No. 23-7490

IN THE

SUPREME COURT OF THE UNITED STATES

Chanel E.M. Nicholson — PETITIONER
(Your Name)

vs.

W.L. York, Inc., dba Cover Girls; D WG FM, Inc., dba Splendor, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Chanel E.M. Nicholson
(Your Name)

12331 North Gessner Road
(Address)

Houston Texas 77064
(City, State, Zip Code)

(713) 885 1736 email: chanelellese@gmail.com
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QUESTION(S) PRESENTED

Where the discriminatory act was refusing admission of Petitioner (a Black entertainer) to the business' premises for work because her admission would exceed the business' racial quota limiting the number of Black entertainers on the premises simultaneously, and notwithstanding the business' requirement that the entertainers pay for each such admission for work, were such acts of exclusion taking place within the limitations period "discrete acts" of discrimination starting a new limitations clock, as announced in National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 113 (2002), or did the fact that there were similar exclusions of Petitioner before the limitations period start the limitations period accrual, thereby barring actions based on the exclusions of Petitioner within the limitations period?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Chanel E.M. Nicholson vs. W.L. York, Inc., dba Cover Girls; D WG FM, Inc., dba Splendor, No. 23-20440, United States Court of Appeals for the Fifth Circuit, Judgment entered March 4, 2024, affirming Decisions of the district court below. Appendix A.

Chanel E.M. Nicholson vs. W.L. York, Inc., dba Cover Girls; D WG FM, Inc., dba Splendor; No. 4: 21-CV-2624; United States District Court for the Southern District of Texas, Order Denying Motion to Alter or Amend Summary Judgment on August 21, 2023. Appendix B.

Chanel E.M. Nicholson vs. W.L. York, Inc., dba Cover Girls; D WG FM, Inc., dba Splendor; No. 4: 21-CV-2624; United States District Court for the Southern District of Texas, Summary Judgment entered May 24, 2023. Appendix C.

Chanel E.M. Nicholson vs. A.H.D. Houston, Inc. dba Centerfolds, W.L. York, Inc., dba Cover Girls; D WG FM, Inc., dba Splendor; No. 4:21-CV-2624; United States District Court for the Southern District of Texas, Order Granting Defendants' Motion to Dismiss, Sept. 28, 2022. Appendix D.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinionsof the United States district court appears at Appendix B, C & D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 4, 2024.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

~~CONSTITUTIONAL AND~~ STATUTORY PROVISIONS INVOLVED

42 U.S. Code § 1981

42 U.S. Code § 1981 - Equal rights under the law
(a) Statement of equal rights
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined
For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment
The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

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STATEMENT OF THE CASE

1. Every Time Petitioner Came to Work Was a Discrete Event Requiring Payment and Often Resulting in Discriminatory Denial of Access, in Violation of the Terms of Plaintiff's Agreements with Respondents.

Petitioner was never an employee of either of the Respondents. Each time she was granted a dancer/entertainer position she was required to enter a License & Access ("L&A") Agreement, the provisions of which are discussed in more detail in Section 2 below. The L&A Agreements with W.L. York, Inc., dba Cover Girls ("Cover Girls") and with D WG FM, Inc., dba Splendor ("Splendor") granted Petitioner unlimited access to Respondents' premises, did not mention that any fee was required for access, and granted her the right to choose her own hours and to leave without penalty.[1] The L&A Agreements provide that she receives no compensation with Splendor or Cover Girls, and that all her compensation is solely from customers.[2]

The L&A Agreements had no automatic termination or time-triggered termination,[3] and were never terminated by either party. Thus, the L&A Agreements with Splendor and Cover Girls remained in effect in 2021 when this case was filed in the district court.

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[1] Petitioner's L&A Agreement with Cover Girls is in **Appendix E**; her L&A Agreement with Splendor is in **Appendix F**.
[2] **Appendices E&F**, para. 4.
[3] **Appendices E&F**, para. 8.

