No. 23-7490

In the Supreme Court of the United States

CHANEL E.M. NICHOLSON, PETITIONER,

v.

W.L. YORK, INC., DBA COVER GIRLS, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

JOHN P. ELWOOD
ANDREW T. TUTT
Counsel of Record
SAMUEL F. CALLAHAN
JILLIAN M. WILLIAMS
ORION LOUIS CHARNLEY DE NEVERS
STACEY MENJIVAR
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

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The Court should take this case to resolve a recognized circuit conflict over a question it left open in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115 n.9 (2002): whether the continuing violations doctrine applies to claims premised on a pattern or practice of discrimination, or instead applies "only in the context of hostile work environment claims." Pet. App. A. 8.

Petitioner Chanel Nicholson alleges that respondents maintained a racist policy limiting the number of black dancers who could work the same shift at respondents' establishments, in violation of the right secured under 42 U.S.C. § 1981 to make and enforce contracts on the same terms as white citizens. *See* Pet. App. A. 2-3; Opp. App. 9a ¶ 2 (operative complaint). Petitioner herself was repeatedly subjected to this policy—beginning in 2014, and then in 2017 and 2021. *See* Pet. App. A. 2-3, 7-8. Importantly, petitioner did not sue for herself alone: She filed this lawsuit as a putative "class action" (Pet. App. A. 1, 3) to represent a class of "Black or Brown Dancers" whose

rights were similarly violated as a result of respondents' policy (Opp. App. 9a-10a).

The question this case presents is: When did the four-year statute of limitations on petitioner's § 1981 "pattern-or-practice" claim begin to run? If the "continuing violations doctrine" applies, it began to run from the last-known application of the policy, in 2021—making petitioner's lawsuit timely. Pet. App. A. 3, 6-8. But the Fifth Circuit in this case—for at least the sixth time[1]—instead held that "the continuing violations doctrine" has no application to pattern-or-practice claims because it "applies *only* in the context of hostile work environment claims, which Nicholson does not allege in this case."

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[1] *See Katz v. Wormuth*, No. 22-30756, 2023 WL 7001391, at *6 (5th Cir. Oct. 24, 2023) (holding "the continuing violation doctrine ... only applies to hostile work environment claims, not discrimination or retaliation claims"); *Heath v. Bd. of Supervisors*, 850 F.3d 731, 741 (5th Cir. 2017) (rejecting application of continuing violations theory to "retaliation claim based on discrete acts"); *Mitchell v. Crescent River Port Pilots Ass'n*, 265 F. App'x 363, 369 (5th Cir. 2008) (rejecting a "'continuing violation' theory of discrimination" that is based on "an ongoing pattern of discrimination"); *Hamic v. Harris Cnty. W.C. & I.D. No. 36*, 184 F. App'x 442, 447 (5th Cir. 2006) (holding the continuing violations doctrine did not apply to "an ongoing pattern of retaliation"); *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 279 (5th Cir. 2004) (holding the continuing violations doctrine did not apply to "a pattern of discriminatory behavior" because *Morgan* only "carved out an exception for claims based on a hostile work environment"); *see also McWilson v. Bell Textron Inc.*, No. 4:23-cv-01104-P, 2024 WL 3585615, at *6 (N.D. Tex. July 30, 2024) (interpreting *Morgan* and Fifth Circuit cases as "confirming the continuing violation doctrine applies only to hostile work environment claims"); *accord Scales v. Target Corp.*, No. 24-00324, 2024 WL 4729480, at *3 (S.D. Tex. Nov. 7, 2024); *Pollard v. Dejoy*, No. 24-224, 2024 WL 3617534, at *7 (E.D. La. Aug. 1, 2024); *Black v. Miss. Dep't of Rehab. Servs.*, 3:20-cv-00643, 2021 WL 1948468 (S.D. Miss. May 14, 2021) (same); *Bashiri v. Alamo Cmty. Coll. Dist.*, No. SA–07–cv–1028, 2009 WL 2998228, at *2-3 (W.D. Tex. Sept. 16, 2009).

Pet. App. A. 8 (emphasis added). Thus, according to the Fifth Circuit, Nicholson's case is time-barred. That wrongheaded decision exacerbated an acknowledged circuit split on an important and recurring question.

The Court should grant certiorari for three reasons.

