No. 14-864

In The Supreme Court of the United States

HILLCREST PROPERTY, LLP,

Petitioner,

v.

PASCO COUNTY, FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether this Court should grant a petition for certiorari which primarily raises 42 U.S.C. § 1988 and a "Continuing Violation Doctrine" as reasons why the statute of limitations does not bar Hillcrest's facial substantive due process claim when Hillcrest, the magistrate judge, the district court, and the Eleventh Circuit below neither raised nor considered Section 1988 nor any "Continuing Violation Doctrine."

2. Whether this Court should grant a petition for certiorari to review the Eleventh Circuit's decision that the statute of limitations bars a facial claim where the decision, rather than being in conflict with this Court's decisions, other courts of appeals' decisions, or state court of last resort decisions, was consistent with well-established case law applying statutes of limitations against facial constitutional claims.

3. Whether this Court should grant a petition for certiorari to review the Eleventh Circuit's decision that the statute of limitations bars a facial substantive due process claim where Hillcrest had two years,

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[1] Petitioner Hillcrest Property will be referred to as "Hillcrest," and Respondent Pasco County as "the County." Sections 319.8 (which has been renumbered to 901.2(H)) and 319.9 (which has been renumbered to 901.2(I)) of the County's Land Development Code, which establish the right-of-way dedication procedures, will be referred to as "the Ordinance." References to Hillcrest's petition for certiorari will be to "Petition," to Hillcrest's Appendix as "Appendix," and to the Amici Brief as "AB."

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW
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three months to bring the facial claim within the four-year limitations period once the Ordinance was definitively applied to Hillcrest and where Hillcrest's as-applied substantive due process claim remains pending in district court.

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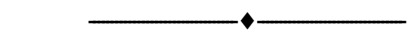
CONSTITUTIONAL PROVISION AT ISSUE

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> "Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."



CONCISE STATEMENT OF THE CASE, SETTING FORTH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

It may be desirable to outline the underlying chronology here in order to demonstrate that (a) Hillcrest *never raised § 1988 or any "Continuing Violation Doctrine" below*, (b) neither the magistrate judge nor the district court nor the Eleventh Circuit considered or resolved *§ 1988 or any "Continuing Violation Doctrine,"* and (c) even if Hillcrest had no reason to challenge the Ordinance until it was "applied" to Hillcrest's property, Hillcrest had at least two years, three months after the Ordinance was definitively "applied" against Hillcrest to challenge the Ordinance facially prior to the statute of limitations on facial claims expiring on November 22, 2009.

On November 22, 2005, the County adopted the Ordinance (Petition 7; Appendix 113-174).

On December 18, 2006, Hillcrest submitted a site plan to the County for a shopping center along State

Road 52 (Appendix 3; see Appendix 24, 84). Hillcrest claims that the Ordinance was "first applied" to it in December 2006, when it initially submitted the site plan for approval (Petition 11).

On February 3, 2007, County staff reviewed the site plan submittal and wrote Hillcrest, indicating that it would be required to dedicate a 50-foot strip of its property along State Road 52, or to apply for a variance, as a condition for the approval of the site plan in accordance with the Ordinance (Doc. 119-4).

In March and July 2007, Hillcrest submitted revised site plans to the County (Appendix 85).

On August 23, 2007, the County Development Review Committee, the County's final decisionmaker concerning right-of-way dedications, approved Hillcrest's site plan, requiring a 50 foot strip of land (or approximately 1.6 acres) to be dedicated (Appendix 26; Doc. 114-7).

Even if Hillcrest wanted to challenge the Ordinance facially, and even if there were no harm to Hillcrest when the Ordinance was adopted on November 22, 2005, Hillcrest suggests that the Ordinance was "applied" against Hillcrest in December 2006 or February 3, 2007, and the Ordinance was definitively "applied" to Hillcrest on August 23, 2007. Hillcrest admits that all three of those times were "well within the [four-year] statutory period after the Ordinance was enacted" (Petition 5, 11).

On November 22, 2009, at least two years, three months after the Ordinance was "applied" to Hillcrest, the four-year statute of limitations would expire if the statute of limitations began to run on Hillcrest's facial substantive due process claim with the adoption of the Ordinance on November 22, 2005 (as the Eleventh Circuit would hold below).

On April 7, 2010, Hillcrest sued the County for various federal and state claims, including a federal facial substantive due process claim and a federal as-applied substantive due process claim (Petition 15; Appendix 4, 96).

The County raised a four-year statute of limitations in connection with cross-motions for summary judgment on Hillcrest's claims. In responding to the County's statute of limitations defense, Hillcrest raised neither Section 1988 nor any "Continuing Violation Doctrine" nor argued that no statute of limitations should be applied against the facial claim.

Neither the magistrate judge nor the district court accepted the County's statute of limitations defense. Neither the magistrate judge nor the district court considered or mentioned Section 1988 or any Continuing Violation Doctrine in their respective recommendation and judgment (Appendix 37-38, 95-99). Rather, the district court held that the statute of limitations on Hillcrest's facial substantive due process claim only began to run when Hillcrest "applied" for site plan approval on December 18, 2006, or when County staff indicated that certain property

would need to be dedicated on February 3, 2007 (Appendix 4, 37). The district court granted summary judgment that the Ordinance was facially unconstitutional, and enjoined the County from enforcing the Ordinance (Appendix 10, 70). The district court denied the County's motion for summary judgment against Hillcrest's as-applied substantive due process claim, which remains to be tried in district court (Appendix 69).

The County appealed the injunction and the summary judgment to the Eleventh Circuit, claiming that the district court was wrong on the merits in holding that the Ordinance was facially unconstitutional and again claiming that the four-year statute of limitations barred Hillcrest's facial substantive due process claim. Hillcrest countered that "an ordinance . . . facially violates substantive due process when it is applied" (a copy of Hillcrest's entire argument concerning the statute of limitations in the Eleventh Circuit is attached as County Appendix A). On June 18, 2014, the Eleventh Circuit reversed, holding that the statute of limitations began to run with the enactment of the Ordinance and barred Hillcrest's facial substantive due process claim; the Eleventh Circuit did not reach the County's argument that the Ordinance on its merits was not facially unconstitutional.[2]

[2] If this Court were to grant Hillcrest's petition, and if this Court were to accept Hillcrest's argument that the statute of

(Continued on following page)

Much of Hillcrest's petition and the amici brief addresses concerns unrelated to the Eleventh Circuit's statute of limitations-based holding and to the two statute of limitations-based "questions presented." For example, Hillcrest much bemoans the merits of the Ordinance (Petition 4, 7-14). Given the Eleventh Circuit's holding and given the "questions presented," the County does not deem it either necessary or proper now to negate Hillcrest's characterization of the Ordinance or recitation of facts.

