No. 02-258

IN THE
Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF ON THE MERITS FOR PETITIONER

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QUESTION PRESENTED

The federal supplemental jurisdiction statute includes a provision, 28 U.S.C. § 1367 (d), that tolls the period of limitations for supplemental claims while they are pending in federal court and for 30 days after they are dismissed. The question presented is whether the tolling provision invades state sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause.

PARTIES TO THE PROCEEDINGS

Petitioner is Susan Jinks. Respondent is Richland County.

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OPINIONS BELOW

The opinion of the South Carolina Supreme Court (Pet. App. A, 2a-10a) is reported at 349 S.C. 298, 563 S.E.2d 104. The judgment of the South Carolina Court of Common Pleas (Pet. App. B, 11a-12a) is unreported. The opinion of the U.S. Court of Appeals for the Fourth Circuit (Pet. App. C, 13a-20a) is reported at 163 F.3d 598 (table)(per curiam)(unpublished). The Order of the United States District Court for South Carolina (Pet. App. D, 21a-22a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on April 22, 2002. The petition for a writ of certiorari was filed on July 18, 2002, and was granted on October 21, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set out in the Appendix to the Petition for Certiorari (Pet. App. F, 26a-30a).

STATEMENT OF THE CASE

Carl H. Jinks died of complications associated with alcohol withdrawal on October 18, 1994 at Respondent Richland County's Detention Center within four days of his arrest for failure to pay $1500 in child support. *Jinks v. Richland County*, 349 S.C. 298, 301, 563 S.E.2d 104, 105 (S.C. 2002). At the time of arrest, Respondent was put on notice that Jinks was suffering from alcohol withdrawal, a diagnosis confirmed by subsequent examination by Dr. Charles Eskridge, the detention center physician, who wrote a prescription for Jinks that was never administered. *See Jinks v. McCaulley,* 163 F.3d 598 (4th Cir. 1998)(table)(per curiam)(unpublished), Pet. App. C, at 13a [hereinafter "*McCaulley*"].

In 1996, within the applicable state statute of limitations, Petitioner Susan Jinks brought an action against the county and its physician-employee in the United States District Court for the District of South Carolina, raising claims under 42 U.S.C. § 1983 and supplemental claims for wrongful death and survival under the South Carolina Tort Claims Act, S.C. CODE ANN. §§ 15-78-10 *et seq*. (Supp. 2001). *Jinks*, 349 S.C. at

301, 563 S.E.2d at 105. On November 20, 1997, the district court granted defendants' motions for summary judgment on the Section 1983 claim. *Id.* On December 3, 1997, the court issued an order declining to exercise jurisdiction over the remaining state claims and dismissed the state claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3). *Id.* The Fourth Circuit subsequently affirmed the district court's rulings. *McCaulley,* 163 F.3d 598 (4th Cir. 1998)(table).

On December 18, 1997, sixteen days after the district court dismissed her action and while the federal appeal was pending, Petitioner filed a wrongful death and survival action in the Court of Common Pleas for Richland County. *Jinks*, 349 S.C. at 301, 563 S.E.2d at 105. Her filing was well within the 30-day tolling period provided by 28 U.S.C. § 1367(d). After trial, a jury returned a verdict of $80,000 in actual damages in favor of Petitioner and against Richland County in the wrongful death action. It returned defense verdicts on the wrongful death action for Dr. Eskridge and on the survival action for both defendants. *Id.* After denial of its post-trial motions, Richland County appealed to the South Carolina Supreme Court. *Id.*

That court held 28 U.S.C. § 1367(d) unconstitutional, reasoning that it interferes "with the State's sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause." *Id.* at 108. In reaching that conclusion, the state Supreme Court held that, although the tolling provision was "necessary" as a useful aid to federal jurisdiction, it was not "'proper' within the meaning of the Necessary and Proper Clause. . . . [because it] interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." *Id.* at 107. Further, citing this Court's decision in *Alden v. Maine,* 527 U.S. 706, 749 (1999), the state Supreme Court declared that "the State has the authority to determine *whether* it

consents to suit within its own court system." 563 S.E.2d at 107 (emphasis in original). It then found that such consent exists only to the extent permitted by the state Tort Claims Act. *Id*. at 108. The court further held that, by extending the time period for waiver of sovereign immunity of the state's political subdivisions, § 1367(d) exercised an attribute of state sovereignty, in violation of the Tenth Amendment. *Id.*

SUMMARY OF ARGUMENT

1. South Carolina's Supreme Court invalidated the tolling provision of the federal supplemental jurisdiction statute, 28 U.S.C. 1367, on Tenth Amendment grounds. It did so based in the mistaken belief that the limitations period had not already been satisfied and that a statute of limitations is an attribute of sovereignty that can never be overridden by federal law. The decision wrongly gives short shrift to the ample constitutional authority that supports the federal tolling requirement.

In enacting § 1367 at the invitation of this Court, *Finley v. United States,* 490 U.S. 545, 556 (1989), Congress exercised power granted by Article III of the Constitution to allocate judicial authority to courts inferior to this Court. It wrote § 1367 to guarantee plaintiffs a federal forum capable of deciding all claims arising from the same nucleus of operative facts as one that confers original federal jurisdiction. By doing so, it embraced state claims that otherwise have no federal nexus. Sensitive to the jurisprudential preference that state issues be decided in state courts, Congress also provided district courts with the authority to decline jurisdiction over the state claims once the federal cause of action had fallen away. To assure that a litigant's access to justice was not abridged by that action, Congress mandated that such dismissals be without prejudice and created a *de minimis* tolling period of 30 days in which

the plaintiff could refile in state court if the limitations period had expired.

The tolling provision was an integral part of the statute. Without it, experience indicated that district courts would not cede authority over supplemental jurisdiction claims that otherwise belonged in state court, would demand waivers of the limitations period from defendants as the price of dismissal, or would grant a motion for reconsideration when the state court refused to hear the action. Tolling, thus, accommodated the interests of comity by enabling the district courts to send the case for resolution in state courts.

In enacting the tolling provision, Congress acted in aid of federal jurisdiction, as it had done previously on a number of occasions. For example, Congress passed a tolling statute during the Civil War to enable plaintiffs to bring actions that the closing of courts had prevented. Today, tolling laws protect members of the armed forces even in times of peace from losing their claims during both foreign and stateside military service, protect claimants during the pendency of an automatic stay during bankruptcy proceedings, protect plaintiffs with Year 2000-related claims during the mandatory notice and remediation period set by federal law, and protect plaintiffs suing under state law over hazardous environmental release exposure. In addition, courts are invested with authority to stay limitations periods in aid of jurisdiction under the All Writs Act and the Anti-Injunction Act, as well as through the doctrine of equitable tolling. By including a tolling provision in the supplemental jurisdiction statute, Congress went down a well-trod path within its Article III authority, as informed by the Necessary and Proper Clause.

2. In holding that the relevant statute of limitations was an attribute of sovereignty that cannot be invaded by the federal government, the South Carolina Supreme

Court ignored the import of the Supremacy Clause. The Supremacy Clause explicitly acknowledges federal authority over state courts. It mandates that state tribunals enforce federal law. Federal supremacy carves out an exception to the reservation of State rights represented by the Tenth Amendment that specifically overrides state court prerogatives. It thus imposes a constitutional duty to protect the rights of parties under federal law and eliminate unnecessary burdens. Tolling fits into this rubric because its only impact is felt in state courts. It does not change the underlying statute of limitations or litigants' rights.

Equally important, the State's interest in its limitations period is fully met by the federal supplementary jurisdiction scheme set up by the statute. First, plaintiffs must comply with the state limitations to confer the initial federal jurisdiction. By doing so, the State's interest in protecting defendants from stale claims and preserving evidence is fully met. When that limitations period expires during the pendency of the federal action and the forum court determines that the remaining issues are better heard in state court, no prejudice is worked against the State's interests or that of the defendant. The *de minimis* 30-day window created by the tolling provision does not change the timeliness of the claims and does not render the claim suddenly stale. If the district court had decided to retain jurisdiction, the matter would have been heard there in the same timeframe. Refiling in state court does not change the character of the case. Nonsuiting the plaintiff wrongly interferes with the implementation of valid national policies. It would suggest that a wide variety of other federal statutes and other exercises of federal judicial authority that stay state court proceedings are invalid and renders the Supremacy Clause a nullity.