A. Prior Work Experience and Work Experience at Centerfolds and Splendor

Petitioner began working as a dancer/entertainer at age 18 (in 2013) at A.H.D. Houston, Inc. d/b/a Centerfolds (hereinafter "Centerfolds").[4] She worked there for about one year. She was required to pay the hostess at the door a fee every time she came to work. The fee varied depending on her shift starting time. Her sole compensation was from customers, none came from Centerfolds. Sometimes she would be refused entry for work unless she paid certain managers additional requested monies, and other times she was refused entry because there were already "too many" Black entertainers there. Eventually, she was denied access by one of the managers for not paying a large enough "tip" to a particular manager and to one of the bartenders.

After she was denied access at Centerfolds, Petitioner started working at Splendor, near the end of September, 2014.[5] She worked there until about November 2016, when she was refused access at Splendor because she refused to pay a particular manager a substantial "fine." As at Centerfolds, Petitioner was required to pay the hostess at the door at Splendor a fee every time she came to work. The fee

[4]A.H.D. Houston, Inc. d/b/a Centerfolds was a defendant in this case until dismissed on Sept. 28, 2022. **Appendix D**. Centerfolds, Cover Girls and Splendor all have the same two sole directors, who are also the sole named officers, and who were also initially named as defendants. These two individuals were dismissed as defendants on September 28, 2022. **Appendix D.**

[5] *See* **Appendix F**, Petitioner's L&A Agreement with Splendor, entered on 9.27.2014.

varied depending on her shift starting time. Her sole compensation was from customers, none came from Splendor.

On multiple occasions Petitioner was refused entry to work at Splendor, unless she paid certain managers additional requested monies. There were times when Petitioner would arrive for a shift at Splendor, only to be refused entry at the door. If she investigated, she was told it was because there were too many Black dancers already on the premises, or sometimes, because Bob Furey (who was a regional manager covering both Splendor and Cover Girls) was there.

The requirement that Petitioner pay each time for work at Splendor, the forced tipping of managers for access, and the exclusions of Petitioner because the Black dancer quota had been reached, were all breaches of her agreement with Splendor. *See* **Appendix F**, her L&A Agreement with Splendor, para. 3 (Granting Petitioner the right to "determine her schedule in performing the services, including but not limited to, her ability to arrive and leave the premises at any time without penalty ...").

B. Work Experience at Cover Girls

After being denied access at Splendor in about November 2016, Petitioner entered an L&A agreement with Cover Girls on November 6, 2016 and began

working there.[6] She was required to pay a fee to the hostess at the door at Cover Girls varying from $20 to $80 (depending on the shift starting time) every time she came to work. Her sole compensation was from customers, none came from Cover Girls.

She was also often forced to tip managers and other employees at the end of her shift, or she would not be allowed future access to Cover Girls. Petitioner was often denied access (up to several times per week) because there were already "too many" Black dancers on the Cover Girls premises, or because Bob Furey was on the premises. In late November 2017, Petitioner was denied access when she was told by a manager that there were already "too many Black dancers" on the premises.

Bob Furey was a regional manager who once removed a day manager's hiring authority for retaining a black dancer.[7] Cover Girls' general manager Hal Naumann, almost never hired non-Caucasian dancers.[8] Bob Furey is also reported to have instructed managers to support a policy of limiting the number of black dancers on the premises because he believed they would attract police attention to drug dealing and sex slavery on the premises.

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[6] See **Appendix E**, Petitioner's L&A Agreement with Cover Girls, entered on Nov. 16, 2016.
[7] See **Appendix G,** excerpts from deposition of Andrew Skwera; a long-time manager at Cover Girls pp 44-45.
[8] **Appendix G** p.8.

Petitioner did not return to try to work at Cover Girls after she was denied access in November 2017. She was working as a dancer/entertainer at other venues, and continued to do so until she became pregnant with a second child a few months later.

Again, as at Splendor, all the payments for access to work at Cover Girls, the forced tipping of managers, and the exclusions of Petitioner because Bob Furey was there or because the Black dancer quota had been reached, were breaches of her agreement with Cover Girls. *See* **Appendix E**, her L&A Agreement with Cover Girls, para. 3 (Granting Petitioner the right to "determine her schedule in performing the services, including but not limited to, her ability to arrive and leave the premises at any time without penalty ...").

