In The
Supreme Court of the United States

STATE OF ARIZONA; TERRY GODDARD, Arizona Attorney General; PAUL CARTER, Assistant Attorney General; DORA B. SCHRIRO, Director Of The Arizona Department Of Corrections,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA; ROBERT V. TUZON,

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

In suits filed pro se by inmates against prison employees and officials, judges of the United States District Court for the District of Arizona habitually issue orders requiring the Defendants, their attorneys, and unnamed prison officials to investigate the inmates' allegations and to file with the court and serve on the plaintiffs a verified report informing them of the facts learned from the investigation and identifying what responses the Department of Corrections would make to the allegations. There are several important questions about the district court's power to enter such orders:

1. A rule of civil procedure promulgated by this Court requires the parties in most suits to exchange disclosure statements, but it specifically exempts suits filed pro se by prison inmates. Do the district judges have the power to, in essence, enact their own rule – inconsistent with this Court's rule – requiring the defendants in pro-se inmate suits to unilaterally provide super disclosure statements?

2. The Prison Litigation Reform Act requires inmates to exhaust administrative remedies before filing suit; it does not allow them a second chance if they fail to properly and timely do so. The district judges' orders require prison officials to respond to inmates' allegations, even when their claims would be barred because they failed to exhaust administrative

QUESTIONS PRESENTED – Continued

remedies available under prison grievance procedures. Does the district court have the power to abrogate the PLRA?

3. Under separation-of-powers principles, the judicial branch cannot co-opt the executive branch involuntarily into performing tasks for it. Similarly, under federalism principles, a federal court cannot co-opt a state government agency to do its bidding. Do district judges exceed powers by ordering state prison officials to investigate and report to the court on inmates' unproven allegations?

4. Due process requires courts to act neutrally and fairly toward the parties; courts must have jurisdiction over the parties. The district court in these cases requires only the defendants – and related officials of the Arizona Department of Corrections, who are not parties to the suit – to conduct an investigation and disclose facts, with no similar requirement made of the inmates–Plaintiffs. Do these unilateral orders violate the due-process rights of the Defendants and associated persons?

PARTIES TO THE PROCEEDING

The Petitioners are the State of Arizona, its Attorney General Terry Goddard, Assistant Attorney General Paul E. Carter, and Director Dora Schriro of the Arizona Department of Corrections.

The Respondents are the United States District Court for the District of Arizona, and former inmate Robert Tuzon, who filed an action in the district court under 42 U.S.C. § 1983, naming as defendants several Arizona prison officials and employees.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported: *In re Arizona*, 528 F.3d 652 (9th Cir. 2008). It is included as Appendix A.

The decision of the district court is unreported: *Tuzon v. Chewall, et al.*, 2005 WL 2412811, No. CV-04-00235-TUC-FRZ (D. Ariz. October 30, 2008). It is included as Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its decision on June 9, 2008. No rehearing was sought or ordered. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Respondent Tuzon filed suit under 42 U.S.C. § 1983, alleging violations of his federal constitutional rights. The Respondent United States District Court for the District of Arizona had jurisdiction under 28 U.S.C. § 1341 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rule of Civil Procedure 26(a) is included as Appendix C.

42 U.S.C. § 1997e(a) is included as Appendix D.

STATEMENT OF THE CASE

The Petitioners ask this Court to grant certiorari to settle a dispute between them and various judges of the Arizona federal district court. When lawsuits filed by unrepresented prison inmates are assigned to these jurists, these judges habitually enter an order that requires defense counsel and officials of the Arizona Department of Corrections – who are not parties to the actions – to do the following:

- investigate the inmates' allegations;
- make a decision whether to take any action in response to the inmates' claims;
- provide the court a written report – supported by affidavits – summarizing the investigation and the responses, if any, that ADC intends to take in response to the claims; and
- provide a copy of the report to the inmate–plaintiffs.

The judges have no authority to issue these orders, which contravene a rule of civil procedure

promulgated by this Court and a statute enacted by Congress. These orders are unfair: they treat one side of the lawsuit more favorably than the other without justification. And the court does not even have jurisdiction over some of the parties who are subjected to these orders.

Faced with all these problems, the Ninth Circuit nonetheless affirmed the Order at issue in this case. Thus, the Petitioners turn to this Court to instruct the lower courts to conduct themselves within the bounds of their powers.