Suffice it to say, that the facts of the application of the Ordinance to Hillcrest are irrelevant to the merits of Hillcrest's facial substantive due process claim. See, e.g., *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) ("a plaintiff can only succeed in a facial challenge by 'establishing that no set of circumstances exists under which the Act would be valid'"); *Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 770 n.11 (1988) ("[f]acial attacks . . . are not dependent on the facts surrounding any particular permit denial"); *Preminger v. Secretary of Veterans Affairs*, 517 F.3d 1299, 1311 (Fed. Cir. 2008) ("[a] facial challenge . . . is independent of the individual bringing the complaint

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limitations was no bar to the facial claim here, two big if's, this Court should remand to the Eleventh Circuit to give it the opportunity to consider the County's arguments on the merits that the Ordinance was not facially unconstitutional. See cases at page 14 below.

and the circumstances surrounding his . . . challenge"). Thus, the County will not detail specific disagreements with Hillcrest's characterization of the facts underlying the application of the Ordinance to Hillcrest. The County would note that there is considerable factual disagreement, evidenced by the fact that there was no summary judgment against Hillcrest's as-applied substantive due process claim, which remains to be tried.

What is important to a facial challenge is what the Ordinance on its face provides. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007) ("[t]he question is whether the Act, *measured by its text in this facial attack*, imposes a substantial obstacle to late-term . . . abortions"); *N.Y. State Club Ass'n v. New York*, 487 U.S. 1, 14 (1988) ("[t]o succeed in its [facial] challenge, [the plaintiff] must demonstrate from the *text* of [the statute] . . . that . . . the [l]aw cannot be applied constitutionally"); *U.S. v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) ("[a] facial attack tests a law's constitutionality based *on its text alone* and does not consider the facts or circumstances of a particular case").

The Ordinance provides, *inter alia*, that a landowner may transfer density and intensity from the property to be dedicated to the remaining portion of the development site (Appendix 145-146); that a landowner may apply for a waiver if he "believes that the amount of land required to be dedicated exceeds the amount of land that is roughly proportional to the transportation impacts to be generated" (Appendix

154-155); that a landowner may obtain variances where the Ordinance causes a hardship or inordinate burden (Appendix 163-164); and that, once a landowner exhausts the administrative procedures for a waiver, he may file a "civil claim, action or request challenging, or seeking compensation for, [the] dedication" (Appendix 163).

The amici argue in depth that the Eleventh Circuit's decision somehow confuses a substantive due process claim with a taking claim (AB 14-19). The County would note that it was Justice Harlan, rather than Chief Justice Marshall, who wrote *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (AB 17). More importantly, however, the Eleventh Circuit's decision did not concern the merits of a substantive due process claim or of a takings claim. Rather, the Eleventh Circuit's decision was limited to holding that the statute of limitations barred Hillcrest's facial substantive due process claim. Thus, the County will generally resist the temptation to further respond to Hillcrest's and the amici's confusing a substantive due process claim with a taking claim.

SUMMARY OF THE ARGUMENT

This Court should deny Hillcrest's petition for certiorari because the Eleventh Circuit's decision applying a statute of limitations to bar Hillcrest's facial substantive due process claim against the Ordinance neither conflicts with this Court's decisions nor

with decisions from other circuit courts of appeals nor with a state court of last resort. Moreover, Hillcrest below never raised and the magistrate judge, the district court and the Eleventh Circuit never considered the key components of Hillcrest's petition, *to wit*, 42 U.S.C. § 1988 and "the federal Continuing Violation Doctrine." Finally, Hillcrest's and the amici's extended parade of horribles stemming from the Eleventh Circuit's decision is grossly exaggerated, if not completely wrong.

Hillcrest's petition is saturated with references to 42 U.S.C. § 1988 and "the federal Continuing Violation Doctrine." Indeed, the second of the two questions Hillcrest presents for review involves only one issue: "whether the federal Continuing Violation Doctrine" applies. Hillcrest, however, never raised Section 1988 or any "Continuing Violation Doctrine" in the district court or in the Eleventh Circuit. Neither the magistrate judge nor the district court judge nor the Eleventh Circuit in their respective recommendation and decisions mentioned Section 1988 or any "Continuing Violation Doctrine." This Court almost never considers issues, such as Section 1988 and any "Continuing Violation Doctrine" here, which were neither raised nor decided below.

The other question which Hillcrest presents, "[w]hether a state statute of limitations should apply to a claim . . . seeking to enjoin enforcement of a county ordinance" claimed to be facially unconstitutional, asks this Court to jettison well-established principles from this Court and from the circuit courts

of appeals. Federal courts have consistently applied state statutes of limitations against facial claims against ordinances and statutes, at least where defendants, such as the County here, raised the statute of limitations, at least outside the First Amendment and race contexts, and at least where, *as the Eleventh Circuit found here, the "injury should have been apparent to Hillcrest upon the Ordinance's passage*" (Appendix 9). Moreover, there is no need to discard well-established principles here: Hillcrest's as-applied substantive due process claim remains pending and Hillcrest may pursue damages *and injunctive relief* in connection with its as-applied claim.

Hillcrest and the amici have peppered their petition and brief, respectively, with fears that the Eleventh Circuit's decision applying a statute of limitations to bar Hillcrest's facial claim would effectively "immunize" an ordinance or statute from constitutional challenge. What Hillcrest and the amici forget is that, while Hillcrest's facial substantive due process claim against the Ordinance has wound its way through the Eleventh Circuit up to this Court, Hillcrest's as-applied substantive due process claim against the Ordinance remains to be tried in district court. Moreover, circuit courts of appeals have consistently held that the bar of a statute of limitations against a facial claim against an ordinance or statute does not bar an as-applied claim against the ordinance or statute, on which the statute

of limitations only begins to run once the ordinance or statute is "applied."

Hillcrest also has suggested that it would be unfair to bar its facial substantive due process claim because the statute of limitations could run prior to a landowner being aware that it had, or should have, a claim against the Ordinance. What Hillcrest overlooks is that the Eleventh Circuit held that the four-year statute of limitations expired on Hillcrest's facial substantive due process claim on November 22, 2009, four years from the enactment of the Ordinance on November 22, 2005. Hillcrest had applied for preliminary site plan approval on December 18, 2006, almost three years prior to November 22, 2009, and the County definitively "applied" the Ordinance against Hillcrest at least by August 23, 2007, two years, three months prior to November 22, 2009. Thus, even if Hillcrest were unaware of the Ordinance (or its impacts) prior to August 23, 2007, Hillcrest had two years three months to bring its facial substantive due process claim against the Ordinance within the four-year period the Eleventh Circuit applied. Hillcrest, however, did not sue prior to April 7, 2010, more than two years seven months after the Ordinance was definitively "applied" to Hillcrest and almost six months after the four-year statute of limitations on facial claims had expired.

REASONS FOR DENYING THE PETITION

I. Misstatements of law or fact in the petition that bear on what issues properly would be before the Court if certiorari were granted

Hillcrest has no Fifth Amendment claim. Hillcrest claims that the Ordinance violates "the Fifth Amendment's Due Process Clause" (questions presented, Petition i; see Petition 2). As for the constitutional provision at issue, Hillcrest quotes the Fifth Amendment (rather than the Fourteenth Amendment). The Fifth Amendment's Due Process Clause, of course, does not apply to the states (or to the County as a political subdivision of the state). See, e.g., *Dusenbery v. U.S.*, 534 U.S. 161, 167 (2002); *Betts v. Brady*, 316 U.S. 455, 462 (1942). If the petition were granted, but it should not be, the question should be rephrased as to whether the Ordinance violates the Fourteenth Amendment's Due Process Clause.