3. State law may not penalize a person for pursuing federal rights. Here, Congress provided claimants with a

right to adjudicate related federal and state claims in federal court, while accommodating federalism interests by providing a mechanism to return to state court cases that have developed into purely state-law contests. South Carolina would treat the pursuit of this right in federal court differently than the same bundle of claims filed in state court. Such a result amounts to a form of palpable discrimination against federal rights.

Access to justice is a constitutional value second to none. When Congress appropriately provides a federal forum to a claimant, a determination to cede that authority to state courts with concurrent jurisdiction must include a reasonable opportunity to assert all the remaining claims that comprised the single constitutional case in federal court. When a state limitations period operates to foreclose the presentation of a claim authorized by federal law, the Constitution requires that the more suitable period contained in federal law prevail.

This Court should uphold § 1367 (d) and reverse the judgment of the South Carolina Supreme Court.

ARGUMENT

In enacting the supplemental jurisdiction statute, 28 U.S.C. § 1367, Congress demonstrated a due respect for both federalism and the values it represents. It understood that only by tolling the state limitations period could federal courts dismiss an action more appropriate to the state courts. Without such tolling, district courts will not decline jurisdiction over state law claims even after federal claims were dismissed. Misreading the Constitution's commands, the Supreme Court of South Carolina declared this well-grounded attempt to accommodate federalism interests unconstitutional.

I. Enactment of the Tolling Provision Is within Congress's Constitutional Authority

Congress enacted the supplemental jurisdiction statute, 28 U.S.C. § 1367, after this Court ruled that a district court could not exercise pendent jurisdiction without statutory authorization. *Finley v. United States,* 490 U.S. 545 (1989). In accepting this Court's invitation to enact such a law, Congress included the tolling provision, 28 U.S.C. § 1367(d), as an integral part of the statute, because Congress considered it to be essential to honoring the principles of federalism by minimizing federal intrusion into matters best resolved in state court. Rather than abridge state rights, as the South Carolina Supreme Court found below, the tolling provision enhances respect for federalism.

A. Respect for Federalism Required a Tolling Provision

The supplemental jurisdiction statute provides, with certain limitations, that "district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. §1367(a).

Although Subsection (a) asserts the full measure of possible federal judicial authority over state-based claims, the remaining subsections demonstrate a discriminating sensitivity to State interests. Subsection (b) places limits on supplemental jurisdiction in cases premised solely on diversity of citizenship. 28 U.S.C. § 1367 (b). Subsection (c) authorizes district courts to "decline to exercise supplemental jurisdiction" so the matter may be heard in state court, if

> (1) the claim raises a novel or complex issue of State law,
> (2) the [state-based] claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. 1367(c).

Subsection (d) tolls the limitations period for any supplemental claim dismissed under subsection (c) and for any other claims voluntarily dismissed. The tolling window created lasts only 30 days after dismissal without prejudice from district court, unless state law provides a longer tolling period. 28 U.S.C. § 1367(d).

The academic advisors to Congress on § 1367 noted that the statute was needed to fill "a widening chasm in the jurisdictional authority of the federal courts." Rowe, *et al., Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction,* 74 JUDICATURE 213, 213 (1991). Scholars, legal institutions, and courts recognized the absence of a tolling provision as a significant obstacle to satisfactory federal-state court relations. As early as 1948, Professor Herbert Wechsler recommended the addition of a tolling provision in any statutory resolution of the issues surrounding supplemental jurisdiction. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROBS. 216, 233 (1948).

The American Law Institute (ALI) took up the issue after Chief Justice Earl Warren told it that "a proper

jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism" was needed. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS ix (1969)(quoting Chief Justice Earl Warren, Opening Address to the 36th Annual Meeting of the ALI (May 1959)). Subsequently, the ALI proposed that the state limitations period be tolled while a supplemental jurisdiction case is pending in federal court, in order to encourage the return of purely state issues to state court. Section 1386(b) of the ALI proposal would have tolled the state limitations period by "an action timely commenced in federal court." *Id*. at 65. The ALI argued that such a provision was necessary "as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available." *Id*. at 453.

After *Finley,* the Federal Courts Study Committee recommended enactment of a supplemental jurisdiction law that included a tolling provision, noting that "[a]bolishing or radically curtailing pendent and ancillary jurisdiction would eliminate some cases and claims from the federal courts, but this is a situation in which it is unwise to do so." REPORT OF THE FEDERAL COURTS STUDY COMM. 47-48 (1990).

Congress chose to enact only what it deemed the "noncontroversial" recommendations[1] of the study committee in The Federal Courts Committee Study Implementation Act of 1990, which became Title III of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5104 (1990). That Act was passed to promote "the just, speedy and inexpensive resolution of civil disputes" and enhance citizens' access to the courts.

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[1] 136 Cong. Rec. H13313 (Oct. 27, 1990) (remarks of sponsor, Rep. Kastenmaier).

S. REPT. NO. 101-416, 101st Cong., 2d Sess., at 1, *reprinted in* 1990 U.S.C.C.A.N. 6801, 6804. Section 310 of the 1990 Act contained the supplemental jurisdiction law now found at 28 U.S.C. 1367.

Congress sought to accomplish two fundamental purposes in enacting § 1367. First, it provided a federal forum for cases in which it was appropriate to invoke original federal jurisdiction but that also involved state law claims arising from the same nucleus of operative facts. The House Report, which provides the principal legislative history, states that § 1367, "by making federal court a practical arena for the resolution of an entire controversy, has effectuated Congress's intent in the jurisdictional statutes to provide plaintiffs with a federal forum for litigating claims within original federal jurisdiction." H.R. REPT. NO. 101-734, 101st Cong., 2d Sess., at 28 (1990), *reprinted in,* 1990 U.S.C.C.A.N. 6860, 6874.

Second, Congress intended to honor the age-old preference that state courts should decide state issues. *See, e.g., Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716 (1966)(noting "important countervailing interest[s]" that justify deference to state courts, including "considerations of proper constitutional adjudication, regard for federal-state relations, [and] wise judicial administration."). To accommodate State interests, Congress incorporated standards into the law to encourage appropriate federal discharge of an action in favor of state courts and tolled state limitations periods for 30 days to facilitate resumption of the litigation in state court when the federal claims have fallen away.

By adopting the pre-*Finley* jurisprudence on supplemental jurisdiction, Congress endorsed this Court's instruction to federal courts considering whether to hear a state-based cause of action after the federal claim has ended to "consider and weigh in each case, and at every

stage of the litigation, the values of judicial economy, convenience, fairness and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims." *City of Chicago v. International College of Surgeons,* 522 U.S. 156, 173 (1998)(quoting *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 350 (1988)).

Accepting this encouragement, federal courts generally dismissed state supplemental claims so that they might be heard more appropriately in state court. *See, e.g., O'Connor v. Commonwealth Gas Co.,* 251 F.3d 262, 272 (1st Cir. 2001); *Brandenburg v. Housing Auth. of Irvine,* 253 F.3d 891, 900 (6th Cir. 2001); *Carr v. CIGNA Sec., Inc.,* 95 F.3d 544, 546 (7th Cir. 1996)(calling it the "general rule"); *Parker & Parsley Petroleum Co. v. Dresser Indus.,* 972 F.2d 580, 585 (5th Cir. 1992); *Cook, Perkiss & Liehe v. Northern California Collection Service, Inc.,* 911 F.2d 242, 247 (9th Cir. 1990). *See also United Mine Workers v. Gibbs,* 383 U.S. 715, 726-27, 726 n.15 (1966) (quoting *Strachman v. Palmer,* 177 F.2d 427, 431 (1st Cir. 1949)("Federal courts should not be over-eager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation.").

