

No. _____

In The
Supreme Court of the United States

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CURTIS WHEELER, CYNTHIA WHEELER, AND
ROGER E. NAGHASH,

Petitioners,

v.

COUNTY OF ORANGE,
a political subdivision of the State of California, et al.,

Respondents.

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**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the “pure” form of “Continuing Violation Doctrine” should apply to Civil Rights and Tort Claims of Intentional and Negligent Infliction of Emotional Distress.
2. Whether the local rule, trial judge discretion, or lack of local rule can preempt the state statutory right for an attorney to appear in court and represent her clients at hearings or trials.

**PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW**

CURTIS WHEELER AND CYNTHIA WHEELER,
their attorneys, ROGER E. NAGHASH AND NICOLE
B. NAGHASH,

Petitioners/Petitioners/Plaintiffs,

vs.

COUNTY OF ORANGE, a political subdivision of the
State of California, ITS PUBLIC WORKS DIVISION,
ITS CITATION PROCESSING CENTER, SHANE L.
SILEBY, INDIVIDUALLY, AND IN HIS OFFICIAL
CAPACITY AS DIRECTOR, COUNTY OF ORANGE –
PUBLIC WORKS, SOCORRO VILLEGAS, ALSO
KNOWN AS CORA VILLEGAS, INDIVIDUALLY
AND IN HER OFFICIAL CAPACITY AS OFFICER,

Respondents/Defendants.

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the Central District of
California, Western Division (Trial Court):

Wheeler, et al. v. County of Orange, et al., No. 8:20-
cv-01264 MCS (DFMx)

United States Court of Appeals for the Ninth Circuit
(Reviewing Court):

Wheeler, et al. v. County of Orange, et al., No. 20-
56143 (2020), (Judgment of Dismissal Reversed
and Remanded)

Wheeler, et al. v. County of Orange, et al., No. 22-
55662, (2022), (Judgment of Dismissal Affirmed)
(Pet. App. B, 8a-24a).

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PETITION FOR WRIT OF CERTIORARI

The underlying action arose from governmental overreach and abuse of power at the hands of defendants. Plaintiffs and Petitioners own a real property in an unincorporated area of Orange County, California, which is administered and governed by Defendants and Appellee, Orange County and its subdivision. From about early 2016, until present, Appellees and each of them, required Petitioners to obtain unnecessary and retaliatory building and/or construction permits for various parts of their real property, for the fictitious work that was either never performed or was NOT required. As a pretext of requiring fictitious or unnecessary permits, individual Appellee would appear at Petitioners' home at all hours, demand access to inside their home, engage in unlawful interrogations of Petitioners' family members, taking pictures of Petitioners in their backyard in their private moments, and engross in more intolerable harassment of Petitioners. Petitioners lodged many oral and written complaints to officials Department of Public Works, the governmental entity, who is responsible for all related public works in connection with the Petitioners' real property. A series of hearings were held to address Petitioners' complaints and infringement of their personal and private rights, to no avail. In response, individual Appellees, retaliated and increased the intensity and frequency of their harassments against Petitioners and increased the issuance of many more citations. In addition, Appellees began demanding money from Petitioners, for alleged and fictitious

violations that never existed. Petitioners' repeated complaints and demands for Appellees to cease and de-
cease their unlawful behaviors and conducts were to
NO avail.