Hillcrest's and amici's confusion concerning a "facial" and an "as-applied" claim. Hillcrest and the amici fail to understand the difference between a facial challenge and an as-applied challenge.

Hillcrest's first question presented characterizes its claim as "seeking to enjoin enforcement of a county ordinance that, *on its face*, and in violation of the Fifth Amendment's Due Process Clause, extortionately leverages the police power every time it is *applied* to coerce landowners. . . ." (Petition i). Hillcrest's second question is whether it should be able "to bring

a *facial* Due Process claim either upon enactment of the ordinance or later, within the limitations period following *application* of the ordinance to that landowner" (Petition i).

The amici also fail to understand the difference between a facial claim and an as-applied claim. "It is the effective *application* of an unconstitutional law that impacts the property owners in the substantive due process context and commences the statute of limitations, *regardless of whether that property owner brings a facial or an as-applied claim*" (AB 22). The amici, however, cite no precedent from lower federal courts, much less from this Court, supporting such proposition. Rather, the amici cite to two law review articles.

II. Hillcrest never raised 42 U.S.C. § 1988, the Continuing Violation Doctrine, or that there should be no statute of limitations against facial claims below.

At least seven times, Hillcrest's petition refers to 42 U.S.C. § 1988 (Petition 5, 20, 21, 22, 24, 24, 28). Hillcrest faults the Eleventh Circuit for failing to "analyz[e] the propriety under 42 U.S.C. § 1988 of applying a statute of limitations to a law that is facially void ab initio. . . ." (Petition 5), for "assum[ing], without an analysis of 42 U.S.C. § 1988 . . . that Hillcrest's facial challenge was subject to a statute of limitations" (Petition 22), and "for summarily deciding such

an important issue of federal law as a matter of first impression without considering § 1988" (Petition 23).

At least seven times Hillcrest's petition refers to "the federal Continuing Violation Doctrine" (Petition i, 5, 5, 33, 33, 37, 38). Hillcrest claims that the Eleventh Circuit "ignores this Court's Continuing Violation Doctrine" (Petition 33, 37). Indeed, the second of the two questions Hillcrest presents focuses exclusively on the Continuing Violation Doctrine, *to wit*, "[i]f there is a statute of limitations, whether the federal Continuing Violation Doctrine applies. . . ." (Petition i).

Hillcrest also urges "[a] simple rule that § 1983 claims seeking to invalidate and enjoin the enforcement of a facially unconstitutional ordinance [should] not be subject to statutes of limitations" (Petition 24).

But Hillcrest never raised Section 1988, any "Continuing Violation Doctrine," or that there should be no statute of limitations against a facial claim in the district court or in the Eleventh Circuit (County Appendix A). Nor did the magistrate judge (Appendix 72-110), the district court judge (Appendix 11-71), or the Eleventh Circuit (Appendix 1-9) mention Section 1988, any "Continuing Violation Doctrine," or any argument that there should be no statute of limitations.

Thus, this Court should deny Hillcrest's attempt to include Section 1988, any "Continuing Violation Doctrine" or any claim that there should be no statute of limitations against a facial claim within the scope

of any certiorari review. See *U.S. v. Williams*, 504 U.S. 36, 41 (1992) (Scalia, J.) ("[o]ur traditional rule . . . precludes a grant of certiorari . . . when 'the question presented was not pressed or passed upon below' "). See also *Travelers Casualty v. Pacific Gas*, 549 U.S. 443, 455 (2007) (Alito, J.); *Cooper Industries v. Aviall Services*, 543 U.S. 157, 168-169 (2004) (Thomas, J.), quoting *Adarand Constructors v. Mineta*, 534 U.S. 103, 109 (2001); *TRW v. Andrews*, 534 U.S. 19, 34 (2001) (Ginsburg, J.); *Glover v. U.S.*, 531 U.S. 198, 205 (2001) (Kennedy, J.).

III. Even if Hillcrest had raised Section 1988 below, this Court should deny certiorari because this Court has long applied state statutes of limitations to Section 1983 claims notwithstanding Section 1988.

This Court's precedent has been to apply state statutes of limitations to Section 1983 claims. See, e.g., *Wallace v. Kato*, 549 U.S. 384 (2007); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980).

Hillcrest suggests, however, that the Eleventh Circuit's decision conflicts with "a strong policy rooted in the Supremacy Clause of prohibiting states from erecting obstacles to the full purposes and remedial objectives of federal laws, including § 1983" (Petition 22). Hillcrest further inexplicably claims that "the Eleventh Circuit's opinion stands at odds with . . . § 1988" (Petition 23).

Hillcrest cites five cases in support of its precedent-shattering argument that Section 1988 precludes the statute of limitations being applied here (Petition 18, 20, 21, 22, 23). None comes close to so holding, or even suggesting.

- *Owens v. Okure*, 488 U.S. 235, 239, 251 n.13 (1989), held that a three-year state statute of limitations for personal injuries applies to Section 1983 claims. Because it did so, it was unnecessary to reach the argument that applying a one-year statute of limitations would be inconsistent with the federal interests.

- *Johnson v. Railway Express*, 421 U.S. 454, 470 (1975), held that timely filing of a complaint with the EEOC pursuant to the Civil Rights Act of 1964 did *not* toll the statute of limitations from running on a claim under the Civil Rights Act of 1866. Hillcrest fails to note that what it cites in *Johnson* is a concurring in part, *dissenting in part opinion, which faulted the Supreme Court majority there for affirming a finding that the statute of limitations barred a civil rights complaint*.

- *Felder v. Casey*, 487 U.S. 131, 138-139 (1988), involved a *120-day state notice-of-claim provision*. The 120-day notice-of-claim provision or the six-month statute of limitations in *Burnett v. Gratton*, 468 U.S. 41 (1984), is far different than the four-year statute of limitations here, especially where, as here, a landowner had

two years, three months to file its facial claim once the Ordinance was definitively "applied" against it (see pages 1-3 above).

- *Perez v. Campbell*, 402 U.S. 637, 649 (1971), held that a state statute that a discharge in bankruptcy does not bar a license from being revoked for failing to satisfy an automobile-related judgment was invalid for being in conflict with the bankruptcy code.

- *Free v. Bland*, 369 U.S. 663, 666 (1962), held that a Texas law that United States savings bonds, bought with community funds and taken in name of husband "or" wife, were community property, and that husband must reimburse deceased wife's estate upon taking bonds, was inconsistent with, and must yield to, federal law, expressed in Treasury Regulations, conferring right of survivorship.

IV. Even if Hillcrest had raised the Continuing Violation Doctrine below, this Court has never applied the Continuing Violation Doctrine to a facial substantive due process claim and the Eleventh Circuit's decision does not conflict with decisions from this Court or from other circuit courts of appeals concerning the Continuing Violation Doctrine.

As for Hillcrest's attempt to fault the Eleventh Circuit for "ignor[ing] this Court's well-established Continuing Violation Doctrine" (Petition 33), Hillcrest cites six cases from this Court (Petition 33-34), but none of the six cases involved the "Continuing Violation Doctrine" in connection with facial claims or with prayers for an injunction. Indeed, WestLaw retrieved 60 decisions where this Court has used the term "continuing violation," but none of the 60 involved any facial challenge against legislation, as is involved here.

