

No. 18-647

IN THE
Supreme Court of the United States

PULTE HOMES OF NEW YORK LLC,

Petitioner,

v.

TOWN OF CARMEL, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MAURIZIO SAVOJARDO III
Counsel of Record
MIRANDA SAMBURSKY SLONE SKLARIN
VERVENIOTIS LLP
The Esposito Building
240 Mineola Boulevard
Mineola, New York 11501
(516) 741-7676
msavoiaro@msssv.com

Counsel for Respondents

QUESTIONS PRESENTED

1. Did the Circuit Court properly hold that the continuing violation doctrine was inapplicable to discrete acts?
2. Did the Circuit Court properly determine that Petitioner's claims accrued more than three (3) years prior to the commencement of the lawsuit?
3. Whether the question of the applicability of the continuing violation doctrine to civil rights claims under 42 U.S.C. § 1983 is properly preserved for review where the Circuit Court did not reject the application of the doctrine to Section 1983 claims, but merely concluded the doctrine was inapplicable to the facts of this case.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION.....	1
STATEMENT OF THE CASE	3
A. Petitioner’s State Court Actions	3
B. Petitioner’s Federal Court Action.....	5
C. Decision Below.....	6
REASONS FOR DENYING CERTIORARI.....	8
I. The Circuit Court’s Decision Does Not Conflict with This Court’s Precedents	8
II. The Circuit Courts Consistent with This Court’s Decision in <i>Morgan</i> Uniformly Agree the Continuing Violation Doctrine Does Not Apply to Discrete Acts	11
III. The Circuit Court Did Not Hold the Continuing Violation Doctrine Is Inapplicable to Section 1983 Claims	16

Table of Contents

	<i>Page</i>
IV. There is No Split Between the Circuit Courts as to the Applicability of the Continuing Violation Doctrine to Claims Asserted Under Section 1983.....	18
CONCLUSION	20

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>A Society Without A Name v. Virginia</i> , 655 F.3d 342 (4th Cir. 2011).....	11
<i>Abascal v. Jarkos</i> , 357 F. App'x 388 (2d Cir. 2009).....	9
<i>Betts v. Hall</i> , 679 F. App'x 810 (11th Cir. 2017).....	19
<i>Carpinteria Valley Farms, Ltd. v.</i> <i>Cty. of Santa Barbra</i> , 344 F.3d 822 (9th Cir. 2003)	19
<i>Chardon v. Fernandez</i> , 454 U.S. 6 (1981).....	5, 6, 10
<i>Colby v. Herrick</i> , 849 F.3d 1273 (10th Cir. 2017).....	11
<i>Cowell v. Palmer Twp.</i> , 263 F.3d 286 (3d Cir. 2001)	11
<i>Delaware State Coll. v. Ricks</i> , 449 U.S. 250 (1980).....	10
<i>DePaola v. Clarke</i> , 884 F.3d 481 (4th Cir. 2018).....	18

Cited Authorities

	<i>Page</i>
<i>Didden v. Vill. of Port Chester</i> , 173 F. App'x 931 (2d Cir. 2006)	9, 10
<i>District of Columbia Court of Appeals v.</i> <i>Feldman</i> , 460 U.S. 462 (1983).	7
<i>Earle v. District of Columbia</i> , 707 F.3d 299 (D.C. Cir. 2012)	19
<i>Foster v. City of Detroit</i> , 405 F.2d 138 (6th Cir. 1968).	12
<i>Glaser v. Fulton-Montgomery Cmty. Coll.</i> , 50 F. App'x 17 (2d Cir. 2017)	11
<i>Gordon v. City of Warren</i> , 579 F.2d 386 (6th Cir. 1978).	12
<i>Gorelik v. Costin</i> , 605 F.3d 118 (1st Cir. 2002).	11, 18
<i>Gosselin v. Kaufman</i> , 656 F. App'x 916 (10th Cir. 2016)	15
<i>Hamic v. Harris Cty. W.C. & I.D. No. 36</i> , 184 F. App'x 442 (5th Cir. 2006)	11
<i>Heard v. Sheahan</i> , 253 F.3d 316 (7th Cir. 2001).	12