Petitioners initiated the underlying action to seek remedies for the violations of their rights of privacy, constitutional and property rights. Following the service of Summons and Complaint, parties entered into a stipulation to extend statutory time for Defendants to appear and file their responsive pleading. Following the expiration of stipulated extension of time, Defendants filed a motion to dismiss the underlying complaint. The hearing for the motion was scheduled on October 5, 2020. However, due to Plaintiffs' counsel inadvertent calendaring mishap, Plaintiffs' counsel erroneously scheduled the hearing on October 12, 2020. The court summarily dismissed the underlying action, the first appeal was initiated. The Ninth Circuit Court of Appeal, reversed the dismissal, and remanded for further proceedings. Following the remand, the trial court ordered Plaintiffs to file their first amended complaint. Defendants filed a motion to dismiss pursuant to Rule 12(b), which was scheduled for hearing on March 7, 2022. On March 7, 2022, an associate attorney, from the Law Offices of Roger E. Naghash representing Plaintiffs attempted to appear for the hearing of motion to dismiss. Nicole B. Naghash is a licensed attorney, a member of California Bar, Central District Court of California in good standing, and an associate attorney at the Law Offices Of Roger E. Naghash.

On March 7, 2022, Nicole B. Naghash appeared in-person at the hearing as provided by C.D. Cal. R. 7-14, and the trial court refused to allow Nicole B. Naghash, who is one of Plaintiffs' attorneys to appear at the hearing and argue in opposition to motion to dismiss first amended complaint. Instead, the trial court issued an Order to Show Cause, re: why sanctions should NOT be imposed against Roger E. Naghash, ordered Roger E. Naghash to file a declaration, as to appearance of an associate attorney at Law Offices Of Roger E. Naghash instead of Roger E. Naghash, and refused to allow any oral arguments. The trial court ordered the declaration to be filed within seven (7) days. Following the timely filing of declaration by Roger E. Naghash, the trial court imposed \$300.00 sanction against Roger E. Naghash for allowing Nicole B. Naghash, an associate at the Law Offices Of Roger E. Naghash who has been representing Plaintiffs, to appear at the oral argument on March 7, 2022, instead of Roger E. Naghash. The trial court further issued its ruling for motion to dismiss, ***without allowing*** Plaintiffs to appear and present their arguments in opposition to motion to dismiss the first amended complaint. The court dismissed the first amended complaint with twenty (20) days leave to amend. In its ruling, the court warned Roger E. Naghash that the next amendment would be subject to Rule 11, sanctions against Roger E. Naghash. In its ruling, the court stated, “. . . the Court advises Plaintiffs and counsel to consider carefully whether they can submit an amended complaint consistent with Federal Rule of Civil Procedure 11(b). . . .” Due to clear and unmistakable biases by Honorable

Mark C. Scarci, judge, there is NO SET OF FACTS, EVIDENCE, PLEADINGS, OR LAWS, UNDER WHICH, Plaintiffs would be permitted to present their case and have their day in court. There is NO set of facts, allegations, and/or evidence that judge Scarci would allow Plaintiffs and their counsels to present and go forward with their case. Judge Scarci had openly threatened Roger E. Naghash with Rule 11 sanction, in his ruling. Filing a second amended complaint would have been futile, which would have certainly subjected Law Offices Of Roger E. Naghash and Roger E. Naghash, and Plaintiffs, to Rule 11 sanctions, as judge Scarci had already issued a groundless sanction order against Roger E. Naghash for NO legal and/or factual reasons, let alone, Plaintiffs' amended complaint. An appeal to the reviewing court was taken for the second time, and the judgment of dismissal and order of sanction were affirmed.



OPINIONS BELOW

The court of appeals' opinion (Pet.App. A, 3a-7a) is unreported.

The District Court's underlying judgment of dismissal, (Pet.App. B, 9a-10a), and (Pet.App. C, 12a-27a) is unreported.



JURISDICTION

The Ninth Circuit entered its decision below on November 8, 2023. (Pet.App. A, 3a-7a). Petitioners timely file this petition and invoke this Court’s jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The “Continuing Violations Doctrine.” *National RR Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 114 (2002), and the accrual of statute of limitations in the context of Civil Rights Claims under Section 1983 of Title 42 of the United States Code provides:

Every person who, under color of [law] of any State 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, be liable to the party injured in an action at law[;]
and

California Statutes, known as the “State Bar Act,” authorizing Practice of Law, before all state and federal courts, in the State of California. Section 6125 of California Business and Profession Code, provides, that

No person shall practice law in California unless the person is an active licensee of the State Bar.