Still, courts considered expiration of the state limitations period a "salient factor" advising against dismissal. *O'Connor,* 251 F.3d at 273 (citing *Rodriguez v. Doral Mortgage Corp.,* 57 F.3d 1168, 1177 (1st Cir. 1995)). Thus, enactment of the tolling provision addressed a palpable dilemma faced by plaintiffs with both federal and state claims.

Often, a plaintiff had no way out of this dilemma other than to eschew his or her right to bring the action in federal court. Claim preclusion required plaintiffs seeking vindication of their rights in federal court to include the state claims that arise from the same nucleus of facts in their federal lawsuit. *See generally* 18 Wright,

et al., Federal Practice and Procedure at § 4412, at 287 (Supp. 2002). *See also Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 586 (1999)(acknowledging the issue preclusive effect of § 1367 jurisdiction). South Carolina, like most states, mandates that a "litigant is barred from raising any issues where were adjudicated in the former suit and *any issues which might have been raised in the former suit." Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n,* 362 S.E.2d 176, 177 (S.C. 1987)(emphasis added). *Compare L.A. Draper & Son, Inc., v. Wheelabrator-Frye, Inc.,* 454 So. 2d 506 (Ala. 1984); *Hauser v. Mealey,* 263 N.W.2d 803 (Minn. 1978); *International Games, Inc. v. Sims,* 444 N.E.2d 736 (Ill. App. 3d Dist. 1982); *City of Los Angeles v. Superior Court,* 149 Cal. Rptr. 320, 85 Cal. App. 3d 143 (Ct. App. 2d Dist. 1978). A plaintiff could not risk filing in federal court and losing the state claim because the limitations period was not tolled.

To prevent that scenario, federal courts felt compelled to devise a variety of ad hoc, stopgap, and often inconsistent approaches. Some courts required the defendant to waive the state statute of limitations. For example, in *Financial General Bankshares, Inc. v. Metzger,* 680 F.2d 768, 778 (D.C. Cir. 1982), the District of Columbia Circuit found that the locally based claim should be dismissed to allow adjudication in the local courts but not "until the plaintiff has filed an action in the Superior Court of the District of Columbia and the defendant has filed in that court a record of waiver of any applicable statute of limitations." Similar waivers were required in other courts. *See Duckworth v. Franzen,* 780 F.2d 645, 657 (7th Cir. 1985)(opinion by Posner, J.), *cert. denied,* 479 U.S. 816 (1986); *Brewer v. City of El Cerrito,* 666 F. Supp. 1346, 1351 (N.D. Cal. 1987); and *Harkins Amusement Enterprises, Inc. v. Harry Nace Co.,* 657 F.

Supp. 1037, 1040 (D. Ariz. 1987) .[2] In a variation on this theme, Judge Keeton deferred decision on dismissal until the state court had determined whether the statute of limitations would bar the claim in state court. *Pallazola v. Rucker,* 621 F. Supp. 764, 770-71 (D. Mass. 1985).

Under a second approach, courts found the existence of a statute of limitations issue a sufficient reason to retain jurisdiction over a supplemental claim that would otherwise be heard in state court. Then-Judge Breyer, speaking for a panel of the First Circuit, held "that expiration of a state limitations period is an important factor for a district court to consider when deciding whether or not to dismiss a pendent claim." *Newman v. Burgin,* 930 F. 2d 955, 963 (1st Cir. 1991). Although not adopting a hard and fast rule, *Newman* recognized that a number of courts had held that the failure of a district court to exercise jurisdiction over the state law claim was an abuse of discretion when the case faced a state limitations problem. *Id.* at 963-64 (citing *L.A. Draper & Son, Inc. v. Wheelabrator-Frye, Inc.,* 735 F.2d 414, 427-30 (11th 1984); *Henson v. Columbus Bank and Trust Co.,* 651 F.2d 320, 325 (5th Cir. 1981); *O'Brien v. Continental Ill. Nat'l Bank and Trust Co.,* 593 F.2d 54, 65 (7th Cir. 1979). *See also Beck v. Prupis,* 162 F.3d 1067, 1100 (11th Cir. 1998)(collecting cases indicating that elapse of limitations period mandates retention of case).

Similarly, in a case that had originally been removed to federal court and then was appropriately sent back to state court after the plaintiffs dismissed their federal claim, this Court held that the elapse of the relevant limitations period was "a potent reason for giving federal courts discretion to remand" such claims to keep

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[2] Courts have generally required waiver of the limitations period "where the foreign court would not provide an adequate alternative in the absence of such a condition." *In re Union Carbide Corp. Gas Plant Disaster,* 809 F.2d 195, 203-04 (2d Cir. 1987).

them alive. *Cohill,* 484 U.S. at 352. Remand, however, is not an available option when the case is originally filed in federal court.

A third approach held that federal court reconsideration was mandatory if a state court found the statute of limitations precluded hearing the case. The Fifth Circuit, for example, instructed that "if the district court determines that the pendant claim should be dismissed by the federal court and [the plaintiff] later discovers that his case is time barred in the state court, *the federal district court should grant a motion for reconsideration* of whether or not the federal court will exercise its pendent jurisdiction to hear the state law claim." *Rheaume v. Texas Dep't of Public Safety,* 666 F.2d 925, 932 (5th Cir. 1982)(emphasis added). *See also U.S. Industries, Inc. v. Blake Construction Co.,* 671 F.2d 539, 551 (D.C. Cir. 1981); *Henson,* 651 F.2d at 325; *McLaughlin v. Campbell,* 410 F. Supp. 1321, 1326 (D. Mass. 1986).

These makeshift solutions were unsatisfactory for a number of reasons. Foremost among them, all the solutions invaded state sovereignty to some degree. Required waiver of the limitations period on a case-by-case basis, without congressional authorization, was especially problematic when the defendant, as here, was a political subdivision of the state, for it commandeered a non-judicial state officer's acceptance of a federal mandate; namely, waiver of the limitations period. *Cf. Printz v. United States,* 521 U.S. 898, 935 (1997). Moreover, deciding to keep or reconsider dismissal of a case more appropriate to adjudication in state court solely to avoid the limitations problem created serious problems under the doctrine of comity, which this Court has repeatedly described as a "vital consideration." *See, e.g., Younger v. Harris,* 401 U.S. 37, 44 (1971).

The solutions were also uncertain, ad hoc and often discretionary, leaving the plaintiff to guess whether a state court would entertain the supplemental claims if his or her federal cause was dismissed. When they would not, federal courts would not always protect the claim by keeping the case. For example, in *Burns-Toole v. Byrne,* 11 F.3d 1270 (5th Cir.), *cert. denied,* 512 U.S. 1207 (1994), the Fifth Circuit refused to disturb the discretion of the district court in dismissing all claims, federal and state, and found the fact "that the statute of limitations has run on [plaintiff's] state law claims hardly dictates a result which we, in the interest of justice, cannot countenance." *Id*. at 1276.

Under such circumstances, counsel would be ill-advised to chance dismissal of all claims in the federal forum, even though his or her client had a federal right to pursue the case in that forum. The tolling provision thus addresses this dilemma, which this Court recognized may "foreclose some plaintiffs from litigating their state-law claims, [or] . . . chill other plaintiffs from bringing their federal-law claims." *Cohill,* 484 U.S. at 352 n.9. *See also Edmondson & Gallagher v. Alban Towers Tenant Ass'n,* 48 F.3d 1260, 1267 (D.C. Cir. 1995)(§ 1367(d) "reduces one concern expressed in [*Cohill*] – that plaintiffs would lose their claims if their case were dismissed rather than remanded.").

Finally, the solutions were unduly complex and at odds with the principle of judicial economy, adding significant additional litigation time and effort to a case while undesirably overtaxing both the parties and the courts. The inconsistent treatment of cases involving supplemental jurisdiction ill served the fair administration of justice.

Congress saw tolling as a solution to these issues. The House Report states that the tolling provision's

> purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court. It also eliminates a possible disincentive for such a gap in tolling where a plaintiff might wish to seek voluntary dismissal of other claims in order to pursue an entire matter in state court when a federal court dismisses a supplemental claim.

