No. S210150
(Court of Appeal No. F063381)
(Tulare County Super. Ct. No. VCU242057)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES, *ET AL.*,
Plaintiffs and Respondents,

v.

COUNTY OF KERN and KERN COUNTY BOARD OF SUPERVISORS,
Defendants and Appellants.

APPELLANTS' OPENING BRIEF ON THE MERITS

ARNOLD & PORTER LLP
STEVEN L. MAYER (No. 62030)
steve.mayer@aporter.com
3 Embarcadero Center, 10th Floor
San Francisco, California 94111
Telephone: 415.471.3100
Facsimile: 415.471.3400

HOGAN LAW APC
MICHAEL M. HOGAN (No. 95051)
mhogan@hoganlawapc.com
225 Broadway, Suite 1900
San Diego, California 92101
Telephone: 619.687.0282
Facsimile: 619.234.6466

COUNTY OF KERN
THERESA A. GOLDNER (No. 107344)
COUNTY COUNSEL
tgoldner@co.kern.ca.us
MARK L. NATIONS (No. 101838)
DEPUTY COUNTY COUNSEL
mnations@co.kern.ca.us
1115 Truxtun Avenue, 4th Floor
Bakersfield, California 93301
Telephone: 661.868.3800
Facsimile: 661.868.3805

Attorneys for Defendants and Appellants
County of Kern and Kern County Board of Supervisors

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Statutes

TABLE OF AUTHORITIES

Other Authorities

Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849 (1992) 5

16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE §106.66[3][c] (3d ed. 2011) 13

S. REP. NO. 101-416 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802 2, 13, 15

ISSUE PRESENTED

The Court granted review limited to the following issue: Does 28 U.S.C. §1367(d) require a party to refile its state law claims within thirty days of their dismissal from a federal action in which they had been presented, or does it instead suspend the running of the limitations period during the pendency of the claims in federal court and for thirty days after their dismissal?

INTRODUCTION

Federal district courts have supplemental jurisdiction over state law claims "that are so related to claims in the action within [the federal district court's] 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). Accordingly, where a plaintiff has a federal claim within the jurisdiction of a federal court, he can join a state law claim if the "state and federal claims . . . derive from a common nucleus of operative fact." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). However, if the federal claim is resolved in the defendant's favor, the federal court can—and frequently does—dismiss the state claims without prejudice, as the District Court did here. 1 AA 274-79.

How much time the plaintiff has to refile his state law claims in state court is governed by 28 U.S.C. §1367(d). That statute provides that "[t]he period of limitations'" for any supplemental claim "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. §1367(d)). The statute therefore "prevent[s] the limitations on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks v. Rockland Cnty.*, 538 U.S. 456, 459 (2003).

In the twenty-three years since its adoption, both the California courts and courts across the country have adopted two conflicting views of how Section 1367(d) operates when, as in this

case, a state statute of limitations expires while a supplemental claim is pending in federal court. Four courts have adopted the "Extension Approach," and held that in such cases the plaintiff must file a state court complaint within thirty days of the date its federal claim is dismissed. Five other courts have held that a plaintiff can "tack on" to the thirty-day period provided by Section 1367(d) any portion of the state-law limitations period that had not expired when the plaintiff filed in federal court. Under this approach (the "Suspension Approach"), Section 1367(d) suspends the operation of a state statute of limitation while the case is pending in federal court, and the statute begins to run again thirty days after the case is dismissed. The Court has granted review to resolve this conflict, at least for the California courts.

The Court should hold that a plaintiff has only thirty days to refile its state law claims. As numerous courts have recognized, Section 1367(d) is ambiguous because "tolled" can mean different things, and have different effects, in different contexts. *See* Part I(A), *infra*. Consequently, the Court is free to adopt the statutory interpretation that best promotes the legislative intent. That is the Extension Approach, which best resolves the conflicting interests at stake in favor of the goals that Congress sought to achieve when it passed the bill containing Section 1367(d)—"the just, speedy, and inexpensive resolution of civil disputes." S. REP. 101-416, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804.

In contrast, the Suspension Approach permits litigants to keep their cases dormant for years, for no good reason. Indeed, if the Suspension Approach were the law, Respondents would not have needed to refile this case in state court until mid-October 2013—*more than seven years* after passage of the ordinance they challenge and two months after this brief is being filed with the Court. Absent a more express command than appears in Section 1367(d), there is no reason to countenance such delay, particularly when construing a statute enacted to achieve precisely the opposite result. *See* Part I(B), *infra*.