Only one of the six cases Hillcrest cites, *Bazemore v. Friday*, 478 U.S. 385, 395 (1986), involved Section 1983, but it never used the term "continuing violation doctrine" and did not concern a statute of limitations.

The County does not understand Hillcrest's reliance on *Franconia Associates v. U.S.*, 536 U.S. 159 (2002), as somehow "reflect[ing] federal courts' concerns" giving rise to "a well-established [Continuing Violation Doctrine]" (Petition 33-34). Not only were those four supposed "concerns" not mentioned in *Franconia*, but *Franconia* did not involve any continuing

violation doctrine at all. What *Franconia* involved was whether a claim for breach of contract necessarily accrues upon the promisor's repudiation of the contract, or whether the claim accrues at the time the promisor fails to perform in accordance with the contract.

Hillcrest's reliance on another of the six cases, *Ledbetter v. Goodyear Tire & Rubber*, 550 U.S. 618, 649 (2007), as "appl[ying] the [continuing violation] doctrine" is totally misplaced (Petition 34). This Court's majority in *Ledbetter did not apply the continuing violation doctrine*. *Without mentioning it was citing to a dissenting opinion, Hillcrest cited to the dissenting opinion in Ledbetter.*

Massachusetts v. Mellon, 262 U.S. 447, 488-489 (1923), did not involve the Continuing Violation Doctrine at all. Rather, in holding that a state's and one taxpayer's challenge to a federal statute for abridging state rights should be dismissed, *Mellon* unremarkably indicated that federal courts "have no power per se to review and annul acts of Congress on the ground that they are unconstitutional," but only to "decide . . . judicial controvers[ies]."

As for Hillcrest's claims that the Eleventh Circuit's decision "conflict[s] with other courts of appeals" (Petition 33, 38) and that "the courts of appeals are now intolerably split on whether the [continuing violation] doctrine must be applied to facial Due Process challenges under § 1983" (Petition 6), circuit courts of appeals have rejected the continuing violation

doctrine in connection with facial Section 1983 challenges to ordinances. See, e.g., *New Pulaski v. Baltimore*, 2000 WL 1005207 at *6 (4th Cir. 2000), *cert. denied*, 121 S.Ct. 1080 (2001) (rejecting continuing violation doctrine in context of a facial challenge to an ordinance, holding that "any taking occurred at the time of the Moratorium's enactment"); *Assoacion de Suscripcion Conjunta v. Juarbe-Jimenez*, 659 F.3d 42, 52 (1st Cir. 2011) ("[t]he transfer of funds . . . each year is simply a harmful effect of the passage of Rule LXX, the underlying source of the Association's complaint. Thus, the continuing violation doctrine is inapposite").

Circuit courts have applied a Continuing Violation Doctrine, generally in employment, Title VII, conspiracy and monopolization cases, rather than in facial challenges to an ordinance, a statute, or a rule. See, e.g., *Z Technologies v. Lubrizol Corp*., 753 F.3d 594, 599 (6th Cir. 2014) ("while the Supreme Court has never directly limited the scope of the continuing violations doctrine, it appears to have employed the doctrine only in conspiracy and monopolization cases"); *Slorp v. Lerner, Simpson & Rothfuss*, 587 Fed.Appx. 249, 257 (6th Cir. 2014) ("[c]ourts have been 'extremely reluctant' to extend the continuing-violation doctrine beyond the context of Title VII"); *Lockridge v. University of Maine*, 597 F.3d 464, 474 (1st Cir. 2010); *Schaffhauser v. Citibank*, 340 Fed.Appx. 128, 131 (3d Cir. 2009); *Frame v. Arlington*, 575 F.3d 432, 438 (5th Cir. 2009); *Juarbe-Jimenez*, *supra*, 659 F.2d at 51.

Even in contexts where the Continuing Violation Doctrine applies, "the 'ongoing injuries' or harmful 'effects' of a single unlawful act do not extend the limitations period. . . ." *Juarbe-Jiminez*, *supra*. "A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." *Broom v. Strickland*, 579 F.3d 553, 555 (6th Cir. 2009) (holding that statute of limitations barred challenge to Ohio's lethal-injection method of execution); *Tearpock-Martini v. Borough of Shickshinny*, 756 F.3d 232, 236 (3d Cir. 2014); *Ocean Acres v. Dare County*, 707 F.2d 103, 106 (4th Cir. 1983). Here, apart from the "application" of the Ordinance, which Hillcrest can challenge (and is challenging) in an as-applied claim, there was "a single . . . act," the County's adoption of the Ordinance. The Continuing Violation Doctrine does not apply.

Even in contexts where the Continuing Violation Doctrine applies, it has been applied only to permit a plaintiff to recover damages which otherwise would be time-barred. See, e.g., *Lockridge*, *supra*, 597 F.3d at 474; *Selby v. National Railroad Passenger Corp.*, 1999 WL 716836 (9th Cir. 1999). The Continuing Violation Doctrine, thus, would be inapplicable to avoid the statute of limitations on Hillcrest's facial due process claim because the joint pretrial statement of Hillcrest and the County indicated that Hillcrest was seeking damages on its taking, as-applied due process, and as-applied equal protection

counts, but *was not seeking damages on its facial substantive due process count* (Doc. 129 at 8-9).

V. Even if Hillcrest had raised an argument that there should be no statute of limitations against facial claims below, this Court should deny certiorari because statutes of limitations have been traditionally applied against facial claims, at least where a defendant, such as the County here, raises the statute of limitations, at least outside the First Amendment and race contexts, and at least where a plaintiff knew or should have known of its injuries prior to the statute of limitations expiring, such as did Hillcrest here.

This Court has consistently applied state statutes of limitations to Section 1983 claims, without suggesting any exception for facial claims. See, e.g., *Wallace v. Kato*, 549 U.S. 384 (2007); *Tomanio*, *supra*, 446 U.S. 478.

This Court also has indicated that the statute of limitations begins to run once the plaintiff may "file suit and obtain relief." See, e.g., *TRW*, *supra*, 534 U.S. at 34 n.6 (2001) (Ginsburg, J.), quoting *Bay Area Laundry v. Ferbar Corp*., 522 U.S. 192, 201 (1997) ("[u]nless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief. See *Reiter*

v. Cooper, 507 U.S. 258, 267 (1993) ('While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.')"). See *Petrella v. Metro-Goldwyn-Mayer*, 134 S.Ct. 1962 (2014) ("[a] claim ordinarily accrues 'when [a] plaintiff has a complete and present cause of action.' In other words, the limitations period generally begins to run at the point when 'the plaintiff can file suit and obtain relief' ").

Hillcrest incorrectly suggests that it could not challenge the Ordinance until it was "applied" to Hillcrest (Petition 29, 30). *As the Eleventh Circuit below found, the "injury should have been apparent to Hillcrest upon the Ordinance's passage and enactment*" (Appendix 9). Such injury gives Hillcrest standing. Hillcrest's amended complaint alleges that the Ordinance "precludes or severely restricts use and development of property lying within a transportation corridor," such as Hillcrest's property (Doc. 36, page 7), and that the Ordinance "require[s lands within the transportation corridor] to be set aside and dedicated" (Doc. 36, page 8). In particular as for its facial substantive due process claim, Hillcrest alleged that the Ordinance "on [its] face. . . . authorize[s] imposition of right-of-way exaction or set aside requirements upon landowners seeking to develop their property. . . ." (Doc. 36, page 31).