Cited Authorities

	<i>Page</i>
<i>Heath v. Bd. of Supervisors</i> , 850 F.3d 731 (5th Cir. 2017).....	19
<i>Hendrix v. City of Yazoo City</i> , 911 F.2d 1102 (5th Cir. 1990).....	12
<i>Humphrey v. Eureka Gardens Pub. Facility Bd.</i> , 891 F.3d 1079 (8th Cir. 2018).....	11, 19
<i>Kuhnle Bros., Inc. v. County of Geauga</i> , 103 F.3d 516 (6th Cir. 1997).....	12, 14
<i>Long v. Howard Univ.</i> , 512 F. Supp. 2d 1 (D.C. Cir. 2007).....	11
<i>Loumiet v. United States</i> , 828 F.3d 935 (D.C. Cir. 2016)	9, 12, 13, 16
<i>Lovett v. Ray</i> , 327 F.3d 1181 (11th Cir. 2003).....	11
<i>Montin v. Estate of Johnson</i> , 636 F.3d 409 (8th Cir. 2011).....	13, 14, 15, 16
<i>Nat’l R.R. Passenger Corp. v. Morgan</i> , 536 U.S. 101 (2002).....	<i>passim</i>
<i>Ozoroski v. Maue</i> , 460 F. App’x 94 (3d Cir. 2011)	18

Cited Authorities

	<i>Page</i>
<i>Page v. United States</i> , 729 F.2d 818 (D.C. Cir. 1984)	9
<i>Prairie View A & M University v. Chatha</i> , 317 S.W.3d 402 (Tex. App. 2010)	12
<i>Printup v. Dir., Dep’t of Job & Family Servs.</i> , 646 F. App’x 781 (6th Cir. 2016)	11, 19
<i>Savory v. Lyons</i> , 469 F.3d 667 (7th Cir. 2006)	19
<i>Shannon v. Babb</i> , 103 F. App’x 201 (9th Cir. 2004)	11
<i>Sherman v. Town of Chester</i> , 752 F.3d 554 (2d Cir. 2014)	17
<i>Shomo v. City of New York</i> , 579 F.3d 176 (2d Cir. 2009)	17
<i>United Airlines, Inc. v. Evans</i> , 431 U.S. 553 (1977)	8
<i>Va. Hosp. Assoc. v. Bailes</i> , 868 F.2d 653 (4th Cir. 1989)	12, 18
<i>Vasquez v. Davis</i> , 882 F.3d 1270 (10th Cir. 2018)	<i>passim</i>

Cited Authorities

	<i>Page</i>
<i>Washington v. Cty. of Rockland</i> , 373 F.3d 310 (2d Cir. 2004)	18
<i>Watkins v. Chicago Hous. Auth.</i> , 527 F. App'x 504 (7th Cir. 2013)	11
<i>Wider v. Va. Hosp. Ass'n</i> 406 U.S. 498 (1990).....	13, 18
<i>Youakim v. Miller</i> , 425 U.S. 231 (1976).....	2, 16-17

STATUTES AND OTHER AUTHORITIES

42 U.S.C. § 1983.....	<i>passim</i>
Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5	12

INTRODUCTION

Pulte Homes of New York LLC (“Petitioner”) commenced this action pursuant to 42 U.S.C. § 1983 alleging that the Town of Carmel and Town of Carmel Planning Board (“Respondents”) violated its equal protection and due process constitutional rights when Respondents assessed Petitioner \$749,000 in recreation fees with respect to Petitioner’s efforts to build multiple new housing developments in the Town of Carmel.

The Circuit Court affirmed the dismissal the Section 1983 claims as time-barred as the present action was commenced after the three (3) year limitations period had expired. App. 4a-6a. The Circuit Court also affirmed the dismissal of Petitioner’s state law claim for declaratory relief seeking to require the Respondents to refund Petitioner the assessed fees on the grounds that a United States District Court is not the proper forum for an appeal of a state court decision as the state court had previously denied Petitioner this relief. App. 6a-7a.

Petitioner’s attempt to categorize this case as involving a continuing violation was properly rejected by the Circuit Court as the Respondents’ resolutions imposing the fees were discrete acts to which the continuing violation doctrine cannot be applied under this Court’s decision in *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 112 (2002).

Petitioner is seeking this Court’s review of the decision below under the guise that: (1) there is a split among the Circuits as what constitutes a continuing violation; and (2) whether the continuing violation doctrine

applies to claims arising under 42 U.S.C. § 1983. Brief for Petitioner at pp. 7-9. Significantly, what constitutes a continuing violation, and its inapplicability to discrete acts were both resolved by *Morgan*. In a disingenuous effort to manufacture a “split” among the Circuit Courts on this issue, Petitioner relies upon case law that pre-dates the Court’s decision in *Morgan*. Contrary to Petitioner’s assertion, there is no split among the Circuit Courts. Not a single Circuit Court of Appeals has applied the continuing violation doctrine to discrete acts that occur outside the limitations period to render a claim timely as Petitioner is advocating be done.