Fed. R. Civ. Proc., R 83 provides:

(1) In General. After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with – but not duplicate – federal statutes and rules adopted under 28 U.S.C. §§2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) Requirement of Form. A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the

particular case with actual notice of the requirement.

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STATEMENT

Petitioners CURTIS WHEELER and CYNTHIA WHEELER (hereinafter “**Petitioners**” or “**Wheelers**”), at all times mentioned herein were resident, in an unincorporated area of County of Orange, in Rossmoor, California. Appellee, SOCORRO VILLEGAS, ALSO KNOWN AS CORA VILLEGAS, in their individual and official capacity as an officer duly authorized to act on behalf of County of Orange, Department of Public Works, (hereinafter, “**Villegas**” or “**Appellee**”). At all times, mentioned here. Appellee, Villegas, was responsible and assigned the task of Code Enforcement in unincorporated area of County of Orange, and City of Rossmoor, California, and has fabricated and manufactured evidence and documents and caused significant and irreparable damage to Petitioners, Curtis and Cynthia Wheeler. (Pet.App. E, 37a).

Appellee, SHANE L. SILEBY, in his individual and official capacity as the director of public works of County of Orange duly authorized to act on behalf of County of Orange, Department of Public Works, (hereinafter, “**Sileby**” or “**Appellee**”). At all times, mentioned here. Appellee, Sileby was responsible, assigned and directed the task of Code Enforcement in unincorporated area of County of Orange, and City of Rossmoor, California, and has fabricated and

manufactured evidence and documents and caused significant and irreparable damage to Petitioners, Curtis and Cynthia Wheeler. (Pet.App. E, 39a-40a).

COUNTY OF ORANGE, a municipal entity, ITS PUBLIC WORKS DIVISION, ITS CITATION PROCESSING CENTER, SOCORRO VILLEGAS, ALSO KNOWN AS CORA VILLEGAS, IN their INDIVIDUAL AND OFFICIAL CAPACITY AS OFFICER, SHANE L. SILEBY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS DIRECTOR, COUNTY OF ORANGE – PUBLIC WORKS, (hereinafter collectively referred to as “**County of Orange**” or “**Appellees**” or “**Public Entities Appellees**”). (Pet.App. E, 39a-40a)

On or about April 6, 2016, Petitioners, Wheelers filed all appropriate and necessary application for permit with Southern California Gas Company and Appellee, COUNTY OF ORANGE, (hereinafter “Orange County”) to relocate a gas line feeding the Subject Property, outside their residence, that is commonly known as 2641 Copa De Oro Drive, Rossmoor, California 90720-4909, (hereinafter referred to as “**Subject Property**”). (Pet.App. E, 39a-40a)

On or about September 23, 2016, the permit for relocation of the gas-line, feeding the Subject Property was granted. (Pet.App. E, 39a-40a)

On or about May 10, 2016, Appellee, Villegas returned to the Subject Property, in disarray and their work-out cloths, without any attempt to first identify herself or produce any official identification. Petitioners, Wheelers son, Brian Wheeler answered the door.

Appellee, Villegas asked Brian Wheeler numerous personal questions, such as who he was, who lived in the house, where there any renters, etc., all without first identifying herself or producing any official identification. Brian Wheeler told Appellee Villegas he was not comfortable answering those questions and inquired into identify the stranger who was asking all these personal questions about the occupants in the Subject Property. Appellee Villegas, identified herself, without showing any official identification and told Brian Wheeler that she is with the Appellee, County of Orange and she is a code-enforcement officer. Brian Wheeler, then told Appellee, Villegas to leave as he was NOT going to share any of the requested private information with Appellee, Villegas, and asked them to leave to which she complied. (Pet.App. E, 40a-41a)

