Filed: 3/20/24

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CALIFORNIANS FOR EQUAL RIGHTS FOUNDATION et al., Plaintiffs and Appellants, v. COUNTY OF ALAMEDA et al., Defendants and Respondents.	A167472 (Alameda County Super. Ct. No. 22CV014956)

Plaintiffs Californians for Equal Rights Foundation, Chunhua Liao, and Deborah Ferrari (collectively "plaintiffs") filed a taxpayer lawsuit against defendants Alameda County, Alameda County Public Works Agency, and Alameda County General Services Agency (collectively "defendants"), challenging two Alameda County programs that require prime contractors to set aside a portion of public contracts for minority owned businesses. The trial court granted defendants' motion for judgment on the pleadings, finding plaintiffs' claims were all facial challenges to the programs that were barred by the statute of limitations.

On appeal, plaintiffs argue their complaint is not time-barred because defendants' adherence to the programs is ongoing and their claims accrued within the limitations period. They also contend their claims are properly characterized as both facial and as-applied claims and are timely under

California's "continuous accrual doctrine." We express no view as to the merits of the complaint. But given there is no dispute that plaintiffs have taxpayer standing for purposes of the motion on review, that defendants are currently implementing the programs, and that defendants have a continuing obligation to ensure equal protection and equal treatment under the laws, we conclude the continuous accrual doctrine applies and, consequently, the trial court erred in finding all of plaintiffs' claims were time-barred. As such, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2022, plaintiffs filed a lawsuit challenging the ongoing existence and implementation of two Alameda County programs: the Construction Compliance Program and the Enhanced Construction Outreach Program. We take the following facts from the allegations of the complaint, which we accept as true for purposes of assessing the judgment on the pleadings. (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777 (*People ex rel. Harris*).)

Plaintiff Californians for Equal Rights Foundation is a nonprofit foundation "established to defend Article I, Section 31 of the California Constitution and the principle of equality under the law" and has members who are residents and taxpayers of Alameda County. Plaintiffs Chunhua Liao and Deborah Ferrari are residents and taxpayers of Alameda County.

The Construction Compliance Program has been in place since at least 2010 and is implemented by the county's Public Works Agency. This program requires prime contractors to meet a 15 percent participation goal for minority owned business enterprises (MBE) in construction projects with bids of $100,000 or more, or to demonstrate good-faith efforts to do so. The Enhanced Construction Outreach Program was approved in 2003 by the

county's Board of Supervisors and is implemented by the county's General Services Agency. This program requires prime contractors to meet a 15 percent participation goal for MBEs in all "Capital Construction projects" approved by the Alameda County Board of Supervisors for sealed bid construction projects over $125,000, or to demonstrate good-faith efforts to do so. These programs are funded in part by property and other taxes contributing to the Alameda County General Fund. Defendants adhered to the two programs in their consideration of recent projects in 2020 and 2021.

Based on these factual allegations, the complaint sets out two causes of action under section 1983 of title 42 of the United States Code ("42 U.S.C. section 1983") for violations of the Equal Protection Clause of the Fourteenth Amendment, and two causes of action for violations of article I, section 31 of the California Constitution.[1] Plaintiffs do not allege the programs have been applied against them or injure them directly. Nonetheless, they seek a declaration that the programs are unconstitutional, a permanent injunction to prevent further implementation of the programs, and one dollar in nominal damages.

In their motion for judgment on the pleadings, defendants contended a four-year statute of limitations (Code Civ. Proc., § 343[2]) bars plaintiffs' claims which, as facial challenges to the programs, accrued when the programs were enacted. Plaintiffs disagreed, characterizing their claims as both facial and

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[1] Article I, section 31 of the California Constitution provides, in relevant part: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The term "state" includes counties and other political subdivisions and governmental instrumentalities. (Cal. Const., art. I, § 31, subd. (f).)

[2] Further statutory references are to the Code of Civil Procedure.

as-applied challenges because they object to both the enactment *and* ongoing enforcement of the programs. Plaintiffs argued that statutes of limitation cannot bar a taxpayer challenge to an ongoing constitutional violation, and alternatively, that their claims are timely under the doctrine of continuous accrual.

The trial court granted judgment on the pleadings with leave to amend, concluding that plaintiffs alleged only facial claims that the programs were racially discriminatory and that section 343 barred the claims. Thereafter plaintiffs notified the court they would not amend the complaint and asked the court to enter judgment so they could pursue an appeal. The court subsequently entered judgment against plaintiffs, and this appeal followed.