Regarding the applicability of the continuing violation doctrine to Section 1983 claims, the Circuit Court’s decision analyzed whether the doctrine applied, thereby acknowledging that it is available in the context of a Section 1983 claim. App. 4a. The Circuit Court simply determined that in the present case the criterion to apply the continuing violating doctrine were not satisfied. App. 4a. The Circuit Court never concluded that the continuing violation doctrine is inapplicable to Section 1983. As such, adjudication of the applicability of the continuing violation doctrine to Section 1983 claims is not preserved or ripe for further appellate review. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

The Petition should be denied as this case involves a simple routine factually-driven accrual and statute of limitations analysis which does not necessitate further review by this Court.

STATEMENT OF THE CASE

A. Petitioner's State Court Actions

This case has its origins in Petitioner's state court challenges to the constitutionality of the Respondents' resolutions passed in 2008 and 2013 imposing recreation fees as a condition for Petitioner to develop a senior center within the Town. Petitioner filed state court actions following the passage of both the Respondents' 2008 and 2013 resolutions challenging their constitutionality. App. 3a. Neither state court action resulted in an order directing the Respondents to refund the fees paid by Petitioner. App. 27a.

The Petitioner's state court challenge to the 2008 resolutions culminated in the 2011 Decision of the state appellate court which granted the Petition in part and remanded the matter back to the Respondents for further consideration of whether an assessment of recreation fees was appropriate, the proper amount of the fees and specific findings to support any assessment. App. 25a.

In 2012, Petitioner sought additional site plan approval amendments. App. 26a. From May to September 2013, Respondents held public hearings on Petitioner's plans. App. 26a. Petitioner participated in these hearings and actively objected to the imposition of the recreation fees. App. 13a. On September 25, 2013, Respondents preliminarily approved Petitioner's site plans contingent upon the payment of a per unit recreation fee. App. 6a. Then, on September 27, 2013, the Respondents passed resolutions imposing a recreation fee. App. 26a. Despite having paid a recreation fee in 2008 and never receiving

a refund, Petitioner once again paid the fees required by the 2013 resolutions on October 18, 2013. App. 6a.

Petitioner then filed its second state court action seeking declaratory relief consisting of “vacating, annulling and setting aside” the 2013 resolutions, and an award of attorney fees. Significantly, Petitioner did not request monetary damages, or the return of the recreation fees required by the 2013 resolutions. App. 26a. On March 11, 2014, the state court granted Petitioner’s Petition to the extent it annulled the 2013 resolutions. App. 26a.

In March 2014, Petitioner requested the return of the recreation fees it paid. App. 26a. Realizing its fatal error that the remedies it requested in its state court Petition did not include an order directing Respondents to refund the fees, Petitioner filed a motion seeking to amend the state court’s March 11, 2014 Order to require the Respondents to refund the recreation fees it paid. App. 27a. Petitioner’s motion was denied. App. 27a.

In denying the Petitioner’s motion to modify the existing court order to require the Respondents to issue a refund of the fees paid by Petitioner, the state court held that because Petitioner failed to request the return of the fees in its Petition, it was not entitled to that relief. App. 27a. In its decision, the state court emphasized that Petitioner “failed to request [a] refund in its [2013 action] despite the fact that it paid the monies approximately 7 days prior to commencing [the 2013 action]”. App. 27a. In an order dated February 3, 2016, the state appellate court affirmed, concluding that Petitioner was “not seeking to correct a mere clerical error”. App. 27a. Instead, Petitioner was seeking “to change the judgment in a substantive manner.” App. 27a.

Petitioner then took no action for eight (8) months until filing the instant action on October 17, 2016. App. 27a. Significantly, during that time, the three (3) year limitations period to challenge the 2013 resolutions pursuant to Section 1983 elapsed.

B. Petitioner's Federal Court Action

Petitioner filed an action on October 17, 2016 in the Southern District of New York ("District Court") claiming Respondents violated its constitutional rights to equal protection and procedural and substantive due process pursuant to 42 U.S.C. § 1983. App. 27a. The statute of limitations period for Section 1983 claims in New York is three (3) years. App. 19a. As such, the District Court dismissed Petitioner's claims relating to the 2008 resolutions as time-barred, as the claim was filed five (5) years after the limitations period had elapsed. App. 17a.

