No. _____

In The
Supreme Court of the United States

JACK DARRELL HEARN; DONNIE LEE MILLER;
JAMES WARWICK JONES,

Petitioners,

vs.

STEVEN McCRAW, in his Official Capacity as Director of the Texas Department of Public Safety; and, SHEILA VASQUEZ, in her Official Capacity as Manager of the Texas Department of Public Safety-Sex Offender Registration Bureau,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD GLADDEN
LAW OFFICE OF
RICHARD GLADDEN
1204 W. University Dr.,
Ste. 307
Denton, Texas 76201
940/323-9300 (voice)
richscot1@hotmail.com
(email)

WM. T. HABERN
Counsel of Record
for Petitioners
THE HABERN LAW FIRM
P.O. Box 130744
Houston, Texas 77219
713/942-2376 (voice)
bill@paroletexas.com
(email)

Counsel for Petitioners

July 2021

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

H:\41103 Gladden cv 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:03 PM
Attorney: Gladden

QUESTION PRESENTED

Under 42 U.S.C. §1983, and the Continuing Violations Doctrine, Does a "Separate Accrual Rule," or in Contrast a "Discovery of Injury Rule," Apply to a Claim which Challenges Governmental Conduct that has Occurred *Within* a Limitations Period, after a Violation has Allegedly Occurred Previously *Outside* the Limitations Period, Pursuant to the Same Policy?

H:\41103 Gladden in 04.docx
Last saved by Shelley
Last printed: 7/22/21 1:12 PM
Attorney: Gladden

PARTIES TO THE PROCEEDING AND RELATED CASES

No parties other than those listed in the caption have been parties to the proceeding in the court whose judgment is sought to be reviewed. The Petitioners are all individual persons, not corporations, and no Petitioner has a parent or publicly held company owning 10% or more of any corporation's stock. The proceedings in other all other courts directly related to this case are, in chronological order, as follows:

- *Hearn v. Vasquez*, No. 1:18-CV-504-LY (W.D. Tex. May 27, 2020) (Final Judgment).
- *Hearn v. Vasquez*, No. 1:18-CV-504-LY (W.D. Tex. June 19, 2020) (Order Denying Motion for New Trial or to Alter or Amend Final Judgment).
- *Hearn v. McCraw,* No. 20-50581 (5th Cir. April 15, 2021) (per curiam) (Final Judgment).
- *Hearn v. McCraw,* No. 20-50581 (5th Cir. May 11, 2021) (Order Denying Petition for Rehearing En Banc).

H:\41103 Gladden in 04.docx
Last saved by Shelley
Last printed: 7/22/21 1:12 PM
Attorney: Gladden

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RELATED CASES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

1) The Fifth Circuit's Decision Directly Conflicts with the Supreme Court's Decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and its Progeny, Wherein this Court has Repeatedly Ruled a Limitations Period Begins to Run "Anew" with each Application of a Challenged Governmental Policy 8

2) The Fifth Circuit's Decision Directly Conflicts with the Decisional Law of the U.S. Courts of Appeals for the Fourth, Sixth, Seventh and Ninth Circuits 14

CONCLUSION 16

TABLE OF CONTENTS – Continued

Page

APPENDIX:

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit from which review is sought, *Hearn v. McCraw*, No. 20-50581 (5th Cir. April 15, 2021) (per curiam) (unpublished) 1a

The Opinion and Order of the United States District Court for the Western District of Texas, which denied Petitioners' motion for new trial or to alter or amend the Final Judgment in *Hearn v. Vasquez*, No. 1:18-CV-504-LY (W.D. Tex. June 19, 2020) (unpublished).....10a

The Findings of Fact and Conclusions of Law, and Final Judgment, of the United States District Court for the Western District of Texas, *Hearn v. Vasquez*, No. 1:18-CV-504-LY (W.D. Tex. May 27, 2020) (unpublished) 13a

The Order of the United States Court of Appeals for the Fifth Circuit which denied Petitioners' petition for rehearing hearing en banc in *Hearn v. McCraw*, No. 20-50581 (5th Cir. May 11, 2021) (unpublished) 28a