DISCUSSION

" 'A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review.' [Citation.] 'All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law . . . .' " (*People ex rel. Harris, supra*, 59 Cal.4th at p. 777.) The application of the statute of limitations on undisputed facts is a purely legal question that is also subject to de novo review. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 (*Aryeh*).)

A. Principles Governing Accrual of Actions

Whether the trial court erred in finding plaintiffs' complaint is time-barred hinges on when plaintiffs' claims accrued.

Under section 312, civil lawsuits must be commenced within the time prescribed by the statutes of limitation "after the cause of action shall have accrued." At common law, a cause of action was deemed to accrue " ' "when [it] is complete with all of its elements"—those elements being wrongdoing,

harm, and causation.' [Citations.] This is the 'last element' accrual rule: ordinarily, the statute of limitations runs from 'the occurrence of the last element essential to the cause of action.' " (*Aryeh, supra*, 55 Cal.4th at p. 1191.) "To align the actual application of the limitations defense more closely with the policy goals animating it, the courts and the Legislature have over time developed a handful of equitable exceptions to and modifications of the usual rules governing limitations periods. These doctrines may alter the rules governing either the initial accrual of a claim, the subsequent running of the limitations period, or both." (*Id.* at p. 1192.) Among these is the doctrine or theory of continuous accrual. (*Ibid.*)

"[U]nder the theory of continuous accrual, a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period." (*Aryeh, supra*, 55 Cal.4th at p. 1192.) Thus, " '[w]hen an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.' " (*Id.* at p. 1199.) The continuous accrual doctrine responds "to the inequities that would arise if the expiration of the limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct." (*Id.* at p. 1198.) Otherwise, "parties engaged in long-standing misfeasance would . . . obtain immunity in perpetuity from suit even for recent and ongoing misfeasance." (*Ibid.*)

In determining the applicability of these rules, we consider the laws underlying plaintiffs' claims. (*Aryeh, supra*, 55 Cal.4th at p. 1192.) Plaintiffs' causes of action are brought under 42 U.S.C. section 1983 and article I, section 31 of the California Constitution. These provisions neither include a

statute of limitations nor offer a relevant definition of when claims alleging their violation accrue. (See *Aryeh*, at p. 1193; 42 U.S.C. § 1983; Cal. Const., art. I, § 31.) Nor do the allegedly applicable statutes of limitations—i.e., section 343 and section 335.1[3]—make any mention of accrual or an alternative to the traditional accrual rule.

As the Supreme Court explains, "[t]his silence triggers a presumption in favor of permitting settled common law accrual rules to apply." (*Aryeh*, *supra*, 55 Cal.4th at p. 1193.) Accordingly, we will look to "the well-settled body of law that has built up around accrual, including the traditional last element rule and its equitable exceptions" such as the doctrine of continuous accrual. (*Ibid.*)

B. Plaintiffs' Complaint is Not Time-Barred

We begin by noting defendants do not dispute, at least for purposes of the motion on review, that plaintiffs have taxpayer standing to challenge the constitutionality of defendants' contracting programs based on allegations that they include impermissible racial set asides. The purpose of taxpayer standing under section 526a[4] " 'is to permit a large body of persons to challenge wasteful government action that otherwise would go unchallenged

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[3] Section 343 provides: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." Section 335.1 provides: "Within two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another."

[4] Section 526a provides: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a local agency, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax that funds the defendant local agency . . . ."

because of the standing requirement.' [Citation.] '*The essence of a taxpayer action is an illegal or wasteful expenditure of public funds or damage to public property.* It must involve an actual or threatened expenditure of public funds. General allegations, innuendo, and legal conclusions are not sufficient; rather, the plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur.' " (*McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1165, italics added.) Here, the complaint alleges, and there is no dispute, that defendants are currently implementing the programs and their allegedly impermissible racial set asides, as exemplified by the contract awards made in 2020 and 2021.

In assessing whether the continuous accrual doctrine applies, we examine "the nature of the obligation allegedly breached" and determine whether there is a continuing or recurring obligation. (*Aryeh*, *supra*, 55 Cal.4th at p. 1200.) As relevant here, both the federal and state constitutional provisions contemplate steadfast governmental adherence to equal protection and nondiscrimination principles. The Equal Protection Clause of the Fourteenth Amendment imposes an ongoing obligation on the states not to deny to any person within its jurisdiction the equal protection of the laws. (*Fisher v. Univ. of Texas* (2016) 579 U.S. 365, 388 [university has an "ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies"].) Meanwhile, article I, section 31 of the California Constitution prohibits state and local governments from engaging in discrimination, or granting preferential treatment, on the basis of race in public employment and public contracting. (Cal. Const., art. I, § 31, subds. (a), (f).) This state constitutional provision applies to any "action taken after the section's effective date" in 1996. (*Id.*,

subd. (b).) Defendants do not dispute their continuing obligations under the state and federal Constitutions to ensure equal protection and equal treatment under the laws.