The District Court further determined that Petitioner's claims relating to the 2013 resolutions were also time-barred, and that the continuing violation doctrine did not apply. App. 22a. The District Court relied upon this Court's holding in *Chardon v. Fernandez*, 454 U.S. 6 (1981), which enunciated that the "proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful", in determining that Petitioner's claims accrued on September 27, 2013 - - the date the resolutions imposing the fees were adopted. App. 19a-21a. In reaching its decision, and rejecting Petitioner's request to apply the discovery rule to the accrual of its claims, the District Court further reasoned that "given the allegations that [Petitioner] actively participated in the Planning Board's public hearings from

May to September 25, 2013, it is not plausible that it took twenty days or more for news of the Resolutions to reach [Petitioner]”. App. 21a. Significantly, the District Court emphasized that Petitioner did not allege in its complaint or argue at any point that it was unaware of the 2013 resolutions until it paid the recreation fees in October 2013. App. 21a.

C. Decision Below

By Amended Summary Order, the Circuit Court affirmed the District Court’s Decision and Order, holding that the Petitioner’s claims were time-barred and that the continuing violation doctrine did not apply to the Respondents assessment of a one-time construction fee. App. 4a.

The Circuit Court concluded that regardless of when Petitioner’s claims relating to the 2008 resolutions accrued, the claims were time-barred as Petitioner had paid the fees it now alleged to be unconstitutional more than five (5) years prior to filing the instant suit. App. 5a.

Regarding the 2013 fees, the Circuit Court rejected Petitioner’s argument that this claim accrued in March 2014 when Respondents did not refund the recreation fees. App. 4a. Instead, the Circuit Court, relying on this Court’s holding in *Chardon*, concluded that Petitioner’s claims with respect to the 2013 recreation fees were also time-barred as they accrued no later than September 27, 2013 when the resolutions imposing the fees were passed. App. 5a-6a. The Court below reasoned that Petitioner, at a minimum, was aware of the recreation fees when the resolutions imposing the fees were passed on September

27, 2013, and although the fees were not paid until October 2013, the proper focus was on when the resolutions were passed, not when the consequences of the resolutions became painful comprising the date when the fees were paid by Petitioner. App. 5a.

Significantly, the Circuit Court determined Petitioner's argument that it was not aware of the imposition of the recreation fees until well-after the resolutions were passed was plausibly without merit. App. 6a. The Circuit Court emphasized that Petitioner "clearly alleged in its complaint that in public hearings from May 2013 to September 2013, it actively objected to the imposition of further recreation fees because it knew that [Respondents] would impose such fees as a condition on further construction." App. 6a. In this regard, the Circuit Court pointed to Petitioner's attendance at the September 25, 2013 hearing where Respondents preliminarily approved Petitioner's site plans "specifically contingent upon [Petitioner's] payment of the \$3,500 per unit recreation fee." App. 6a. Thus, the Circuit Court concluded Petitioner's claims regarding the 2013 resolutions accrued when the resolutions were passed and that Petitioner's claims which all emanate from the resolutions were time-barred. App. 4a.

Lastly, the Circuit Court concluded the District Court properly dismissed Petitioner's state law claim seeking a declaratory judgment requiring Respondents to refund the recreation fees. App. 6a. The Circuit Court determined, relying upon this Court's holding in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), that since Petitioner previously pursued its claim in state court and lost, a "United States district court is not the proper forum for an appeal from a state court decision." App. 6a.

Therefore, as the decision of the Circuit Court is consistent with this Court's decisions refusing to apply the continuing violation doctrine to discrete acts, and the standard for determining when a Section 1983 claim has accrued, further review by this Court is unnecessary. Moreover, to the extent Petitioner is seeking an advisory opinion as to the applicability of the continuing violation doctrine to claims asserted pursuant to Section 1983, this issue is not ripe or preserved for review.

REASONS FOR DENYING CERTIORARI

I. The Circuit Court's Decision Does Not Conflict with This Court's Precedents

Under this Court's holding in *Morgan*, the continuing violation doctrine cannot be applied to save Petitioner's time-barred claims predicated upon the discrete acts consisting of the resolutions passed by Respondents in 2008 and 2013. 536 U.S. at 110.

This Court defined a discrete act as one "occur[ing]" on the day that it "happened." *Id.* at 110. Further, this Court in *Morgan* rejected the view that so long as one discrete act falls within the statute of limitations, acts which are plausibly or sufficiently related to the act may also be considered timely for the purposes of imposing liability. *Id.* at 114. In fact, this Court's pronouncement that "discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period" dates back over forty (40) years to this Court's decision in *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977). *Morgan*, 536 U.S. at 112.