C. Another Application and Rejection at Splendor

On June 24, 2021, after the pregnancy and after working at some other positions, Petitioner sought to resume dancing and went to apply for a dancer/entertainer position at Centerfolds. She was told they were not hiring, though several Caucasian dancers were observed starting their shifts.

After her rejection at Centerfolds, on Aug. 11, 2021 Petitioner arrived at Splendor to audition for a dancer position. She was told by a manager who is believed to be a relative of the owners that they were not hiring and she should try

at Centerfolds. She was told by a different manager she knew from having worked there that he would like to hire her but they were not hiring Black Dancers at Splendor.

She did not assert her rights to access the Splendor premises from her Splendor L&A Agreement, or mention that she had such an agreement, as she did not recall entering the L&A Agreement. Whether Splendor had honored Petitioner's existing L&A agreement, or had granted Petitioner a position and then entered a new L&A agreement with Petitioner on Aug. 11, 2021, she would have been required to pay the entry fee that time and each time she came there to work, in breach of the agreement she had. **Appendix F**, Petitioner's L&A Agreement with Splendor, para. 3.

2. Petitioner's License and Access Agreements with Cover Girls and Splendor Are Not Employment Agreements and Have No Obligations for Cover Girls and Splendor and Provide No Rights for Petitioner Other than Access to Work

Petitioner's License and Access Agreements ("L&A Agreements") with Respondents Cover Girls (**Appendix E**) and with Splendor (**Appendix F**) are substantially identical, but for the first party name. Each agreement emphasizes throughout that Petitioner is not an employee, and that Respondents will provide no compensation or other benefit of any kind to Petitioner. Substantially all provisions of the agreements provide rights to Respondents, with nearly all obligations assumed

by Petitioner, and providing Petitioner only a right of access, as shown in the following agreement excerpts.

The L&A Agreements (**Appendices E&F**) state in para. 3:

> The Dancer shall also determine her schedule in performing the services. including but not limited to, ***her ability to arrive and leave the premises at any time without penalty.*** It is specifically understood that the Dancer sets her own schedule of when and what bours she works. [emphasis added]

The L&A Agreements state in para. 4 (**Appendices E&F**):

> The Dancer understands that [Respondent] will not pay her any hourly wage or overtime pay, advance or reimburse her for any business-related expenses, or provide to her any other employee related benefits. The Dancer acknowledges that she will receive no compensation from [Defendant], that her compensation shall be comprised solely of monies received from customers and not [Respondent] ...

The L&A Agreements state in para. 5 (**Appendices E&F**):

> The Dancer acknowledges and agrees that she is not an employee of [Respondent]. It is the express intention of the parties that the Dancer is, and shall remain during the term of this agreement, a licensee granted access to [Respondent] and not be deemed an agent, servant, independent contractor, or employee of [Respondent] for any purpose. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between the Dancer and [Respondent]. The parties acknowledge that the Dancer is not an agent, servant, independent contractor, or employee of [Respondent] for purposes of taxation ....

The L&A Agreements state in para. 6 (**Appendices E&F**):

> The Dancer shall maintain accurate records of all income generated using [Respondent's] facilities and the Dancer is solely responsible for all taxes, fees and assessments for any and all income generated using [Respondent's] facilities in the operation of her business. The Dancer is responsible for reporting her income and paying her own income taxes and other taxes of every description incidental to her self-employment. The Dancer agrees to

indemnify and/or reimburse [Respondent] if [Respondent] is required to pay any taxes on the Dancer' s behalf.

The L&A Agreements state in para. 12 (**Appendices E&F**, capitalization in original):

> THE DANCER SHALL INDEMNIFY, HOLD HARMLESS AND PAY FOR [Respondent's] DEFENSE FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES OR LIABILITY, INCLUDING ATTORNEYS' FEES, ARISING FROM OR RELATING TO THIS AGREEMENT OR THE DANCER'S RELATIONSHIP WITH [Respondent], INCLUDING LIABILITY ARISING FROM [Respondent's] OWN NEGLIGENCE.