A. Material Facts and Course of Proceedings.

The Plaintiff Robert V. Tuzon, a convicted felon, was serving a life term with the Arizona Department of Corrections. (After the Ninth Circuit issued its Opinion, he was released on parole. Given the relief he requests in his Amended Complaint, his release does not moot his cause of action.) Tuzon is an experienced litigator, having represented himself in numerous lawsuits, many of which he has appealed to the Ninth Circuit. He sued various ADC officials under § 1983, alleging various, largely unrelated violations. (Dkt. 16.) He sought various types of relief, including compensatory damages, punitive damages, and various forms of injunctive relief. (*Id.*; Dkt. 18 at 2.)

In accordance with the Prison Litigation Reform Act of 1996, 28 U.S.C. § 1915 ("PLRA"), the District Court screened the Complaint, entering its Screening

Order. (Dkt. 18.) It allowed him to proceed with the following alleged claims:

- Against ADC Officer Escarcega, Sergeant Silva, Officer Lowe, Deputy Warden Taylor, and Captain Ochoa for failing to protect him from assaults by gang members. (*Id.* at 3-4, 9.)

- Against librarian Fry and Mr. Dees for confiscating various legal materials that led to the denial of parole. (*Id.* at 5, 7.)

- Against Taylor for denying him food for 104 days in retaliation for his accusations against Officer Escarcega. (*Id.* at 7-8.)

- Against Deputy Warden Martinez for subjecting him to cruel and unusual punishment by making him work as a lead cook, knowing that he was medically limited to light duties. (*Id.* at 10.)

- Against Mr. Chenail for denying him prescription eyeglasses. (*Id.* at 10.)

The district court dismissed several counts for failure to state a claim against various ADC officials, including Director Dora Schriro, based on his allegations that they had failed to report one of the assaults against him to prosecuting authorities. (*Id.* at 11-12.) It also dismissed:

- His claim that various ADC officials had confiscated his legal mail and files. (*Id.* at 6-7.)

- His due-process claim based on a prison official's confiscation of his funds. (*Id.* at 8-9.)

- His retaliation and due-process claims against a prison sergeant. (*Id.* at 9.)

- His retaliation and Eighth Amendment claims against a prison health administrator based on treatment that he had provided for Tuzon's skin infection. (*Id.* at 10-11.)

The District Court then entered the Order at issue here. (Dkt. 43 [Appendix B].) It required defense counsel, the Defendants, and non-defendant parties associated with them, to investigate Tuzon's allegations, to propose possible administrative resolutions, and to prepare a written report, supported by affidavits, outlining their findings. (*Id.*) The Order states:

> B. Defendants or officials responsible for the operation of the appropriate institution are directed to undertake a **review** of the subject matter of the Complaint to:
>
> 1. Ascertain the facts and circumstances underlying the Complaint; and
>
> 2. Consider whether any action can and should be taken by the institution or other appropriate officials to resolve the subject matter of the Complaint.
>
> C. Defendants are directed to **file a written Report with this Court on or before 1/12/07.** Defendants **shall furnish** Plaintiff a complete copy of the Report and all attachments at the time the Report is filed.

1. The Report shall include, but shall not necessarily be limited to, a thorough explanation of the actions complained of in the Complaint.

2. The Report shall state the results, if any, of the review undertaken by the officials responsible for the institution.

3. Any facts alleged in the Report shall be affirmed under oath by affidavit. **Defendants shall not base any factual allegations on unsigned affidavits.**

4. The Report shall include copies of any documents pertaining to the administrative record.

5. Copies of all affidavits, reports, other records, etc., shall be attached to the Report at the time that it is filed.

(*Id.* at 1-2.) The Order requires nothing of Tuzon. (*Id.*, passim.)

Various Arizona district court judges had entered orders substantially similar to the Order at issue here. Some of them granted the Arizona Attorney General's motions to reconsider and strike provisions like those contained in the Order. (Petition for Writ of Prohibition, Exs. 9 and 10.) Others declined to do so. (*Id.*, Exs. 11-13.)

The Defendants moved for reconsideration of the Order. (Dkt. 44.) Tuzon responded, attesting that he is "a competent adversarial party." (Dkt. 45, ¶ 3, ¶ 9(a).) He acknowledged that he was aware of the

concept of discovery in civil litigation and his own obligations under Rule 11. (*Id.*, ¶¶ 8 and 9.) Finally, he asserted that the parties should work together and get to the core of the case "without [the] Court's intervention until needed." (*Id.*, ¶ 9(b).) The district court denied the Motion for Reconsideration, stating only that there was "no basis to depart from its original decision." (Dkt. 48.) The Defendants moved to stay enforcement of the Order pending a Petition for Writ of Prohibition to be filed in the Ninth Circuit. (Dkt. 51.)