In contrast, the continuing violation doctrine is applied in the limited scenario where unlawful conduct or practices do not occur on a particular identifiable day. *Id.* at 115. Under this doctrine, the cumulative effect of unlawful conduct is permitted to be considered where no single incident in a continuous chain of activity can “fairly or realistically be identified as the cause of significant harm.” *Loumiet v. United States*, 828 F.3d 935, 948 (D.C. Cir. 2016) *quoting* *Page v. United States*, 729 F.2d 818, 821-22 (D.C. Cir. 1984). Thus, the doctrine is triggered by continuous unlawful acts, but not by continual damage from an initial discrete unlawful act. *Morgan*, 356 U.S. at 117. Further, in order for the continuing violation doctrine to apply, a claimant must allege both an ongoing policy of violations of the claimant’s constitutional rights, and that some action in furtherance of that policy was taken within the statute of limitations. *Id.* at 117; *Abascal v. Jarkos*, 357 F. App’x. 388, 391 (2d Cir. 2009).

At bar, the resolutions passed by Respondents imposing the recreation fees are discrete acts as they occurred on easily identifiable dates - - September 24, 2008 and September 27, 2013, respectively. *Morgan*, 536 U.S. at 110. Petitioner cannot point to a series of actions by Respondents, the cumulative impact of which caused it harm. *Loumiet*, 828 F.3d at 948. This is because the harm incurred by Petitioner arose from the passage of the resolutions imposing the fees. *Morgan*, 536 U.S. at 110; *See Didden v. Vill. of Port Chester*, 173 F. App’x 931, 932 (2d Cir. 2006).

The concept of determining whether the harm at issue is caused by a discrete act or a continuing constitutional violation was explained well by the Second

Circuit in *Didden*. There, the defendant Village adopted a resolution in 1999 in which it found a public purpose for condemnation of certain properties. *Didden*, 173 F. App'x at 933. According to the plaintiff property owner, four (4) years later, in 2003, the municipal defendant demanded a payment in order to avoid condemnation proceedings. *Id.* The plaintiff commenced suit in January 2004. *Id.* The Second Circuit affirmed the District Court's dismissal on statute of limitations grounds, concluding that the plaintiff had knowledge of his injury in 1999 when the condemnation resolutions were passed, and therefore the statute of limitations accrued at that time, even though the demand for payment did not occur until 2003. *Id.*

In determining the accrual date for Petitioner's claim, the Circuit Court properly focused on the time that the alleged violation of Petitioner's due process and equal protection rights occurred - - which is when the resolutions were passed; and, not on the later date when Petitioner allegedly suffered the consequences of those resolutions by paying the fees. *Chardon*, 454 U.S. at 8; *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980); *Vasquez v. Davis*, 882 F.3d 1270, 1277 (10th Cir. 2018); *Didden*, 173 F. App'x at 933.

The simple fact is that Petitioner commenced its Section 1983 claim in District Court requesting a refund of the recreation fees it paid in an attempt to obtain the remedy it mistakenly failed to request in its 2013 state court action. Petitioner's demand for the return of the recreation fees does not amount to an ongoing constitutional violation. This is especially true given the prior state court orders denying Petitioner this precise relief. App. 6a.

Thus, review by this Court is unnecessary as it is well-settled that the continuing violation doctrine cannot be applied to resurrect time-barred claims predicated upon discrete acts.

II. The Circuit Courts Consistent with This Court's Decision in *Morgan* Uniformly Agree the Continuing Violation Doctrine Does Not Apply to Discrete Acts

Contrary to Petitioner's assertion, there is no split among the Circuit Courts. The Circuit Courts uniformly agree that the continuing violation doctrine cannot be applied to resurrect time-barred claims predicated upon discrete acts. *See, e.g., Gorelik v. Costin*, 605 F.3d 118, 122 (1st Cir. 2002); *Glaser v. Fulton-Montgomery Cmty. Coll.*, 50 F. App'x 17, 20 (2d Cir. 2017); *Cowell v. Palmer Twp.*, 263 F.3d 286, 293 (3rd Cir. 2001) *abrogated by Morgan*, 536 U.S. at 114; *A Society Without A Name v. Virginia*, 655 F.3d 342, 348 (4th Cir. 2011); *Hamic v. Harris Cty. W.C. & I.D. No. 36*, 184 F. App'x. 442, 447 (5th Cir. 2006); *Printup v. Dir., Dep't of Job & Family Servs.*, 646 F. App'x 781, 790 (6th Cir. 2016); *Watkins v. Chicago Hous. Auth.*, 527 F. App'x 504, 506 (7th Cir. 2013); *Humphrey v. Eureka Gardens Pub. Facility Bd.*, 891 F.3d 1079, 1082 (8th Cir. 2018); *Shannon v. Babb*, 103 F. App'x. 201, 202 (9th Cir. 2004); *Colby v. Herrick*, 849 F.3d 1273, 1280 (10th Cir. 2017); *Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003); *Long v. Howard Univ.*, 512 F. Supp. 2d 1, 17 (D.C. Cir. 2007).