The L&A Agreements state in para. 15 (**Appendices E&F**, capitalization in original):

> [Respondent] AND THE DANCER AGREE THAT IF, UPON ANY RULING OR DECISION OF AN ARBITRATOR, COURT OR OTHER TRIBUNAL WITH JURISDICTION OVER THE MATTER THAT THE RELATIONSHIP BETWEEN [Respondent] AND THE DANCER IS ONE OF EMPLOYER AND EMPLOYEE, THE DANCER SHALL SURRENDER, REIMBURSE AND PAY TO [Respondent] ALL MONEY RECEIVED BY THE DANCER AT ANY T1ME SHE PERFORMED ON THE PREMISES OF [Respondent] - ALL OF WHICH WOULD OTHERWISE HAVE BEEN COLLECTED AND KEPT BY [Defendant] HAD THE PARTIES NOT ENTERED INTO THIS LICENSE AGREEMENT, AND THE DANCER SHALL IMMEDIATELY PROVIDE A FULL ACCOUNTING TO SPLENDOR OF ALL INCOME WHICH SHE RECEIVED DURING THE RELEVANT T1ME PERIOD. IN THE EVENT THAT THE DANCER FAILS TO REPAY [Respondent] AS PROVIDED IN THIS PARAGRAPH, [Respondent] SHALL BE ENTITLED TO OFFSET ANY WAGE OBLIGATION BY ANY AMOUNT NOT RETURNED BY THE DANCER.

3. Essentially the Only Obligations Imposed on Respondents Cover Girls and Splendor in Petitioner's License and Access Agreements Were Never Terminated by Either Party

In paragraph 3, the L&A Agreements with Respondents Cover Girls and Splendor (**Appendices E&F**) both provide: "The Dancer shall also determine her schedule in performing the services, including but not limited to, ***her ability to arrive and leave the premises at any time without penalty***. It is specifically understood that the Dancer sets her own schedule of when and what bours she works." (emphasis added)

In paragraph 8, the L&A Agreements with Respondents Cover Girls and Splendor (**Appendices E&F**) both provide: "[Defendant] and the Dancer shall have the right to terminate this Agreement at any time and for any reason, or for no reason at all." Defendants have never presented any evidence that they exercised their termination right or otherwise that either of these L&A Agreements were ever terminated. Petitioner therefore retained her right to access their premises for work when she was excluded by Cover Girls in late November 2017 and by Splendor in 2021.

4. The Fifth Circuit's and District Court Decisions Appealed

The Fifth Circuit summarized Petitioner's position as alleging that her claims which were not filed until August of 2021, were timely, because: "[E]ven though she first experienced discrimination from Cover Girls in 2016 and from Splendor in

2014, she was subjected to subsequent discrete acts of discrimination from both entities that reset the four-year statute of limitations." The Fifth Circuit then held that *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) was inapplicable to her claims, because: "[T]he act of discrimination that she alleges took place in 2021 that forms the basis of her § 1981 claim against Splendor was merely a continuation of Splendor's original act of discrimination that she alleges took place in 2014, upon which the limitations period has already elapsed. ... Thus, her claims of unlawful discrimination began to accrue in 2014."

Similarly, regarding Petitioner's claims against Cover Girls, the Fifth Circuit held: "Thus, Cover Girls' first act of discrimination that Nicholson alleges took place in 2016 merely remained ongoing when she returned in 2017. Consequently, her § 1981 claim against Cover Girls began to accrue when she signed the LAA with the club in November 2016... we agree with the district court that her claims were barred by the applicable four-year statute of limitations." *Id.*

The District Court had denied Petitioner's Motion to Alter or Amend Summary Judgment on August 21, 2023, and had granted summary judgment for Defendants on May 24, 2023.