First, the continuing violations doctrine applies to pattern-or-practice discrimination claims like the one at issue in this case. *Morgan* left this question open. 536 U.S. at 115 n.9; *see Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 156 (2d Cir. 2012). But the answer is obvious: A pattern-or-practice claim—by its very nature—requires the plaintiff to establish a continuing pattern or a practice of unlawful acts, meaning it continues to accrue with every unlawful act that constitutes the pattern or practice. This Court's statute-of-limitations ruling in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982), bolsters that conclusion. In *Havens* the Court recognized that in the case of "challenges not just [to] one incident of conduct . . . but [to] an unlawful practice that continues," the statute of limitations begins to run from the "last asserted occurrence of that practice." *Havens*, 455 U.S. at 381. That is so not only because the harm plaintiff suffers stems from a "continuing violation manifested in a number of incidents," *id.*, but also because the accrual date for a cause of action turns, in part, on equitable considerations, and a defendant that intentionally and systematically engages in an unlawful pattern or practice forfeits the interest in repose that is typically afforded other parties.

Second, courts of appeals are deeply divided over whether the continuing violations doctrine applies to pattern-or-practice claims or is instead limited to hostile work environment claims. Some echo the Fifth Circuit's erroneous view that the doctrine is limited to hostile work environment claims—even if the underlying claim is characterized by the "cumulative effect of individual acts"

that makes it functionally indistinguishable from a hostile work environment claim.[2] Others correctly recognize that the continuing violations doctrine applies to pattern-or-practice claims.[3] This split cannot heal itself. At this point, circuits can only pick sides in this established conflict.

Third, this question is important and recurring. The "doctrinal confusion" in this area "has brought about the disparate treatment of similar claims." Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonz. L. Rev. 271, 273 (2008). Discrimination claims arise in numerous situations, often as a result of repeated systematic ongoing patterns or practices. Indeed, pattern-or-practice claims are among the most important civil rights claims, involving allegations of systematic discrimination over extended periods. Under the correct application of the continuing violations doctrine, the statute of

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[2] *See Bird v. Dep't of Hum. Servs.*, 935 F.3d 738, 748 (9th Cir. 2019) (holding that "[e]xcept for a limited exception for hostile work environment claims" "after *Morgan II*, little remains of the continuing violations doctrine"); *Tassy v. Buttigieg*, 51 F.4th 521, 530, 532 (2d Cir. 2022) (holding continuing violations doctrine is not available for pattern-or-practice claims); *Williams v. Giant Food Inc.*, 370 F.3d 423, 428 (4th Cir. 2004) (same); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1186 (10th Cir. 2003) (same).

[3] *See Fincher v. Town of Brookline*, 26 F.4th 479, 486 (1st Cir. 2022) (holding continuing violations doctrine applies to pattern-or-practice claims); *Heraeus Med. GmbH v. Esschem, Inc.*, 927 F.3d 727, 740 (3d Cir. 2019) (relying on *Havens* for the proposition that the "continuing violation doctrine" covers claims that "accrue[] over time as a result of a 'continuing pattern, practice, [or] policy' that is unlawful in nature"); *Mayers v. Laborers' Health & Safety Fund of N. Am.*, 478 F.3d 364, 368 (D.C. Cir. 2007) (holding continuing violations doctrine applies when the "two *Morgan* limitations" are not implicated); *Sharpe v. Cureton*, 319 F.3d 259, 268-69 (6th Cir. 2003) (holding continuing violations doctrine applies to challenges "involving a longstanding and demonstrable policy of discrimination" because that category of claims was "not implicated by *Morgan*").

limitations on those claims accrues after the last discriminatory act.

The Court should grant the petition and reverse.

A. THE DECISION BELOW IS WRONG

The continuing violations doctrine applies to pattern-or-practice claims—it is not limited to "hostile work environment" claims, as the Fifth Circuit has held. Pet. App. A. 8. *Morgan* explicitly left this question open. 536 U.S. at 115 n.9. Commentators have remarked that *Morgan* "cast the fate" of pattern-or-practice claims "into doubt." Graham, *supra*, at 304. But the essential logic of pattern-or-practice claims shows that they should be governed by the continuing violations doctrine. The rationale behind the continuing violations doctrine is to address the ongoing nature of certain discriminatory practices, which may not be fully apparent or actionable based on isolated incidents. It also ensures plaintiffs can challenge systemic discrimination that persists over time, rather than being barred by the statute of limitations for each discrete act.

A pattern-or-practice claim, by its very nature, does not ripen until a pattern or practice of unlawful conduct is established. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (noting that pattern-or-practice claims focus on the employer's "standard operating procedure" rather than "isolated" events). Thus, unlike a discrete act of discrimination—which crystallizes at one point in time—a pattern or practice becomes evident only when multiple acts, uniformly reflecting the same unlawful policy, coalesce to form a broader course of conduct. Each additional act bolsters the plaintiff's claim that the employer's misconduct is systematic, rather than episodic, ensuring the claim does not fully accrue until the continuity of the employer's behavior is established.

The Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), supports that conclusion. In that case, which of course did not arise "in the context of hostile work environment," Pet. App. A. 8, a unanimous Court recognized that ongoing violations of federal anti-discrimination laws must be treated differently from discrete, isolated unlawful acts. *Havens*, 455 U.S. at 380. The Court recognized that where the plaintiff alleges a continuing violation, concerns regarding staleness or prejudice to the defendant are absent or diminished. After all, where the defendant's wrongful course of conduct persists unbroken into the statutory period, each new act helps prove the ongoing practice itself. Simply put, an employer that maintains a continuing violation neither deserves nor obtains the repose afforded by the statute of limitations. *Id.* at 380-81.

Additionally, recognizing the continuing violations doctrine for pattern-or-practice claims furthers the strong remedial purposes of civil rights statutes like 42 U.S.C. § 1981. By allowing the statute of limitations to run from the last application of an unlawful policy (rather than from the earliest discrete incident), courts ensure that plaintiffs can challenge the full scope of a systematic practice. This prevents defendants from effectively insulating ongoing discriminatory conduct by waiting out the clock on each isolated act. Indeed, under the Fifth Circuit's rule, respondents may now apply their discriminatory policy against petitioner indefinitely. That cannot be correct. Treating each newly enforced discriminatory act as part of a continuing violation aligns with the equitable underpinnings of civil rights law, preventing repeated misconduct from being artificially segmented into time-barred fragments. There is no "end" to the act of exclusion when the exclusion is ongoing and the reason for it is still visible in the mirror.

B. THE CIRCUITS ARE DEEPLY DIVIDED ON THIS IMPORTANT AND RECURRING QUESTION

The courts of appeals are sharply divided over whether and how the continuing violations doctrine applies to claims alleging a pattern or practice of discrimination.

- Five circuits—the Second, Fourth, Fifth, Ninth, and Tenth—hold that the continuing violations doctrine applies exclusively to hostile workplace claims.
- Four circuits—the First, Third, Sixth, and D.C.—hold that the continuing violations doctrine also applies to claims involving a pattern or practice of unlawful conduct.

Had petitioner brought her suit in a circuit that recognized the application of the continuing violations doctrine to pattern-or-practice claims, her § 1981 claim would have been considered timely.

1. Like the Fifth Circuit below, four other circuits hold that the continuing violations doctrine is limited to hostile workplace claims and thus is unavailable to address claims arising out of a pattern or practice of discrimination. *See Bird*, 935 F.3d at 748; *Tassy*, 51 F.4th at 530, 532; *Williams*, 370 F.3d at 428; *Davidson*, 337 F.3d at 1186. In these circuits, "an allegation of an ongoing discriminatory policy does not extend the statute of limitations." *Chin*, 685 F.3d at 157 (collecting aligned cases from the Fourth, Ninth, and Tenth Circuits).

Like the Fifth Circuit, other circuits on the long side of the split treat it as irrelevant that a pattern of discriminatory acts is the result of a shared policy or practice. In these circuits, the fact that a plaintiff's injury "flows from a company-wide, or systematic, discriminatory practice will not succeed in establishing the employer's liability for acts occurring outside the

limitations period." *Bird*, 935 F.3d at 747 (quoting *Lyons v. England*, 307 F.3d 1092, 1107 (9th Cir. 2002)). The allegation that "acts were undertaken pursuant to a discriminatory policy" simply "does not extend the statutory limitations period." *Id.* (quoting *Cherosky v. Henderson*, 330 F.3d 1243, 1247 (9th Cir. 2003)).

In other circuits, by contrast, pattern-or-practice claims are sufficient to trigger the application of the continuing violations doctrine. *See Fincher*, 26 F.4th at 486; *Heraeus*, 927 F.3d at 740; *Mayers*, 478 F.3d at 368; *Sharpe*, 319 F.3d at 268-69. In these circuits, "[t]he 'continuing violation doctrine' can apply to claims that "accrue[] over time as a result of a 'continuing pattern, practice, [or] policy' that is unlawful in nature"; in "such cases, '[n]o single act may be enough to make out a claim,'" so "'the statute of limitations runs from the last act of the illegal conduct.'" *Heraeus*, 927 F.3d at 740 (first quoting *Havens*, 455 U.S. at 381, and then quoting *Blake v. JP Morgan Chase Bank NA*, 927 F.3d 701, 706 (3d Cir. 2019)). These courts may consider a defendant's actions outside the limitations period as part of an alleged ongoing pattern of unlawful conduct as long as they are "part of the same unlawful . . . practice." *Fincher*, 26 F.4th at 486.