Significantly, the overwhelming majority of cases relied upon by Petitioner to demonstrate the so-called Circuit "split" were decided prior to this Court's holding in *Morgan* where it was enunciated that the continuing

violation doctrine could not be applied to discrete acts. *See Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968); *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978); *Va. Hosp. Assoc. v. Bailes*, 868 F.2d 653 (4th Cir. 1989); *Hendrix v. City of Yazoo City*, 911 F. 2d 1102 (5th Cir. 1990) *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 *as recognized by* *Prairie View A & M University v. Chatha*, 317 S.W.3d 402 (Tex. App. 2010); *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516 (6th Cir. 1997); *Heard v. Sheahan*, 253 F.3d 316 (7th Cir. 2001).

Petitioner relies upon only four (4) Circuit Court decisions decided after *Morgan*. These four (4) cases, discussed below, do not demonstrate a split in the legal standard employed by the Circuit Courts when analyzing the applicability of the continuing violation doctrine in the context of claims asserted under Section 1983 as professed by Petitioner. Contrary to Petitioner's assertion, these cases confirm that the Circuit Courts recognize that the continuing violation doctrine can be applied to cases alleging Section 1983 violations¹, as well as other types of claims. Significantly, in not a single case cited by Petitioner was the continuing violation applied to alleged constitutional violations predicated upon discrete acts.

In *Loumiet*, the plaintiff asserted a *Bivens* claim, among others, in relevant part, alleging abuse of process, malicious prosecution, and civil conspiracy claiming a

1. As discussed in greater detail in point IV *infra*, all of the Circuit Court of Appeals, except for the 10th Circuit and D.C. Circuit, have formally recognized that the continuing violation doctrine can be applied to cases alleging violations of Section 1983.

retaliatory administrative prosecution by the Office of the Comptroller of the Currency (OCC) for his role in a bank audit. The D.C. Circuit concluded the OCC's continued three-year (3) prosecution of a frivolous retaliatory legal proceeding that was not "substantially justified" constituted a continuous harm under *Bivens* which properly invoked the continuing violation doctrine to toll the accrual of Loumiet's *Bivens* claims until the final disposition of the OCC's prosecution efforts. *Loumiet*, 828 F.3d at 948-49. So too, consistent with the well settled law that claims for malicious prosecution accrue upon the disposition of the criminal proceeding in favor of the accused, Loumiet filed his *Bivens* claims within three (3) years of the dismissal of the charges against him. *Id.* at 949. Thus, the D.C. Circuit concluded his claims were timely. *Id.* Therefore, contrary to Petitioner's portrayal, the *Loumiet* case does not support the proposition that the continuing violation doctrine can be applied to discrete acts, or that there is a split among the Circuit Courts as to whether the doctrine can be applied in the context of a Section 1983 action. In fact, in *Loumiet*, the D.C. Circuit cited *Wider v. Va. Hosp. Ass'n* 406 U.S. 498 (1990), where this Court affirmed the application of the continuing violation doctrine to delay the accrual of a Section 1983 claim. *Id.* at 949. Accordingly, Petitioner's assertion that certiorari should be granted so this Court can clarify the applicability of the continuing violation doctrine to Section 1983 claims is a fiction.

So too, Petitioner's reliance upon *Montin v. Estate of Johnson*, 636 F.3d 409, 416 (8th Cir. 2011) is similarly misplaced. In *Montin*, the plaintiff was involuntarily confined in a psychiatric institution following his acquittal on felony criminal charges. During his confinement, the

institution changed its policies regarding the various hierarchical categories of liberty afforded to its residents, thereby allegedly restricting Montin's ability to move about the facility or travel offsite.

The Eight Circuit remanded the case back to the District Court to determine whether Montin's alleged restrictions of his movement constituted an ongoing violation of his liberty interest, or were merely the ongoing consequences from the psychiatric institution's earlier change in policy. Significantly, Montin was only seeking declaratory relief in the form of ending the ongoing restriction, and not monetary damages emanating from the psychiatric institution's adoption of a policy which restricted his movement years earlier and which claim was time-barred. *Id.* at 416-17. In remanding the matter, the Eight Circuit noted that it had never applied the continuing violation to a discrete act, but recognized that Montin's claim potentially involved alleged ongoing daily restrictions each of which plausibly could constitute a new constitutional violation with each passing day. *Id.* Thus, *Montin* is factually distinguishable from the instant matter, and is consistent with the long line of due process cases involving the continued enforcement of an unconstitutional statute in which a new constitutional violation occurs each day the statute remains in effect. See *Kuhnle Bros., Inc.*, 103 F.3d at 521-22.