REASONS FOR GRANTING THE PETITION

A. The Decision by the Fifth Circuit that the Statute Accrued from the Pre-Limitations Period Exclusions of Petitioner, Is in Conflict with the Supreme

Court's *Morgan* and *Lewis v. City of Chicago* Decisions, and with All Related Decisions from Other Circuits

This petition should be granted because the Fifth Circuit's decision below was in clear conflict with every United States court of appeals that has reviewed the question of whether discrete discriminatory acts taking place within the limitations period are barred because the statute accrued from the time of prior similar discriminatory acts. All have decided there is no such bar, and that discrete discriminatory acts within the limitations period are actionable. Moreover, the Fifth Circuit's decision on the important question of federal law on when the statute of limitations for discrete discriminatory acts commences is in direct conflict with this Court's decisions in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) and *Lewis v. City of Chicago*, 550 U.S. 205, 211 (2010). *See* RULES OF THE Supreme Court of the United States 10(a); 10(c).

B. Summary of the Argument

The Supreme Court's holding in *Morgan*, 536 U.S. at 113 that each discrete act of discrimination "starts a new clock for filing charges alleging that act," establishes a rule which the facts of the case at bar conform to with near exactitude.[9] The fact that Petitioner first experienced discrimination from Cover Girls in 2016

9 Accord *Lewis v. City of Chicago*, 550 U.S. 205, 211 (2010), (Every "use" of an employment practice that causes a disparate impact is a separate actionable violation of Title VII with its own 180– or 300–day statute-of-limitations clock. "Setting aside the first round of selection in May 1996, which all agree is beyond the cut-off, no one disputes that the conduct petitioners challenge occurred within the charging period.")

and from Splendor in 2014 does not bar her claims in the case, which took place within the limitations period and are for discrete discriminatory acts of excluding her from the workplace.[10]

Petitioner had no employment agreement and no ongoing employee relationship with Defendants, and received no compensation from Defendants. Petitioner had a "License and Access Agreement" which provided that she could freely access Defendants' premises. In fact, however, every time Plaintiff came to work (at both Splendor and Cover Girls) she had to pay a fee – effectively new consideration for each entry to the premises for work, in beach of the agreements. She was periodically denied entry, because there were already "too many" Black dancers on the premises (or sometimes, for not paying additional fees to managers or employees); which were also agreement breaches. Her claims in this case were limited to one racially-motivated discrete act of exclusion at Splendor in 2021 and one racially-motivated discrete act of exclusion at Cover Girls in late 2017 – both of which were undisputedly within the limitations period.[11]

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10 *Morgan ibid.*: "The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed."

11 Note that in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004), the Supreme Court held that claims arising under the 1991 amendments to section 1981 are governed by the four-year federal statute of limitations set forth in 28 U.S.C. § 1658.

The Court in *Morgan,* 536 U.S. at 114, noted that: "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify." Excluding Petitioner, therefore, because the quota of Black dancers had been reached, were discrete acts of discrimination; most similar to "failure to hire." Her rejections at Splendor in 2021 and at Cover Girls in late November 2017, therefore, both started new statute of limitations clocks. The statute of limitations did not accrue from any of her prior exclusions from Splendor or Cover Girls which took place before the limitations period, under the holding of *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 113. *Accord Lewis v. City of Chicago*, 550 U.S. at 211.

Other circuits that have considered whether for allegations of discrete discriminatory acts the limitations period accrues from prior similar acts, or whether each new act starts a new limitations clock, have universally decided the latter rule applies. *See Williams v. Giant Food Inc.*, 370 F.3d 423, 429 (4th Cir. 2004) ("[T]he district court properly determined that the § 1981 claim could only be based upon alleged failures to promote between May 1998 and Williams's resignation."); *Dressler v. Daniel*, 315 F.3d 75 (1st Cir. 2003) (Note: summary judgment against plaintiff was affirmed on other grounds: "The first two discreet acts of alleged retaliation fall outside the filing period; ... these acts are time barred. *See Morgan*, 122 S.Ct. at 2077. As to the third act, however, Dressler claims that she was not aware that the police complaints had been filed until August 3, 1999. The district