H.R. REPT. NO. 101-734, at 30 (1990), *reprinted in,* 1990 U.S.C.C.A.N. 6860, 6876.

Tolling enables federal courts to let the supplemental claim go to state court, fostering a greater adherence to the key values of federalism. It makes subsection (c), which details the federalism-sensitive reasons for a court to decline supplemental jurisdiction, effective.

Professor John Oakley, reporter for the ALI's Federal Judicial Code Revision Project, confirms this pro-federalism understanding of the tolling provision's purpose: "Congress clearly intended subsection 1367(d) to facilitate discretionary dismissal under subsection 1367(c) by relieving courts of concerns about the inequitable consequences of state limitations law barring the dismissed claim from refiling." Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project,* 31 U.C. DAVIS L. REV. 855, 945 (1998).

Experience demonstrates that § 1367(d) has had its intended effect. Its very existence has encouraged federal appellate courts to mandate that district courts "dismiss the pendent state claim without prejudice and . . . toll the period of limitations." *Franklin v. Zain,* 152 F.3d 783, 786 (8th Cir. 1998). In other instances, circuit courts have

found no abuse of discretion when a district court has dismissed the action without prejudice *because* § 1367(d)'s tolling provision saved the right to go to state court despite the expiration of the limitations period. *See Hedges v. Musco,* 204 F.3d 109, 123-24 (3d Cir. 2000); *Seabrook v. Jacobson,* 153 F.3d 70, 72 (2d Cir. 1998); *Beck,* 162 F.3d at 1099; *Neal v. District of Columbia,* 131 F.3d 172, 175 n.5 (D.C. Cir. 1997); *Brown v. City of Boston,* 98 F.3d 1333, 1996 WL 590553, *1 (1st Cir. 1996)(unpublished)(Pet. App. E, 23a). Moreover, at least one district court has held that the tolling provision permits it to dismiss, rather than remand, cases that have been removed to federal court. *See Naragon v. Dayton Power Light Co.,* 934 F. Supp. 899 (S.D. Ohio 1996).

If this Court agrees with the South Carolina Supreme Court, it will also reverse the admonition this Court issued in *Gibbs* that the disposition of supplemental claim is a "doctrine of discretion, not of plaintiff's right," *Gibbs,* 383 U.S. at 726 (footnote omitted). Without a state court option, access to justice considerations will compel the retention of the state claim in federal court. Such a result will also add to the docket of an already overtaxed federal court system and downgrade considerations of comity that might otherwise recommend that these cases are more appropriately heard in state court. It may also force plaintiffs to forego their right to bring their actions initially in federal court, for fear of losing their state claim altogether.

B. Congress Enacted the Tolling Provision Based on Its Article III Authority

In enacting the supplemental jurisdiction statute, Congress exercised its authority under Article III to allocate judicial authority to courts inferior to this Court. U.S. Const. Art. III, § 1. The Constitution contemplates that it is the "*duty* of Congress to pass such laws as [are] necessary and proper to carry into execution the powers

vested in the judicial department." *Ableman v. Booth,* 62 U.S. 506, 521-22 (1858)(emphasis added). This congressional authority spans enormous breath. *See Lockerty v. Phillips,* 319 U.S. 182, 187 (1943)(citations omitted)("The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good'.").

The Framers anticipated that federal courts would exercise supplemental jurisdiction-like authority. For example, Alexander Hamilton noted that the "judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." The Federalist, No. 82, at 493 (A. Hamilton)(C. Rossiter ed. 1961). Early on, Chief Justice John Marshall wrote that once a federal court found a "sufficient foundation for jurisdiction, . . . then all the other questions must be decided as incidental to this, which gives that jurisdiction." *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738, 822 (1824).

Osborn further recognized a significant congressional role in authorizing that jurisdiction: "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the [federal c]ourts jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Id.* at 823. Professor Oakley has noted that Chief Justice Marshall's view has "aged well." Oakley, *Joinder and Jurisdiction in the Federal District Courts: The State of the Union of Rules and Statutes,* 69 TENN. L. REV. 35, 40 (2001)(citing *Verlinden B.V. v. Bank of Nigeria,* 461 U.S. 480, 492 (1983) and *American National Red Cross v. S.G.,*

505 U.S. 247, 253-55 (1992) as reaffirming the *Osborn* principles).

Although the Constitution established a system of "dual sovereignty," *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991), it also created a unitary system of justice to the extent that

> the national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.

The Federalist, No. 82, at 494 (Hamilton).

When the two court systems exercise concurrent jurisdiction, Congress retains responsibility for the borders between the state and federal courts. It has done so by authorizing the federal courts to restrain state courts from invading jurisdiction properly within the federal ambit. For example, the All Writs Act, 28 U.S.C. § 1651(a), authorizes a federal court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Act "has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve "the rational ends of law."'" *Harris v. Nelson,* 394 U.S. 286, 299 (1969)(quoting *Price v. Johnson,* 334 U.S. 266, 282 (1948)). Unless otherwise restricted by Congress, the Act enables a federal court to utilize "all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its

sound judgment to achieve the ends of justice entrusted to it." *Adams v. United States ex rel. McCann,* 317 U.S. 269, 273 (1942).

Similarly, the Anti-Injunction Act, 28 U.S.C. § 2283, while generally restricting injunctions to stay state proceedings, grants federal courts such power when "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Tolling provisions, like § 1367(d), utilize the same constitutional authority as the All Writs and Anti-Injunction acts. Like them, § 1367(d) is a necessary aid to jurisdiction. Congress has enacted similar tolling requirements before. Perhaps the earliest instance was when Congress tolled the limitations period for both civil and criminal cases during the Civil War. Stay Act of June 11, 1864, ch. 118, 13 Stat. 123 (1864). A current tolling statute, effectuating the same purpose, is the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. § 525. State courts reviewing the constitutionality of that statute have upheld it. *See Perkins v. Manning,* 59 Ariz. 60, 122 P.2d 857 (Ariz. 1942);*Van Heest v. Veech,* 58 N.J. Super. 427, 156 A.2d 301 (N.J. Co. Ct. 1959). The Act has not been challenged on Tenth Amendment grounds in federal court, even though its application to military personnel who are not experiencing exigent circumstances would seem to have a lesser justification for congressional intrusion on state court matters than § 1367(d). *See Conroy v. Aniskoff,* 507 U.S. 511 (1993).

The Tenth Amendment concerns advanced by the South Carolina Supreme Court cast constitutional doubt on the validity of other federal statutes that impose stays upon state courts and state court procedures. For example, federal bankruptcy law imposes an automatic stay on all judicial proceedings against the debtor. 11 U.S.C. § 362(a). The stay serves a two-fold purpose: (1)

providing the debtor with a breathing spell from creditors and saving the debtor from expending resources in other litigation; and, (2) creating order among potential creditors by preventing them from pursuing their own remedies separate from the bankruptcy proceedings. *See Independent Union of Flight Attendants v. Pan American World Airways, Inc.,* 966 F.2d 457, 459 (9th Cir. 1992).

Because a statute of limitations might expire during the course of the automatic stay, the Bankruptcy Code provides a 30-day savings period that operates identically to § 1367(d). 11 U.S.C. § 108(c). Numerous courts have recognized that "[t]his section extends the statute of limitations for creditors in actions against the debtor, where the creditor is hampered from proceeding outside the bankruptcy court due to the provisions of 11 U.S.C. § 362 [the automatic stay provision]." *In re DiCamillo,* 186 B.R. 59, 61 (E.D. Pa. 1995)(quoting *Brickley v. United States (In re Brickley),* 70 B.R. 113 (9th Cir. BAP 1986)). *See also Aslanidis v. U.S. Lines, Inc.,* 7 F.3d 1067, 1073 (2d Cir. 1993)(Section 108(c) "extended [the limitations period] for 30 days after notice of the termination of a bankruptcy stay, if any such deadline would have fallen on an earlier date.").