In early May of 2016, prior to the issuance of the permit, Appellee, to relocate the gas line outside of the Subject Property, Appellee, Villegas appeared at the Subject Property, demanding access and entry into Subject Property to inspect the plumbing inside Subject Property. Petitioners, Wheelers refused to allow Appellee, Villegas to enter the Subject Property. Appellee, Villegas visibility upset, left with the clear understanding that she was going to gain access to the Subject Property and retaliate against Wheelers for their refusal to allow Appellee Villegas access and entry into Subject Property, at which time, Appellee, Villegas systematic harassment, terrorizing and petrifying Petitioners, Wheelers began. (Pet.App. E, 40a-41a).

There were many more events and systematic harassments, other unlawful conducts and behaviors pursuant to Appellees' Orange County "Policy." (Pet.App. E, 39a-41a).

(1) Description of Injuries

Appellees purposeful, vindictive, and unlawful harassment began approximately more than ten (10) years, ago with Appellee, Villegas demanded Petitioners, Wheelers to remove their parked vehicle from the driveway of the Subject Property. From about early May of 2016, until present, Appellees and each of them have continued with their systematic, intentional, unlawful and unconstitutional campaign of terrors, to prevent Petitioners who are elderly to use the Subject Property. (Pet.App. E, 50a-66a).

Appellees and each of them, have prevented Petitioners, Wheelers from using their own home for intended purposes. Petitioners are afraid of using their backyard in fear of Appellees appearing unannounced and take unlawful pictures without their consents and authorizations. Appellees and each of them have prevented Petitioners, Wheelers from entering and residing in their own home, in fear of retaliations, mental, perceived, and/or physical harms at the hands of Appellees and each of them. (Pet.App. E, 50a-66a).

Appellees and each of them, have manufactured and fabricated evidence for the sole purpose of engaging in campaign of terror and harassment and have refused and continue to refuse to provide Petitioners,

Wheeler, with due process of law and have a meaningful hearing to address Petitioners, Wheelers grievances. Petitioners, Wheeler live at the Subject Property in constant fear and anxiety as these Appellees have made Petitioners, Wheelers' lives unbearable, through their systematic campaign of terror, harassment and causing fear. (Pet.App. E, 50a-66a).

Petitioners, Wheelers live in constant fear and anxiety and have been depressed which has prevented them from sleeping at nights and have been unable to enjoy the simplest fact of life, as these Appellees have been threatening to take the Subject Property from Petitioners, Wheelers, for which they have worked all their lives. Petitioners, Wheelers have been terrified of living in their home, anxiously waiting for these Appellees to appear at Subject Property or send them another false, fictitious and fabricated notice of violation as a pretext of taking the Subject Property from Petitioners, Wheelers. (Pet.App. E, 50a-66a).

Among others, Appellee, Officer Villegas, would come to Petitioners' home and demand entry into Petitioners' house to inspect indoor plumbing. Appellees, falsify dates and events, to fit the violations that they have predetermined. Among them, was September of 2016, when the Gas Company replaced gas lines with all necessary permits that was issued by the Gas Company, whereas Appellees submitted a tag permit for the gas line that is incorrectly dated April 6, 2016, with the rubber stamp date of September 23, 2016. (Pet.App. E, 46a-66a).

Appellee filed a motion to dismiss First Amended Complaint scheduling the hearing for March 7, 2022, at a wrong address for the courthouse. The address provided in the notice was incorrect. The motion to dismiss pursuant to rule 12(b)(6) was virtually identical to the one filed earlier by Defendants, that was summarily granted. (Pet.App. D, 29a-33a). Petitioners filed oppositions to the repetitive motion to dismiss pursuant to rule 12(b)(6). Following the opposition, Appellees filed their reply and notice of correction of the location of hearings.

On or about February 14, 2022, Roger E. Naghash received a court's minute order in an unrelated matter, pending before the Superior Court, in and for County of Orange. (Pet.App. D, 29a-33a), On or about February 14, 2022, Roger E. Naghash filed an ex parte motion to continue the hearing on March 3, 2022. (Pet.App. D, 29a-33a).