STATEMENT OF FACTS

Because the Court has granted review on only a single, procedural issue, the relevant facts are simple and undisputed. In August 2006, Respondents filed a federal lawsuit challenging the validity of Measure E, a Kern County ordinance prohibiting the land application of biosolids, on federal and state law grounds (the "Federal Case"). Respondents' federal complaint asserted, *inter alia*, that Measure E (1) violates the dormant Commerce Clause, (2) is preempted by the Act, and (3) constitutes an invalid exercise of the County's police power. 1 AA 139-77. The District Court granted summary judgment to Respondents on their Commerce Clause and state-law preemption claims, but found that disputed facts precluded summary judgment on their police power claim. *City of Los Angeles v. Cnty. of Kern*, 509 F. Supp. 2d 865, 869-70 (C.D. Cal. 2007).

On appeal, the Ninth Circuit reversed and vacated the trial court's decision, holding that Respondents lacked prudential standing to assert their Commerce Clause claim. *City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841 (9th Cir. 2009). Accordingly, the Court of Appeals dismissed Respondents' federal claim and remanded the case to the District Court to determine whether to exercise supplemental jurisdiction over Respondents' preemption and police powers claims. *Id.* at 849. The District Court then declined to exercise supplemental jurisdiction and, on November 9, 2010, dismissed the Federal Case. 1 AA 274-79.

More than two-and-a-half months later, on January 26, 2011, Respondents filed the present case, reasserting their claims that Measure E is preempted by the Act (1 AA 17-18 (¶¶63-72)); is an improper exercise of Kern County's police powers (1 AA 18 (¶¶73-78)); and violates the federal Commerce Clause (1 AA 19-20 (¶¶79-90)).[1] Respondents then filed several motions for preliminary

---

[1]Respondents also added two new state-law claims that were never made in the Federal Case. *See* 1 AA 20-21 (¶¶91-98), 21

(continued . . .)

injunction. 1 AA 40, 280; 2 AA 296, 375. The trial court granted the motions, finding that Respondents were likely to prevail on their preemption and police powers claims and that the balance of hardships tipped in their favor. 3 AA 668-72.

On appeal, Appellants contended that reversal was required because the court had erroneously concluded that Respondents were likely to succeed on their preemption and police power claims. Among other things, Appellants contended that Respondents' preemption and police power claims were time-barred by 28 U.S.C. §1367(d). After the Court of Appeal disagreed, this Court granted review to resolve the conflict in the California decisions concerning the proper interpretation of this federal statute.

ARGUMENT

I.

RESPONDENTS' PREEMPTION AND POLICE POWERS CAUSES OF ACTION ARE BARRED BY 28 U.S.C. §1367(d).

Respondents' preemption and police powers causes of action were both asserted in the Federal Case. That case was dismissed on November 9, 2010. *See* p.3, *supra.* 28 U.S.C. §1367(d) required Respondents to refile those claims in state court within thirty days of their dismissal—*i.e.*, by December 9, 2010. They did not do so. Instead, Respondents waited until January 26, 2011—seventy-eight days after the Federal Case was dismissed—to file this action. Accordingly, Respondents' first and second causes of action are time-barred, and the trial court should have held that Respondents had no probability of prevailing on either claim.

(. . . continued)

(¶¶99-105). Like Respondents' federal Commerce Clause claim, these claims are not at issue in the present appeal because the trial court did not rely on them in granting a preliminary injunction. *See* 3 AA 665-66.

Prior to 1990, no federal statute governed how state statutes of limitations would apply when a federal court declined to exercise jurisdiction over a state-law claim. As a result, federal District Courts faced with remanding a state law claim that might be time-barred had "three basic choices." *Jinks v. Richland County*, 538 U.S. 456, 462 (2003). "First, they could condition dismissal of the state-law claim on the defendant's waiver of any statute-of-limitations defense in state court." *Id.* at 463; *see, e.g.*, *Duckworth v. Franzen*, 780 F.2d 645, 657 (7th Cir. 1985); *Fin. Gen. Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982). Second, if the defendant refused to waive the defense, federal courts "could retain jurisdiction over the state-law claim even though it would more appropriately be heard in state court." *Jinks*, 538 U.S. at 463; *see Newman v. Burgin*, 930 F.2d 955, 963-64 (1st Cir. 1991) (collecting cases). Third, federal courts "could dismiss the state-law claim but allow the plaintiff to reopen the federal case if the state court later held the claim to be time barred." *Jinks*, 538 U.S. at 463; *see, e.g.*, *Rheaume v. Texas Dep't of Pub. Safety*, 666 F.2d 925, 932 (5th Cir. 1982).

