No. _____

IN THE
Supreme Court of the United States

KEVIN E. FIELDS,

Petitioner,

v.

MICHAEL WILBUR, *ET AL.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether 28 U.S.C. §1915(e)(1) vests the federal district courts with broad discretion to request counsel for indigent civil litigants, as the Second and Third Circuits have held, or instead requires an indigent civil litigant seeking counsel to demonstrate the existence of certain "exceptional circumstances" (including a likelihood of success on the merits) before the court can exercise its discretion to request counsel under § 1915(e)(1), as the Fifth, Sixth, Ninth, and Eleventh circuits have held.

2) Whether prison officials' failure to respond to a properly filed inmate grievance—in violation of the prison system's own regulations—exhausts the inmate's administrative remedies for purposes of the Prison Litigation Reform Act, as the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held, or whether the prisoner's failure to secure a response to his grievance despite the prison's own failure to follow its regulations precludes a subsequent civil suit, as the Ninth Circuit held here.

LIST OF PARTIES

Petitioner

Kevin E. Fields

Respondents

Michael Wilbur

Jose Ruiz

John C. Rabe

Frank Fuhlrodt

Elizabeth Canfield

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INTRODUCTION

This case presents two important questions, each of which warrants this Court's review in its own right.

The first question involves the standard under which federal district courts may seek to appoint counsel for indigent civil litigants under 28 U.S.C. § 1915(e)(1). While the language of the statute on its face grants the trial court broad, unqualified discretion to request counsel—providing simply that "[t]he Court may request an attorney to represent any person unable to afford counsel"—the federal courts of appeals have developed three conflicting standards for determining whether a request for counsel is appropriate. This open and notorious conflict, which has mired the circuit courts in uncertainty, should be resolved now.

For their part, the Second and Third Circuits hew closely to the statutory language, giving district courts wide latitude to request counsel based on a non-exclusive list of factors that are relevant to the exercise of the district court's discretion. *See Tabron v. Grace*, 6 F.3d 147, 155 (3d Cir. 1993); *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986) (citing *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981)). In sharp contrast to this flexible approach, however, the Fifth, Sixth, Ninth and Eleventh Circuits sharply cabin that discretion by requiring indigent civil litigants to show, before a district court may even consider requesting counsel to represent them, that their case presents "exceptional circumstances." *See, e.g., Overholt v. Unibase Data Entry, Inc.*, No. 98-3302, 2000 WL 799760, at *4 (6th Cir. June 14, 2000); *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir.

1999); *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993); *Santana v. Chandler*, 961 F.2d 514, 515 (5th Cir. 1992); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). To meet this test, these courts then impose a standard lacking any basis in law or logic: They require the indigent *pro se* litigant seeking counsel to demonstrate *both* that he or she has a "likelihood of success on the merits" *and* that he or she lacks the ability "to articulate his [or her] claims *pro se* in light of the complexity of the legal issues involved." *See, e.g.*, App. 3a (quoting *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (internal quotations and citations omitted)).

Wholly apart from these courts' failure to ground this standard in the text of the relevant statute, not one of these courts has explained ***how*** indigent *pro se* litigants seeking counsel reasonably can be expected to simultaneously meet both prongs of this test. After all, if the claims at issue are too complex for an indigent *pro se* litigant to articulate on his or her own, how can he or she possibly hope to demonstrate a likelihood of success on the merits? Perhaps not surprisingly, then, this test has prompted significant inter- and intra-circuit debate over its propriety. *See Parham v. Johnson*, 126 F.3d 454, 457 n.6 (3d Cir. 1997) (Jones, J., sitting by designation) ("I have re-evaluated my position. I now agree that Congress did not intend nor did they state that appointment of counsel is only justified in 'exceptional circumstances'."); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 n.3 (9th Cir. 1986) ("[W]e question how a court reasonably can expect a strong showing by a § 1983 claimant on the first prong when it is manifestly unlikely that a *pro se* petitioner involved in a complex case which he cannot litigate

effectively would be *capable* of demonstrating a likelihood of success on the merits.") (emphasis in original).