The minute order required Roger E. Naghash to appear in-person for a hearing, at 8:30 a.m., on March 3, 2022, in Department C17 of Orange County Superior Court. (Pet.App. D, 15a-30a) On or about February 15, 2022, the court in the unrelated matter, continued the hearing from March 3, 2022, to March 4, 2022, at 8:30 a.m., and required Roger E. Naghash to appear in-person for a hearing. (Pet.App. D, 29a-33a). On or about February 15, 2022, Roger E. Naghash filed another ex parte motion to continue the hearing from March 4, 2022, to a later date. (Pet.App. D, 29a-33a).

On or about February 15, 2022, the court in the unrelated matter, advanced the hearing from March 4, 2022, to March 3, 2022, at 8:30 a.m., and required Roger E. Naghash to appear in-person for a hearing. (Pet.App. D, 29a-33a).

On March 1, 2022, Roger E. Naghash returned to the office, from out of state trip. Upon return, Roger E. Naghash received another minute order in the mail, that indicated the hearing for the unrelated matter was continued, yet again, to March 4, 2022, at 8:30 a.m., and required Roger E. Naghash to appear in person in department, C17. (Pet.App. D, 29a-33a). On March 4, 2022, at 8:30 a.m., Roger E. Naghash appeared in-person in Department C17. The court did NOT call the matter for hearing until about 11:59 a.m. (last matter on law and motion calendar). When the matter was called, the court indicated that it will address the matter “later.” Roger E. Naghash believed that the hearing was continued to March 7, 2022.

On March 7, 2022, at 9:00 a.m., the hearing for Defendants’ motion to dismiss was scheduled for hearing before this honorable court, which required in-person appearance for all hearings before this honorable court. (Pet.App. D, 29a-33a). On March 4, 2022, upon return to the office, there was insufficient time to provide notice and file an ex parte motion for either continuance of hearings or leave to appear telephonically, in either this matter or the unrelated matter in Orange County. (Pet.App. C, 12a-27a).

Ms. Nicole B. Naghash is an associate attorney with the Law Offices Of Roger E. Naghash, is familiar with this action, and has been working on this matter. Ms. Naghash, is a member of California Bar Association, licensed attorney, and admitted to practice law before the United States District Court, Central District. (Pet.App. D, 29a-33a). On March 4, 2022, due to scheduling conflict for in-person appearances on March 7, 2022, the undersigned requested Ms. Naghash to appear in place of Roger E. Naghash, as Roger E. Naghash had to appear in Orange County at 8:30 a.m., on March 7, 2022. (Pet.App. D, 29a-33a). On March 7, 2022, at 8:30 a.m., Roger E. Naghash appeared in Department C17, of Orange County Superior Court. On March 7, 2022, at 8:30 a.m., the clerk of the court informed Roger E. Naghash that the court has continued the in-person hearing to April 7, 2022. (Pet.App. C, 12a-27a).

On March 7, 2022, Roger E. Naghash had to appear in-person in two (2) different courtrooms (at 8:30 a.m., in Orange County and 9:00 a.m., in Los Angeles), which was an impossibility, to appear in person, in two (2) separate counties, at almost the same time. (Pet.App. D, 29a-33a)

(2) Proceedings Below

On July 16, 2020, Petitioners initiated the underlying action to seek remedies for the violations of their rights of privacy, constitutional and property rights. Defendants appeared and filed their initial motion to

dismiss the complaint, that was summarily granted. Petitioners filed their initial appeal. On November 23, 2021, the appeal vacated the order of dismissal and remanded the case for further proceedings. (Pet.App. F, 67a).

On December 28, 2021, upon remand, the trial court ordered Plaintiffs to file their first amended complaint. (Pet.App. E, 33a-63a).