None of these alternatives was satisfactory. The first depended on the defendant's willingness to waive the statute of limitations. The second frustrated the statutory policies limiting federal jurisdiction. The third was inefficient. *See Jinks*, 538 at 463.

28 U.S.C. §1367(d) was enacted to provide "a straightforward tolling rule in place of this regime." *Jinks*, 538 U.S. at 463. It therefore "prevent[s] the limitations on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks*, 538 U.S. at 459. This provision "is significant, because without it, federal litigants would be left to the vagaries of state tolling laws." Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 982 (1992).

In the twenty years since its adoption, both the California courts and courts across the country have adopted two conflicting views of how Section 1367(d) operates when, as in this case, a state statute of limitations expires while a supplemental claim is pending in federal court.[2] Four courts, including the Second District, have held that in such cases the plaintiff must file a state court complaint within thirty days of the date its federal claim is dismissed. *See Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998); *accord, Berke v. Buckley Broad. Corp.*, 821 A.2d 118 (N.J. Super. Ct. App. Div. 2003); *Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. 2001); *Huang v. Ziko,* 511 S.E.2d 305 (N.C. Ct. App. 1999). Under this interpretation, Section 1367(d) extends the time to file a state court complaint to thirty days after dismissal. Accordingly, we shall refer to this interpretation as the "Extension Approach." *See In re Vertrue Mktg. & Sales Practices Litig.*, 712 F. Supp. 2d 703, 723 (N.D. Ohio 2010), ("*Vertrue*") (adopting same terminology), *aff'd*, 719 F.3d 474 (6th Cir. 2013).

Five other courts, including the Third District and the Fifth District in this case, have held that a plaintiff can "tack on" to the

---

[2]"The statute of limitations for asserting an infringement of constitutional rights is one year." *Coral Constr., Inc. v. City & Cnty. of San Francisco*, 116 Cal. App. 4th 6, 27 (2004). Respondents' claim that Measure E is an unconstitutional exercise of the County's police power is therefore subject to a one-year statute of limitations. Their claim that Measure E is preempted by state law is subject to the three-year statute of limitations contained in Code of Civil Procedure Section 338(a). *See Travis v. Cnty. of Santa Cruz*, 33 Cal. 4th 757, 772 (2004) (preemption claim governed by three-year statute unless specific, shorter statute applies).

Although Respondents contended in the Court of Appeal that the three-year statute applied to all of their claims (*see* RB 13 n.1), it is unnecessary to resolve that dispute. Measure E was enacted in 2006, and Respondents' causes of action accrued at that time. *See Coral Constr., Inc.*, 116 Cal. App. 4th at 27. Accordingly, both the one-year and the three-year statutes expired while the Federal Case was pending.

thirty-days provided by Section 1367(d) any portion of the state-law limitations period that had not expired when the plaintiff filed in federal court. *See Bonifield v. Cnty. of Nevada*, 94 Cal. App. 4th 298 (2001); *accord, Vertrue*, 712 F. Supp. 2d 703 (N.D. Ohio 2010); *Goodman v. Best Buy, Inc.*, 777 N.W.2d 755 (Minn. Ct. App. 2010); *Turner v. Kight*, 957 A.2d 984 (Md. Ct. App. 2008). Under this approach, Section 1367(d) suspends the operation of a state statute of limitation while the case is pending in federal court, and the statute begins to run again thirty days after the case is dismissed. Accordingly, we shall refer to this approach as the "Suspension Approach." *See Vertrue*, 712 F. Supp. 2d at 723.

As we discuss below, most of the courts that have addressed the issue have held that the Extension Approach best accommodates the competing interests at stake: it allows ample time for plaintiffs to refile their dismissed claims in state court while ensuring that they will do so promptly. Nevertheless, the courts adopting the Suspension Approach have held that these policy considerations are trumped by the statutory language:

> "The point . . . that an extension approach is entirely satisfactory to avoid forfeitures and that a suspension approach is not necessary to achieve that objective, is undoubtedly true. The fact that a better mechanism—one less intrusive on State sovereignty and interests—could, or perhaps *should*, have been chosen does not require a conclusion that Congress intended that mechanism if the language it used indicates otherwise.' (*Vertrue*, 712 F. Supp. 2d at 724 (quoting *Turner*, 957 A. 2d at 992) (emphasis in original))

This predicate is wrong. The ambiguous language of 28 U.S.C. §1367(d) is susceptible to both the Extension Approach and the Suspension Approach. *See* Part I(A), *infra*. Consequently, the Court should adopt the former approach, which is both faithful to the statutory language and represents the resolution of the competing interests at stake that best promotes Congressional intent. *See* Part I(B), *infra*.