Finally, the Seventh Circuit has adopted its own hybrid approach, eschewing reliance on the Second and Third Circuits' multifactor test or the Fifth, Sixth, Ninth, and Eleventh Circuits' "exceptional circumstances" test, and asking instead whether "the plaintiff appear[s] to be competent to try [the case] himself and, if not, would the presence of counsel [make] a difference in the outcome." *Farmer v. Haas*, 990 F.2d 319, 322 (7th Cir. 1993).

Given the open disagreement among (and the sharp disputes within) the courts of appeals on this question, and in light of the importance of the assistance of counsel to indigent *pro se* litigants in pursuing complex civil claims, this Court's guidance on the proper standard for requesting counsel for indigent civil litigants is desperately needed.

The second question presented in this case involves the exhaustion requirement of the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(a). Four years ago this Court recognized that while prisoners must exhaust their available administrative remedies before transforming a prison grievance into a federal civil suit, there is a substantial "possibility that prisons might create procedural requirements for the purpose of tripping up all but the most skillful prisoners." *Woodford v. Ngo*, 548 U.S. 81, 102-03 (2006). The Court in that case, however, "ha[d] no occasion to decide how such situations might be addressed," *id.*, and thus specifically reserved judgment on that issue for a

future case in which it squarely was presented. This is that case.

The California State Prison System has established a three-tiered system of formal review for inmate grievances, and its regulations require every prisoner who wishes to pursue a grievance to obtain a decision from each level of the system in order to exhaust his or her remedies. To make that system work, the prison system's own regulations require the decisionmaker at each stage of the process to provide a written decision to the grievant within a certain time period. CAL. CODE REGS. tit. 15, § 3084.6(b).

There is no dispute in this case that prison officials violated those regulations here. In short, they *never* responded to Petitioner's properly and timely filed grievance at the intermediate level of review. And then they compounded that error by *refusing even to consider* Petitioner's grievance at the prison's third and final tier of review, on the ground that Petitioner had not first received a response to his grievance at the second level—that is, because prison officials violated binding regulations by failing to respond to his grievance at the second level.

Petitioner then filed suit against the State in the U.S. District Court for the Eastern District of California. Yet rather than concede its own responsibility, the State added insult to injury: It successfully sought summary judgment on Petitioner's federal civil claims regarding retaliation on the ground that Petitioner's grievance was not considered at the third level of review (even though Petitioner bore no responsibility for that failure, and despite Petitioner's effort to present his claim at that

level). Throughout the proceedings in the district court, including summary judgment and a jury trial on Petitioner's claims regarding the unsanitary conditions in his cell, Petitioner repeatedly asked the magistrate judge and district court to request counsel to represent him under 28 U.S.C. § 1915(e)(1). All six of Petitioner's requests for counsel, however, were denied, because the court determined that Petitioner's case did not present exceptional circumstances.

In upholding those refusals, the Ninth Circuit perpetuated the atextual "exceptional circumstances" test rejected by two other courts of appeals, and deepened a longstanding, three-way circuit split. This Court should intervene to resolve this split and bring a uniform standard to this important area of law.

Until the Ninth Circuit upheld the district court's grant of summary judgment for failure to exhaust on Petitioner's retaliation claim, the federal courts of appeals were unanimous in holding that the obvious frustration of the grievance process by prison officials, in violation of the prison's own regulations, is no barrier to judicial review. The Ninth Circuit in this case, however, created a clear split among the courts of appeals on the PLRA's exhaustion requirement. Given the recurring nature of exhaustion questions under the PLRA, *see Woodford*, 548 U.S. at 94 n.4, this Court should resolve the split that now has developed on the question reserved by *Woodford*.

OPINIONS BELOW

The Ninth Circuit's decision is not published in the official reporter, but is available at 2009 WL

5196075, and reprinted in the Appendix ("App.") at 1a-3a. The district court's final judgment is not published in the official reporter, and is not otherwise available, but is reprinted at App. 4a-5a. The district court's decision on summary judgment is not published in the official reporter, but is available at 2007 WL 2688453, and is reprinted at App. 6a-8a. The district court's decisions on Petitioner's motions for counsel are not published in the official reporter, and are not otherwise available, but are reprinted at App. 35a-54a.