Even if Hillcrest did not know the precise extent of its damages when the Ordinance was enacted, that would not preclude Hillcrest from then suing and does not preclude the statute of limitations from then running. See, e.g., *Guggenheim v. Goleta*, 638 F.3d 1111, 1119-1120 (9th Cir. 2010) (en banc), *cert. denied*, 131 S.Ct. 2455 (2011) (indicating in affirming summary judgment that statute of limitations would run from ordinance's enactment; "[n]or does it matter that a challenge might not have been worth making in 1979 or 1987 when property values were lower, but became worth making when the housing bubble inflated many prices. As *Levald*[*, Inc. v. Palm Desert*, 999 F.2d 680, 688 (9th Cir. 1993)] . . . stated, 'while the rising property values may be relevant to an as-applied challenge, they are not relevant to a claim that the very enactment of the statute effected a taking' "); *Juarbe-Jimenez*, *supra*, 659 F.3d at 52 (holding that statute of limitations began to run on facial takings claim at enactment of rule even though "the Association did not know the precise dollar amount that would be subject to Rule LXX in future years"). The precise nature of damages is particularly unnecessary here where Hillcrest did not seek any damages on its facial substantive due process claim (see pages 20-21 above).

Hillcrest also urges that a rule that facial claims are not subject to a statute of limitations would "provid[e] uniformity where it would not otherwise exist due to differences under state law as to whether facial claims are subject to statutes of limitations" (Petition 24). But this Court's precedent in applying state statutes of limitations to Section 1983 claims

inherently does not involve uniformity. See, e.g., *Wallace v. Kato*, 549 U.S. 384 (2007) (two-year statute, Illinois law); *Porter v. Nussle*, 534 U.S. 516 (2002) (three-year statute, Connecticut law); *Owens*, *supra*, 488 U.S. at 240-241 (three-year statute, New York law); *Wilson v. Garcia*, 471 U.S. 261 (1985) (three-year statute, New Mexico law). See also *Goodman v. Lukens Steel*, 482 U.S. 656 (1987) (two-year statute, Pennsylvania law, Section 1981).

VI. The Eleventh Circuit's decision does not conflict with decisions from other courts of appeals

The Eleventh Circuit's decision is certainly consistent with other circuit courts of appeals' decisions concerning the accrual of facial claims and other circuit courts of appeals applying statutes of limitations against facial claims. See, e.g.,

- *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) ("[w]hen . . . plaintiffs bring a facial challenge to an agency ruling . . . '*the limitations period begins to run when the agency publishes the regulation*'");
- *Center for Biological Diversity v. Salazar*, 695 F.3d 893, 904 (9th Cir. 2012) (defendants "contend that any facial challenge to the 1983 regulatory definition of 'small numbers' is barred by the six-year statute of limitations for civil

actions against the United States. . . . We agree");

- *Juarbe-Jimenez*, *supra*, 659 F.3d at 48-51 ("the limitations period accrues when the purportedly unconstitutional statute or regulation is enacted or becomes effective");
- *Colony Cove Properties v. City of Carson*, 640 F.3d 948, 956 (9th Cir. 2011) ("[t]his court recently confirmed that the statute of limitations for facial challenges to an ordinance runs from the time of adoption");
- *Equity Lifestyle Properties v. County of San Luis Obispo*, 548 F.3d 1184, 1193 n.15 (9th Cir. 2008) ("the statute of limitations on a facial takings claim runs from the date when the statute is enacted. Here the statute of limitations expired in 1985, one year after the ordinance was enacted and eight years before MHC filed this suit");
- *Claxton v. Colusa County*, 446 Fed.Appx. 10, 12 (9th Cir. 2011) ("the limitations period for a [facial] challenge to Resolution 07-010 began to run on the date of the Board of Supervisors' action, February 20, 2007");
- *Guggenheim*, *supra*, 638 F.3d at 1119 ("'the basis of a facial challenge is that the very enactment of the statute had

reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed");

- *Action Apartment Ass'n v. Santa Monica Rent Control Board*, 509 F.3d 1020, 1027 (9th Cir. 2007) ("[a]lthough we have not yet held that these accrual rules apply to facial substantive due process claims . . . , we see no reason to distinguish between facial takings claim and facial substantive due process claims. First, the *Wilson* [*v. Garcia*, 471 U.S. 261 (1985)] limitations period applies to all § 1983 claims, regardless of the civil right asserted. Second, the logic of the accrual rules in the taking context applies with equal force in the substantive due process context. Given the general rule that 'the statute of limitations begins to run when a potential plaintiff knows or has reason to know of the asserted injury,' it stands to reason that any facial injury to any right should be apparent upon passage and enactment of a statute. Action, thus, should have known of its injury on the date of the ordinance's enactment");

- *MHC Financing v. Santee*, 234 Fed.Appx. 439 (9th Cir. 2007) ("MHC's substantive due process and equal protection claims . . . are subject to a one-year limitations

period. MHC did not commence either of its lawsuits within a year of the effective date");

- *Dunn-McCampbell Royalty Interest v. National Park Service*, 112 F.3d 1283, 1287 (5th Cir. 1997) ("[o]n a facial challenge to a regulation, the limitations period begins to run *when the agency publishes the regulation in the Federal Register*. . . . Dunn-McCampbell failed to mount a facial challenge to the regulations within six years of their publication in 1979, and the companies' cause of action falls outside the limitations period");
- *Kuhnle Brothers v. County of Geauga*, 103 F.3d 516, 521 (6th Cir. 1997) ("[a]ny deprivation of property that [plaintiff] suffered was fully effectuated when Resolution 91-87 was enacted, and the statute of limitations began to run at that time");
- *Wind River Mining v. U.S.*, 946 F.2d 710, 715 (9th Cir. 1991) ("[i]f the person wishes to bring a policy-based facial challenge to the government's decision, that. . . . must be brought within six years of the decision").

The amici claim that the Eleventh Circuit "incorrectly utilized statute of limitations rules from Takings jurisprudence" in holding that Hillcrest's facial

substantive due process claim was time-barred (AB 5). But many of the bulleted cases at pages 24-27 above were not takings cases. See, e.g., *Action Apartment*; *MHC Financing*; *Kuhnle*.

Hillcrest claims that starting the statute of limitations on facial claims with the enactment of the underlying ordinance is problematic in Florida because "the only notice given to affected persons of the enactment of a local ordinance is constructive notice by publication. . . ." (Petition 23). *Hire Order* and *Dunn-McCampbell*, however, indicate that circuit courts of appeals have no hesitancy to use a publication date as the start date for the statute of limitations.

Hillcrest incorrectly claims that "no legal wrong can arise from . . . mere enactment" of an unconstitutional law and that "no cause of action can accrue upon its mere enactment, and a statute of limitations is simply inapplicable. The cause of action arises when officials seek to enforce the unconstitutional law" (Petition 21).