At bar, there is no similar ongoing daily violation of Petitioner's constitutional rights. Indeed, Respondents have no statute, ordinance or resolution in effect that restricts Petitioner from exercising a constitutional right on an ongoing daily basis. Significantly, in *Montin* the Eighth Circuit firmly asserted that if the claim related

solely to the psychiatric institution's creation of the policy restricting his movements, which is similar to the Respondents' passing of the resolutions imposing the fees, it "would have little difficulty rejecting applying the continuing violation doctrine to such a discrete act. *Montin*, 636 F.3d at 415.

In addition, Petitioner's reliance upon two (2) Tenth Circuit decisions to evidence a "split" in the Circuit Courts is severely misplaced. *See Vasquez*, 882 F.3d at 1277; *Gosselin v. Kaufman*, 656 F. App'x. 916, 919 (10th Cir. 2016). For example, in *Vasquez*, the Tenth Circuit merely mentioned that the continuing violation doctrine has not yet been formally adopted in that Circuit. *Vasquez*, 882 F.3d at 1277. Notably, the court in *Vasquez* concluded that plaintiff's untimely claims predicated upon alleged deliberate indifference to his medical needs could not be saved by the continuing violation doctrine. *Id.* In this regard, the court noted that the defendants had not committed any violations during the limitations period to satisfy the one timely act requirement necessary for the continuing violation doctrine to apply. *Id.* Thus, even though the Tenth Circuit has not yet formally recognized the continuing violation doctrine, in conformity with *Morgan* it refused to apply the doctrine where there was not at least one timely constitutional violation. *Morgan*, 536 U.S. at 115.

Thus, as demonstrated by the cases relied upon by Petitioner, the Circuit Courts in deciding whether or not the continuing violation doctrine is applicable to a given case engage in a factually intensive case by case analysis to determine if the alleged unconstitutional conduct is truly of an ongoing nature, or if the plaintiff is merely

continuing to feel the effects of time-barred unlawful conduct. *Loumiet*, 828 F.3d at 948; *Montin*, 636 F.3d at 415; *Vasquez*, 882 F.3d at 1277.

At bar, Petitioner failed to plausibly allege a continuous pattern of actions which caused cumulative harm as in *Montin* and *Loumiet*. Petitioner relies upon merely two (2) time-barred discrete acts which allegedly caused it harm consisting of the passing of the two (2) resolutions imposing recreation fees. Petitioner's claim is distinguishable from scenarios where the continuing violation doctrine has been applied to a continuous and ongoing series of actions where it is the culminative harm of those actions which predicate a Section 1983 claim. *Loumiet*, 828 F.3d at 948.

Petitioner is merely attempting to create a scenario worthy of this Court's review where there is no basis for it. The gravamen of this case is its facts, and not the legal issue of whether the continuing violation doctrine is applicable to Section 1983 claims.

III. The Circuit Court Did Not Hold the Continuing Violation Doctrine Is Inapplicable to Section 1983 Claims

The Circuit Court never held that the continuing violation doctrine does not apply to Section 1983 claims. Given that this Court ordinarily does not decide issues that were not raised or resolved in the lower court absent exceptional situations, the Petitioner's request that certiorari be granted "to clarify" the applicability and scope of the continuing violation doctrine to claims asserted under Section 1983 should be denied. *Youakim*,

425 U.S. at 234. In this regard, Petitioner is seeking an advisory opinion that is not determinative of the dispute between the parties. *Id.*

Significantly, the Circuit Court did not “strictly rel[y] on the discovery rule in calculating accrual” as asserted by Petitioner. Brief for Petitioner at p. 3. In this regard, the Circuit Court held that the Petitioner’s claims accrued upon the passage of the Respondents’ resolutions and that “the continuing violation doctrine plainly does not apply to the Town’s assessment of a one-time construction fee” as it was a discrete act. App. 4a-6a.

The Circuit Court did not hold that the continuing violation doctrine could never be applied to Section 1983 claims, as suggested by Petitioner. In fact, the Second Circuit has applied the doctrine to Section 1983 claims where discrete acts were not at-issue. *See Shomo v. City of New York*, 579 F.3d 176, 179 (2d Cir. 2009) [holding the continuing violation doctrine can apply to Eighth Amendment claims of medical indifference where there is an ongoing policy of deliberate indifference]; *see also Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014). Simply stated, there is no justiciable dispute between the parties concerning whether the continuing violation doctrine can apply to claims brought under Section 1983. Accordingly, Petitioner’s request for a writ of certiorari should be denied.