Again, we express no view as to the merits of the complaint. But given the continuing constitutional obligations of defendants to ensure equal protection and equal treatment under the law, we conclude that giving effect to the continuous accrual doctrine is appropriate on the facts alleged. Significantly, application of the doctrine to the instant complaint furthers the doctrine's aim to eliminate the alleged inequities that would arise if expiration of the limitations period following the programs' enactments were held to bar claims challenging their facial validity. Conversely, barring application of the doctrine would theoretically immunize the government from any taxpayer action making a facial challenge to the programs' alleged invalidity because no taxpayers, including plaintiffs, had sued within the limitations period following the programs' initial enactments. (*Aryeh*, *supra*, 55 Cal.4th at p. 1198.) As defendants' alleged implementation of the programs and acts of unconstitutional discrimination appear to be ongoing, their claim to repose is vitiated. (*Ibid.*)

That the complaint features facial claims does not undermine the conclusion that plaintiffs' claims appear timely. Defendants cite no authority precluding the application of the continuous accrual doctrine to facial claims alleging the type of ongoing constitutional violations alleged in the complaint.[5]

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[5] The parties dispute whether the complaint properly pleads an as-applied claim. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069.) We need not address the point, as defendants cite no authority proscribing the application of the continuous accrual doctrine to the type of facial claims alleged by plaintiffs.

On this score, defendants' reliance on *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757 (*Travis*) is misplaced. In *Travis*, the high court declined to apply the doctrine of continuous accrual, because doing so would have conflicted with the legislative intent manifested in Government Code section 65009, a statute which specified strict time limits for challenges to various local planning and zoning decisions. (*Travis*, at pp. 765–766, 774–775 [observing the doctrine "would, in this context, create an illogical contrast" with application of Government Code section 65009 and thereby "thwart the legislative purpose behind section 65009 without any necessity in justice or fairness"].) Notably, defendants fail to identify any statute or constitutional provision similarly manifesting a legislative policy that would be contravened by applying the doctrine of continuous accrual here. (*Travis*, at p. 775 [citing to *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 819, 825 (*Howard Jarvis Taxpayers Assn.*) and noting the continuous accrual rule was adopted in that case in the absence of specific legislative guidance].) And as the Supreme Court has made clear, where the lawmaking body has not articulated a specific accrual rule or limitations period, courts may properly apply common law accrual rules. (*Aryeh*, *supra*, 55 Cal.5th at pp. 1193–1197.)

Rather than dispute their continuing constitutional obligations to ensure equal protection and equal treatment under the law, defendants resort to either distinguishing cases in which ongoing obligations were found or asserting that obligations must closely resemble the obligations featured in those cases. (*Aryeh*, *supra*, 55 Cal.4th at p. 1200 ["duty not to impose unfair charges in monthly bills . . . was a continuing one, susceptible to recurring breaches"]; *Howard Jarvis Taxpayers Assn.*, *supra*, 25 Cal.4th at pp. 819, 821–822 [continued collection of an invalid tax was an ongoing violation of

Proposition 62].) But defendants cite no authority holding the continuous accrual doctrine should be so limited. Nor do they proffer a developed or reasoned argument supporting their notion that the continuous accrual doctrine should not extend to alleged violations of constitutional obligations not to unlawfully discriminate. Indeed, the law appears to the contrary. (See, e.g., *Aryeh*, at p. 1199 [observing "the obligation not to discriminate in setting wages [is] an ongoing one" and discussing *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, which held the two-year statute of limitations did not bar suit even though discriminatory wages had gone on for six years].)

Citing cases concerning equitable tolling, defendants next argue that the continuous accrual doctrine applies only "occasionally and in special situations" where a limitations period "might otherwise prevent a good faith litigant from having a day in court," and that this underlying policy goal would not be achieved here. (*Addison v. State of California* (1978) 21 Cal.3d 313, 316; *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99.) This is unpersuasive. The doctrine of continuous accrual is not equivalent to the doctrine of equitable tolling. Equitable tolling "may suspend or extend the statute of limitations when a plaintiff has reasonably and in good faith chosen to pursue one among several remedies and the statute of limitations' notice function has been served." (*Aryeh, supra*, 55 Cal.4th at p. 1192.) In contrast, the theory of continuous accrual contemplates that "a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period." (*Ibid.*) In any case, barring application of the continuous accrual doctrine here would appear to forestall resolution of potentially valid claims of unlawful discrimination until a future contractor

affected by the programs has both the will and the resources to bring a challenge.