Moreover, the same considerations as engage a district court considering dismissal of the supplemental claim attend the decision of a bankruptcy court over whether relief should be granted from the automatic stay. "Comity and justice would dictate that this court abstain if the matter before it involves issues of State constitutional law, important State policy, or unsettled State law." *In re Broughton*, 49 B.R. 312, 316 (Bankr. N.D. Ill. 1985) *aff'd,* 60 B.R. 373 (N.D. Ill. 1986)(citing *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478 (1940)). *Compare* 28 U.S.C. § 1367(c).

Because the bankruptcy stay operates as an "aid to the exercise of federal jurisdiction" in the same manner as

section 1367(d), the reasoning of the South Carolina Supreme Court would mandate that it too be found unconstitutional.

The *Jinks* ruling also calls into question the validity of the federal Y2K Act, 15 U.S.C. § 6606(e)(4)(tolling during notice and remediation period for Year 2000-related claims) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9658 (setting a uniform limitations-period commencement date in suits under state law for damages due to hazardous release exposure).

Despite the questions raised by the South Carolina Supreme Court, these other federal acts are valid. The South Carolina ruling also raises serious issues about a federal court's authority to stay state proceedings as a matter of inherent judicial power. Section 1367(d) tolling works in a fashion that is similar to a federal court's authority to stay pending state proceedings during removal as a "protective device which keeps separate tribunals from adjudicating the merits of the same controversy." *Wood v. DeWeese,* 305 F. Supp. 939, 941 (W.D. Ky. 1969).

The decision below even casts doubt on the authority this Court may exercise during the pendency of a petition for certiorari, wherein a single justice of this Court may stay a state court of last resort's final judgment. *See, e.g., Nebraska Press Ass'n v. Stuart,* 423 U.S. 1327, 1329 (1975)(Blackmun, J.)("As a single Justice, I clearly have the authority to grant a stay of a state court's 'final judgment or decree' that is subject to review by this Court on writ of certiorari."). Obviously, the exercise of such authority is an "aid to jurisdiction" in the same sense as § 1367(d).

Moreover, this Court has recognized that equitable tolling is permissible when consistent with congressional

intent in enacting a particular statutory scheme. *See Bowen v. City of New York,* 476 U.S. 467, 479 (1986); *Honda v. Clark,* 386 U.S. 484 (1967). The equitable tolling doctrine generally permits a statute of limitations to be tolled provided that there is timely notice, lack of prejudice to the defendant, reasonable and good faith conduct on the part of the plaintiff, and a prayer for the same remedies in each forum. *Daviton v. Columbia/HCA Healthcare Corp.,* 241 F.3d 1131, 1133 (9th Cir. 2001).

That equitable relief available in federal court, even in diversity cases, is not restricted to what is available in state court. *Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 105-06 (1945). It is generally available when "a plain, adequate and complete remedy at law" is wanting. *Id*. at 105. "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. *Id*. at 106.

Section 1367(d) operates in similar fashion to the equitable tolling doctrine, but with statutory notice. It is difficult to imagine how it, endorsed by Congress, can be unconstitutional when equitable tolling is not.

C. The Necessary and Proper Clause Supports Congressional Authority under Article III

To the extent that Article III leaves some questions about the scope of congressional authority in aid of federal jurisdiction unanswered, the Necessary and Proper Clause fills in the picture. In its ruling, the South Carolina Supreme Court misconceived the constitutional status of the Necessary and Proper Clause when it found the Clause violated by § 1367(d). *Jinks,* 563 S.E.2d at 108. Petitioner understands the court's ruling to suggest that Congress was without authority to enact the tolling provision as a matter of its enumerated powers and those additional powers that are properly incident to them.

In discussing this issue, the South Carolina court conceded that the tolling provision was "necessary" as a "useful 'aid to the exercise of federal jurisdiction,'" but still found it not "'proper' . . . [because it] interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." *Jinks,* 349 S.C. at 304, 563 S.E.2d at 107 (citation omitted). In so ruling, the court misunderstood the constitutionally authorized scope of federal authority. The Necessary and Proper Clause states that "The Congress shall have Power . . .":

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. Art. I, Sec. 8, cl. 18.

The court's reading of the word "proper" ascribes a weight to it that it cannot sustain. The requirement that a law be "proper" requires that Congress only exercise powers reasonably ancillary to express constitutional authority and not those otherwise prohibited. As a general proposition, "Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim. This is but a corollary to the grant to Congress of any Article I power." *Graham v. John Deere Co.,* 383 U.S. 1, 6 (1966)(citing *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824)). Moreover, this Court has recognized that the Constitution gives Congress "'the necessary resources of flexibility and practicality . . . to perform its function.'" *Yakus v. United States,* 321 U.S. 414, 425 (1944)(citation omitted).

These teachings are in accord with Justice Story's Commentaries, which described the Necessary and Proper Clause .as removing all uncertainty about congressional authority to carry out its obligations. 3 Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 603, at 433 (1833; R. Rotunda ed. 1987). The test, Story wrote, is "whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by congress." *Id.*

With respect to judicial power, this Court has acknowledged that "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna v. Plumer,* 380 U.S. 460, 472 (1965). Thus, to the extent doubt arises about congressional authority in support of federal jurisdiction, the Necessary and Proper Clause .allays that uncertainty.

It is worth noting that the South Carolina court's rationale – that the State alone may determine "the extent to which its political subdivisions are subject to suit" as an aspect of sovereignty – ignores the premise that underlies this Court's jurisprudence on federal civil rights under 42 U.S.C. § 1983, the same statute originally pleaded by the Petitioner to bring the matter into federal court. This Court has ruled that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Department of Social Services,* 436 U.S. 658, 690 (1978).

The scope of § 1983 is such that lawsuits to vindicate federal civil rights may be brought in state court, even without the State's consent to the use of its courts. *See, e.g., Felder v. Casey,* 487 U.S. 131 (1988). In *Felder,* the Wisconsin Supreme Court had ruled that compliance with the state notice-of-claim requirement was a prerequisite to filing a § 1983 action. It reasoned that, "while Congress may establish the procedural framework under which claims are heard in federal courts, States retain the authority under the Constitution to prescribe the rules and procedures that govern actions in their own tribunals." *Id.* at 137. Rejecting that argument, this Court held the "notice-of-claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is pre-empted when the § 1983 action is brought in a state court." *Id*. at 138.

Similarly, the South Carolina limitations period "conflicts in both its purpose and effects" with the objectives of § 1367 and "will frequently and predictably produce different outcomes . . . solely on whether the claim is [heard] in state or federal court." It too must yield to the federal statute, which, in this instance, requires tolling.

The *Felder* Court further held that "where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" 487 U.S. at 138 (quoting *Brown v. Western R. Co.,* 338 U.S. 294, 296 (1949)). Moreover, state courts may not "impose unnecessary burdens upon the rights of recovery authorized by federal laws." *Brown,* 338 U.S. at 298-99. The *Felder* Court then determined that "the very notions of federalism upon which respondents rely dictate

that the State's outcome-determinative law must give way when a party asserts a federal right in state court." *Felder,* 487 U.S. at 150. For that reason, "[j]ust as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under federal law [are] protected." *Id*. at 151 (citations omitted).

A similar result should obtain here. In enacting § 1367, Congress accepted this Court's formulation in *Gibbs* that state and federal claims emanating from a "common nucleus of operative fact" comprise "but one constitutional 'case'" and thus grants "power in the federal courts to hear the whole." *Gibbs,* 383 U.S. at 725 (footnotes omitted) . As a single "constitutional 'case,'" the matter retains its federal character even after the federal claims have been dismissed, which is why the federal court may retain jurisdiction over what would otherwise be purely state claims. That calculus does not change merely because the federal court exercises discretion, in the interests of comity, to decline further jurisdiction over the state claims. The supplemental jurisdiction statute creates a uniquely federal remedy with a broad sweep. Tolling enters the picture only when a plaintiff has chosen the federal forum and it becomes unavailable to him or her, making § 1367(d) an indispensable aid to federal court jurisdiction.

There is one further reason Respondent's objection at the alleged federal override is ill-considered. Both before and after enactment of § 1367(d), the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq*. (Supp. 2001) continues to define the extent and timing of any lawsuit to vindicate the state claims at issue here. Petitioner was required to comply with that Act, in order to file her supplemental claim in federal

court. She did, by filing within the applicable statute of limitations. There was no override.