The Defendants then moved to dismiss the Complaint based on Tuzon's failure to exhaust administrative remedies under the PLRA. (Dkt. 55.) They simultaneously moved to stay discovery, including the requirement to file the report required by the Order. (Dkt. 56.) While these motions were pending, they filed their Petition for Writ of Prohibition in the Ninth Circuit Court of Appeals, seeking an order prohibiting the district court from entering and enforcing the subject portions of the Order (the "Petition").

Before the Ninth Circuit ruled on the Petition, the District Court granted the Defendants' Motion to Dismiss in part and denied it in part, further denying as moot their Motion to Stay Discovery, but granting their request to stay enforcement of the requirement to investigate and report as to the subject matter of Tuzon's claims, pending the resolution of their Petition. (Dkt. 76.) The Parties then cross-moved for summary judgment. (Dkt. 81, 84, 90, 94, 95, 97.)

On June 9, 2008, the Ninth Circuit denied Defendants' Petition for Writ of Prohibition. *In re Arizona*, 528 F.3d 652 (9th Cir. 2008) (Appendix A).

On July 22, 2008, the district court granted the Defendants' Motion for Summary Judgment in part and denied it in part, at the same time denying Tuzon's Motion in its entirety. (Dkt. 101.) Defendants timely moved for a new trial and for reconsideration of the denial of qualified immunity to Defendant Escarcega on August 4, 2008. (Dkt. 102.) The District Court directed Tuzon to file a response to the Motion by September 10, 2008. (Dkt. 104.)

Both while the Petition was pending and after the Ninth Circuit issued its Opinion, judges in the district court have again issued orders similar to the one at issue here. *E.g.*, *Cardella v. Flanagan*, D. Ariz. No. CV 05-154-TUC-RCC (Dkt. 41 filed Dec. 10, 2007); *Fierro v. Richardson*, D. Ariz. No. CV 07-580-TUC-DCB (Dkt. 17 filed July 17, 2008); *Brinkman v. Schriro*, D. Ariz. No. CV 06-512-TUC-CJK (Dkt. 39, filed May 18, 2007).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to rein in the district judges in Arizona who are exceeding their lawful authority. The Court must step in because the Ninth Circuit failed in its duty to control the courts under its charge.

I. The Court Should Grant Certiorari to Reassert Its Authority and Supremacy in Promulgating Federal Rules of Procedure.

This Court has the responsibility and the power to adopt rules of civil procedure (with Congressional approval). Lower courts are not free to impose their own procedures that directly conflict with the rules that this Court has adopted. But the district court here, with the Ninth Circuit's blessing, did just that, ordering one-sided disclosure in a pro-se inmate case, when this Court has decreed that there shall be no disclosure in such cases.

Congress has the original authority to prescribe the rules of procedure for the federal courts. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 n.3 (1987) (citing U.S. Const. art. III; U.S. Const. art. I, § 8, cl. 18). In the Rules Enabling Act, Congress delegated the rulemaking authority to this Court while maintaining oversight over the rules so adopted. 28 U.S.C. § 2072; 28 U.S.C. § 2074; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10, 15 (1941).

This Court has adopted a rule mandating that parties to civil proceedings mutually exchange disclosure statements revealing, among other things, known facts, witnesses, and exhibits. Fed. R. Civ. P. 26(a)(1) (Appendix C). But it has specifically decreed that this mutual disclosure exchange does not apply in certain cases, including "an action brought without counsel by a person in custody of . . . a state, or a

state subdivision. . . ." Fed. R. Civ. P. 26(a)(1)(E)(iv) (Appendix C).

The district judge here, along with other district judges and magistrate judges, acting with the Ninth Circuit's endorsement, have essentially abrogated Rule 26(a)(1)(E)(iv). They require super disclosure statements in pro-se inmate cases: cases that are specifically exempt from the disclosure requirement. Worse still, as noted above, the super disclosure that they have mandated is not mutual. So the lower courts here have not only adopted a de facto rule in contravention of this Court's dictates, they have done so in a unilateral – and therefore unfair – fashion.