On January 17, 2022, Petitioners filed their first amended complaint. (Pet.App. E, 35a-63a)

On January 31, 2022, Appellees filed their repetitive motion to dismiss pursuant to rule 12(b)(6), for which the notice of motion provided the wrong location of the court for the hearing. On February 7, 2022, Petitioners, prepared and filed their opposition to the repetitive motion. On February 11, 2022, Appellees filed their Reply to the opposition along, with a notice of correction of the location of the hearing.

On March 7, 2022, Ms. Nicole B. Naghash, one of Petitioners' counsels, a licensed attorney from Law Offices Of Roger E. Naghash appeared in-person at the hearing. Judge Mark C. Scaci refused to allow Ms. Nicole B. Naghash to appear on the record and present oral arguments on behalf of Petitioners as provided by C.D. Cal. R 7-14. (Pet.App. D, 29a-33a)

On March 7, 2022, the court issued an Order to Show Cause re: imposition of sanctions. (Pet.App. D, 29a-33a). On March 13, 2022, Roger E. Naghash,

prepared and filed his declaration in response to court's Order to Show Cause.

On July 12, 2022, notice of appeal was filed.



REASONS FOR GRANTING THE PETITION

Defendants in the underlying actions engaged in multiple wrongful actions, spanning over several years. The wrongful acts included but not limited to issuing pretextual citation, demanding Petitioners to unlawfully widening their drive-way, unlawfully demanding Petitioners to move their gas lines, unlawfully demanding Petitioners to permit Defendants to go inside their residence to inspect the plumbing, falsely publishing wrong dates as a pretext of issue a citation, preventing Petitioners from presenting evidence, etc.

One of Petitioners' causes of action in their first amended complaint is violation of their constitutional rights under 42 U.S.C. § 1983. The two primary issues in a § 1983 action are: (1) whether the defendants violated the plaintiffs' constitutional rights, and (2) whether such violation was under color of state law. *Dykes v. Hoseman*, 743 F.2d 1488 (11th Cir. 1984).

Section 1983 grants an individual a private cause of action when his federal rights are infringed by state statute, state officials, or person's acting under color of state law. A defendant's alleged infringement of federal rights must be "fairly attributable to the state." *Lugar*

v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 2753, 73 L. Ed. 2d 482 (1982). “[A] sufficiently close nexus (must exist) between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.” *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 2785, 73 L. Ed. 2d 534 (1982). State regulation, substantial state funding, or a contractual relationship with a state government do not provide a sufficient nexus for state action. *Boczar v. Manatee Hospitals & Health Systems, Inc.*, 731 F. Supp. 1042 (M.D.Fla.1990). The state must exercise such “coercive power” or “[provide] such significant encouragement either overt or covert, that the choice must in law be deemed to be that of the [s]tate.” *Boczar*, at 1045 (quoting *Blum v. Yaretsky*, 457 U.S. at 1004, 102 S.Ct. at 2785).

The applicable statute of limitation turns on one or more wrongful actions, that have various analysis in determining the accrual of the cause of action.

I. The Reviewing Court’s Decision Is A Significant Departure From Other Circuits In Applying the “Continuing Violation Doctrine” In Intentional and Negligent Emotional Distress and Civil Rights Claims Under 1983 Sections

Courts have identified as either “pure” or “modified” “Continuing Violations Doctrine,” and its applications, based on Plaintiff’s cause of action.

Several courts have found that claims for the intentional or negligent infliction of emotional distress may represent “pure” continuing violations, depending on the nature of the underlying misconduct. Harkening to allegations of “battered woman’s syndrome,” one recurring scenario in which courts have applied the continuing violations doctrine to infliction of emotional distress claims arises when an estranged spouse or cohabitant accuses a former paramour of a pattern of abuse. *Curtis v. Firth*, 850 P.2d 749, 753-55 (Idaho 1993).