Without the tolling provision, the second application of the state limitations period becomes outcome-determinative in the manner discussed by the *Felder* Court. With it, the plaintiff stands on the same footing in state court as he or she did in federal court. Tolling, then, accomplishes the "twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna,* 380 U.S. 468 (footnote omitted). A tolling provision is palpably within congressional authority.

II. Section 1367(d) Does Not Violate the Tenth Amendment

The principal constitutional objection posed by the South Carolina Supreme Court's decision below focuses on the Tenth Amendment's reservation of rights to the States. The court held "§ 1367(d) extends the waiver of the sovereign immunity of political subdivisions, thereby interfering with the State's sovereignty in violation of the Tenth Amendment." 349 S.C. at 306, 563 S.E.2d at 108. Critical to that determination was the court's reliance on another court's description of the holding in *New York v. United States,* 505 U.S. 144 (1992). Specifically, the *Jinks* Court quoted the Fourth Circuit as saying the Tenth Amendment requires two inquiries:

> First, whether the regulation it embodies is within Congress' power as being within those enumerated in the Constitution. Second, whether, even if so, the means of regulation employed yet impermissibly infringe upon state sovereignty.

Jinks, 349 S.C. at 303, 563 S.E.2d at 106 (quoting *United States v. Johnson,* 114 F.3d 476, 480 (4th Cir. 1997)). The

court was evidently misled by that bowdlerization of this Court's holding. The States ceded some of their sovereign authority to the Union in order to unite under the Constitution. Where the Constitution grants federal authority, by definition, it was not reserved to the States. This Court's *New York* decision could not be clearer:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

New York, 505 U.S. at 156.

As already discussed *infra,* Congress had full authority under Article III and informed by the Necessary and Proper Clause to enact § 1367(d). That is sufficient to take this question out of the ambit of the Tenth Amendment. Still, the Constitution provides further explicit confirmation of the power Congress exercised here. Congressional enactments are generally made binding on the States through the Supremacy Clause, which provides:

> Laws . . . which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the *Judges in every State shall be bound thereby,* any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2 (emphasis added). Explaining the Clause's scope, Chief Justice Marshall wrote, "acts of the State Legislatures . . . [which] interfere with, or are contrary to the laws of Congress, made in pursuance of

the constitution," are invalid under the Supremacy Clause, and "the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 211 (1824).

In considering the conjunction between this constitutional command and the Tenth Amendment, this Court recently said:

> Although Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs, see *Printz [v. United States,* 521 U.S. 898,] 935 [(1997)]; *New York [v. United States],* 505 U.S. [144,] 188 [(1992)], *it may require state courts . . . to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power*," *Printz, supra,* at 907.

Alden v. Maine, 527 U.S. 706, 752 (1999)(emphasis added).

As an aid to jurisdiction, the tolling provision is "appropriate for the judicial power." Its coercive effect operates solely on state judges, as authorized by the Supremacy Clause. Significantly, the exercise of that judicial power is not a matter in which a political subdivision or a private party is "be[ing] forced to entertain in [state] courts suits from which it was immune in federal court." *Howlett v. Rose,* 496 U.S. 356, 365 (1990). The matter was timely filed in a federal court with full authority to hear it, even after the federal predicate for original jurisdiction had fallen out. *See New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.,* 101 F.3d 1492, 1505 (3d Cir. 1996); *Shanaghan v. Cahill,* 58 F.3d 106, 110 (4th Cir. 1995); *Noble v. White,* 996 F.2d 797, 799 (5th Cir. 1993). The

decision to defer to the state courts should not suddenly nonsuit the plaintiff. And nothing in the Tenth Amendment requires a contrary result.

In *Printz,* this Court examined the "historical understanding and practice, . . . the structure of the Constitution, and . . . the jurisprudence of this Court" to evaluate a Tenth Amendment claim. *Printz,* 521 U.S. at 905. Citing a variety of laws dealing with citizenship and naturalization issues, lawsuits over seaworthiness, and proofs of claims emanating from the Revolutionary War and ordering deportation of alien enemies, the *Printz* Court noted that "[t]hese early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Id.* at 906-07. The language and contemporaneous legislative understanding of the Supremacy Clause, which served as the basis for the *Printz* Court's declaration, provides insurmountable support for § 1367(d)'s imposition of a *de minimis* tolling period for supplemental claims that fully met the limitations period in its original filing in federal court and must now be refiled in state court.

Another source of historic understanding that this Court has always found to be of "great authority" for those purposes is The Federalist. *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 418 (1821). There, Hamilton wrote that the federal government's constitutionally authorized power to protect the rights of individual citizens "will enable the government to employ the ordinary magistracy of each [State] in the execution of its laws." The Federalist No. 27, at 176 (Hamilton). James Madison similar recognized that state court judges would be "clothed with the correspondent authority of the Union" in a variety of matters, including "the organization of the judicial power." *Id.*, No. 45, at 282 (J. Madison).

Because of this necessary reliance on state courts, Hamilton wrote,

> the national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.

The Federalist, No. 82, at 494 (Hamilton).

Because the Constitution anticipates a unitary system of justice in the enforcement of federal interests and supplemental claims that are joined with federal ones comprise but a single "constitutional 'case,'" *Gibbs,* 383 U.S. at 725, then it logically follows that Congress may require state courts to hear those claims that have been divorced from the federal ones that impart original jurisdiction in the federal courts. After all, a single claim "arising under" federal law creates the federal nexus that fits within Article III power. *See Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381, 386 (1998). And such supplemental claims "are not 'separate and independent' for purposes of removal," *Cohill,* 484 U.S. at 354, and should not be viewed otherwise here. The only relevant inquiry as to whether Congress may impose these cases on the states is whether the state law claims "'are so related to [the federal] claims . . . that they form part of the same case or controversy.'" *City of Chicago v. International College of Surgeons,* 522 U.S. 156, 167 (1997)(quoting 28 U.S.C. § 1367(a)). Here, they indisputably are.

More support for the unitary nature of the state and federal court systems where concurrent jurisdiction is applicable can be found *Guaranty Trust Co. v. York,* 326 U.S. 99, 108 (1945)*,* where this Court observed that "a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect only another court of the State." *Guaranty Trust Co. v. York,* 326 U.S. 99, 108 (1945). The same should obviously be true when a federal court, exercising supplemental jurisdiction, considers a state law claim after the federal claim has fallen away. Filing in it, therefore, should satisfy the state limitations requirement.

The federal interest continues, even after dismissal, because the disposition is without prejudice. Dismissal without prejudice means that a plaintiff, once any other remedies have been exhausted, may return to court. *See Seniority Research Group v. Chrysler Motor Corp.,* 976 F.2d 1185 (8th Cir. 1992). Thus, the district court retains a residuary jurisdiction. If the federal court may retrieve the dismissed case and make a decision on the merits, it is hard to imagine how enabling a state court to do so through a tolling of the limitations period invades an aspect of the State's sovereignty.

In fact, the invasion asserted by the South Carolina Supreme Court seems entirely illusory. To file a supplemental claim in federal court, a plaintiff must meet the state statute of limitations. As this Court held in *Guaranty Trust*, where one is barred by the statute of limitations from recovery in state court, one should be likewise barred in federal court. Elaborating on this truism in *Ragan v. Merchants Transfer & Warehouse Co., Inc.,* 337 U.S. 530, 533-34 (1949), this Court found it could not "give [an action] longer life in the federal court than it would have had in the state court without adding something to the cause of action." Here, § 1367(d) gives no longer life to a cause of action but seeks to transfer a

live cause of action from federal court, where it can receive final disposition, to the constitutionally preferable provided in state court. The underlying action has already surmounted the hurdle of timeliness imposed by the limitations period and no prejudice is worked to any party. Because the plaintiff is properly in federal court under the state limitations rules, he or she should not be barred from state court because the plaintiff is not likewise barred from federal court.

For that reason, the State's interests – and the defendant's interests – are fully met. A "statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim." *Walker v. Armco Steel Corp.,* 446 U.S. 740, 751 (1980).