TABLE OF AUTHORITIES

Page

CASES:

Am. Trucking Associations Inc. v. New York Thruway Auth., 199 F. Supp. 3d 855 (S.D.N.Y. 2016) 13

Elvis Presley Enterprises, Inc. v. Capece, 141 F.3d 188 (5th Cir. 1998) 8

Flynt v. Shimazu, 940 F.3d 457 (9th Cir. 2019) 14, 15

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 12

Heath v. Bd. of Supervisors for S. Univ. and Agric. and Mech. Coll., 850 F.3d 731 (5th Cir. 2017) 7

Kuhnle Brothers, Inc. v. County of Geauga, 103 F.3d 516 (6th Cir. 1997) 15

Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit, 507 U.S. 163 (1993) 16

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) 9, 14

Lewis v. City of Chicago, 528 F.3d 488 (7th Cir. 2008) 15

Lewis v. City of Chicago, 560 U.S. 205 (2010) 9, 14, 15

Nat'l Advertising Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991) 15

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) 8, 9, 14

TABLE OF AUTHORITIES – Continued

Page

Palmer v. Board of Education of Community Unit School District 201-U, 46 F.3d 682 (7th Cir. 1995) 15

Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663 (2015).....13

Santobello v. New York, 404 U.S. 257 (1971).....5

Virginia Hospitals Association v. Baliles, 868 F.2d 653 (4th Cir. 1989), *aff'd in part on other grounds sub nom. Wilder v. Va. Hospital Ass'n*, 496 U.S. 498 (1990) 14, 15

Wilson v. Garcia, 471 U.S. 261 (1985) 13

STATUTES, CODES, AND RULES:

28 U.S.C. §1254 1

The Civil Rights Act of 1871, Rev. Stat. §1979, 42 U.S.C. §1983..... 2, 12, 13, 16

Act of May 29, 1989, 71st Leg., R.S., ch. 785, §4.17, 1989 Tex. Gen. Laws 3471.....3

Act of May 30, 1993, 73rd Leg., R.S., ch. 866, §4, 1993 Tex. Gen. Laws 3420 3

Act of June 13, 1997, 75th Leg., R.S., ch. 669, §1, 1997 Tex. Gen. Laws 2253 4

Act of May 24, 2005, 79th Leg., R.S., ch. 1008, §1.01, 2005 Tex. Gen. Laws 3385.....4

Rule 13.1, Rules of the Supreme Court of the United States 1

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit from which review is sought, *Hearn v. McCraw*, No. 20-50581 (5th Cir. April 15, 2021) (per curiam), are unpublished, but are reprinted in the Appendix ("App.") at 1a–9a. The Order of the United States District Court for the Western District of Texas which denied Petitioners' motion for new trial or to alter or amend judgment in *Hearn v. Vasquez*, No. 1:18-CV-504-LY (W.D. Tex. June 19, 2020), is unpublished, but is reprinted at App. 10a–12a. The Findings of Fact and Conclusions of Law and Final Judgment of the United States District Court for the Western District of Texas in *Hearn v. Vasquez*, *supra* (W.D. Tex. May 27, 2020), are unpublished, but are reprinted at App. 13a–27a. The Order of the United States Court of Appeals for the Fifth Circuit which denied Petitioners' petition for rehearing hearing en banc in *Hearn v. McCraw*, No. 20-50581 (5th Cir. May 11, 2021) is unpublished, but is reprinted at App. 28a–29a.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit from which review is sought was entered on April 15, 2021 (App. 1a–9a), and in accordance with Rule 13.1 this Petition has been timely filed. Jurisdiction of this Court is invoked by Petitioners under 28 U.S.C. §1254(1).

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

STATUTORY PROVISION INVOLVED

The Civil Rights Act of 1871, Rev. Stat. §1979, 42 U.S.C. §1983, provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

In the early 1990s Petitioners each entered pleas of guilty as part of negotiated agreements with the State of Texas in connection with allegations that they had committed certain criminal offenses.[1] Under the plea bargain agreements Petitioners were placed on community supervision without a finding of guilt ("deferred adjudication"), based on their alleged commission of "reportable sex offenses" as defined by Texas law.[2] The negotiated plea agreements were approved and accepted by the state district courts in each of Petitioners' criminal cases, and Petitioners were

[1] Opinion and Judgment of the Court of Appeals, App. 2a.