Similar to hostile work environment claims under Title VII, claims for the intentional or negligent infliction of emotional distress may involve conduct that is harmful only when viewed in the aggregate. Emotional distress that is substantial enough to support a tort claim may result only from a series of slights, each of which is modest on its own terms, but which deliver a substantial blow when taken together. On its own, this attribute would not preclude application of the discovery rule to these claims; the plaintiff could be charged with the requisite knowledge at the time the conduct reached a breaking point. The accrual problem that justifies application of the continuing violations doctrine in this context is that (again, like hostile work environment suits) claims for the intentional or negligent infliction of emotional distress entail both a subjective and an objective component. This characteristic can make it especially difficult for a potential plaintiff who has suffered emotional distress due to a series of misdeeds to discern when his or her claim has accrued.

Fairness interests thus argue in favor of applying a different accrual rule to these claims, particularly in circumstances in which the defendant, through his or her own misconduct, seems to have exercised some control over the plaintiff.

On the other hand, claims of Nuisance, Trespass and others represent the touchstone modified continuing violations. RESTATEMENT (SECOND) OF TORTS § 161 cmt. c, § 899 cmt. d (1965);

A nuisance or trespass claim does not arise once and for all when the offensive activity at issue first manifests itself. Instead, each day's maintenance of, or failure to remove, an existing nuisance or trespass will give rise to a new and separate cause of action. As "every continuance of a nuisance or trespass is [considered] a fresh one."

Claims brought under 42 U.S.C. § 1983 and other civil rights laws have been classified as modified continuing violations, allowing plaintiffs to attack at least part of a course of unlawful conduct long after its inception. Decisions addressing the continuing violations doctrine in the civil rights setting have approached the limitations issues before them in a variety of ways with different outcomes among the circuits. *Virginia Hospital Association v. Baliles*, 868 F.2d 653 (4th Cir. 1989), [plaintiff had alleged an ongoing constitutional violation, and that the statute [of limitations] would not have begun to run until the violation ended;] *Palmer v. Board of Education*, 46 F.3d 682 (7th Cir. 1995), [The plaintiffs filed suit under 42 U.S.C. § 1983 more than

one year after the school was closed. The defendants argued that the statute of limitations provided a complete defense to the plaintiffs' suit. The United States Court of Appeals for the Seventh Circuit disagreed;] *Knox v. Davis*, 260 F.3d 1009 (9th Cir. 2001), [on appeal, the United States Court of Appeals for the Ninth Circuit upheld the dismissal. Over a dissent, the majority rejected the plaintiff's argument that her claim represented a modified continuing violation, with each denial of visitation constituting a separate unlawful act with its own limitations period. The appellate court concluded that because none of these snubs involved "independent consideration" by the defendants, the denials represented a mere "continuing impact" of a past violation, namely the original suspension, and not grounds for separate claims;] *Pitts v. City of Kankakee*, 267 F.3d 592 (7th Cir. 2001), [Treating the continued presence of the signs as akin to the ongoing existence of a single defamatory publication, the court held that the plaintiffs' claims were not continuing in nature. Rather, the claims were complete when the signs were first posted.]

In *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), this court held, a Title VII plaintiff cannot rescue an otherwise time-barred claim simply by alleging that he or she received "discriminatory pay."

More specifically, in *Ledbetter* the Court considered whether a Title VII plaintiff's "pay discrimination" claim represented a modified continuing violation, with each unequal paycheck giving rise to a

separate claim with its own limitations period, or whether this type of claim in fact challenged the decision or decisions that produced the uneven pay, in which case the limitations period would begin to run once and for all when the discriminatory decisions were made, or at the latest, when they became known to the plaintiff. The *Ledbetter* court adopted the second of these constructions in the context of unequal pay claims. The *Ledbetter* majority noted that the outcome might have been different had the plaintiff pled and proved a claim under the Equal Pay Act, rather than Title VII. *Id.* at 2165 (majority opinion).