- First, a "legal wrong can arise from . . . mere enactment." Indeed, Hillcrest's amended complaint pointed to the encumbrance of Hillcrest's property stemming from the Ordinance (see page 22 above). The encumbrance certainly gave Hillcrest standing to challenge the Ordinance. Indeed, the amici cite *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560-561 (1992), as indicating that standing exists where there is (i) "injury in fact," (ii) sufficient "causal connection between the injury and the conduct complained of," and (iii) "likelihood that the injury will be redressed by a favorable decision" (AB 7), all of which were present once the Ordinance was enacted here. The amici's attempt to rely on *Warth v. Seldin*, 422 U.S. 490 (1975), to undercut standing here is misplaced; as amici note, the ordinance in *Warth* "had *not* negatively impacted the projects of any of the association's members" (AB 8). Here, however, *as the Eleventh Circuit found*, the Ordinance has encumbered Hillcrest's property. In any event, even if Hillcrest were correct that it could not challenge the Ordinance until it was "applied," the Ordinance was definitively applied no later than August 23, 2007, two years three months prior to the four-year statute of limitations expiring.

- Second, a facial cause of action often arises from enactment or publication of the statute, ordinance, or rule (see the bulleted cases at pages 24-27 above).

- Third, an as-applied cause of action does arise "when officials seek to enforce [an] unconstitutional law" (see cases at pages

> 34-38 below). Indeed, Hillcrest's as-applied substantive due process claim remains pending in district court.

The amici assert the Eleventh Circuit found that the Ordinance itself devalued Hillcrest's property, but claim that any devaluation does not play a role in substantive due process analysis (AB 6, 19). Regardless of whether the amici's claim is correct, any devaluation would give a landowner standing to challenge the Ordinance. See page 23 above.

The amici attempt to distinguish those "cases where lower courts have found that the statute of limitations commences from the enactment of a law" as being where "the injury sustained by the plaintiff was fully effectuated by the enactment of the statute" (AB 6). Suffice it to say, that there was nothing in many of the bulleted cases at pages 24-27 above indicating that "the injury . . . was fully effectuated" with the enactment of the allegedly unconstitutional ordinance, statute, or rule.

VII. The Eleventh Circuit's decision does not conflict with decisions from state courts of last resort

Hillcrest claims that "[t]he Eleventh Circuit has decided an important federal question in a way that conflicts with a decision of the Florida Supreme Court" (Petition 27).

Hillcrest cites only *Lake Worth Towers v. Gerstung*, 262 So.2d 1, 4 (Fla. 1972). *Gerstung*, however, involved no federal question whatsoever. In any event, there is no conflict with *Gerstung*. *Gerstung* did not involve any facial challenge at all. *Gerstung* was an as-applied case, seeking an order either enjoining the tax collector from collecting municipal taxes on a particular piece of property for a particular year or, alternatively, forcing the tax collector to reassess the particular property as unimproved for the particular year. Because the tax was void, rather than voidable, in the absence of statutory authority for imposing the challenged full-value assessment on the particular property, the Supreme Court of Florida held that the challenge could proceed "even though the statute of limitations had run and administrative remedies had not been exhausted." Even so, the Supreme Court of Florida noted "even as to property not subject to taxation at all because of its immunity or exempt status, it is our view that if the tax assessed is paid, suit must be brought by the taxpayer against the county within one year after payment to recover the amount paid pursuant to F.S. Section 95.08. . . . The policy involved in such limitations and laches is that there must be a time when tax processes and procedures that have been completed should not be judicially disturbed. . . ."

Even if the Florida Second DCA were "a state court of last resort," Sup. Ct. R. 10(b), *Pass v. State*,

922 So.2d 279 (Fla. 2d DCA 2006), does not conflict with the Eleventh Circuit's decision below. *Pass* held only that a criminal defendant on postconviction relief could claim that the statute underlying his conviction was unconstitutional at the time of the alleged offenses. There was no statute of limitations applicable to challenging a criminal statute as unconstitutional.

VIII. Hillcrest's and the amici's parade of horribles is grossly exaggerated, if not completely without merit.

In an attempt to pique this Court's interest, Hillcrest and the amici parade various "horribles" which they claim stem from the Eleventh Circuit's decision. The horribles, like Mark Twain's death, have been "greatly exaggerated."

(1) Hillcrest fears that enforcing a statute of limitations against its facial claim would jeopardize its rights under the Due Process Clause (Petition 26), would "insulate" the Ordinance from a constitutional challenge (Petition 5), and that "[u]nder the Eleventh Circuit's opinion, a statute of limitations, through mere passage of time, can forever immunize from facial challenge an ordinance that, on its face, violates the Constitution" (Petition 18, 19). The amici similarly fear that the Eleventh Circuit's "decision now provides local governments with an incentive to freely pursue constitutional mischief by enacting an unconstitutional law, and then waiting until the

statute of limitations passes before enforcing it" (AB 4-5). The amici further fear that "the Eleventh Circuit's rule insulates unconstitutional laws from challenge because property owners that can challenge them may not have standing to do so until after the statute of limitations has run" (AB 10).

Hillcrest fails to note that enforcing the statute of limitations here did not bar the facial constitutional challenge; what barred the facial constitutional challenge is that Hillcrest waited two years eight months from the Ordinance being definitively "applied" in August 2007 to filing the complaint in April 2010.

Hillcrest also fails to note that it still has a timely as-applied due process claim from the time that the Ordinance was "applied" to it. Hillcrest admits that it "attacked the Ordinance as violating Due Process both on its face and as-applied. . . ." (Petition 4). The Eleventh Circuit held only that the statute of limitations barred the facial claim (Appendix 9; Petition 4). Indeed, the Eleventh Circuit explicitly "express[ed] no view as to the merits of Hillcrest's pending as-applied substantive due process claim," which remains pending in district court (Appendix 9).

While "a statute of limitations, through mere passage of time" may bar a "facial challenge" to an ordinance, it does not preclude a landowner asserting an as-applied constitutional challenge to an ordinance once the ordinance is "applied." The Ninth Circuit in affirming a summary judgment against a

facial claim explicitly rejected an "immunity" argument similar to Hillcrest's argument here. The Ninth Circuit noted that the statute of limitations on an as-applied claim would begin to run only from the time that the ordinance were applied to a particular landowner. "It is not as though an unconstitutional law becomes immunized from all challenges once limitations bar facial challenges to its enactment. . . . [T]he Guggenheims carefully limit their challenge to a facial one, not an as applied challenge. By so doing, they reserve the possibility of an as applied challenge if at some subsequent time the City of Goleta's arbitrator denies them a fair rent increase. If the rent control scheme effects an unconstitutional taking *when applied*, the challenge will be *to that application*, not to the ordinance on its face, and time for the challenge will run from when the administrative action becomes final as opposed to when the ordinance was enacted." *Guggenheim*, *supra*, 638 F.3d at 1119.