[2] *Ibid.*

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

subsequently discharged satisfactorily from community supervision and the accusations against them were dismissed by their respective state district courts.[3]

As part of his negotiated plea agreement, and as provided by then-extant Texas statutory law, Petitioner Hearn was assured at the time of his plea that upon his successful completion of community supervision he would officially be relieved from all "disqualifications and disabilities imposed by law for conviction of an offense" as provided by then-extant Texas statutory law.[4] As part of their negotiated plea agreements, and as provided by then-extant Texas statutory law, Petitioners Miller and Jones were not only assured at the time that they would officially be relieved from all "disqualifications and disabilities imposed by law for conviction of an offense" upon their satisfactory discharge from community supervision (as was Petitioner Hearn); but also, more specifically, Petitioners Miller and Jones were assured their duties to register as "sex offenders" with state authorities would expire on the date the state district court satisfactorily discharged them from community supervision.[5] Petitioner Jones' written plea bargain agreement, for example,

---

[3] Petitioners' Trial Exhibits, Record on Appeal ("ROA"), ROA.968; ROA.992; and ROA.1000–ROA.1001.

[4] *See* Act of May 29, 1989, 71st Leg., R.S., ch. 785, §4.17, 1989 Tex. Gen. Laws 3471, 3501 (former Article 42.12, §5(c), Texas Code of Criminal Procedure).

[5] *See* Act of May 30, 1993, 73rd Leg., R.S., ch. 866, §4, 1993 Tex. Gen. Laws 3420, 3421.

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

expressly provided in accordance with then-extant Texas statutory law that:

> "Your duty to register [as a sex offender] ends on the day your probation is discharged or if you have received an order of Deferred Adjudication for the offense your duty to register ends on the date the court dismisses the criminal proceeding against you and discharges you. . . ."[6]

In 1997 the Texas legislature amended its sex offender registration program ("SORP"). As the result of the statutory amendment in 1997, Petitioner Hearn was required to register as a "sex offender" with state authorities for the first time; and, as an additional departure from the plea agreements Petitioners had negotiated, he, along with Petitioners Miller and Jones, were required to register as "sex offenders" for an additional ten years after their satisfactory discharge from community supervision and the dismissal of their cases.[7] As the result of another statutory amendment in 2005, the Petitioners were each then required to register as "sex offenders" for life.[8]

---

[6] Petitioners' Trial Exhibits, ROA.998.

[7] District Court's Findings of Fact and Conclusions of Law, App. 15a, citing Act of June 13, 1997, 75th Leg., R.S., ch. 669, §1, 1997 Tex. Gen. Laws 2253, 2261.

[8] District Court's Findings of Fact and Conclusions of Law, App. 15a; Act of May 24, 2005, 79th Leg., R.S., ch. 1008, §1.01, 2005 Tex. Gen. Laws 3385, 3387, 3405 (now codified as Article 62.001(6)(A) and Article 62.101(a)(1), Texas Code of Criminal Procedure).

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

Currently, Petitioners are required to comply with numerous legal obligations as the result of the registration requirement. Among other legal obligations (some of which are far more onerous), Petitioners are required to appear annually in-person at local registration offices to verify their registration information, and they are required to appear annually and submit to being photographed by state officials for the purpose of being publicly identified as "sex offenders." In accordance with Texas law, the photographs of Petitioners and the information acquired from Petitioners, both of which are obtained from Petitioners under threat of criminal prosecution, are then posted on the state's publicly accessible sex offender registry website, where Petitioners are labeled as "sex offenders."