A. The Language Of 28 U.S.C. §1367(d) Is Consistent With Both The Extension Approach And The Suspension Approach.

28 U.S.C. §1367(d) provides that "[t]he period of limitations for any claim asserted under [28 U.S.C. §1367(a)] . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." This statute is susceptible to multiple interpretations. Indeed, "[m]ost of the courts that have been called upon to construe the meaning of 'tolled' as used in the context of statutes of limitations, including under §1367(d), have recognized that the term can have more than one meaning." *Turner*, 957 A.2d at 989. As a result, most courts have recognized that 28 U.S.C. §1367(d) is ambiguous. *See id.* ("Several of the cases dealing with the application of §1367(d) acknowledge, tacitly or directly, that the phrase in question could be construed in different manners, and, indeed, the courts have split on what the proper interpretation should be. If the learned appellate judges around the country cannot agree on the meaning and application of the phrase, it cannot be said to have only one reasonable interpretation"); *Berke*, 821 A.2d at 123.

Moreover, the United States Supreme Court has expressly distinguished between the "tolling" of a statute of limitations and the "tolling effect" that governs once the tolling period comes to an end. In *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), the Supreme Court considered the "tolling effect" that the filing of a class action would have on plaintiffs who were unnamed class members of a class the district court eventually declined to certify. "The parties agree[d] that the statute of limitations was tolled during the pendency of the . . . class action, but they disagree[d] as to the effect of the tolling." *Id.* at 652. Consequently, the Court explained that the tolling of a statute of limitations can have several different tolling effects, including the operation of a fixed limitations period for the filing of a new action:

> This opinion uses the word "tolling" to mean that,

> during the relevant period, the statute of limitations ceases to run. "Tolling effect" refers to the method of calculating the amount of time available to file suit *after tolling has ended.* The statute of limitations might merely be suspended; if so, the plaintiff must file within the amount of time left in the limitations period. If the limitations period is renewed, then the plaintiff has the benefit of a new period as long as the original. *It is also possible to establish a fixed period such as six months or one year during which the plaintiff may file suit, without regard to the length of the original limitations period or the amount of time left when tolling began.* (*Id.* at 652 n.1 (emphases added))

As *Fumero Soto* expressly recognizes, the fact that a statute of limitations is "tolled," and therefore "ceases to run," does not require that the unexpired statutory period be available for filing once the tolling period ends. Instead, "when a statute of limitations is tolled, the 'tolling effect' may suspend the statute of limitations during the relevant time period, renew the statute when tolling ceases, or trigger a savings statute without regard to the original limitations period." *Great Plains Trust Co. v. Union Pac. R.R.*, 492 F.3d 986, 998 (8th Cir. 2007). Accordingly, Section 1367(d)'s use of the phrase "shall be tolled" does not necessarily mean that that plaintiff can use the unexpired portion of the statute once tolling ends.

Despite *Fumero Soto*, the courts adopting the Suspension Approach have advanced two reasons why the statutory language compels adoption of that interpretation. *See Vertrue*, 712 F. Supp. 2d at 724; *Goodman*, 777 N.W.2d at 758-61; *Turner*, 957 A.2d at 987-93; *Bonifield*, 94 Cal. App. 4th at 303. *First*, these courts have held that the Suspension Approach is correct because "tolled" means "suspended." For example, the court in *Bonifield v. County of Nevada* stated that "[t]o toll the statute of limitations period means to suspend the period, such that the days remaining begin to be counted after the tolling ceases." *Bonifield*, 94 Cal App. 4th at 303 (quoting *Woods v. Young*, 53 Cal. 3d 315, 326 n.3 (1991)). Accordingly, *Bonifield* held that "section 1367(d) operates at a minimum as follows: The days left in the statute of

limitations period at the time the federal claim was filed begin to run after the tolling ceases, i.e., on the 31st day after the federal claim is dismissed." *Id.*