JURISDICTION

The Ninth Circuit rendered its decision on December 29, 2009, App. 1a, and denied a timely filed petition for rehearing *en banc* on March 1, 2010, App. 55a-56a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT UNITED STATES CODE PROVISIONS AND CALIFORNIA STATE REGULATIONS

42 U.S.C. § 1997e(a) provides in pertinent part:

Suits by Prisoners.

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

28 U.S.C. § 1915(e)(1) (formerly codified at 28 U.S.C. § 1915(d)) provides in pertinent part:

Proceedings in forma pauperis

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

CAL. CODE REGS. tit. 15, § 3084.1(a) provides in pertinent part:

Right to Appeal.

(a) Any inmate or parolee under the department's jurisdiction may appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare. The decisions of the Departmental Review Board which serve as the director's level decision are not appealable and conclude the inmate's or parolee's departmental administrative remedy pursuant to section 3376.1.

CAL. CODE REGS. tit. 15, § 3084.5(g) provides in pertinent part:

(g) Written response. At each level of review not waived, the original appeal shall be returned to the appellant with a written response stating the appeal issue and reasons for the decision.

CAL. CODE REGS. tit. 15, § 3084.6(b)

Appeal Time Limits.

(b) Departmental response. Appeals shall be responded to and returned to the appellant by staff within the following time limits:

(1)Informal level responses shall be completed within ten working days.

(2)First level responses shall be completed within 30 working days.

(3)Second level responses shall be completed within 20 working days, or 30 working days if first level is waived pursuant to section 3084.5(a)(3).

(4)Third level responses shall be completed within 60 working days.

(5)Exception is authorized in the event of:

(A)Unavailability of the appellant, or staff or inmate witnesses.

(B)Complexity of the decision, action, or policy.

(C)Necessary involvement of other agencies or jurisdictions.

(6)Except for the third formal level, if an exceptional delay prevents completion of the review within specified time limits, the appellant shall be informed in writing of the reasons for the delay and the estimated completion date.

STATEMENT OF THE CASE

A. Background

On October 10, 2002, the toilet in Petitioner's cell overflowed and his cell was flooded with water, urine, and human feces. (App. 22a-23a.) As the testimony at trial established, for nearly a month, the guards' only effort to remedy this situation was

to give Petitioner a bar of soap and to periodically mop the area outside of Petitioner's cell. (5/28/08 Trial Tr. 198:18-200:9.)

Petitioner filed an administrative complaint (a California Department of Corrections Inmate/Parolee Appeal Form 602 or, simply, "Form 602"), as is required by CAL. CODE REGS. tit. 15, § 3084.5(g), that detailed the guards' failure to sanitize his cell and objected to being served meals in such unsanitary conditions. (App. 19a.) In retaliation for filing that grievance, the guards began limiting Petitioner's daily food rations. (Plaintiff's Declaration in Supporting Opposition to Defendants [sic] Motion for Summary Judgment, at 5 (4/16/07).) On October 28, 2002, Petitioner therefore filed a second Form 602 seeking redress for the guards' retaliation. (Form 602, Claim No. 02-03865, at App. 57a.) These two distinct (if related) grievances ultimately led to this Petition.

The administrative appeal process in California prisons has an initial "informal" level of review followed by three "formal" levels of review. *See Woodford*, 548 U.S. at 85. An appeal denied at any level may be pursued to the next level of appeal, terminating with an appeal to the Director of the California Department of Corrections ("Director's Level"). CAL. CODE REGS. tit. 15, § 3084.1(a); *Woodford*, 548 U.S. at 86.

Petitioner's initial grievance, regarding the unsanitary conditions in his cell, ultimately was denied at all three formal levels of review. (App. 19a.) With respect to the second grievance, regarding the guards' retaliation, Petitioner bypassed the optional, informal level of review and

proceeded directly with the first formal level of review. At that stage, prison officials denied Petitioner's appeal. (Form 602, Claim No. 02-03865, Parts C-E, at App. 58a-60a.) Petitioner then appealed to the second formal level of review, and the Form 602 indicates that his appeal was assigned to an unnamed individual on March 13, 2003, with a decision due by April 11, 2003. (*Id.* at Part G, at App. 60a.)