The Petitioners filed their original complaint in the United States District Court for the Western District of Texas, Austin Division, on June 8, 2018, pursuant to 42 U.S.C. §1983 ("§1983").[9] The Petitioners' complaint as amended, in reliance on *Santobello v. New York*, 404 U.S. 257 (1971), alleged that by imposing (as to Petitioner Hearn) and by extending (as to Petitioners Miller and Jones) a duty to register as "sex offenders" the State of Texas had breached the terms of Petitioners' negotiated plea bargain agreements in violation of the Fourteenth Amendment.[10] The Petitioners further alleged that since 1997 Respondents had continuously applied and enforced the

---

[9] Petitioners' Original Complaint, ROA.12.

[10] Petitioners' First Amended Complaint, ROA.727–ROA.728.

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

state's amended statutes against them on an annual basis; that the Respondents had done so within the applicable 2-year statute of limitations period immediately preceding the filing of their complaint; and that Respondents' conduct within the limitations period therefore provided the basis for their "actionable" claims.[11]

The Petitioners' complaint was heard at a bench trial in the District Court on August 27, 2019.[12] After trial, on May 27, 2020, the District Court issued an order containing findings of fact and conclusions of law and entered a final judgment.[13] In its findings of fact and conclusions of law the District Court concluded, *inter alia*, that although the requirements of Texas' sex offender registration program had been applied continuously to Petitioners since 1997, and that Respondents had applied Texas' sex offender registration to Petitioners less than a year earlier, Petitioners' claims were barred by the applicable statute of limitations governed by Texas law (two years) measured from the date the Texas statute was amended in 1997.[14] On this

---

[11] *Id.*, ROA.728; ROA.733–ROA.734; *see also* District Court's Findings of Fact and Conclusions of Law, App. 17a (noting Petitioners alleged "separately-actionable constitutional violations" occurring within the applicable limitations period).

[12] District Court's Findings of Fact and Conclusions of Law, App. 13a.

[13] *Ibid.*

[14] *Id.*, App. 23a–24a.

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

basis the District Court entered a final judgment that dismissed Petitioners' complaint.[15]

The Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. On April 15, 2021, a panel consisting of Judges King, Smith and Haynes, after hearing oral argument, affirmed the District Court's judgment on the sole ground that Petitioners' claims were barred by limitations.[16] The Court of Appeals did not reach the remaining issues presented by the appeal or the merits of Petitioners' constitutional claims.[17]

The primary basis for the Court of Appeals' decision was that the Fifth Circuit's decision in *Heath v. Bd. of Supervisors for S. Univ. and Agric. and Mech. Coll.*, 850 F.3d 731 (5th Cir. 2017) "d[id] not alter the general understanding of accrual, that is, that a claim accrues when a plaintiff is (or should be) aware of his injury."[18] In the alternative, the Court of Appeals further ruled that the "equitable" doctrine of laches, as applied to the "continuous violation" doctrine, foreclosed Petitioners' claims.[19] The Petitioners timely filed

---

[15] District Court's Findings of Fact and Conclusions of Law, App. 25a; District Court's Final Judgment, App. 26a.

[16] Opinion and Judgment of the Court of Appeals, App. 2a.

[17] Opinion and Judgment of the Court of Appeals, App. 3a n. 1.

[18] *Id.*, App. 4a–5a.

[19] *Id.*, App. 6a–7a. The affirmative defense of "laches" was neither pled by Respondents in the District Court nor considered by the District Court *sua sponte*, but was raised for the first time by Respondents in their opening brief on appeal. In their reply

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

a petition for rehearing of the panel's decision en banc which was denied by the Fifth Circuit on May 11, 2021.[20]

REASONS FOR GRANTING THE PETITION

1) The Fifth Circuit's Decision Directly Conflicts with the Supreme Court's Decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and its Progeny, Wherein this Court has Repeatedly Ruled a Limitations Period Begins to Run "Anew" with each Application of a Challenged Governmental Policy.

In *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) the Supreme Court ruled that under federal accrual principles "each discrete act starts a new clock for filing charges alleging that act," and that a statute

---

brief on appeal, Petitioners asserted procedural default of this affirmative defense by Respondents, as well as additional argument presented hereinafter in this petition.