As we have seen, however, the courts interpreting Section 1367(d) have recognized that the statute is ambiguous, and the Supreme Court in *Fumero Soto* recognized that a "tolling statute" can have one of several different "tolling effects." The central premise supporting *Bonifield*'s interpretation of Section 1367(d) is therefore erroneous.[3]

Second, courts adopting the Suspension Approach have also relied on the fact that, under the Extension Approach, Section 1367(a) has no effect unless the statute of limitation expires while a state law claim is pending in federal court. The *Vertrue* court thought that result was incompatible with the statutory language:

> [T]he statutory language is written such that *any* claim filed "*shall be*" tolled. In order to give effect to the plain meaning and mandatory nature of the language, this Court finds that extension approach must be rejected. On its face, Section 1367(d) must have a tolling effect on all supplemental state law claims. (*Vertrue*, 712 F. Supp. 2d at 724 (emphases in original))

Accordingly, *Vertrue* held that "[t]he suspension approach is the only approach that comports with the plain meaning of the statute. By essentially 'stopping the clock' during the pendency of the federal lawsuit, all claims receive a tolling benefit and the statute can be uniformly applied." *Id.*[4]

---

[3] *Bonifield* also erred in relying on the definition of "tolling" contained in a California case to interpret a federal statute. *See* 94 Cal. App. 4th at 303 (quoting *Woods*, 53 Cal. 3d at 326 n.3). In that context, *Bonifield* should have looked to the Supreme Court's holding in *Fumero Soto* that the "tolling" of a statute can have several different "tolling effects" rather than the definition of "tolling" used by a California court.

[4] *Accord, Goodman*, 777 N.W.2d at 760.

This is a classic "bootstrap" argument, because it assumes the premise that it seeks to prove. It starts by assuming that "shall be tolled" means "shall be suspended" and then "proves" that the "Suspension Approach" is the correct interpretation of Section 1367(d) because it suspends the running of the limitations period in all cases in which a state law claim is brought in federal court and then dismissed. However, "shall be tolled" can also mean "shall not expire." *See Berke*, 821 A.2d at 123 ("we are satisfied that the 'tolling' provision of the statute refers to the period between the running of the statute while the action is pending in the federal court and thirty days following the final judgment of the federal court declining to exercise supplemental jurisdiction"). In that event, the statute applies in all cases where the limitations period ends when a state law claim is pending in federal court. Under this interpretation, the statute is tolled in all cases where it needs to be tolled—no more and no less. *Vertrue* thus erred in holding that "the only reading of Section 1367(a) that gives meaning to all of the words chosen by Congress is the suspension approach." 712 F. Supp. 2d at 724.

Finally, the language of Section 1367(d) is compatible with the Extension Approach for one additional reason that neither *Bonifield* nor *Vertrue* address. Courts "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Accordingly, when Congress enacted Section 1367(d), it is presumed to have known that the Supreme Court in *Fumero Soto* had expressly recognized only eight years earlier that a "tolling" statute can have one of several different "tolling effects." Yet Congress did not specify what the "tolling effect" of the statute would be. That leaves the Court free to adopt the interpretation of the statute that is most faithful to both the language used by Congress *and* the goals that Congress wanted to further in enacting the statute.[5]

---

[5]In contrast, when Congress wants to adopt a statute imposing

(continued . . .)

B. The Extension Approach Best Accommodates The Competing Interests At Stake By Avoiding The Forfeiture Of State Law Claims Pending In Federal Court While Giving Plaintiffs Ample Opportunity To Refile Such Claims Once Dismissed.

Section 1367(d) was enacted "[t]o prevent the limitations on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks*, 538 U.S. at 459. Both the Extension Approach and the Suspension Approach accomplish this goal, because both prevent state statutes of limitations from expiring while a federal court is considering a supplemental claim. However, the Suspension Approach frustrates both the broader objectives Congress sought to achieve in passing the statute that contains Section 1367(d) and the goals furthered by state statutes of limitations. The Extension Approach suffers from neither of these defects.