The law of South Carolina does not treat statutes of limitation differently. Its Supreme Court recently declared: "The limitations period is intended to run against those who are neglectful of their rights and who fail to exercise reasonable diligence in enforcing their rights. However, it is not the policy of the law to unjustly deprive an injured person of a remedy." *Moriarty v. Garden Sanctuary Church of God,* 534 S.E.2d 672, 679 (S.C. 2000). In South Carolina, the limitations period serves two fundamental purposes, consistent with the teachings of this Court: one purpose "is to relieve the courts 'of the burden of trying claims when a plaintiff has slept on his rights'" and another "is to protect potential defendants from protracted fear of litigation." *Moates v. Bobb,* 470 S.E.2d 402, 404 (S.C. Ct. App. 1996)(quoting *Burnett v. New York Cent. R.,* 380 U.S. 424, 428 (1965)(other citations omitted).

Because a conflict between a federal right and state law favors the right, this Court has found it useful to

examine the extent of that right in "relation to the operation of state laws." *Board of Comm'rs v. United States,* 308 U.S. 343, 350 (1939). That examination reveals that none of the underlying purposes of the limitation period are abridged when, as here, the claim was timely pursued in a federal court with full jurisdiction to decide the matter, but was determined better tried in state court. Neither Petitioner nor any § 1367 plaintiff will have slept on her rights or have proffered stale claims; each will have brought the lawsuit within the requisite state-imposed time period; and each will have been obliged to pursue the matter vigorously during its pendency in district court. Neither Respondent nor any § 1367 defendant can claim surprise and disadvantage; each will have been prepared to defend itself in district court and, because of the tolling provision, must instead mount that defense in state court. Finally, the tolling provision satisfies the South Carolina policy of not using a limitations period "to unjustly deprive an injured person of a remedy." *Moriarty,* 534 S.E.2d at 679. An examination of the federal right preserved by the tolling provision works no violence to South Carolina law.

In a strikingly similar fact pattern, this Court found the filing of a case in a federal administrative forum to satisfy the State's interest in its statute of limitations. It noted that such limitations periods

> are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 342, 348-49 (1944). In that decision, this Court rejected an argument that a state statute of limitations barred a collective bargaining enforcement action brought in federal court after an administrative board had adjudicated the issue. The employer had argued that the state statute of limitations had expired during the pendency of the administrative board hearing, rendering the enforcement action out of time. Writing for the Court, Justice Jackson rejected the argument, flatly stating that a "state statute of limitations can hardly destroy a claim because the period of actual contest over it in a federal tribunal extends beyond the limitation period." *Id*. at 348.

In reaching that conclusion, this Court noted that the legitimate purposes of notice and avoidance of stale claims undergirding the limitations period had been served by timely adjudication before a federal tribunal. Commencement of a federal administrative action had put the defendant on notice and the continuing nature of the dispute before adjudicatory bodies assured that the claim was not stale and that the evidence remained available. As a practical matter, this Court found "it cannot be said that the claims were not timely pursued. Regrettable as the long delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed." *Id*. at 349.

The logic of the decision has considerable force in Petitioner's case. The tolling provision of § 1367 operates on the same principle enunciated in *Railroad Telegraphers*. It provides a *de minimis* window in which a plaintiff may refile in state court if the limitations period expires during the pendency of the federal district court action. In the instant case, Petitioner's original federal court action, including the supplemental claim, were timely filed and fully pursued, evidencing no neglect and no prejudice to the defendant.

In 1965, this Court considered a case that constituted the mirror image of the current issue. Its resolution is instructive for today's issue. In *Burnett v. New York Central R. Co.,* 380 U.S. 424 (1965), an action was commenced under the Federal Employers' Liability Act in Ohio state court, but subsequently dismissed on venue grounds. Within eight days of dismissal, the plaintiff brought a new action in federal district court. That, too, was dismissed, this time, however, because it was barred by the statute of limitations, which expired while the matter was in state court. The issue went to this Court on plaintiff's claim that the limitation period was tolled during the pendency of his state court action.

This Court unanimously held that the "state action . . . was properly 'commenced within the meaning of the federal limitation statute," that the initial filing tolled the limitations period, and that plaintiff's federal action was timely. *Id*. at 426. To arrive at this conclusion, this Court examined the nature of statutes of limitation, finding that they "are primarily designed to assure fairness to defendants." *Id*. at 428. Limitations periods accomplish fairness by "'preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id*. (quoting *Railroad Telegraphers,* 321 U.S. at 348-49.

Still, however important those purposes are, they are "frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights." *Id*. Examples mustered by *Burnett* Court included instances where the defendant misled the plaintiff into believing there was more time to commence the action or where war prevented the plaintiff from bringing the action in time. *Id*. at 428-29.

In *Hanger v. Abbott,* 73 U.S. (6 Wall.) 532 (1867), this Court imposed a tolling period, without statutory

basis, on a lawsuit brought by a resident of New Hampshire against a resident of Arkansas shortly after the Civil War. Though the suit was untimely under the relevant state statute of limitations, this Court recognized that plaintiff's rights and remedies were suspended during the war because the courts had not then been open and available to the parties. The Court noted that the statute of limitations contained no express exception regarding war periods, but found that it was necessary to impose one. The tolling rule established in *Hanger* "has been consistently followed in the federal courts." *Osbourne v. United States*, 164 F.2d 767, 769 (2d Cir. 1947). Citing *Osbourne,* the *Burnett* Court noted that "[i]n such cases a plaintiff has not slept on his rights but, rather, has been prevented from asserting them." *Burnett,* 380 U.S. at 429.

The *Burnett* Court also found that tolling is appropriate where the plaintiff "did not sleep on his rights but brought an action within the statutory period in the state court of competent jurisdiction. . . . [The defendant] could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his" cause of action. *Id*. at 429-30. The Court went on to note that "[b]oth federal and state jurisdictions have recognized the unfairness of barring a plaintiff's action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run." *Id*. at 430.

These cases make apparent that the judicial power extends to tolling the limitations period where justice would otherwise be denied. Because Congress enacted § 1367 to extend to the full measure of Article III authority, the tolling provision is well within constitutional limits on federal judicial power and must be found constitutional.

The propriety of congressional enactment of a tolling provision becomes even more compelling when one

examines the precedents that permit a federal court to override a state limitations period. South Carolina, where this action arose, has previously recognized that those lawsuits "which the Constitution has placed under national power to control in 'its substantive *as well as its procedural* features,'" pose only the question of "whether Congress intended [the federal] statute to preclude the operation of different state limitations statutes in respect to [that action]." *Konrad v. South Carolina Electric and Gas Co.,* 308 S.C. 167, 170, 417 S.E.2d 557, 559 (S.C. 1992)(citations omitted). Where the answer is yes, the federal rule must be followed. *Id*.

The *Konrad* decision recites a truism, anchored in the decisions of this Court. State statutes of limitation are susceptible to being overridden when they "'frustrate or interfere with the implementation of national policies'" or are "at odds with the purpose or operation of federal substantive law." *North Star Steel Co. v. Thomas,* 515 U.S. 29, 34 (1995)(quoting *DelCostello v. Teamsters,* 462 U.S. 151, 161 (1983)). Such overrides often occur where the state limitations period fails "'to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights.'" *Id*. at 36 (quoting *DelCostello,* 462 U.S. at 166.

Even if the limitations period cannot be considered met by the timely filing in federal court, it is clear that South Carolina's limitations period frustrates clearly stated national polices and are at odds with the purpose and operation of federal law.

Perhaps the proper question to pose when deciding whether a federal tolling rule should be upheld against federalism concerns was framed in *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 428 (1996): "Would 'application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against

citizens of the forum state, or] be likely to cause a plaintiff to choose the federal court?"

Here, the answer to the *Gasperini* question is clear. Application of the tolling provision does not unfairly discriminate against citizens of the forum state nor does it make it more likely that the litigation would take place in federal court. In fact, in line with the comity concerns that animated Congress, application of the tolling rule accommodates state interests and increases the likelihood that state claims appended under supplemental jurisdiction will be heard in the forum state's courts.