There is no indication on the Form 602, however, that a decision was ever rendered at the second level of review or that the form was ever returned to Petitioner (as California regulations require). *Id.*; CAL CODE REGS. tit. 15, § 3084.5(g). A prison official eventually filed a declaration with the district court stating that the appeal was "canceled" on March 13, 2003 (App. 20a), the same day that the form indicates the appeal was assigned for review (App. 60a), but it is undisputed that Petitioner was *never notified* of that alleged cancellation (as would have been required by CAL. CODE REGS. tit. 15, §§ 3084.5(g), 3084.6(b)), and that he received *no* other response to his second-level appeal (least of all one within the period of time required by the prison regulations). CAL. CODE REGS. tit. 15, § 3084.6(b). Nor was Petitioner provided with an explanation of the reason for any decision on his appeal as required by prison regulations. CAL. CODE REGS. tit. 15, § 3084.5(g).

Having thus received no response at the second formal level of administrative review, and out of an abundance of caution, Petitioner appealed to the Director's Level. That appeal was returned along with a letter from N. Grannis, the Chief of the

Inmate Appeals Branch ("Grannis Letter"), stating that the appeal was being returned unheard, because it had been "rejected, withdrawn or cancelled" at the second formal level of review. (App. 64a-65a.) This was the first indication of any sort that Petitioner received regarding what might have happened to his appeal at the second formal level of review. If Petitioner had any questions, the letter continued, they should be taken up with the Appeals Coordinator. The letter gave no indication that Petitioner could appeal the rejection, withdrawal, or cancellation of his second level appeal, much less that there was any administrative mechanism through which he could appeal the rejection of his Director's Level appeal.

B. Procedural History

On October 31, 2003, after receiving the Grannis Letter, Petitioner filed a *pro se* complaint against several prison officials in the United States District Court for the Eastern District of California, alleging violations of 42 U.S.C. § 1983. Petitioner's Second Amended Complaint raised two claims under § 1983: (1) that prison officials violated the Eighth Amendment by causing Petitioner to live in a cell contaminated with human waste for nearly a month (the subject of his first grievance); and (2) that prison officials violated Petitioner's First Amendment rights by retaliating against him for filing a grievance regarding his Eighth Amendment claims (the subject of his second grievance). (App. 9a-10a.)

On December 21, 2006, Respondents moved for summary judgment on all of Petitioner's claims. (App. 10a.) The Magistrate Judge recommended that summary judgment on Petitioner's Eighth

Amendment claims be denied, finding that Petitioner had raised sufficient issues of triable fact. (App. 33a.) The Magistrate Judge also recommended that the defendants' claim of qualified immunity be denied, explaining that "[b]y 2002, requiring an inmate to live in a cell with a malfunctioning toilet for 28 days constituted a knowing violation of the Eighth Amendment." (App. 33a.)

Over Petitioner's objection, however, the Magistrate Judge recommended that Petitioner's retaliation claim be dismissed for failure to exhaust his administrative remedies. According to the Magistrate Judge, Petitioner's grievance was canceled at the second formal level of review, and Petitioner never appealed to the Director's Level. (App. 19a-20a.)

Both Petitioner and Respondents objected to the Magistrate Judge's report. (App. 7a.) For his part, Petitioner objected to the Magistrate Judge's recommendation that his retaliation claim be dismissed for failure to exhaust administrative remedies. Petitioner attached the Grannis Letter, which accompanied his returned appeal to the Director's Level. (App. 64a-65a.) Petitioner then argued that he had in fact exhausted his administrative remedies, because the Grannis Letter demonstrated (contrary to the Magistrate Judge's assertion) that he had in fact pursued his appeal to the Director's Level of review. Finally, Petitioner maintained that, at the very least, he was entitled to an evidentiary hearing to resolve the conflict between Respondents' declaration, which claimed Petitioner had not pursued a Director's Level appeal, and the Grannis Letter.