Although the Tenth Circuit has not formally adopted the continuing violation doctrine to claims arising under Section 1983, this case is not the proper avenue for the Court to decide this broader issue. *See Vasquez*, 882 F.3d at 1277. At bar, Petitioner’s true complaint is that the court

below did not agree with its position that the continuing violation doctrine applied to the specific facts of this case, not that the Second Circuit refuses to apply the doctrine to Section 1983 claims. As such, Petitioner is merely seeking an advisory opinion from this Court.

IV. There is No Split Between the Circuit Courts as to the Applicability of the Continuing Violation Doctrine to Claims Asserted Under Section 1983

Contrary to Petitioner's assertions, this Court has already recognized the continuing violation doctrine's applicability to Section 1983 claims. *See Va. Hosp. Ass'n*, 868 F.2d at 663, *aff'd sub nom. Wilder*, 496 U.S. at 498 [applying continuing-violations doctrine to delay accrual in Section 1983 case]. Indeed, Petitioner's brief does not cite a single Circuit Court decision which proclaimed that the continuing violation doctrine is wholly inapplicable to claims asserted under Section 1983.

So too, all the Circuit Courts, routinely consider the continuing violation doctrine in their analysis of Section 1983 claims. *See Gorelik*, 605 F.3d at 122 [holding alleged "republication" of newsletter did not, under continuing violation doctrine, toll limitations period on Section 1983 claim]; *Washington v. Cty. of Rockland*, 373 F.3d 310, 318 (2d Cir. 2004) [continuing violation doctrine did not toll limitations period for race discrimination claims under Section 1983 as decision to file disciplinary charges was a discrete act]; *Ozorowski v. Maue*, 460 F.App'x 94, 97 (3d Cir. 2011) [continuing violation doctrine was inapplicable to "discrete, isolated events not appropriately linked to some larger scheme" to deny prisoner medical care]; *DePaola v. Clarke*, 884 F.3d 481, 487 (4th Cir. 2018) [continuing

violation doctrine applied where inmate repeatedly sought treatment from medical professionals and was denied care within statute of limitations for Section 1983 claim]; *Heath v. Bd. of Supervisors*, 850 F.3d 731, 739 (5th Cir. 2017) [continuing violation doctrine applied to Section 1983 claims of a hostile work environment]; *Printup*, 654 F.App'x at 789 [continuing violation doctrine did not delay accrual of Section 1983 claims of violations of procedural and substantive due process]; *Savory v. Lyons*, 469 F.3d 667, 673 (7th Cir. 2006) [holding the limitations period for prisoner's Section 1983 claim seeking access to physical evidence was not extended under the continuing violation doctrine]; *Humphrey*, 891 F.3d at 1079 [continuing violation doctrine does not apply to substantive due process and equal protection claims predicated upon a discrete act]; *Carpinteria Valley Farms, Ltd. v. Cty. of Santa Barbara*, 344 F.3d 822, 829 (9th Cir. 2003) [continuing violation doctrine inapplicable to Section 1983 land use case predicated on discrete acts where the requisite single timely act was not satisfied]; *Betts v. Hall*, 679 F.App'x 810, 813 (11th Cir. 2017) [holding continuing violation doctrine did not extend limitations period for Section 1983 claims based on discrete acts].

Only the D.C. Circuit and the Tenth Circuit, have analyzed the continuing violation doctrine in the context of a Section 1983 claim, while not yet formally adopting the doctrine. *Earle v. District of Columbia*, 707 F.3d 299, 306 (D.C. Cir. 2012) ["We need not decide whether the continuing violation doctrine applies to section 1983 claims because [plaintiff] does not prevail under this theory, assuming *arguendo* it applies"]; *Vasquez*, 882 F.3d at 1277 ["Even if we applied the continuing violation doctrine, it would not save [plaintiff's] claims against these Defendants."].

The mere fact that two (2) Circuit Courts have not yet had the occasion to formally recognize the applicability of the continuing violation doctrine does not evidence a “split” among the Circuit Courts warranting further review of the adjudication of this case where the lower court merely held that Petitioner did not satisfy the standard for the doctrine to apply.

CONCLUSION

For the foregoing reasons, Petitioner’s Petition for a writ of certiorari should be denied.

Dated: Mineola, New York
December 19, 2018

Respectfully Submitted,

MAURIZIO SAVOJARDO III

Counsel of Record

MIRANDA SAMBURSKY SLONE SKLARIN

VERVENIOTIS LLP

The Esposito Building

240 Mineola Boulevard

Mineola, New York 11501

(516) 741-7676

msavoiaro@msssv.com

Counsel for Respondents