Congress has provided that the rules of procedure in the district courts are to be only those adopted under, or consistent with, the Rules Enabling Act. "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b); *accord* 28 U.S.C. § 2071(a) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title."). This Court has reiterated that rule, decreeing that the district courts may only adopt local rules that are "consistent with . . . federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075." Fed. R. Civ. P. 83(a)(1). Local rules that are inconsistent with the rules of civil procedure are unenforceable. *See, e.g., Reese v. Herbert*, 527 F.3d

1253, 1268-69 (11th Cir. 2008) (refusing to enforce local rule inconsistent with rule of civil procedure governing movant's burden in granting summary judgment); *Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1109 (9th Cir. 1999) (local rule regarding waiver of objection to hearing by magistrate judge was invalid because it conflicted with statutes and rules on the subject). The Arizona District Court has not officially promulgated a super-disclosure rule in pro-se inmate cases, but the district judges who habitually enter orders similar to Appendix B have created a de facto rule of procedure in their courts. Their actions are no less valid for being informally implemented than would have been a formal rule promulgated by the entire court.

This Court should grant certiorari to assert and solidify its supremacy over the lower federal courts and to clarify that the lower courts can neither create nor enforce procedural rules – whether de facto or officially promulgated – that conflict with this Court's rules.

II. The Court Should Grant Certiorari to Clarify the Role of Administrative Exhaustion Under the Prison Litigation Reform Act.

The Prison Litigation Reform Act requires inmates to pursue and exhaust available prison administrative remedies as a prerequisite to a suit under § 1983: "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." 42 U.S.C. § 1997e(a). (Appendix D.) The exhaustion requirement provides prison officials with a valuable right of avoiding litigation on the merits of a claim against them. *E.g., Perez v. Wis. Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999). The purpose of the exhaustion requirement is to enable the parties to try to resolve their issues administratively and avoid the burdens of litigation. *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002).

The exhaustion provisions of the PLRA are mandatory. *Booth v. Churner*, 532 U.S. 731, 740 (2001). An inmate's failure to properly and timely comply bars the action. *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). This means that an inmate who does not act timely to seek prison review of his grievances loses his opportunity to ask the prison officials to conduct an inquisition into his complaints; he does not get a second chance. Yet, the district court here – like judges in other cases in the district court – gave Tuzon that unauthorized second chance when it required prison officials to undertake a similar review. This thwarts the congressional purpose behind the PLRA.

The Ninth Circuit ignored the Prison Litigation Reform Act problem. (Appendix A, passim.) This Court should step in to make clear to the lower courts that they must comply with the PLRA.

III. The Court Should Grant Certiorari to Establish the Limits of the District Courts' Powers Under the Separation of Powers and Principles of Federalism.

The judicial system in the United States of America is adversarial, not inquisitorial. American judges are supposed to act as neutral arbiters or referees, not investigators for one side or the other. And even if American judges were inquisitors, they have no power – under principles of both federalism and separation of powers – to require executive officials of state government to undertake their investigations.

The judge in this case, like judges and magistrate judges in other similar cases, has co-opted the services of officials and employees of the Arizona Department of Corrections to undertake a judicial investigation of unproven allegations. This action crosses the line of judicial power, failing to recognize the limited powers of the judiciary at the same time it crosses boundaries of federalism. This raw abuse of power should be stopped, and this Court's action is necessary to achieve that.

Tuzon, a former state prison inmate, has alleged that several officers and employees of the Arizona Department of Corrections committed various unconstitutional acts against him. It is, of course, his right to file suit in the federal court, just as it is the right and duty of the court to adjudicate the dispute. But courts are supposed to act as arbiters or referees, not

investigators. "The premise of our adversarial system is that trial courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983) (quoting *Ala. Power Co. v. Gorsuch,* 672 F.2d 1, 7 (D.C. Cir. 1982)). Since the courts themselves are not inquisitors, it follows that they have no power to co-opt other organizations to undertake an inquisition. Neither does the judiciary have the power to direct a co-equal branch of government – the executive – to undertake such an inquisition.