On September 9, 2007, without any substantive discussion, the district judge adopted the Magistrate Judge's findings and recommendations in full. (App. 6a-8a.) The Judge dismissed, over Petitioner's objections, the retaliation claim, granting in part the Respondents' motion for summary judgment. (App. 7a-8a.) Petitioner represented himself in the subsequent jury trial on his Eighth Amendment claim. The jury returned a verdict in favor of the Respondents.

Petitioner appealed both the summary judgment on his retaliation claim (on exhaustion grounds) and the jury verdict on his Eighth Amendment claim (on the basis that counsel should have been requested). After hearing oral argument, the Ninth Circuit affirmed the decision below in a three-page, unpublished decision. (App. 1a-3a.) It held that Petitioner did not exhaust his administrative remedies because "an additional avenue of possible relief remained open to him"—namely, "contact[ing] the Appeals Coordinator." (App. 2a.) Regarding the jury verdict, the Ninth Circuit held Petitioner did not demonstrate "exceptional circumstances" and that his requests for counsel were, accordingly, properly denied. (App. 3a.)

REASONS FOR GRANTING THE WRIT

First, the "exceptional circumstances" standard for requesting counsel to represent indigent civil litigants, which is followed by the Fifth, Sixth, Ninth and Eleventh Circuits, cannot be reconciled with the plain text of 28 U.S.C. § 1915(e)(1) and flatly contradicts the flexible approach taken in the Second and Third Circuits. No court has ever provided a principled basis for the "exceptional circumstances" test, and as other circuit courts (and a dismayed panel of the Ninth Circuit) have recognized, there is no such basis. This Court's intervention is critically needed both to resolve this dispute among the circuits and to provide principled guidance to trial courts.

Second, the Ninth Circuit's decision in this case departs from each of the five other circuits to have considered how prison officials' failure to comply with binding prison regulations impacts an inmate's right to redress in federal court, by holding that Petitioner failed to exhaust his administrative remedies despite prison officials failure to respond to his properly filed grievance in the manner and within the time provided by the prison's own regulations. Until now, the appellate courts were united in holding that prison officials' failure to respond to a prisoner's grievance exhausts the prisoner's available remedies. Review by this Court is necessary to restore uniformity on this important issue of national application.

I. The Circuits Are Deeply Divided Over The Appropriate Standard For Requesting Counsel For Indigent Civil Litigants, And The "Exceptional Circumstances" Test

Applied By The Ninth Circuit In This Case Is Both Contrary To The Statute's Text And Unworkable In Practice.

The circuit courts have divided over the proper standard for requesting counsel for indigent civil litigants for more than 25 years, and that divide has only continued to deepen. Moreover, the exceptional circumstances test applied by the Ninth Circuit in this case, and by the Fifth, Sixth, and Eleventh Circuits in prior cases, is directly contrary to the text of 28 U.S.C. § 1915(e)(1). That departure from the statutory text is of real consequence; in practice, the exceptional circumstances test amounts to a near-total elimination of the discretion Congress granted the federal district courts.

The circuit courts are sharply divided on the proper standard to apply to requests from indigent civil litigants for counsel. For their part, the Fifth, Sixth, Ninth, and Eleventh Circuits all strictly condition the district courts' exercise of the statute's otherwise unqualified grant of discretion to cases presenting "exceptional circumstances," despite the fact that the statute itself contains no such limitation. *See, e.g.*, *Overholt*, 2000 WL 799760, at *4 (refusing to request counsel under § 1915(e)(1), "because there are no exceptional circumstances warranting the appointment of counsel"); *Bass*, 170 F.3d at 1320 ("The district court...should appoint counsel only in exceptional circumstances") (internal citation omitted); *Lavado*, 992 F.2d at 605-06 (6th Cir. 1993) ("Appointment of counsel in a civil case ... is justified only by exceptional circumstances.") (internal citations and quotations omitted); *Santana*, 961 F.2d at 515 ("Such an appointment is

appropriate in a case that presents 'exceptional circumstances.'"); *Aldabe*, 616 F.2d at 1093 ("As the district court held, however, this court has limited the exercise of th[e] power [to request counsel for indigent, civil litigants] to exceptional circumstances.").