Madison recognized that the "Gordian Knot of the Constitution seems to lie in the problem of collision between the federal & State powers, especially as eventually exercised by their respective Tribunals." *Quoted in* J. Rakove, *Judicial Power in the Constitutional Theory of James Madison,* 43 WM. & MARY L. REV. 1513, 1539 (2002)(quoting Letter from James Madison to Spencer Roane (Jun. 29, 1821), in James Madison, Writings 777 (J. Rakove ed., 1999)). Madison suggested two approaches to cut that knot: avoidance or a "sounder policy" that would allow federal judicial needs "to prevail." *Quoted in id.* at 1539-40 (quoting Letter, at 778).

Tolling works no prejudice to State interests, but instead accommodates those interests. Federal judicial needs and litigants' rights, both of which are served by tolling, ought to prevail here.

III. The Tolling Provision Prevents Discrimination against a Federal Right

Tenth Amendment concerns surely evaporate when state law discriminates against litigants asserting federal constitutional rights. In *James v. Kentucky,* 466 U.S. 341 (1984), this Court held that a litigant cannot be compelled to comply with state procedural rules so onerous that they

unreasonably burden the exercise of those rights. In *Nash v. Florida Industrial Comm'n,* 389 U.S. 235 (1967), a state law that penalized an individual for seeking federal judicial redress, with one penalty being forfeiture of any related state law claim against the same defendant, was found unconstitutional.

Enforcement of the limitations period operates to cause the same result that the *Nash* Court condemned. Petitioner could have filed her federal and state claims in state court. If she had, she could have expected a decision on the merits on all causes of action. Instead, she filed in federal court, not mistakenly but as a matter of right. There, too, she might have received a decision on the merits on all her causes of action. Instead, in the interests of comity, the district court dismissed her state claims so that they could be adjudicated in state court. Now, however, like the law reviewed in *Nash*, state law in the form of the limitations period, penalizes her with forfeiture of her state law claims for having pursued them in federal court. This is not a result the Constitution tolerates.

South Carolina's insistence on strictly enforcing its statutory limitations period, already met by the original filing in federal court, impermissibly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Here, as with § 1983, "Congress chose to provide injured persons with immediate access to *federal* courts, [although] it did not leave the protection of such rights exclusively in the hands of the federal judiciary." *Felder,* 487 U.S. at, 147 (1988)(citing *Patsy v. Board of Regents of Florida,* 457 U.S. 496, 503-04, 506-07 (1982)).

The access to justice purpose behind § 1367 and its tolling of the state limitations period, *see* S. REPT. NO. 101-416, at 1, *reprinted in* 1990 U.S.C.C.A.N. 6803, 6804,

occupy a high place in the constitutional order. "Justice is the end of government," wrote Madison. "It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." The Federalist No. 51, at 324 (Madison). He added, that to the end of achieving justice, "the practicable sphere may be carried to a very great extent by a judicious modification and mixture of the *federal principle." Id.* at 325 (emphasis in original). Tolling of supplemental claims constitutes such a judicious modification and mixture.

Echoing Madison's sentiments about the place of access to justice in the pantheon of constitutional principles, this Court long ago held that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803). To that end, "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison,* 349 U.S. 133, 136 (1955). That means that due process assures that a litigant can make his case "'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976)(quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)). Removing the tolling provision from the statute results in a denial of due process by preventing the plaintiff from ever making her case before a court.

Earlier this year, this Court recognized that a constitutionally based access to court claim exists "to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury,* 122 S. Ct. 2179, 2186 (2002). Read together with the earlier cases, this Court had established that a timely lawsuit, properly invoking the jurisdiction of the federal courts, cannot lose its

legitimacy and constitutional protection when it is subsequently determined that the case might be better heard in state court. Refiling in state court in order to respect state authority cannot abridge that authority and should not deprive that plaintiff of any ability to seek judicial vindication. Yet, that, unfortunately, is what the South Carolina Supreme Court's decision would do.

It matters little that South Carolina has a legitimate interest in its limitations period. Most state laws are supported by various legitimate interests. Even so, those laws must be set aside when they discriminate against federal rights, or, as one treatise puts it, *do not afford* a litigant "*a reasonable opportunity to assert federal rights.*" 16B Wright, at § 4027, at 392. *See also Lee v. Kemna,* 534 U.S. 362, 391-92 (2002)(Kennedy, J., dissenting); *Dice v. Akron, Canton & Youngstown R. Co.,* 342 U.S. 359, 361 (1952)("State laws are not controlling in determining what the incidents of this federal right shall be."); *Davis v. Wechsler,* 263 U.S. 22, 24-25 (1923) (Holmes, J.)("the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . local practice shall not be allowed to put unreasonable obstacles in the way.").

State courts must enforce laws within a federal overlay. Since the First Congress, state courts have had to enforce federal policies and laws. *Testa v. Katt,* 330 U.S. 386, 389-91 (1947). The "policy of the federal Act is the prevailing policy in every state." *Id.* at 393. Relying on this precedent, this Court recently declared, "state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause." *Printz,* 521 U.S. at 928 (parenthetical omitted).

The decision of the South Carolina Supreme Court rests heavily on its determination that statutes of limitation are an attribute of state sovereignty that brook no federal interference, regardless of the purpose or

constitutional basis of the authority. *Jinks,* 563 S.E.2d at 108. This Court has repeatedly refuted that position in the past. Though great deference is shown state limitations choices, this Court has noted that

> State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. "Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide."

DelCostello v. International Broth. of Teamsters, 462 U.S. 151, 161 (1983)(citations omitted).

For that reason, "when the operation of a state limitations period would frustrate the policies embraced by the federal enactment, this Court has looked to federal law for a suitable period." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 355-56 (1991). Circumstances that admit of that action include state limitations periods that provide only a truncated period of time within which to file suit because such statutes inadequately accommodate the federal scheme and are inconsistent with Congress's compensatory aims. *See Burnett v. Grattan,* 468 U.S. 42, 50-55 (1984).

Similarly, the discrimination against federal rights affected by the limitations period cannot stand. Renewed application of the limitations period by South Carolina discriminates against litigants choosing to pursue federal rights. It discriminates between a claimant who goes directly to state court and is regarded as timely for all claims and one who chooses to pursue the federal and state claims in federal court, where he or she may lose the chance to pursue state claims. As a result, application of

the statute of limitations impermissibly produces different outcomes based on whether the action began in state or federal court.

Thus, without the tolling provision, there is a substantial possibility – significant enough to constitute a limitation on access to justice – that the state claims presented to the courts for redress by the plaintiff would receive no judicial audience. That result would work a serious injustice, leaving valid claims unheard and causing a significant waste of judicial resources, the same concerns that "motivated the creation of pendent jurisdiction in the first place." *Shanaghan,* 58 F.3d at 111-12.

It is safe to conclude with respect to the supplemental jurisdiction statute, as this Court did in *Wilson v. Garcia,* 471 U.S. 261, 269 (1985) with respect to Civil Rights Act of 1871, 28 U.S.C. § 1983, which is the underlying cause of action in this case, that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." But that is the consequence of what South Carolina has ruled here.

Here, Congress established a right to take a federal cause of action and a state claim ancillary to it to federal court. It created as well a means by which the federal court could cede responsibility to hear the state matter to state court by tolling the applicable statute of limitations. Congress had such authority and exercised it prudently to recognize both plaintiffs' fundamental due process rights and the rights of the State. Application of a rule that allows defendants to reassert the statute of limitations after the legal contest was timely begun is a "harsh . . . rule" that "is wholly incongruous with the general policy of the Act." *Dice,* 342 U.S. at 362.

The tolling provision prevents that discrimination and must be respected. It constitutes an elegant and narrowly tailored solution to the problem of concurrent jurisdiction that respects, rather than transgresses, federalism principles and values. Without it, the prudent plaintiff would be well advised to choose state court, obviating the federal scheme and the intention of Congress to provide a federal forum in § 1367. The tolling provision is constitutional.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

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