Furthermore, a federal court has no power to require the executive branch of a *state* government to undertake such an inquisition. This is all the more so because the district court's order here requires state prison officials to divert resources away from the intractable problems of prison administration and devote them to investigating the as-yet unproven allegations that Tuzon has brought in this case (and that other prison inmates have brought in numerous other lawsuits). This Court has repeatedly cautioned the federal courts to stay out of the day-to-day administration of state prisons, both on separation-of-powers and federalism principles. *E.g., Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989). The courts must grant a government agency the "widest latitude in the dispatch of its own internal affairs." *Rizzo v. Goode*, 423 U.S. 362, 378 (1976). "[I]t is not the role of courts, but that of the political

branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). "[P]roper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers." *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974).

The threshold for federal-court involvement in prison operations is therefore a proven violation of the law: "When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* at 405-06. By requiring Arizona prison officials to investigate the allegations that prisoners raise in their all-too-easy-to-file lawsuits, the courts inevitably interfere with prison operations and infringe on limited – and shrinking – resources. Thus, this Court should grant certiorari to remind the Ninth Circuit and the district court of the principles laid out in *Lewis v. Casey* and to require them to apply those principles:

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm. . . . It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur. Of course, the two roles

> briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm. But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly. If – to take another example from prison life – a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care, . . . simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.

Lewis v. Casey, 518 U.S. at 349-50.

The lower courts here have ignored *Lewis v. Casey*'s requirement that an inmate must prove that he has suffered actual harm before a federal court may order prison officials to take action. They have required prison officials to investigate Tuzon's claims and to consider whether to take appropriate responsive action. This is both premature and tardy. It is premature because at the time they are supposed to conduct this review and possibly act to Tuzon's

benefit, Tuzon has not yet proved that he has suffered any actual harm. It is tardy because the Prison Litigation Reform Act requires inmates like Tuzon to seek similar administrative remedies *before* filing suit. *See* Argument § II, supra.

IV. The Court Should Grant Certiorari to Give Guidance to the Lower Courts to Protect the Due-Process Rights of Parties and Non-Parties.

Courts are supposed to be neutral arbiters of the cases and controversies that come before them; they are supposed to give equal treatment to both sides of any lawsuit. This principle applies whether the party is an individual, a trade union, a corporation, or a government. And it applies not only to the ultimate decision but how the parties are treated in the conduct of the case. The fundamental tenet underlying the concept of due process of law is that the parties – both sides of a conflict – are supposed to be treated fairly. Neither the district court's order nor the Ninth Circuit's opinion achieves that end.

The Order tilts the playing field for Tuzon and against the Defendants by requiring the Defendants (and associated persons) to conduct – at taxpayer expense – an investigation to prove or disprove Tuzon's allegations. This is unfair and violates the Defendants' due-process rights.

The Federal Rules of Civil Procedure help secure a party's right to fundamental fairness in court proceedings. The district court, on its own initiative,

flouted the rules when it directed the Defendants to provide Tuzon with far more disclosure than Rule 26 allows. It did so without ordering Tuzon to provide reciprocal disclosures to the Defendants.

The Order forces the Petitioners (and associated persons who are not parties to the proceeding) to essentially prepare Tuzon's case for him, at least the factual side of it: It requires the Petitioners – but not Tuzon – to investigate Tuzon's claims. It requires the Petitioners – but not Tuzon – to disclose facts. It requires the Petitioners – but not Tuzon – to file affidavits supporting those disclosed facts, and forces them to do so without benefit of mutual discovery. It requires the Petitioners to address the merits of Tuzon's claims before he has even proven them. By entering the Order, the district court therefore transformed the Defendants and associated persons into investigators for Tuzon and the court; it denied them the right to defend themselves pursuant to a fair and orderly adversarial process.

Furthermore, the Order purports to wield power over ADC officials even though it has not obtained personal jurisdiction over them. Having jurisdiction to act is the most basic element of a court's power over a party. Neither the Ninth Circuit nor the District Court recognized or applied this simple tenet.

The Petitioners pointed out the fundamental unfairness of the Order. But the Ninth Circuit turned a deaf ear: it acknowledged that the Petitioners had raised due-process concerns (Appendix A at 7a), but it

did not even address them (*id.*, passim.) This Court should step in to instruct the lower courts that they must give equal treatment to all litigants who come before them, including the States and their officials and employees. It should grant certiorari to ensure that courts do not exceed their lawful bounds by making orders – with the implied threat of contempt of court for failing to comply – against persons over whom it has not obtained jurisdiction.

CONCLUSION

The Court should grant this Petition for Certiorari.

Respectfully submitted,

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