By contrast, the Third Circuit has rejected this standard outright, holding that such strict limits on the trial court's discretion are both unnecessary and contrary to the text of the statute:

> Nothing in [§ 1915(e)(1)'s] clear language suggests that appointment [of counsel] is permissible only in some limited set of circumstances. Nor have we found any indication in the legislative history of the provision to support such a limitation. Accordingly, we conclude that the magistrate judge erred as a matter of law in stating that he had no discretion to appoint counsel in the absence of "exceptional circumstances."

Tabron, 6 F.3d at 155. The Second Circuit likewise has rejected the exceptional circumstances test in favor of an open-ended list of relevant factors to consider:

> We think the factors described in *Maclin* are appropriate for the trial court to consider in exercising its discretion to appoint counsel pursuant to 28 U.S.C. § 1915(d) [now recodified at § 1915(e)(1)]. We recognize that some circuits appear to take a more stringent approach than *Maclin* to appointment of counsel [citing the Ninth Circuit's exceptional circumstances standard] . . . . In

> our view, however, the *Maclin* factors find the proper middle ground.

Hodge, 802 F.2d at 61 (citing *Maclin*, 650 F.2d at 887).

Finally, the Seventh Circuit, which pioneered the multi-factor approach, has since abandoned the *Maclin* test in favor of something between the standard followed in the Second and Third Circuits and the exceptional circumstances test applied by the Fifth, Sixth, Ninth, and Eleventh Circuits. *See Farmer*, 990 F.2d at 321-22 ("[T]he necessary inquiry is simpler than *Maclin's* multifactorial approach implies: given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome?").

It bears particular note that this conflict *among* the appellate courts also has fostered disagreements *within* those courts. Thus, while the Sixth Circuit continues to follow the exceptional circumstances test, Judge Jones—who authored the Sixth Circuit's leading opinion on the issue—since has rejected the test. *See Parham*, 126 F.3d at 457 n.6 (Jones, J., sitting by designation) ("I have re-evaluated my position. I now agree that Congress did not intend nor did they state that appointment of counsel is only justified in 'exceptional circumstances'."). And at least one panel of the Ninth Circuit has sharply condemned the exceptional circumstances test, deeming it both "incoheren[t]" and inconsistent with the law. *See Wilborn*, 789 F.2d at 1332 n.3.

The fact that such strong disagreement persists both among and within the circuits is all the more unusual, because the statute itself is so clear on this

issue. It provides simply that "[t]he court may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). By its plain terms, this provision thus gives broad—uncabined—discretion to trial courts to decide on a case-by-case basis whether to request counsel for indigent litigants. Nevertheless, the Ninth Circuit, along with the Fifth, Sixth, and Eleventh circuits, have engrafted a standard of pure "judicial creation" onto the statute, *Parham*, 126 F.3d at 457 n.6, in a manner unsupported by law or logic.

Make no mistake: the standard here matters, and the differences between the courts' varied approaches are more than simply word-play. The Second and Third Circuits regularly request counsel for indigent litigants under the statute. *See, e.g.*, *Rivas v. Suffolk County*, Nos. 04-4813-pr, 04-5198-pr, 2008 WL 45406, at *2 (2d Cir. Jan. 3, 2008) ("Given the complexity of the factual and legal issues presented by this case, we remand to the district court to reappoint *pro bono* counsel."); *Tafari v. Hues*, 473 F.3d 440, 442 (2d Cir. 2007) ("In August 2005, this Court granted Tafari IFP status for the purposes of this appeal and ordered the appointment of counsel pursuant to 28 U.S.C. § 1915(e)(1) 'because the issues raised are important and unresolved.'"); *Woodham v. Sayre Borough Police Dep't*, 191 F. App'x 111, 116 (3d Cir. 2006) ("Under the circumstances, the District Court's repeated denials of Woodham's motions were not consistent with the sound exercise of discretion."); *Bennett v. Goord*, 343 F.3d 133, 139 (2d Cir. 2003) ("Although leaving to the district court the resolution of any request for appointment of counsel, we note that Bennett appears plainly to meet the threshold requirement

that his claims are likely to be of substance."); *Montgomery v. Pinchak*, 294 F.3d 492, 505 (3d Cir. 2002) ("Given our analysis of the *Tabron* factors and our assessment of the District Court's clear errors in applying those factors, we conclude that the District Court abused its discretion in refusing to appoint counsel for Montgomery, either upon Montgomery's initial motion prior to discovery, or later in the proceedings when it became apparent that the appointment of counsel would be particularly appropriate in this instance.").