Defendants also rely on cases in which challenges to utility fees and taxes were found barred by statutes of limitation. In such cases, the courts determined the relevant limitation periods began to run when the fees or taxes were established rather than with each monthly or annual charge. (*Campana v. East Bay Municipal Utility Dist.* (2023) 92 Cal.App.5th 494, 496–497, 501–505 (*Campana*); *Coachella Valley Water Dist. v. Superior Court* (2021) 61 Cal.App.5th 755, 759–760, 770–774 (*Coachella Valley Water Dist.*).) Defendants additionally rely on *Luke v. Sonoma County* (2019) 43 Cal.App.5th 301 (*Luke*), where the defendant county had increased pension benefits without complying with state laws requiring "local legislative bodies to obtain an actuarial statement of the future annual costs of proposed pension increases, and to make the future annual costs public at a public meeting." (*Luke*, at p. 304.) Because the plaintiff filed his lawsuit more than three years after the county's authorization of the increased benefits, both the trial and appellate courts concluded that the challenges to the increases were time-barred. (*Ibid.*)

These cases are distinguishable. The statutes of limitations at issue in *Campana* and *Coachella Valley Water Dist.* expressly addressed when claims challenging utility charges would accrue; moreover, none of the statutes authorizing the utility charges imposed any ongoing obligations. (*Campana*, *supra*, 92 Cal.App.5th at pp. 501, 505; *Coachella Valley Water Dist.*, *supra*, 61 Cal.App.5th at pp. 767, 774; see also *Luke*, *supra*, 43 Cal.App.5th at pp. 306–308 [doctrine of continuous accrual found inapplicable in case involving "a one-time obligation . . . to obtain and make public a statement of the future costs of proposed pension increases 'before authorizing' them"].) Additionally,

in *Campana* and *Coachella Valley Water Dist.*, there was no likelihood the defendants could evade judicial review, as they regularly adopted new rates and taxes which could be challenged in the future. (*Campana*, at p. 505; *Coachella Valley Water Dist.*, at p. 773.)

In sum, we conclude that application of the continuous accrual doctrine is appropriate on the facts alleged. Having so concluded, we need not and do not address plaintiffs' separate claim that a new limitations period begins running whenever defendant Alameda County assesses taxes that will fund the two programs or when resident plaintiffs pay their annual taxes.

Finally, we turn briefly to the ultimate issue of whether the claims in plaintiffs' complaint, filed on July 25, 2022, are time-barred. In the trial court proceedings, defendants and the court relied solely on the four-year limitations period in section 343. Though defendants currently posit that the two-year limitations period in section 335.1 is applicable, their discussion of the issue is meager at best. Plaintiffs take no position as to which is the correct statute of limitations, and neither do we. Under either of these limitations periods, defendants fall short of salvaging their judgment on the pleadings. Setting aside the circumstance that no one disputes defendants' ongoing implementation of the two challenged programs, and even assuming the accrual question hinges on plaintiffs' allegations that both programs were operative and implemented in 2021 and that the Construction Compliance Program was implemented in May 2020, defendants cannot establish the wholesale untimeliness of the action. That is, even under defendants' theory, assuming the two-year limitations period applies to and bars plaintiffs' 42 U.S.C. section 1983 claims that relate to the May 2020 implementation of the

Construction Compliance Program, plaintiffs' remaining claims—which relate to the implementation of both programs in 2021—survive.[6]

Because the particular issue of which statute of limitations is controlling has not been properly presented or briefed, and its resolution is unnecessary to disposition of the appeal, we do not decide it.

DISPOSITION

The judgment is reversed, and the matter remanded for further proceedings consistent with this opinion. Plaintiffs are entitled to costs on appeal. (Cal. Rules of Court, rule 8.278.)

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[6] At oral argument, defendants requested that we identify the moment of accrual for claims such as those asserted by plaintiffs and that we hold accrual occurs when defendants award a contract where the programs were utilized. We decline to do so, as these issues were not briefed and are belatedly raised. In any event, there is no question in this case that the challenged programs remain in force and have not fallen into desuetude, and that by way of example plaintiffs alleged the programs were applied in 2021 and thus within the two- or four-year limitations periods at issue. (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 268–269 [noting *Wirin v. Horrall* (1948) 85 Cal.App.2d 497, 504–505 which held that the "mere 'expending [of] the time of the paid police officers of the city of Los Angeles in performing illegal and unauthorized acts' constituted an unlawful use of funds which could be enjoined under section 526a"].)

Fujisaki, J.

WE CONCUR:

Tucher, P.J.

Petrou, J.