[20] Court of Appeals' Order Denying Petition for Rehearing En Banc, App. 28a–App. 29a. In their petition for rehearing en banc Petitioners also argued the panel had failed to apply the correct legal analysis, as provided in *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188, 205–206 (5th Cir. 1998), for determining whether Respondents were entitled to relief under the laches doctrine. *Compare* Opinion and Judgment of the Court of Appeals, App. 7a ("there is good reason for us temper" application of the continuing violation doctrine "in this case where Plaintiffs have all sworn that they were made aware of the change in the law-and thus the alleged breach-over two decades ago and yet never challenged the alleged breach until this suit").

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

of limitations defense does not "bar a [plaintiff] from using the prior acts as background evidence to support a timely claim." *Id.*, 536 U.S. at 113. Since its decision in *Morgan*, the Supreme Court has repeatedly re-affirmed this principle. Thus, in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the Court ruled that "a freestanding violation may always be charged within its own charging period *regardless of its connection to other violations.*" *Id.*, 550 U.S. at 636 (2007) (emphasis added), *superseded by statute on other grounds*, Pub. Law No. 111-2, 123 Stat. 5 (2009). And in *Lewis v. City of Chicago*, 560 U.S. 205 (2010) the Court again stated that "it does not follow" that no new actionable claim may be deemed timely, or that "no new claims [can] arise," when a state through its agents implements a prior unlawful (or unconstitutional) policy sometime "down the road" and does so within an applicable limitations period that precedes the filing of a complaint. *Id.*, 560 U.S. at 214. These decisions recognize that a "separate accrual rule," and not a "discovery of injury rule," applies to claims which challenge conduct that has occurred *within* a limitations period, after a violation has allegedly occurred *outside* the limitations period.

In order to reach its decision affirming the District Court's judgment on the limitations issue the Court of Appeals sought to distinguish Petitioners' claims on two grounds. First, the Fifth Circuit ruled Petitioners' pleadings were not "framed" in a manner that alleged Respondents' conduct constituted "separately actionable" violations occurring within the

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

limitation period.[21] Second, the Court of Appeals ruled that Respondents' conduct when "annually" applying Texas' SORP to Petitioners during the applicable limitations period constituted a "single act" that occurred in 1997 and not thereafter.[22] The former ruling of the Court of Appeals (concerning the manner in which Petitioners alleged their claims) is plainly refuted by the record, and the latter ruling (premised on a "single act" theory) is in error as a matter of law.

When "framing" their claims Petitioners' complaint alleged they had been subjected to "separately actionable" violations because, *inter alia*:

> "The computerized central database maintained by [Respondents] presently reveals several things. First, [Respondents'] database discloses that during the limitations period that preceded the filing of [Petitioners'] claims in this case: 1) [Respondents] 'updated' [Petitioners'] photographs on the database; 2) [Respondents] publicly reported on the database that [Petitioners] had timely 'verified' their registration information as required by Chapter 62 [of the Texas Code of Criminal Procedure]; and 3) [Respondents] publicly reported on the database that [Petitioners] had

---

[21] Opinion and Judgment of the Court of Appeals, App. 4a ("As Plaintiffs have framed their argument"); *id.*, App. 5a ("as Plaintiffs frame their injury").

[22] *Id.*, App. 6a ("there is only one act at issue").

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

> involuntarily disclosed 'information required by the department.' "[23]

Additionally, Petitioners presented extensive briefing to the District Court which made it clear they were not merely relying on Respondents' conduct which had occurred "outside" the limitations period (such as the 1997 amendment to Texas' SORP). As disclosed by these pleadings, Petitioners "framed" and plainly alleged the State of Texas' requirement that they involuntarily provide certain information annually, and Respondents' annual collection and public disclosure online of the "updated" information that Petitioners are required to involuntarily provide, constituted "separately actionable" violations because Respondents' actions involved "applications" of an unconstitutional policy within the limitations period.[24]

With regard to the Court of Appeals' legal conclusion that when "annually" applying Texas' SORP to Petitioners during the applicable limitations period

---

[23] Plaintiffs' First Amended Complaint, ROA.624; ROA.631; and, ROA.639.