Circuit courts of appeals have consistently indicated that a plaintiff, like Hillcrest here, may still have an as-applied claim even though the statute of limitations has foreclosed the facial claim. See, e.g.,

- *Weaver v. Federal Motor Carrier Safety Administration*, 744 F.3d 142, 145 (D.C. Cir. 2014) ("[w]here Congress imposes a statute of limitations on challenges to a regulation, running from a regulation's issuance, facial challenges to the rule or

the procedures by which it was promulgated are barred. *NRDC* [*v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981)]. But when an agency seeks to *apply* the rule, those affected may challenge that *application*");

- *P&V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1026, 380 U.S. App. D.C. 96, 101 (2008) ("our conclusion that P&V's facial challenge to the 1986 rule is untimely does not immunize the rule from all challenge: If the Corps *applies* the rule to P&V's property . . . then P&V would be able to challenge the rule notwithstanding that the limitations period has run");

- *Cellular Telecommunications v. FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003) (noting "at least two notable circumstances in which the court will entertain challenges beyond a statutory time limit to the authority of an agency to promulgate a regulation," one being "following *enforcement* of the disputed regulation");

- *Dunn-McCampbell*, *supra*, 112 F.3d at 1287 ("[i]t is possible . . . to challenge a regulation after the limitations period has expired provided that the ground for the challenge is that the issuing agency exceeded its constitutional . . . authority. To sustain such a challenge, however, the claimant must show some direct,

final agency action involving the particular plaintiff within six years of filing suit. . . . These cases do not create an exception from the general rule that the limitations period begins to run from the date of publication in the Federal Register. They merely stand for the proposition that *an agency's application of a rule, to a party creates a new, six-year cause of action to challenge the agency's constitutional or statutory authority*");

- *Wind River Mining*, *supra*, 946 F.2d at 715 ("[i]f a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision. Similarly, if the person wishes to bring a policy based challenge to the government's decision, that too must be brought within six years of the decision. . . . If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse *application* of the decision to the particular challenger");

- *NLRB Union v. FLRA*, 834 F.2d 191, 195-196 (D.C. Cir. 1987) ("[a]s applied to rules and regulations, the statutory time limit restricting judicial review of [agency]

action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further [agency] action *applying* it");

- *Center for Biological Diversity*, *supra*, 695 F.3d at 904 ("[a]lthough Plaintiffs *cannot challenge facially* the 1983 regulatory definition [in light of the statute of limitations], they *can challenge the Service's alleged application* of that definition in the 2008 Chukchi Sea regulations. . . .");
- *Colony Cove*, *supra*, 640 F.3d at 956 (affirming summary judgment against facial takings claim on statute of limitations grounds, but affirming summary judgment against as-applied due process claim on other grounds);
- *Functional Music v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958) ("[t]he rules here attacked were . . . promulgated in 1955. It very well may be that they were then sufficiently final to support judicial review. No such review had been sought, however. And as to those rules, the statutory period specified for review of, or appeal from, Commission orders and decisions has now long since passed. Nevertheless, we are persuaded that judicial examination is now permissible. As applied to rules and regulations, the

> statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of the rule where properly brought before this court for review of further Commission action *applying* it").

Moreover, barring a facial challenge, while preserving an as-applied challenge, should not harm a landowner. Facial challenges are the "most difficult" to succeed. See *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (noting that "[*a*] *facial challenge* to a legislative Act is, of course, *the most difficult challenge* to mount successfully, *since the challenger must establish that no set of circumstances exists under which the Act would be valid*").[3] See also *Washington Grange*, *supra*, 552 U.S. at 451 ("[f]acial challenges are disfavored. . . . Facial challenges . . . run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' "); *Broadrick v. Oklahoma*, 413 U.S. 601,

[3] In the 25-plus years since *Salerno*, this Court has often quoted *Salerno* in noting that facial claims are the "most difficult." See, e.g., *Reno v. Flores*, 507 U.S. 292, 300 (1993); *Chicago v. Morales*, 527 U.S. 41, 78 (1999); *National Endowment v. Finley*, 524 U.S. 569 (1998); *Rust v. Sullivan*, 500 U.S. 173 (1991).

613 (1973) (facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly").

(2) Hillcrest fears that the Eleventh Circuit's decision would "bar a federal court from prospectively enjoining enforcement of an unconstitutional law" (Petition 5). But a landowner could obtain an injunction once the law was attempted to be applied. Even if a landowner's desire were to obtain broader scale relief than for himself, he could obtain that in an as-applied challenge. In *Citizens United v. FEC*, 558 U.S. 310, 331 (2010), this Court quoted favorably from Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv.L.Rev. 1321, 1327-1328, 1339 (2000), that "[o]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases."

(3) Hillcrest fears that the Eleventh Circuit's decision "strikes a severe blow to the remedial purposes of § 1983 by allowing an outcome-determinative procedural rule to overcome the federal interests that are at the heart of § 1983" (Petition 18). Yet the "severe blow" is no different than in enforcing any state statute of limitations, often a shorter two- or three-year statute, against a Section 1983 claim. See page 24 above.

(4) Hillcrest fears that the Eleventh Circuit's "decision will force aggrieved parties to bring suit long before the offending ordinance is either applied

to them or such application is imminent, and long before such party has a practical need to bring such a suit" (Petition 19). The amici similarly fear that landowners "will now have to expend limited financial resources to bring a premature facial substantive due process claim" (AB 5) and that landowners will be "forced to file lawsuits well before it is truly necessary" (AB 14). Any such fears are unfounded. A landowner may wait until the Ordinance is "applied" without forgoing his constitutional challenge to the Ordinance. The four-year statute of limitations on as-applied claims begins to run from the time the Ordinance is applied. See pages 33-38 above.

(5) Hillcrest suggests a rule that landowners could "wait to bring their facial challenge until the ordinance is actually enforced (i.e., applied) or its enforcement is imminent" (Petition 24). If a landowner waits to bring his claim once an ordinance is "applied," he is no worse off than bringing only an as-applied claim, rather than a facial claim. At that time, a facial claim is a less favorable option for the landowner because facial claims are the most likely to be unsuccessful. See pages 38-39 above.

(6) Hillcrest suggests that "the Eleventh Circuit's decision compels an aggrieved party, faced with the looming limitations period, to forego the usual option of waiting to bring suit until the ordinance is enforced. . . ." (Petition 37; see Petition 19). Hillcrest fears that the Eleventh Circuit's decision "penalizes the innocent plaintiff who has no immediate development plans, or who would prefer to wait until he or

she applied for development approval to see if the government modifies, adds to, or grants waivers or variances. . . ." (Petition 37). Hillcrest claims the Eleventh Circuit's decision "requir[es] that suit be brought before the unconstitutional law is enforced or its enforcement is imminent" (Petition 37-39). Nothing in the Eleventh Circuit's decision would bar a landowner from waiting until an ordinance is "enforced" or "applied" to bring an as-applied claim. See pages 33-38 above.

(7) Amici suggest that the Eleventh Circuit's decision permits the statute of limitations to "run before the harm of the ordinance is manifest" (AB 13). Amici are wrong. First, the Eleventh Circuit found that the Ordinance itself encumbered Hillcrest's land (see page 22 above). Second, even if no harm were "manifest" prior to the Ordinance being definitively "applied" in August 2007, Hillcrest had two years three months to sue without the four-year statute of limitations expiring (see pages 1-3 above).