"Congress enacted the supplemental jurisdiction statute, 28 U.S.C. §1367, as part of the Judicial Improvements Act of 1990." *Raygor v. Regents of the Univ. of Minnesota*, 534 U.S. 533, 540

(. . . continued)

the Suspension Approach, it knows how to do so. *See, e.g.*, 15 U.S.C. §16(i) (providing that "the running of the statute of limitations" for private antitrust actions "shall be suspended" when an antitrust action is filed by the federal government); 19 U.S.C. §1621(2) ("the time of the absence from the United States of the person subject to the penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within the 5-year period of limitation"); 28 U.S.C. §2244 (d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending *shall not be counted toward any period of limitation under this subsection*") (emphasis added); 50 U.S.C. app. §526(a) ("The period of a service member's military service *may not be included* in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns") (emphasis added). Congress used no similar language when it adopted Section 1367(d).

(2002). Congress enacted the Act, in turn, "to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes." S. REP. 101-416, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804.

The Extension Approach furthers this goal because it accommodates and balances the interests of both plaintiffs and defendants. It protects plaintiffs in two different ways. It assures plaintiffs "that state-law claims asserted under §1367(a) will not become time barred while pending in federal court." *Jinks*, 538 U.S. at 464. Moreover, it provides "a brief window of protection that allows the plaintiff to file in state court without having to face a limitations defense." 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE §106.66[3][c], at 106-101 (3d ed. 2011).

Thirty days to refile a dismissed claim is long enough to accomplish Section 1367(d)'s purpose. By definition, all claims subject to the statute will already have been included in a complaint filed in federal court, so that the plaintiff will already have completed its pre-complaint investigation and drafted its initial pleading. Accordingly, all the plaintiff has to do to comply with Section 1367(d) is amend the caption on its complaint, copy the state law claims previously alleged in the federal complaint and file the new complaint in state court. These ministerial tasks can be readily accomplished within thirty days. Accordingly, the Extension Approach "affords plaintiff[s] a reasonable time within which to get the case refiled" because "30 days is ample time for a diligent plaintiff to refile his claims and keep them alive." *Kolani v. Gluska*, 64 Cal. App. 4th at 402, 409 (1998).

For that reason, the Extension Approach furthers the goals that Congress sought to achieve in enacting Section 1367(d). *See Berke*, 821 A.2d at 123 ("The evident purpose of the statute is only to preserve a plaintiff's right of access to the state court for a minimum thirty-day period in order for it to assert those state causes over which the federal court has declined to exercise

jurisdiction and as to which the statute of limitations has run before that declination"). "At the same time, [the Extension Approach] upholds the policy of the statute of limitations, by *limiting* the time to refile, and thus assuring that claims will be *promptly* pursued in any subsequent action." *Kolani*, 64 Cal. App. 4th at 409 (emphasis in original). It therefore is fair to both plaintiffs and defendants, as Congress intended. *See* p.13, *supra*.

In contrast, the Suspension Approach gives plaintiffs an unnecessary benefit while frustrating both of the goals Congress sought to further in passing the Judicial Improvements Act and the similar purposes served by state statutes of limitation. Because plaintiffs need no more than thirty days to refile their supplemental claims (*see* p.13, *supra*), the courts adopting the Extension Approach have correctly recognized that "a 30-day grace period sufficiently prevents the harm envisioned by Congress." *Vertrue*, 712 F. Supp. 2d at 724. Accordingly, giving plaintiffs the benefit of whatever limitations period was unexpired when its case was filed in federal court "is not needed to avoid forfeitures" caused by the dismissal of state law claims by a federal court. *Kolani*, 64 Cal. App. 4th at 409.[6]

---

[6] *Accord*, *Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. Nov. 19, 2001):

> Subdivision (d) of §1367 recognizes the serious statute of limitations problem a claimant may have after supplemental jurisdiction has been declined in a federal action. It may now be too late under the state statute of limitations to bring a state action on the claim. Subdivision (d) answers this dilemma by assuring that the claim shall have at least a 30-day period for the state action after the claim is dismissed by the federal court. Clearly, Congress's main concern centered on the specific problem arising from the dismissal of state claims by a federal court where the limitations period expired during the pendency of the claims in federal court. Because of inconsistencies in how state law addressed these situations, Congress responded with the 30-day grace period, so that a complainant would be guaranteed at least that amount of time to renew the claims in state court. (*Id.* at *4 (citation and footnote omitted))

Moreover, giving plaintiffs whatever remaining state-law limitations period exists when their federal claims are dismissed will often result in excessive delays. As even the courts adopting the Suspension Approach have conceded, that interpretation of Section 1367(d) "may serve to drastically extend the statute of limitations." *Vertrue*, 712 F. Supp. 2d at 724. As the *Vertrue* court explained, even when "a case is pending in federal court for a significant time, none of that time is counted against the running of the statute of limitations." *Id.* Accordingly, under the Suspension Approach, "a plaintiff could sit idly by and let years pass before pursuing the claim in state court." *Id.*

When Congress passed the Judicial Improvements Act, it recognized that the federal courts "are suffering today under the scourge of two related and worsening plagues," the first of which was the fact that "the costs of civil litigation, and delays that contribute to those costs, are high and are increasing." S. REP. 101-416, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804. These costs and delays would be exacerbated by an interpretation of Section 1367(a) that gave plaintiffs lengthy and unnecessary periods of time to refile dismissed claims in state court. It is therefore not surprising that the Act's legislative history gives no indication that Congress meant to significantly expand the time within which state law claims dismissed by a federal court may be refilled in state court. *See Zhang Gui Juan*, 2001 WL 34883536, at *3 ("the secondary materials give no hint of any 'built-in' tacking provision as being a part of subdivision (d)").

In addition, the Suspension Approach "is contrary to the policy in favor of prompt prosecution of legal claims" embodied in state statutes of limitation. *Huang v. Ziko*, 511 S.E.2d 305, 308 (N.C. Ct. App. 1999).[7] Statutes of limitation "protect defendants from

---

[7] *Accord*, *Kolani*, 64 Cal. App. 4th at 409 (Suspension Approach is "unreasonable" and "does significant harm to the statute of limitations policy"); *Berke*, 821 A.2d at 123 ("Despite its ambiguous use of the word 'tolling,' we do not believe that the federal

(continued . . .)

the stale claims of dilatory plaintiffs" and "stimulate plaintiffs to assert fresh claims against defendants in a diligent fashion." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 395 (1999). They "enable defendants to marshal evidence while memories and facts are fresh and . . . provide defendants with repose for past acts." *Jordache Enters., Inc. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 755 (1998). They "are not mere technical defenses, allowing wrongdoers to avoid accountability. Rather, they mark the point where, in the judgment of the legislature, the equities tip in favor of the defendant (who may be innocent of wrongdoing) and against the plaintiff (who failed to take prompt action)." *Pooshs v. Philip Morris USA, Inc.*, 51 Cal. 4th 788, 797 (2011) (citation omitted).

The Suspension Approach frustrates these policies because it enables plaintiffs to sit on their claims—often for long periods of time—following their dismissal by a federal court. This case proves the point. Measure E was adopted in June 2006, and became effective on July 22, 2006. 1 AA 13. Respondents filed their federal case on August 15, 2006 (1 AA 140) and it was dismissed on November 9, 2010. 1 AA 272-79. Assuming *arguendo* that the three-year statute applies, as Respondents contend (*see* note 2, *supra*), and that it began to run when Measure E became effective, under the Suspension Approach Respondents would have had more than two years and eleven months from November 9, 2010, to refile their federal complaint in state court. In other words, under Respondents' approach, they could have sat idly by until mid-October 2013—seven years after the ordinance they challenge was adopted and four months after this case had made it all the way through the California judicial system to

---

(. . . continued)

statute intends a result that would permit a gross protraction of the limitations period in clear contravention of the underlying policy of statutory limitations on the time for bringing suit").

this Court—before refiling a complaint that had already been the subject of federal litigation for over four years.

Moreover, as the *Kolani* court recognized, the Suspension Approach contradicts the established rule, followed in both California and "the majority of jurisdictions," that "'[i]n the absence of a statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice to him.'" *Kolani*, 64 Cal. App. 4th at 409 (quoting *Wood v. Elling Corp.*, 20 Cal. 3d 353, 359 (1977)); *accord, Huang*, 511 S.E.2d at 308. Frustrating these state policies might be warranted if the Suspension Approach served some overriding federal purpose. As discussed above, however, it does not.

Finally, Congress intended Section 1367(d) to provide "a straightforward tolling rule" that would be "conducive to the administration of justice." *Jinks*, 538 U.S. at 463. The Extension Approach does just that by providing a fixed thirty-day period for refiling of otherwise time-barred state law claims after their dismissal by a District Court. This straightforward rule is simple for litigants to understand and for courts to apply consistently. In contrast, the Suspension Approach requires calculation of the remaining "unexpired" limitations period for each state law claim following federal dismissal. Such a standard is neither straightforward nor conducive to the efficient administration of justice, because it requires applying differing limitations periods for differing state law causes of action, for which the exact dates of accrual often are unclear and disputed, such as where the discovery rule applies. *See, e.g., Prudential Home Mortgage Co. v. Superior Court*, 66 Cal. App. 4th 1236, 1246 (1998) (applying delayed discovery rule); *compare id.* at 1252-56 (Rylaarsdam, J., dissenting) (rejecting application of rule).