court assumed arguendo that Dressler's complaint was filed timely with regard to the police department complaints since she did not find out about the complaints until August 1999."); *Forsyth v. Federation Employment and Guidance Ser.*, 409 F.3d 565, 573 (2nd Cir. 2005) ("Any paycheck given within the statute of limitations period therefore would be actionable, even if based on a discriminatory pay scale set up outside of the statutory period. Similarly, plaintiff's claims under 42 U.S.C. § 1981 and § 296 of the New York State Human Rights Law would not be time-barred ..."); *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012) ("Accordingly, under *Lewis* and *Morgan*, each time the Port Authority failed to promote one of the plaintiffs, that plaintiff had 180 days to challenge the decision."); *Groesch v. City of Springfield*, 635 F.3d 1020, 1027 (7th Cir. 2011) (Holding that the *Morgan* rule also applied to Section 1983 claims, and that: "Following *Morgan, Hildebrandt* and *Reese* firmly established in our circuit that under Title VII, a new cause of action for pay discrimination arose every time a plaintiff received a paycheck resulting from an earlier discriminatory compensation practice occurring outside the statute of limitations period."); *Mems v. City of St. Paul, Dept. of Fire*, 327 F.3d 771, 785 (8th Cir. 2003) ("Those [discrete events] occurring after November 5, 1995, and so within the damages period, include the reprimand of Webb for intimidating McCardle, the rejection of Webb's race harassment charge against McCardle, and the order to report for a fitness-for-duty exam. These discrete acts were properly

before the jury ..."); *Hulteen v. At & T Corp.*, 498 F.3d 1001, 1009 (9th Cir. 2007) (*en banc*) ("Because Pallas timely filed a charge, the existence of past acts would not bar her (or here, Hulteen's) suit under Morgan or Ledbetter."); *Davidson v. America Online*, 337 F.3d 1179, 1185-86 (10th Cir.2003) ("Each discrete refusal to hire is a separate actionable unlawful employment practice that 1starts a new clock for filing a charge alleging that act.' ... Thus, Davidson is limited to filing a claim for the refusals to hire that 'occurred' within the appropriate time period. ...This remains true even if the discrete act was part of a company-wide or systemic policy."); *Herrera v. City of Espanola*, 32 F.4th 980, 1001 (10th Cir. 2022) ("And each day the City failed to provide water service to Appellants constituted a separate violation that triggered a new limitations period [for Herrera's Section 1983 claims].").

C. ARGUMENT

1. The Statute of Limitations for the Section 1981 Claim Against Splendor Commenced in 2021

As noted above, the Fifth Circuit held that *Morgan* was inapplicable to Petitioner's claims, because: "[T]he act of discrimination that she alleges took place in 2021 that forms the basis of her § 1981 claim against Splendor was merely a continuation of Splendor's original act of discrimination that she alleges took place in 2014 . ... Thus, her claims of unlawful discrimination began to accrue in 2014."

But the Court in *Morgan.*, 536 U.S. at 113 concluded: "Each discrete discriminatory act starts a new clock for filing charges alleging that act." The Supreme Court also held, consistently with the foregoing statement, that only older acts outside the statutory period were barred by the statute of limitations (*see Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 114-115):

> Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period. While Morgan alleged that he suffered from numerous discriminatory and retaliatory acts from the date that he was hired through March 3, 1995, the date that he was fired, only incidents that took place within the timely filing period are actionable. Because Morgan first filed his charge with an appropriate state agency, only those acts that occurred 300 days before February 27, 1995, the day that Morgan filed his charge, are actionable. During that time period, Morgan contends that he was wrongfully suspended and charged with a violation of Amtrak's "Rule L" for insubordination while failing to complete work assigned to him, denied training, and falsely accused of threatening a manager. [footnote discussion omitted]

The Court in *Morgan*, 536 U.S. at 113 noted that "refusal to hire" is but one example of a discrete discriminatory act which starts the running of a new statute of limitations:[12]

> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period.

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[12] Note that, however, the *Morgan* Court also held that the "refusal to hire" claims there in issue did not fall within the continuing violations doctrine, and therefore such claims occurring before the statutory period were barred.