[24] Plaintiffs' Response to Defendants' Brief Concerning Defensive Issues Presented at Trial, ROA.820–ROA.823 ("because Plaintiffs have alleged and submitted uncontroverted evidence of Defendants' continuing applications of Texas' SORP to them within the limitations period, which would in turn constitute 'independent' constitutional violations, Plaintiffs are entitled [to] declaratory and injunction relief on their undeniably timely-filed claims, regardless of whether Defendants' application [of] the registration requirement to Plaintiffs in 1997 following amendment to Texas' SORP is viable under the 'common practice' theory of liability").

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

Respondents' conduct constituted only a "single act,"[25] the Fifth Circuit's decision is in error as a matter of law. The Supreme Court has ruled the determination of when a cause of action "accrues" under federal law is a matter of Congressional intent and statutory interpretation.[26] When viewed through this prism the "single act" ruling of the Fifth Circuit is patently inconsistent with the intent of the Congress that enacted §1983 in 1871.

For example, suppose a governmental entity had a policy which authorized a search of homes indiscriminately without probable cause and a warrant. Under the Fifth Circuit's "single act" doctrine concerning "accrual" the fact that a person's home was unconstitutionally searched in 1997 pursuant to the policy would bar a person's "separately actionable" constitutional claim arising from a subsequent search occurring in 2021 because the latter search was undertaken in accordance with the same policy. In the present case Petitioners sought declaratory and prospective equitable relief, and it is illogical to conclude, as the Fifth Circuit has in the instant case, that the Congress which enacted §1983 (in 1871) intended to bar equitable remedies based on injuries incurred within the limitations period, merely because they result from acts that are

---

[25] Opinion and Judgment of the Court of Appeals, App. 6a ("there is only one act at issue").

[26] *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (ruling that determination of when a federal statutory cause of action "accrues" depends on the "remedial intent of Congress embodied" in the federal act invoked by a plaintiff).

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

part of a continuing pattern of similar acts which caused other, similar injuries outside that period.

The Fifth Circuit's decision to affirm the District Court's decision on the alternative ground that "laches" foreclosed Petitioners' claims is also directly in conflict with prior precedent of the Supreme Court.[27] The Supreme Court has ruled that under §1983 federal courts generally must apply the limitations period that a forum state has provided for personal-injury torts.[28] When, as in the present case, a "separately actionable" claim has "accrued" during the applicable limitations period as determined by federal law, the equitable defense of laches may not operate to bar the cause of action. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2015) (ruling that when a "suit seeks relief solely for conduct occurring within the limitations period . . . courts are not at liberty to jettison Congress' judgment on the timeliness of suit"). Moreover, as observed by at least one U.S. District Court, federal appellate courts have described *Petrella's* legal reasoning "as 'categorical' and [have] applied its holding to equitable claims filed within an applicable statute of limitations, whether or not that statute of limitations was enacted by Congress."[29]

---

[27] Opinion and Judgment of the Court of Appeals, App. 7a.

[28] *Wilson v. Garcia*, 471 U.S. 261 (1985).

[29] *Am. Trucking Associations Inc. v. New York Thruway Auth.*, 199 F. Supp. 3d 855, 871 (S.D.N.Y. 2016); *see also id.*, 199 F. Supp. 3d at 872 (observing that were a contrary rule adopted "*Brown v. Board of Education* would have been thrown out of court, on the ground that the Kansas statute authorizing Topeka

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

2) The Fifth Circuit's Decision Directly Conflicts with the Decisional Law of the U.S. Courts of Appeals for the Fourth, Sixth, Seventh and Ninth Circuits.

As most recently noted by the U.S. Court of Appeals for the Ninth Circuit, "[w]hen the continued enforcement of a statute inflicts a continuing or repeated harm, a new claim arises (and a new limitations period commences) with each new injury."[30] Like the Ninth Circuit, the U.S. Courts of Appeals for the Fourth, Sixth, and Seventh Circuits have also adhered to decisional law of the Supreme Court on this point, as described by Petitioners above.[31] Thus, precedent of the Fourth, Sixth, Seventh, and Ninth Circuits, in contrast to the Fifth Circuit, has established that the

---

to maintain segregated public schools had been on the books since 1879"), citing *Virginia Hospitals Association v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd in part on other grounds sub nom. Wilder v. Va. Hospital Ass'n*, 496 U.S. 498 (1990).