Yet, in notable contrast, the Ninth Circuit (which given its size likely has more opportunities to consider this matter than any other circuit) appears to have found its judicially crafted "exceptional circumstances" test satisfied *only a single time. See Agyemen v. Corrs. Corp. of Am.*, 390 F.3d 1101, 1104 (9th Cir. 2004). In practice, thus, the exceptional circumstances test amounts to a near-total deprivation of court-requested counsel for indigent civil litigants.

It thus should come as no surprise that both the trial court and the Ninth Circuit rejected Petitioner's requests for counsel here. In this case, the district court held it could not even consider requesting counsel to represent Petitioner in his jury trial concerning his constitutional challenge to the conditions in which he had been held, because "[e]ven if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case [was] not exceptional." (App. 54a.) Yet the courts paid no heed to the conditions under which Petitioner was expected to make such a

showing. At the time he sought counsel, it is undisputed that he was confined to his cell 23 hours a day and unable even to make phone calls. Nor is it disputed that during the period in question, Petitioner was being heavily medicated with strong narcotics to treat a chronic pain condition.

These are precisely the sort of considerations that one would expect a trial court to rely upon in assessing whether to request counsel. Yet the court here found itself bound to reject Petitioner's request because he had not met the Ninth Circuit's rigid, "exceptional circumstances" test for obtaining counsel. Nothing in § 1915(e)(1) even remotely indicates trial courts lack the ***discretion*** to request counsel in such situations. Yet, this is just what the exceptional circumstances test did here; it stripped the trial court in this case of any discretion to request counsel for Petitioner.

That approach, as another Ninth Circuit panel recognized, is untenable and indeed "incoheren[t]." *See Wilborn*, 789 F.2d at 1332 n.3. As the *Wilborn* panel explained, the exceptional circumstances test requires a *pro se* litigant to show that, on the one hand, he has a substantial likelihood of success on the merits, and that on the other hand the case is too complex for him to effectively litigate it. *Id.* "[W]e question how," the *Wilborn* panel noted, "a court reasonably can expect a strong showing by a § 1983 claimant on the first prong when it is manifestly unlikely that a *pro se* petitioner involved in a complex case which he cannot litigate effectively would be *capable* of demonstrating a likelihood of success on the merits." *Id.* (emphasis in original). Nevertheless, that panel applied the exceptional

circumstances test as described, because it was bound by Ninth Circuit precedent, as was the court here. This Court is not so limited, and its intervention is, accordingly, desperately needed to resolve the circuits' confusion on this important and recurring question and to reverse the "incoheren[t]" result reached by the Ninth Circuit in this case.

II. The Ninth Circuit's Holding That Petitioner Failed To Exhaust His Retaliation Claim Creates A Split With Five Circuits, Each Of Which Has Held That Claims Are Adequately Exhausted Once Prison Officials' Fail To Follow Their Own Regulations.

In holding that Petitioner's retaliation claim was not properly exhausted—despite the fact that prison officials never responded to Petitioner's grievance at the second formal level of review—the panel directly contradicted the holdings of five other circuits that previously considered the effect of prison officials' failure to respond on exhaustion claims under the PLRA. The need for uniformity in this area is particularly important; uncertainty and inconsistency are not only unfair to imprisoned (and often unrepresented) litigants, but will needlessly waste both prison resources (as litigants attempt to ensure their claims are exhausted) and judicial resources (as prisoners pursue claims in federal court believing them exhausted, only to have those claims dismissed after significant resources have been expended). This Court's review is necessary both to repair the split among the circuits and to bring certainty to this important area of law.

