Granting the City's Motion for Summary Judgment be vacated, and this action remanded for trial.

The Ninth Circuit erred in affirming the trial court's grant of the City and County of Honolulu's Motion for Summary Judgement. Chun proved through his criminal State Court proceedings that his disability prevented him from managing his affairs and thus

from understanding his legal rights and acting upon them.” *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996). In Chun’s case it the statute of limitations should have been tolled until Chun was able through the exercise of proper diligence to file suit. *Id.* There was no evidence in the record to establish that this occurred any earlier than February 21, 2018.

The Supreme Court should therefore grant this petition for writ of certiorari in order to correct the Ninth Circuit’s erroneous holding in this case.

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### CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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