Petitioner is only claiming for one discrete event: denial of her access to Splendor to work, in 2021. It is most similar to a "refusal to hire" but in any event, it is clearly a discrete act under *Morgan, ibid.*[13]

The cases cited in **Section B** above show that the First, Second, Fourth, Seventh, Eighth, Ninth and Tenth circuits have all followed the rule from *Morgan* and held that each discrete discriminatory act starts a new limitations clock. Also, the decision the Fifth Circuit relied on to support its decision in this case, *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004), does not do so. The plaintiffs there sought to certify a class comprised of "'[a]ll African-Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate.'" *Id.* at 413. The Court noted that: "The district court denied certification also on the basis that individualized hearings are necessary to determine expiration of the statute of limitations for particular sets of policies." *Id.* at 420. The *Monumental Life* Court noted that the statute for each potential class member's policy ownership accrued "[W]hen the plaintiff either has actual knowledge of the violation or has knowledge

[13] The *Morgan* rule that each discrete discriminatory act starts a new limitations clock is not restricted to Title VII claims, as were at issue in *Morgan. See, e.g., See Williams v. Giant Food Inc.*, 370 F.3d 423, 429 (4th Cir. 2004) (*Morgan* rule applied to Section 1981 claims); *Forsyth v. Federation Employment and Guidance Ser.*, 409 F.3d at 573 (*Morgan* rule applied to Section 1981 claims); *See also Herrera v. City of Espanola*, 32 F.4th 980 and *Groesch v. City of Springfield*, 635 F.3d 1020, 1027 (7th Cir. 2011) (*Morgan* rule applied to Section 1983 claims).

of facts that, in the exercise of due diligence, would have led to actual knowledge." *Ibid.* But the "violation" referenced here was the purchase of the policy, where some of the potential class members bought their policies as early as the 1970s. And, the Court noted that it was not making any determination of when the statute commenced, because "Though individual class members whose claims are shown to fall outside the relevant statute of limitations are barred from recovery, this does not establish that individual issues predominate, particularly in the face of defendants' common scheme of fraudulent concealment."

2. The Four Year Statute of Limitations for the Section 1981 Claim Against Cover Girls Commenced in Late November 2017

The Fifth Circuit noted that the § 1981 claim against Cover Girls, was subject to a four-year statute of limitations period under 28 U.S.C. § 1658. (citing *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004); *Mitchell v. Crescent River Port Pilots Ass'n*, 265 Fed.Appx. 363, 367 (5th Cir. 2008). The Cover Girls agreement (**Appendix E**) is essentially identical to the Splendor agreement (**FAppendix**) but for the Defendants' names. It was not an employment agreement. As at Splendor, she was paid no compensation by Cover Girls, and had to pay $20 to $80 for entry each time she came to work, effectively making each entry a discrete contract with Defendant, with new consideration (in violation of the terms of her agreement, **Appendix E**, para. 3). She was also often forced to pay additional monies to managers or employees for access. And sometimes she was denied access because

Bob Furey was there; or, she was sometimes denied access for the blatantly discriminatory reason that there were "already too many" Black dancers on the premises; also in violation of the terms of her agreement, **Appendix E**, para. 3. Plaintiff's denial of access to Cover Girls in late November 2017 was simply one more discrete, discriminatory act. As such, under *Morgan*, the limitations clock started in late November 2017 (within four years from when the district court case was filed) for Plaintiff's Section 1981 claim against Cover Girls, for all the same reasons noted above that the limitations clock for her claim against Splendor started in 2021, when she was refused access there.

CONCLUSION

In view of the Supreme Court precedent (*National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) and *Lewis v. City of Chicago*, 550 U.S. 205, 211 (2010)), and the fact that every Circuit that has reviewed that precedent has determined that for discrete discriminatory events (which Petitioner's exclusions unquestionably were) the limitations clock starts anew, Petitioner requests grant of a writ of *certiorari*.

Respectfully Submitted,

Chanel E.M. Nicholson, *pro se* Date: