

08 - 849 JAN 5 - 2009

No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND A. KIGHT, et al.,
Petitioners,

v.

SHERRI A. TURNER,
Respondent.

On Petition For A Writ Of Certiorari
to the Court Of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

LEON RODRIGUEZ
County Attorney for
Montgomery
County, Maryland

PATRICIA P.VIA
EDWARD B. LATTNER
101 Monroe Street
Third Floor
Rockville, MD 20850
(240) 777-6700

Counsel for County
Parties

DOUGLAS F. GANSLER
Attorney General of
Maryland

AUSTIN C. SCHLICK
STEVEN M. SULLIVAN
KATHLEEN E. WHERTHEY*
Office of the Attorney
General
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6324

Counsel for State Parties

** Counsel of Record*

QUESTIONS PRESENTED

1. When a federal district court dismisses state law claims under 28 U.S.C. § 1367(c), does 28 U.S.C. § 1367(d) operate to toll the limitations period to the extent necessary to guarantee the plaintiff a period of at least 30 days following the dismissal to refile in state court (as most state courts and all federal courts of appeals that have considered the question have concluded), rather than to suspend the running of the relevant state statute of limitations and thereby grant the plaintiff a refiling period consisting of the entire balance of the limitations period plus 30 days (as the Court of Appeals of Maryland, among a minority of other state courts, has decided)?

2. Once a federal district court has dismissed state law claims under 28 U.S.C. § 1367(c), have they ceased to be “pending” for purposes of 28 U.S.C. § 1367(d)?

PARTIES TO THE PROCEEDING

The plaintiff in the proceedings below, and the Respondent before this Court, is Sherri A. Turner. The defendants below were eight law enforcement officers of the State of Maryland (the “State Parties”) and three officers of Montgomery County, Maryland, as well as the County itself (the “County Parties”). The State Parties are Sheriff Raymond A. Kight, Lt. Col. Bruce Sherman, and Deputy Sheriffs Rodney Brown, Robin Lewis, Richard Kane, William Pechnick, Eric Brown, and Brian Philips. The County Parties are Arthur M. Wallenstein, Theresa L. Hicks, Robert Andrews, and Montgomery County, Maryland. The State Parties and the County Parties are the Petitioners before this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	2
I. THERE IS DISAGREEMENT AMONG THE STATES, AND BETWEEN CERTAIN STATE AND FEDERAL COURTS, CONCERNING THE PROPER INTERPRETATION AND TOLLING EFFECT OF 28 U.S.C. § 1367(d).	9
A. Courts Disagree About The Meaning Of “Tolled” In 28 U.S.C. § 1367(d)	10
B. Courts Disagree About The Meaning Of “Pending” In 28 U.S.C. § 1367(d)	13
C. The Proper Interpretation And Application Of 28 U.S.C. § 1367(d) Require Resolution By This Court	15
II. THE INTERPRETATION OF 28 U.S.C. § 1367(d) ADOPTED BY THE COURT OF APPEALS OF MARYLAND IS CONTRARY TO PRINCIPLES OF FEDERALISM AND CONGRESSIONAL POLICY	16

CONCLUSION 23

APPENDIX App. 1

 Reported opinion of the Court of Appeals
of Maryland, *Turner v. Kight*, 406 Md.
167, 957 A.2d 984 (Oct. 7, 2008). App. 1

 Reported opinion of the Court of Special
Appeals of Maryland, *Turner v. Kight*,
178 Md. App. 1, 938 A.2d 863
(Dec. 19, 2007). App. 32

 Transcript of Circuit Court for Montgomery
County, Maryland, hearing and ruling
on Motions to Dismiss (June 24, 2005) App. 52

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Am. Pipe & Constr. Co. v. Utah</i> , 414 U.S. 538, <i>reh'g denied</i> , 415 U.S. 952 (1974) .	19, 20
<i>Ball v. Renner</i> , 54 F.3d 664 (10 th Cir. 1995) ..	11
<i>Beck v. Prupis</i> , 162 F.3d 1090 (11 th Cir. 1998)	11
<i>Berke v. Buckley Broad. Corp.</i> , 821 A.2d 118 (N.J. Super. Ct. App. Div.), <i>cert. denied</i> , 832 A.2d 322 (N.J. 2003)	10
<i>Bonifield v. County of Nevada</i> , 114 Cal. Rptr. 2d 207 (Cal. Ct. App. 2002)	10, 13



<i>Brown v. City of Boston</i> , 98 F.3d 1333 (1 st Cir. Oct. 15, 1996) (unpublished <i>per curiam</i> decision)	12
<i>Burton v. Youth Servs. Int'l</i> , 176 F.R.D. 517 (D. Md. 1997)	12
<i>Cave v. East Meadow Union Free Sch. Dist.</i> , 514 F.3d 240 (2 nd Cir. 2008)	11
<i>Chardon v. Fumero Soto</i> , 462 U.S. 650 (1983)	15
<i>Chase Sec. Corp. v. Donaldson</i> , 325 U.S. 304 (1945)	20
<i>Clark v. Velsicol Chem. Corp.</i> , 431 S.E.2d 227 (N.C. Ct. App. 1993), <i>aff'd</i> , 444 S.E.2d 223 (N.C. 1994)	14
<i>Dahl v. Eckerd Family Youth Alternatives</i> , 843 S.2d 956 (Fla. Ct. App. 2003)	10
<i>Edmondson & Gallagher v. Alban Towers Tenant Ass'n</i> , 48 F.3d 1260 (D.C. Cir. 1995)	11, 12
<i>Franklin v. Zain</i> , 152 F.3d 783 (8 th Cir. 1998)	11, 12
<i>Goodman v. Best Buy, Inc.</i> , 755 N.W.2d 354 (Minn. Ct. App. 2008)	11, 12
<i>Gruber v. Bendos</i> , 2005 WL 2065234 (D. Md. Aug. 23, 2005)	12

<i>Harter v. Vernon</i> , 532 S.E.2d 836 (N.C. Ct. App.), <i>appeal dismissed and review denied</i> , 546 S.E.2d 97 (N.C. 2000), <i>cert. denied</i> , 532 U.S. 1022 (2001)	10
<i>Hedges v. Musco</i> , 204 F.3d 109 (3 rd Cir. 2000)	12, 13
<i>Huang v. Ziko</i> , 511 S.E.2d 305 (N.C. Ct. App. 1999)	14
<i>Jarmuth v. Frinzi</i> , 2006 WL 4730263 (N.D.W. Va. Mar. 7, 2007), <i>aff'd sub nom. Jarmuth v. Waters</i> , 220 Fed. Appx. 228 (4 th Cir. 2007)	13
<i>Jinks v. Richland County, S.C.</i> , 538 U.S. 456 (2003)	9, 17, 19, 20
<i>Johnson v. City of Bullhead City, Az.</i> , 34 Fed. Appx. 557 (9 th Cir. 2002)	11, 13
<i>Juan v. Gov't of N. Mariana Islands</i> , 2001 WL 34883536 (N. Mariana Islands Nov. 19, 2001)	10
<i>Kendrick v. City of Eureka</i> , 98 Cal. Rptr.2d 153 (Cal. Ct. App. 2000)	14
<i>Kolani v. Gluska</i> , 75 Cal. Rptr. 2d 257 (Cal. Ct. App. 1998)	10, 13, 20
<i>Long v. Bando Mfg. of Am., Inc.</i> , 201 F.3d 754 (6 th Cir. 2000)	12

<i>Okoro v. City of Oakland</i> , 48 Cal. Rptr. 3d 260 (Cal. Ct. App. 2006)	14
<i>Oleski v. Dep't of Pub. Welfare</i> , 822 A.2d 120 (Pa. Commw. Ct. 2003)	10, 13
<i>Raygor v. Regents of Univ. of Minn.</i> , 534 U.S. 533 (2002)	15, 17, 20
<i>Stevens v. ARCO Mgmt. of Wash. D.C., Inc.</i> , 751 A.2d 995 (D.C. 2000)	10
<i>Sun Oil Co. v. Wortman</i> , 486 U.S. 717 (1988)	21
<i>Turner v. Kight</i> , 121 Fed. Appx. 9 (4 th Cir. 2005)	5
<i>Turner v. Kight</i> , 192 F. Supp. 2d 391 (D. Md. 2002)	4
<i>Turner v. Kight</i> , 217 F. Supp. 2d 680 (D. Md. 2002)	5
<i>Turner v. Kight</i> , 406 Md. 167, 957 A.2d 984 (2008)	2, 10, 14-16, 21
<i>Turner v. Kight</i> , 178 Md. App. 1, 938 A.2d 863 (2007), <i>rev'd</i> , 406 Md. 167, 957 A.2d 984 (2008)	2, 13
<i>Weinrib v. Duncan</i> , 962 So.2d 167 (Ala. 2007)	10
<i>Williams Electronics Games, Inc. v. Garrity</i> , 479 F.3d 904 (7 th Cir. 2007)	11

CONSTITUTIONAL PROVISIONS, STATUTES, AND
RULES:

United States Code

28 U.S.C. § 1257(a)	2
28 U.S.C. § 1367	2, 6, 7, 11, 15, 17
28 U.S.C. § 1367(a)	7
28 U.S.C. § 1367(c)	i
28 U.S.C. § 1367(d)	i, 7-21
28 U.S.C. § 1983	4

Federal Rules of Appellate Procedure

Fed. R. App. P. 35(a)	14
---------------------------------	----

Maryland Constitutional Provisions

Md. Const., Art. IV, § 44	1
-------------------------------------	---

Maryland Statutes

Md. Code Ann., State Gov't § 12-101(a)(6) . .	1
-----------------------------------------------	---

Maryland Rules

Md. Rule 2-101(b)	21
-----------------------------	----



MISCELLANEOUS:

S. Rep. 101-416, 101 st Cong., 2 nd Sess. (1990), 1990 U.S. Code Cong. & Admin. News 6802	17, 20
13B Wright, Miller, & Cooper, <i>Federal Practice & Procedure</i> , § 3567.1 (2d ed. 2000 Supp.)	15

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND A. KIGHT, et al.,

Petitioners,

v.

SHERRI A. TURNER,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

◆

The State Parties, Sheriff Raymond A. Kight, Lt. Col. Bruce Sherman, and Deputy Sheriffs Rodney Brown, Robin Lewis, Richard Kane, William Pechnick, Eric Brown, and Brian Philips, and the County Parties, Arthur M. Wallenstein, Theresa L. Hicks, Robert Andrews, and Montgomery County, Maryland, respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals of Maryland in this case.¹

¹ Under Maryland law, the Sheriff of each county is a State constitutional officer, Md. Const., Art. IV, § 44, and Deputy Sheriffs are also State personnel, Md. Code Ann., State Gov't § 12-101(a)(6).

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Turner v. Kight*, 406 Md. 167, 957 A.2d 984 (2008), reversing the judgment of the Court of Special Appeals of Maryland, is reproduced in the appendix to this petition at App. 1-31.

The reported opinion of the Court of Special Appeals of Maryland, *Turner v. Kight*, 178 Md. App. 1, 938 A.2d 863 (2007), affirming the decision of the Circuit Court for Montgomery County, Maryland, is reproduced in the appendix to this petition at App. 32-51.

The Circuit Court for Montgomery County, Maryland, issued an oral opinion dismissing Respondent's claims, and a transcript of the hearing and ruling is reproduced in the appendix to this petition at App. 52-72.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on October 7, 2008. This petition is filed within 90 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1367 provides:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in

any civil action of which the district courts have original jurisdiction, the 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. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the 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.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (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.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

STATEMENT OF THE CASE

On May 15, 2001, Respondent filed in the United States District Court for the District of Maryland a 19-count complaint alleging mistreatment by Montgomery County, Maryland, three County officers, and eight law enforcement officers of the State of Maryland in April 2000. (App. 2.) Twelve counts asserted claims pursuant to 42 U.S.C. § 1983, and seven asserted causes of action under state law. (App. 2.) On March 26, 2002, the district court entered judgment in favor of all the defendants on all of Respondent's federal claims, and declined to exercise supplemental jurisdiction over her pendent state law claims. (App. 3); *see also Turner v. Kight*, 192 F. Supp. 2d 391 (D. Md. 2002). On April 5, 2002, Respondent moved for reconsideration concerning only the federal counts of her complaint. (App. 3.) On August 7, 2002, the

district court granted Respondent's motion for reconsideration as to one federal count, against one defendant County employee. (App. 3); *see also Turner v. Kight*, 217 F. Supp. 2d 680 (D. Md. 2002). On August 20, 2003, the court granted summary judgment in favor of that County employee. (App. 3.) Respondent filed a motion for reconsideration of that order, which the court denied on December 22, 2003. (App. 3.)

On January 15, 2004, Respondent noted an appeal. (App. 3.) On January 7, 2005, the United States Court of Appeals for the Fourth Circuit affirmed the federal district court by unpublished *per curiam* opinion. (App. 3); *see also Turner v. Kight*, 121 Fed. Appx. 9 (4th Cir. 2005). On March 8, 2005, the Fourth Circuit denied Respondent's petition for rehearing en banc. (App. 3-4.)

On March 11, 2005 – more than two years after the federal district court's dismissal of her state law claims, and more than a year after that court's denial of her final motion for reconsideration with respect to the last surviving federal claim – Respondent filed a new action in the Circuit Court for Montgomery County, Maryland, in which she reasserted the same state law claims. (App. 4.) She thus refiled her state law claims relating to the incidents of April 2000 almost two years after the three-year state limitations period for filing those claims had expired as a matter of state law.

On June 24, 2005, the state trial court heard argument on the Petitioners' dispositive motions, which requested dismissal of Respondent's lawsuit as

untimely. (App. 36-37, 52-72.) Specifically, Petitioners asserted that Respondent filed her state court action beyond both the three-year state statute of limitations, and the 30-day grace period that 28 U.S.C. § 1367 afforded her to refile her state claims in state court after their dismissal in federal district court. (App. 56-60.) Respondent, however, contended that, due to the operation of 28 U.S.C. § 1367, “[t]he limitations period was suspended from the period of time that the case was initially filed in Federal Court, that was May of 2001, until all Federal Court claims were dismissed [by the district court], and that was December of 2003.” (App. 63.) In other words, Respondent argued, the running of the limitations clock “was suspended” during the period of time the case was in federal court, and “started ticking again in December of 2003,” when the district court denied her second motion for reconsideration. (App. 63.) Therefore, Respondent contended, at that time she still “had more than two years left on [her] statute of limitations,” plus the 30 days provided by 28 U.S.C. § 1367. (App. 64-65.)

The State trial court rejected Respondent’s arguments. The court observed that Respondent’s interpretation of 28 U.S.C. § 1367 would allow federal courts effectively to extend state limitations periods by many years, when 28 U.S.C. § 1367 affords only a 30-day tolling period to permit refile in state court. (App. 67.) Accordingly, the trial court dismissed Respondent’s action as untimely. (App. 70-71.)

Respondent appealed the trial court’s ruling, which the Court of Special Appeals of Maryland affirmed. (App. 32-51.) That court agreed with the

trial court that 28 U.S.C. § 1367 “tolls the consequence, but not the progression, of a state statute of limitations.” (App. 34.) Maryland’s intermediate appellate court further concluded that “the 30-day period provided by § 1367 begins to run at the end of the federal district court proceedings,” not (as Respondent argued for the first time on appeal) from the conclusion of any subsequent federal appellate proceedings. (App. 34.)

Respondent then petitioned for review by Maryland’s appellate court of last resort, the Court of Appeals of Maryland, which reversed the State trial court and intermediate appellate court. (App. 1-31.) Disagreeing with the two lower State courts, the Court of Appeals of Maryland held that “§ 1367(d) does, indeed, suspend the running of limitations and does not merely extend the period,” and that “the suspension remains in effect until 30 days after all Federal proceedings, including appellate proceedings, are concluded.” (App. 7.) Accordingly, the Court of Appeals of Maryland held that the trial court had incorrectly dismissed Respondent’s claim as barred by limitations.

REASONS FOR GRANTING THE WRIT

This case squarely presents a question of federal law on which the state courts are divided, and which often is of dispositive importance to litigants prosecuting or defending actions containing both state and federal claims. The issue concerns the proper interpretation and tolling effect of 28 U.S.C. § 1367(d), a statute enacted to “assure[e] that state-law claims asserted under § 1367(a) will not become time barred

while pending in federal court.” *Jinks v. Richland County, S.C.*, 538 U.S. 456, 464 (2003). Specifically, the primary question presented is whether 28 U.S.C. § 1367(d) *extends* an otherwise expired limitations period for 30 days following the federal dismissal, or altogether *suspends* the running of the limitations period throughout the action’s pendency in federal court. In addition to the well-developed split among state courts, state and federal courts have reached different conclusions as to which of those constructions of § 1367(d) is correct.

Clarification also is necessary as to when an action ceases to be “pending” for purposes of 28 U.S.C. § 1367(d), and particularly whether it remains “pending” during periods of discretionary federal appeal, including the pendency of petitions for rehearing en banc. This case presents that important subsidiary question as well.

Properly interpreted, § 1367(d) promotes fairness, efficiency, and comity, by allowing a claimant to reassert state law claims in state court if a federal district court dismisses them after the limitations period has expired, but limiting the refiling period to 30 days following that dismissal, unless state law provides a longer period. The incorrect reading of the Maryland Court of Appeals and some other state courts, by contrast, overrides the legitimate state policies embodied in state statutes of limitations, without serving any federal interest.

I. THERE IS DISAGREEMENT AMONG THE STATES, AND BETWEEN CERTAIN STATE AND FEDERAL COURTS, CONCERNING THE PROPER INTERPRETATION AND TOLLING EFFECT OF 28 U.S.C. § 1367(d).

28 U.S.C. § 1367(d) is an unusual federal procedural statute, in that it applies primarily in state courts, where it operates to determine the permissible time period for refiling state law claims after a federal court has dismissed them. In that circumstance, § 1367(d) provides that a federally dismissed state law 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.” Because § 1367(d) determines the viability of refiled state law claims in the state courts, those courts have been the principal arbiters of the statute’s meaning and tolling effect.

A conflict of authority has developed among the states applying 28 U.S.C. § 1367(d), in two respects. The first and more fundamental point of disagreement concerns the meaning and effect of the term “tolled.” The second difference of opinion regarding § 1367(d) concerns the meaning of the phrase “while the claim is pending,” which defines the period during which the limitations bar has no effect. This case provides the Court a suitable vehicle for resolving the widespread judicial disagreement on these two issues of federal law.

A. Courts Disagree About The
Meaning Of “Tolled” In 28 U.S.C.
§ 1367(d).

Most state appellate courts that have decided the issue construe the term “tolled” to mean that, if the limitations period for a state law claim expires while the claim is pending in federal court, then the limitations period extends for a fixed period of only 30 days after dismissal of the state claims by the federal court. *See Weinrib v. Duncan*, 962 So.2d 167, 169 (Ala. 2007); *Kolani v. Gluska*, 75 Cal. Rptr. 2d 257, 261, 262 (Cal. Ct. App. 1998); *Stevens v. ARCO Mgmt. of Wash. D.C., Inc.*, 751 A.2d 995, 997, 1003 (D.C. 2000); *Dahl v. Eckerd Family Youth Alternatives*, 843 S.2d 956, 958 (Fla. Ct. App. 2003); *Berke v. Buckley Broad. Corp.*, 821 A.2d 118, 123-24 (N.J. Super. Ct. App. Div.), *cert. denied*, 832 A.2d 322 (N.J. 2003); *Harter v. Vernon*, 532 S.E.2d 836, 839-40 (N.C. Ct. App.), *appeal dismissed and review denied*, 546 S.E.2d 97 (N.C. 2000), *cert. denied*, 532 U.S. 1022 (2001); *Juan v. Gov’t of N. Mariana Islands*, 2001 WL 34883536 at *4 (N. Mariana Islands Nov. 19, 2001).

By contrast, other state appellate courts, now including the Court of Appeals of Maryland, interpret “tolled” as signifying an interruption and suspension of the running of the limitations period during the federal action, after which the limitations period resumes running, with § 1367(d) adding a further 30 days to that period. *See Bonifield v. County of Nevada*, 114 Cal. Rptr. 2d 207, 211 (Cal. Ct. App. 2002); *Turner v. Kight*, 406 Md. 167, 957 A.2d 984 (Oct. 7, 2008) (App. 1-31); *Oleski v. Dep’t of Pub. Welfare*, 822 A.2d 120,

126 (Pa. Commw. Ct. 2003); *Goodman v. Best Buy, Inc.*, 755 N.W.2d 354, 359 (Minn. Ct. App. 2008).

To the extent that the federal courts of appeals have considered the tolling effect of 28 U.S.C. §1367(d), their interpretations are uniformly consistent with the majority view among the states. *See Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2nd Cir. 2008) (“[P]ursuant to 28 U.S.C. § 1367(d), the limitations period is tolled while [state law] claims are pending and for 30 days after they are dismissed.”); *Williams Electronics Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007) (“[S]ection 1367(d) explicitly tolls the statute of limitations for 30 days after dismissal of a supplemental claim, to allow the plaintiff to refile the claim in state court without being time-barred.”); *Johnson v. City of Bullhead City, Az.*, 34 Fed. Appx. 557, 561 (9th Cir. 2002) (citing § 1367(d) as “tolling the state statute of limitations for thirty days after the dismissal of supplemental state law claims”); *Beck v. Prupis*, 162 F.3d 1090, 1099-1100 (11th Cir. 1998) (“[A] dismissal under section 1367 automatically tolls the statute of limitations on the dismissed claims for 30 days.”); *Franklin v. Zain*, 152 F.3d 783, 786 (8th Cir. 1998) (“Pursuant to 28 U.S.C. § 1367(d), the period of limitations for [a] pendent state claim shall be tolled for the period while the claim was pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period.”); *Ball v. Renner*, 54 F.3d 664, 669 n.8 (10th Cir. 1995) (noting “the 30-day tolling period that 28 U.S.C. § 1367(d) provides for dismissed supplemental claims”); *Edmondson & Gallagher v. Alban Towers Tenant Ass’n*, 48 F.3d 1260, 1267 (D.C. Cir. 1995) (“Section

1367(d) tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal.”); *see also Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 761 (6th Cir. 2000) (citing and following *Edmondson & Gallagher*); *Hedges v. Musco*, 204 F.3d 109, 123 (3rd Cir. 2000) (citing and following *Beck*); *Brown v. City of Boston*, 98 F.3d 1333 (1st Cir. Oct. 15, 1996) (unpublished *per curiam* decision) (citing and following *Edmondson & Gallagher*).

Litigants in at least four states are subject to apparently divergent state and federal court interpretations of the proper application of 28 U.S.C. § 1367(d). For instance, the United States District Court for the District of Maryland, contrary to the Court of Appeals of Maryland, interprets § 1367(d) to afford only a fixed, 30-day extension of the otherwise expired limitations period to permit refiling of otherwise extinguished state claims in state court. *See Burton v. Youth Servs. Int’l*, 176 F.R.D. 517, 522 (D. Md. 1997) (“Although the facts giving rise to [plaintiff’s] state law claims occurred more than three years ago, the Maryland statute of limitations will not bar his recovery if he files suit in state court *within thirty days of this opinion.*”) (emphasis added); *see also Gruber v. Bendos*, 2005 WL 2065234 at *3 (D. Md. Aug. 23, 2005) (“Maryland allows a 30-day period . . . to file a complaint in the state court after a case is dismissed for lack of federal jurisdiction.”). Similarly, in Minnesota, the holding of *Goodman*, 755 N.W.2d at 358-59, is inconsistent with the Eighth Circuit’s construction of § 1367(d) as articulated in *Franklin*, 152 F.3d at 786. In Pennsylvania, the state court

decision in *Oleski*, 822 A.2d at 126, is contrary to the Third Circuit’s interpretation of § 1367(d) as expressed in *Hedges*, 204 F.3d at 123. In California, the interpretation of § 1367(d) in *Bonifield*, 114 Cal. Rptr. 2d at 211, is contrary to the statute’s interpretation both by a coequal California appellate court in *Kolani*, 75 Cal. Rptr. 2d at 261, and by the Ninth Circuit in *Johnson*, 34 Fed. Appx. at 561.

In all these states, the state and federal courts have different understandings about the time within which a state law claim dismissed in federal court must be refiled in state court. Such confusion – which can lead to the inadvertent loss of a state claim or the improper consideration of a claim that should be barred – should not be allowed to persist.

**B. Courts Disagree About The
Meaning Of “Pending” In 28 U.S.C.
§ 1367(d).**

28 U.S.C. § 1367(d) provides that the limitations period is tolled “while the claim is pending and for a period of 30 days after it is dismissed,” thereby indicating that a claim ceases to be “pending” for purposes of § 1367(d) once the federal district court dismisses it. That interpretation is consistent not only with the statute’s plain language, but with learned commentary, *see Turner*, 178 Md. App. at 15, 938 A.2d at 872 (App. 50-51) (discussing “the commentary to § 1367(d) in the United States Code Annotated”), and with the decision of at least one federal court, *see Jarmuth v. Frinzi*, 2006 WL 4730263 at * 12 (N.D.W. Va. Mar. 7, 2007) (“[C]ommon sense counsels that it is the ruling of the trial court judge that effects the

dismissal of a claim” for purposes of § 1367(d)), *aff’d sub nom. Jarmuth v. Waters*, 220 Fed. Appx. 228 (4th Cir. 2007).

Nevertheless, several state courts, now including the Court of Appeals of Maryland, have determined that a state claim remains “pending” not only until its dismissal by a federal district court as § 1367(d) specifies, but also until the disposition of any subsequent federal appeal of right. *See Kendrick v. City of Eureka*, 98 Cal. Rptr.2d 153, 154 (Cal. Ct. App. 2000); *Turner*, 406 Md. at 189, 957 A.2d at 996-97 (App. 29-30); *Huang v. Ziko*, 511 S.E.2d 305, 307-08 (N.C. Ct. App. 1999). The Maryland court further concluded that a claim remains “pending” in the federal appellate court for purposes of § 1367(d) throughout the pendency of any subsequent petition for rehearing en banc, the entertainment of which is, by Federal Rule, discretionary. *See Turner*, 406 Md. at 189, 957 A.2d at 996-97 (App. 29-30); Fed. R. App. P. 35(a). The Maryland Court of Appeals left open the question whether the tolling effect also would continue during the filing and resolution of a petition for certiorari to this Court. *Turner*, 406 Md. at 189, 957 A.2d at 997 (App. 30). Other courts have decided it would not. *See, e.g., Okoro v. City of Oakland*, 48 Cal. Rptr. 3d 260, 264 (Cal. Ct. App. 2006); *Clark v. Velsicol Chem. Corp.*, 431 S.E.2d 227, 229-30 (N.C. Ct. App. 1993), *aff’d*, 444 S.E.2d 223 (N.C. 1994).