[30] *Flynt v. Shimazu*, 940 F.3d 457, 462 (9th Cir. 2019).

[31] *Nat'l R.R. Passenger Corp. v. Morgan*, *supra*, 536 U.S. at 113 ("each discrete act starts a new clock for filing charges alleging that act," and a statute of limitations defense does not "bar a [plaintiff] from using the prior acts as background evidence to support a timely claim"); *Ledbetter v. Goodyear Tire & Rubber Co.*, *supra*, 550 U.S. at 636 ("a freestanding violation may always be charged within its own charging period regardless of its connection to other violations"); *Lewis v. City of Chicago*, *supra*, 560 U.S. at 214 ("it does not follow" that no new actionable claim may be deemed timely, or that "no new claims [can] arise," when a state through its agents implements a prior unlawful (or unconstitutional) policy sometime "down the road" and does so within an applicable limitations period that precedes the filing of a complaint).

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

continuing violation doctrine may not be transformed from a defensive "shield" that limits the viability of claims *outside* a limitations period, into a "sword" that forever after denies a remedy to persons who have "separately actionable" claims based on deprivations of federal rights occurring *within* a limitations period.[32]

---

[32] *Flynt v. Shimazu*, *supra*, 940 F.3d at 462; *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) ("A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment"); *Palmer v. Board of Education of Community Unit School District 201-U*, 46 F.3d 682, 686 (7th Cir. 1995) ("A series of wrongful acts, however, creates a series of claims. A public employer that applies different salary schedules to black and white employees commits a new wrong every pay period, and the fact that the employer has been violating the Constitution for a generation does not permit it to commit fresh violations"); *Virginia Hospitals Association v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989) (affirming District Court's ruling that "[t]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations"), *aff'd in part on other grounds sub nom. Wilder v. Va. Hospital Ass'n*, 496 U.S. 498 (1990); *but see Lewis v. City of Chicago*, 528 F.3d 488, 492–493 (7th Cir. 2008) ("The statute of limitations begins to run upon injury (or discovery of the injury) and is not restarted by subsequent injuries"), *expressly disapproved* in *Lewis v. City of Chicago*, *supra*, 560 U.S. at 214 ("it does not follow" that no new actionable claim may be deemed timely, or that "no new claims [can] arise," when a state through its agents applies a prior unlawful (or unconstitutional) policy sometime "down the road" and does so within an applicable limitations period that precedes the filing of a complaint); *and see also Nat'l Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1167 (4th Cir. 1991) ("determining whether a continuing wrong exists" depends on "[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged").

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM

Like the "heightened pleading" doctrine judicially devised by the Fifth Circuit and condemned by this Court in *Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit*, 507 U.S. 163 (1993), the "single-unchallenged-violation-confers-absolute-governmental-immunity" doctrine adopted by the Fifth Circuit, as it would apply to continuing violations of federally protected constitutional and statutory rights, flagrantly negates the will of Congress. Suffice it to say, when Congress enacted §1983 it intended to provide a remedy for deprivations of those federal rights. The split among the federal courts of appeals on the Question Presented, and the important recurring nature of the issue raised by this petition, warrants the Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD GLADDEN
LAW OFFICE OF
RICHARD GLADDEN
1204 W. University Dr.,
Ste. 307
Denton, Texas 76201
940/323-9300 (voice)
richscot1@hotmail.com
(email)

WM. T. HABERN
Counsel of Record
for Petitioners
THE HABERN LAW FIRM
P.O. Box 130744
Houston, Texas 77219
713/942-2376 (voice)
bill@paroletexas.com
(email)

Counsel for Petitioners

H:\41103 Gladden br 02.docx
Last saved by Shelley
Last printed: 7/22/21 12:17 PM
WL: 9,000 words

Automatic word count: 3911 words as of Thursday, July 22, 2021 12:17:23 PM