Each of the circuits that has considered this question has rejected the Ninth Circuit's apparent reasoning in this case. In particular, the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held that where prison officials fail to respond to a prisoner's grievance within the time required by prison regulations, the prisoner's claim is deemed exhausted under the PLRA. *See Baughman v. Harless*, 142 F. App'x 354, 359 (10th Cir. 2005) (quoting *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002)); *Boyd v. Corrs. Corp. of Am.*, 380 F.3d 989, 996 (6th Cir. 2004) ("Following the lead of the four other circuits that have considered this issue, we conclude that administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance."); *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) ("We join the Eighth and Fifth circuits on this issue because we refuse to interpret the PLRA 'so narrowly as to . . . permit [prison officials] to exploit the exhaustion requirement through indefinite delay in responding to grievances.'") (quoting *Goodman v. Carter*, No. 2000 C 948, 2001 WL 755137, at *3 (N.D. Ill. July 2, 2001)) (alteration in original); *Foulk v. Charrier*, 262 F.3d 687, 698 (8th Cir. 2001) (holding prisoner's administrative remedies were exhausted when prison officials failed to respond to his complaint, making it impossible for him to pursue the complaint to further levels of review); *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999) ("A prisoner's administrative remedies are deemed exhausted when a valid grievance has been filed and the state's time for responding thereto has expired."). As the Tenth Circuit explained in *Baughman*: "[P]rison officials' 'failure to respond to a grievance within the time

limits contained in the grievance policy renders an administrative remedy unavailable.'" 142 F. App'x at 359 (quoting *Jernigan*, 304 F.3d at 1032).

That makes perfect sense: The PLRA is intended to give prison officials an opportunity to respond to and resolve a prisoner's grievance before the prisoner files suit. But, where prison officials fail to respond to properly filed grievances, they cannot later complain that they were deprived of the opportunity to do so—and, needless to say, prisoners like Petitioner cannot force officials to obey their own regulations and answer prisoners' claims. In short, where prison officials fail to seize the opportunity provided them to address a prisoner's claims in the first instance, the prisoner is entitled to pursue his claim in court.

In this case, the State has never disputed that prison officials failed to respond to Petitioner's grievance at the second level of formal review. Instead, it argued, and the Ninth Circuit held, that Petitioner's claim became (in effect) un-exhausted, because he nevertheless pursued his appeal to the Director's Level—where it was screened out and rejected without consideration on the merits—and was ***then*** told that he should contact the Appeals Coordinator. But, as every other circuit to consider the issue has recognized, that is irrelevant. Petitioner's claim was exhausted at the point when prison officials failed to respond to his grievance at the second, formal level of review, and the fact that Petitioner pursued further internal review (which once again yielded no decision on the merits) provides no license for punishing Petitioner by denying him access to the federal courts.

In any event, the Grannis Letter's instruction to contact the Appeals Coordinator did not make administrative remedies available to Petitioner, because under the prison's own regulations, the Appeals Coordinator could provide no relief. As this Court has recognized, "[w]ithout the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust." *Booth v. Churner*, 532 U.S. 731, 736 n.4 (2001). Given the prison's official position regarding Petitioner's claim—that it could not be reviewed at the Director's Level because it had been "rejected, withdrawn or cancelled"—the prison's regulations did not provide any mechanism for the Appeals Coordinator to grant Petitioner any relief.

It thus makes no sense to hold, as the Ninth Circuit did here, that Petitioner lost his right to proceed to federal court because he was given an *ad hoc* instruction to jump through an additional hoop that was not required by prison regulations and that in any event provided no possibility of relief. After all, the point of the exhaustion requirement is to ensure that "the grievant complies with the system's critical procedural rules," *Woodford*, 548 U.S. at 95, not that he or she overcome additional hurdles placed in his way.

The bottom line here is that no one disputes that Petitioner complied with all of the prison's actual regulations—and that prison officials did not. In any other circuit, Petitioner would have been free to pursue his claims in federal court; yet by declaring Petitioner's claims unexhausted, the decision below creates a circuit split where none previously existed.

CONCLUSION

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

Respectfully submitted,

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