(8) Hillcrest incorrectly claims that the Eleventh Circuit's decision now "enables the continued enforcement of an ordinance that is a nullity" (Petition 23). A landowner certainly may preclude enforcement of an ordinance if it were unconstitutional as-applied to the landowner. See *Siebert v. Allen*, 506 F.3d 1047, 1050 (11th Cir. 2007). See page 39 above.

CONCLUSION

The petition for writ of certiorari should be denied.

DATED: March 11, 2015.

Respectfully submitted,

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Hillcrest's Statute of Limitations Argument from Hillcrest's Answer Brief of August 20, 2013, in *Pasco County v. Hillcrest Property, LLP*, Appeal No. 13-12383, United States Court of Appeals for the Eleventh Circuit

* * *

H. The County's Statute of Limitations Arguments Do Not Save An Ordinance That Facially Violates Substantive Due Process When It Is Applied.

The County argued below that, as a matter of law, Hillcrest's facial due process claim accrued upon enactment of the Ordinance in November 2005 and, therefore, was barred by the 4-year statute of limitations applicable to actions brought under 42 U.S.C. section 1983 in Florida. The District Court rejected the County's argument, concluding that:

> This theory condones the government delaying enforcement of a new law until expiration of the applicable limitation and forever insulating the unconstitutional law. Instead a claim for relief accrues and the applicable statute of limitation begins at the occurrence of the last element of the legal claim – usually once, once an injury occurs. Hillcrest's injury occurred the moment Pasco County subjected Hillcrest to the Ordinance. At the earliest, Hillcrest's claim accrued in December 2006, when Hillcrest first applied for site plan approval. (The claim probably accrued in February 2007, when the County first denied the site plan based on Hillcrest's failure

> to comply with the Ordinance.). Hillcrest sued on April 7, 2010, within the four-year limitation of a Section 1983 claim in Florida.

(Doc. 196 at 22-23).

The County does not dispute these findings and its "accrual upon enactment" argument fails for various reasons. First, acceptance of the County's argument would require courts to ratify unconstitutional laws enabling government to place an expiration date on the federal and state constitutions. Constitutions may not be so easily circumvented. "All laws which are repugnant to the Constitution are null and void." *Marbury v. Madison,* 5 U.S. 137, 174, 176 (1803); *see also Chicago, I. & L.R. Co. v. Hackett,* 228 U.S. 559, 566 (1913). For this reason, some courts, like Florida's Supreme Court, hold that there is no statute of limitations on void acts, *Lake Worth Towers, Inc. v. Gerstung,* 262 So. 2d 1, 4 (Fla. 1972), or on facial claims of unconstitutionality. *Frye v. City of Kannapolis,* 109 F.Supp.2d 436, 439 (M.D. N.C. 1999); *Lavey v. City of Two Rivers* 994 F.Supp. 1019, 1023 (E.D. Wis. 1998); *Lamar Whiteco Outdoor Corp. v. City of West Chicago,* 823 N.E.2d 610, 620 (Ill. 2d Dist. App. 2005). The United States Supreme Court has held that there is no statute of limitation for seeking equitable relief from unconstitutional statutes. *Russell v. Todd,* 309 U.S. 280, 287-88 (1940). Over time, federal courts in equity began holding that equitable relief would be withheld where the statute

of limitations had run on a concurrent legal claim. *See id.*[34] Thus, the rule in civil rights cases appears to be that the statute of limitations for equitable relief (striking the ordinance) runs concurrent with the statute of limitations for legal relief (damages); *Accord,* T. Sandefur, *The Timing of Facial Challenges,* 43 Akron L. Rev. 51 (2010), *and cases cited therein* (explaining that statutes of limitations in facial constitutionality claims begin accruing at the time of application).

Second, even if statutes of limitation are applicable to facially void acts, the County's arguments are contrary to basic statute of limitations law. As the District Court correctly concluded, a claim does not accrue and the statute of limitations does not begin to run "until the plaintiffs know or should know (1) that ***they have suffered the injury*** that forms the basis of their complaint and (2) who has inflicted the injury. *Smith v. Shorstein,* 217 Fed. Appx. 877 (11th Cir. 2007) (emphasis added).

The Ordinance, on its face, refutes the County's argument because the mandatory dedication requirement, which causes the injury in fact that is the basis for the complaint, is not triggered until a landowner actually ***applies*** for development approval.

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[34] *Nilsen v. City of Moss Point, Miss.,* 674 F.2d 379, 387 (5th Cir. 1982); *Nemkov v. O'Hare Chicago Corp.,* 592 F.2d 351, 354-55 (7th Cir. 1979); *Williams v. Walsh,* 558 F.2d 667, 671 (2d Cir. 1977); *Madison v. Wood,* 410 F.2d 564, 567 (6th Cir. 1969).

Until that time, the Ordinance imposes no immediate obligation to respond to inclusion of land within a corridor (except, possibly, in the case of the claim that mere enactment of the corridors is a facial taking – a claim not made here and which presupposes the underlying constitutional validity of the Ordinance, and instead seeks compensation for an otherwise facially constitutional enactment).

The District Court found that the injury to Hillcrest occurred when the County subjected Hillcrest to the Ordinance in late 2006, or early 2007, and the County does not contend otherwise.[35] Therefore, the cause of action did not accrue until then, and the County has not demonstrated otherwise.

Third, a careful review of the cases cited by the County reveals that in those cases, unlike this case, the injury upon which the claims were based occurred and was apparent and complete upon enactment of the ordinance in question.

Here, the injury inflicted by the Ordinance is not apparent and complete until the landowner applies for development approval and the County determines the amount of right-of-way it will require be dedicated.

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[35] The County has never explained how mere enactment of the Ordinance inflicted injury on Hillcrest, or on what grounds or when Hillcrest knew or should have known it had suffered the injury from mere enactment of the Ordinance.

Until then, there is no concrete injury – or even, in many cases, Article III standing.[36]

Finally, even if a facial due process claim accrued upon enactment of the Ordinance, a facially unconstitutional ordinance is unconstitutional each time it is applied. *Lorance v. AT & T Tech., Inc.,* 490 U.S. 900, 913 n. 5 (1989) ("a facially discriminatory system . . . by definition discriminates each time it is applied"). It is undisputed that the County first applied the Ordinance to Hillcrest at the earliest in December 2006 and that suit was timely filed less than four years later in April 2010.

For these reasons, the District Court's statute of limitations ruling must be affirmed.

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[36] As it appears Hillcrest did not suffer its injury until sometime in 2007, it would not have had Article III standing in 2005, so its claim could not have accrued. *See e.g. Bronson v. Swensen,* 500 F.3d 1099, 1107 (10th Cir. 2007) (husband who could not obtain marriage license for a second wife and "feared" prosecution did not have standing to challenge anti-polygamy statute as unconstitutional); *CAMP Legal Defense Fund, Inc. v. City of Atlanta,* 451 F.3d 1257, 1271 (11th Cir. 2006) (plaintiff must allege some injury in fact to have standing). In order for the statute of limitations clock to have been ticking, Hillcrest must have been able to bring suit. *Smith,* 217 Fed. Appx. at 881. If Hillcrest did not suffer an injury forming the basis for its standing until 2007, its claim could not have accrued until 2007, and as this lawsuit was brought in 2010 it is timely.