CONCLUSION

The Court of Appeal's decision should be reversed.

Dated: August 23, 2013.

Respectfully,

ARNOLD & PORTER LLP
STEVEN L. MAYER

COUNTY OF KERN
THERESA A. GOLDNER
MARK L. NATIONS

HOGAN LAW APC
MICHAEL M. HOGAN

By: _____
STEVEN L. MAYER

Attorneys for Appellants County of Kern and Kern County Board of Supervisors

CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.504(d)(1)

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used, I certify that the attached Appellants' Opening Brief on the Merits contains 5,743 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

Dated: August 23, 2013.

STEVEN L. MAYER

33689237F

PROOF OF SERVICE

I am over eighteen years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero Center, 7th Floor, San Francisco, CA 94111-4024.

On August 23, 2013, I served the following document(s):

APPELLANTS' OPENING BRIEF ON THE MERITS

I served the document(s) on the following person(s):

SEE ATTACHED SERVICE LIST

The document(s) was served by the following means:

By U.S. mail. I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above.

I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 23, 2013

Myrna M. Da Cunha

SERVICE LIST
Case No. F063381
Supreme Court No. S210150

Gary J. Smith, Esq.
Zachary M. Norris, Esq.
BEVERIDGE & DIAMOND
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
TEL: (415) 262-4000
FAX: (415) 262-4040
Email: gsmith@bdlaw.com
znorris@bdlaw.com

Edward McClaren Jordan, Esq.
Office of the City Attorney
200 N. Main Street, Ste. 700
Los Angeles, CA 90012

Attorneys for Plaintiffs & Respondents City of Los Angeles; R & G Fanucchi, Inc.; Responsible Biosolids Management, Inc.; Sierra Transport

Michael J. Lampe, Esq.
Law Offices of Michael J. Lampe
108 West Center Avenue
Visalia, CA 93291

Attorney for Plaintiff and Respondent City of Los Angeles

Daniel V. Hyde, Esq.
Paul J. Beck, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
221 North Figueroa Street, Suite 1200
Los Angeles, CA 90012
TEL: 213/250.1800
FAX: 213/580.7995
Email: hyde@lbbslaw.com
beck@lbbslaw.com

Attorneys for Plaintiff & Respondent County Sanitation District No. 2 of Los Angeles County

Roberta Larson, Esq.
SOMACH, SIMMONS & DUNN
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
TEL: 916/446.7979
FAX: 916/446.8199
Email: blarson@somachlaw.com

Bradley R. Hogin, Esq.
WOODRUFF, SPRADLIN & SMART
A Professional Corporation
555 Anton Boulevard, Suite 1200
Costa Mesa, CA 92626
TEL: 714/558.7000
FAX: 714/83.7787
Email: Bhogin@wss-law.com

Attorneys for Plaintiffs & Respondents Orange County Sanitation District; California California Association of Sanitation Agencies

Michael M. Hogan, Esq.
HOGAN LAW APC
225 Broadway, Suite 1900
San Diego, CA 92101
TEL: 619/687.0282
FAX: 619/234.6466

Theresa A. Goldner, Esq.
County Counsel
Mark Nations, Esq.
Chief Deputy County Counsel
COUNTY OF KERN
Administrative Center
1115 Truxtun Avenue, Fourth Floor
Bakersfield, CA 93301
TEL: 661/868.3800
FAX: 661/868.3805
Email: tgoldner@co.kern.ca.us
ccolins@co.kern.ca.us
mnations@co.kern.ca.us

Attorneys for Defendants/Appellants County of Kern and Kern County Board of Supervisors

Jerome B. Falk, Jr.
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111

TEL: 415/738-8442
FAX: 415/471-3400
Email: jerryfalk20@gmail.com

Clerk
California Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721-3004

Hon. Lloyd L. Hicks
Judge of the Superior Court
Tulare County Superior Court
Visalia Division
221 S. Mooney Boulevard
Visalia, CA 93291

Clerk
Tulare County Superior Court
Visalia Division
221 S. Mooney Boulevard
Visalia, CA 93291