Thus, for circuits on the short side of the split, the existence of a "longstanding and demonstrable policy of discrimination" is sufficient to trigger the continuing violations doctrine. *Sharpe*, 319 F.3d at 266. A showing that "some form of intentional discrimination against the class of which plaintiff was a member was the company's standing operating procedure" is sufficient to trigger the doctrine. *Id.* (quoting *Burzynski v. Cohen*, 264 F.3d 611, 618 (6th Cir. 2001)). Plaintiffs in these circuits thus "may invoke the continuing violations doctrine for claims that by their nature occur not on any particular day but over a series of days or perhaps years" even if they are not

hostile work environment claims. *Mayers*, 478 F.3d at 368 (cleaned up).

2. As a result of these distinct tests courts have reached differing results under similar facts. That is particularly true in cases like this one where separate incidences of discriminatory conduct allegedly arose as a result of a common discriminatory policy or practice that caused a single indivisible injury. Under the Fifth Circuit's application of the doctrine, petitioner's claims are untimely because even though they "are not 'discrete discriminatory acts' that are 'independently discriminatory' as contemplated in *Morgan*," Pet. App. A. 8, they are nonetheless ineligible for application of the continuing violations doctrine because they are not hostile workplace claims.

3. The question here is important and recurring, as shown by the number of decisions from different circuits sharply splitting over the application of the continuing violations doctrine to pattern-or-practice claims. This issue will continue to recur with some frequency because civil rights violations often involve acts that form part of an ongoing pattern of discrimination or constitutional violation. And this Court's intervention is desperately warranted: "judges and legal scholars" consider "the 'continuing violation' theory" "to be the most muddled doctrine in employment discrimination law." Vincent Cheng, National Railroad Passenger Corporation v. Morgan*: A Problematic Formulation of the Continuing Violation Theory*, 91 Cal. L. Rev. 1417, 1419-20 (2003). This Court's review is essential to bring clarity to this muddled doctrine.

C. RESPONDENTS OFFER NO PERSUASIVE GROUNDS TO DENY REVIEW

1. This case is an optimal vehicle for deciding this important question. This dispute turns on a pure question of law: whether the continuing violations doctrine applies

to pattern-or-practice race discrimination claims. That question was passed upon below, where the court of appeals treated it as dispositive. The court acknowledged that petitioner alleged ongoing practice of discrimination namely, that she was repeatedly "refused access to" her workplace "because she was Black," barring her claim *solely* because Fifth Circuit law limits "the continuing violations doctrine" to "the context of hostile work environment claims." Pet. App. A. 7-8; *see* Pet. App. C. 7; Pet. App. D. 9. The Fifth Circuit noted that it took "no position" on the question it would face on remand: "whether Nicholson's claims would [be timely]" if the continuing violations doctrine applied. Pet. App. A. 8 n.8. And respondents now apparently agree that the court of appeals left that question open as well. Opp. 7 (quoting Pet. App. A. 8). This clean presentation provides the perfect backdrop against which to decide this question.

2. Whether pattern-or-practice claims are subject to the continuing violations doctrine is fairly encompassed within the questions presented. Were there any doubt, respondents' counterstatement of the question removes it. Respondents' question states:

> Although Petitioner bases her 42 U.S.C § 1981 claim on discriminatory conduct occurring more than four years before she filed her complaint, can allegations of subsequent discrete acts of discrimination preclude the statute of limitations from barring her action even though she never alleged a hostile work environment claim and the continuing violations doctrine does not apply?

Opp. i.[4] That reframed question—offered by respondents themselves—confirms that this case unquestionably

[4] If the Court believes that the discriminatory acts that took place in this case in 2017 and 2021 were "discrete acts" under *Morgan*—as respondents' own question presented appears to concede—the

encompasses the question whether the continuing violations doctrine applies to petitioner's claims.

3. Failing to identify any real barrier to this Court's review, respondents point to other litigation. Opp. 10-12. But that litigation—which respondents acknowledge involved distinct and now-dismissed "hostile work environment" claims (Opp. 7-8, 11; Opp. App. 118a-119a)—is irrelevant to whether this Court can reach and decide the purely legal and nationally important question this case presents. The Court should take this case and resolve that question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN P. ELWOOD
ANDREW T. TUTT
Counsel of Record
SAMUEL F. CALLAHAN
JILLIAN M. WILLIAMS
ORION LOUIS CHARNLEY DE NEVERS
STACEY MENJIVAR
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

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Court should, at a minimum, summarily reverse. *Morgan* holds that a "discrete act" accrues—at the earliest—from the date of the act. 536 U.S. at 110. That would at least make timely the claims predicated on the discrete acts of discrimination that took place in 2017 and 2021.