The court in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002), sided with those lower courts who regarded hostile work environments as “pure” continuing violations. The Court held that the entirety of a hostile work environment represents a single discriminatory “practice,” so that a charge attacking the environment and any of its components is timely so long as it is filed within the limitations period following a manifestation of the pervasively hostile atmosphere. *Morgan* case was decided in the context of employment discrimination and hostile work environment and NOT violations of abuse of power under the color of law.

II. The Circuits Are Split Over the Question Presented

Application and analysis of “Continuing Violation Doctrine” is remarkably different among the circuits

based on factual circumstances and Plaintiff's claims. The Ninth and Fifth apply the Continuing violation Doctrine, differently than Sixth, Seventh and Eighth Circuits.

The reviewing court declined to actually address the issue on the merit and repeating the inapplicable local rule. The actual issue as trial court had prevented a licensed attorney (an associate representing the Plaintiff), from appearing at the hearing, where there is NO local or courtroom rules to authorize refusal to allow one of Plaintiffs' attorneys to appear at the hearing and argue the case. The trial court issued an order for sanction against Plaintiffs' attorney, without regard for California statute that authorizes a licensed attorney to represent clients at hearings and trial.

III. This Case is a good vehicle to resolve the circuit splits

In hybrid cases, similar to this case, there as an added analysis that results in yet another distinct result, that varies among the circuits. The analysis requires a second set of methodologies requiring continuing wrongful acts and continuing injuries for the continuing violations doctrine to apply. *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 521 (6th Cir. 1997); *Baker v. F & F Inv. Co.*, 489 F.2d 829, 836 (7th Cir. 1973).

One test, applied in some civil rights cases, provides that for a modified continuing violation to exist: (1) the defendant's wrongful conduct must continue

after the precipitating event that began the pattern of misbehavior; (2) injury to the plaintiff must accrue after that event; and (3) further injury to the plaintiff must have been avoidable if the defendant had at any time ceased his or her wrongful conduct. *Kuhnle Bros., Inc.*, supra, 103 F.3d at 522. Likewise, in antitrust law, a modified continuing violation arises when the defendant commits a “new and independent act that is not merely a reaffirmation of a previous act,” provided that the new act “inflict[s] new and accumulating injury on the plaintiff.” *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004); see also *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467-68 (6th Cir. 1996).

These approaches do not solve the problems that afflict the “continual unlawful acts” definition of a continuing violation. Methodologies that tie a continuing violation to continuing wrongful behavior and evolving injuries still offer little guidance regarding the types of misbehavior that will represent continuous malfeasance. That such behavior must be continually “injurious” does not clarify the issue.

Recognition of injuries as “continuing” depends on several ill-defined factors, including the level of abstraction at which the court characterizes the injury at issue. To illustrate this point, a claim that alleges a gradual worsening of hearing may be styled as one for “hearing loss” generally, or the court may treat each aggravation of the hearing loss as a separate injury. If the former, absent application of the pure form of the continuing violations doctrine, the statute of

limitations will run on the plaintiff's claim at a relatively early juncture. If the latter, the claim may be treated as a modified continuing violation. Compare *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1435 (11th Cir. 1997) (applying the discovery rule to find time-barred a plaintiff's claim for gradually worsening hearing loss), with *Mix v. Delaware & Hudson Ry. Co.*, 345 F.3d 82, 88-91 (2d Cir. 2003), (allowing a plaintiff to recover for incremental hearing loss, provided certain conditions are satisfied).

Instead, the additional "accruing injuries" element merely some circuits to engage in the conceptually slippery chore of tethering the plaintiff's injuries to specific decisions, acts, or failures to act by the defendant. *Kuhnle Bros., Inc. v. County of Geauga*, supra, 103 F.3d 516, 521 (6th Cir. 1997); *Baker v. F & F Inv. Co.*, 489 F.2d 829, 836 (7th Cir. 1973).

CONCLUSION

The Court should grant this petition.

DATED this 26th day of February, 2024

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