**C. The Proper Interpretation And
Application Of 28 U.S.C. § 1367(d)
Require Resolution By This Court.**

These conflicts of authority concerning the construction and application of 28 U.S.C. § 1367(d) are likely to remain unresolved unless and until this Court provides guidance, for several reasons. First, the splits are unlikely to resolve themselves because 28 U.S.C. § 1367 as a whole lacks clarity. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 549 n.2 (2002) (Ginsburg, J., concurring in part and concurring in the judgment) (“The supplemental jurisdiction statute, well-reasoned commentary indicates, is clearly flawed and needs repair.”) (citations and internal quotation marks omitted); *see also* 13B Wright, Miller, & Cooper, *Federal Practice & Procedure*, § 3567.1 n.51 (2d ed. 2000 Supp.) (“[S]ection 1367 could have been more clearly drafted”). The statutory words “tolling” and “pending” are particularly challenging to construe, given their inherent variety of meaning and their usage within the statute. *See Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1 (1983) (discussing various meanings and effects of the word “tolling”); *Turner*, 406 Md. at 184, 957 A.2d at 993 (App. 22) (“Section 1367(d) is hardly a model of clarity” in its use of “pending”). Section 1367(d)’s imprecise drafting and use of terms with a multiplicity of meanings have resulted in inconsistent interpretation by courts and resulting uncertainty for litigants.

The present case represents a suitable vehicle for deciding both disputed aspects of the interpretation of 28 U.S.C. § 1367(d). The Court of Appeals of Maryland

interpreted the meaning of both pertinent statutory terms, “tolled” and “pending,” and both interpretations were necessary to its holding and disposition of the case. *See Turner*, 406 Md. at 175-89, 957 A.2d at 988-98 (App. 11-30). Had the Maryland court not determined that “tolled” meant “suspended,” then the limitations period for Respondent’s state law claims would have expired in the ordinary course, without interruption or suspension, in April 2003, three years after the alleged events on which those claims were based. The April 2003 deadline for refiling Respondent’s state law claims would have applied regardless of the district court’s prior dismissal of those claims in March 2002, had the Maryland court not also determined that Respondent’s state law claims remained “pending” while Respondent continued litigating her remaining, purely federal, claims before both the federal trial and appellate courts until March 2005.

II. THE INTERPRETATION OF 28 U.S.C. § 1367(d) ADOPTED BY THE COURT OF APPEALS OF MARYLAND IS CONTRARY TO PRINCIPLES OF FEDERALISM AND CONGRESSIONAL POLICY.

This Court should resolve the disagreement among state courts, and between state and federal courts, concerning proper interpretation of 28 U.S.C. § 1367(d) and its tolling effect on state statutes of limitation by establishing a rule consistent with this Court’s prior decisions and the federal policies that § 1367(d) was enacted to promote. That rule would require that when a federal district court declines to

exercise supplemental jurisdiction over state law claims, and consequently dismisses them after the limitations period for those claims has expired, the claimant may refile them in state court, but only within a 30-day period following the dismissal. Such an interpretation would best implement Congress's intent in enacting § 1367(d), which was promoting efficient administration of the judicial system, fairness to litigants, and comity between state and federal courts.

“Congress enacted the supplemental jurisdiction statute, 28 U.S.C. § 1367, as part of the judicial Improvements Act of 1990,” *Raygor*, 534 U.S. at 540, in order to improve the efficiency of the federal judiciary system and the judicial process. The statute's purpose was to “promote . . . the just, speedy, and inexpensive resolution of civil disputes.” S. Rep. 101-416, 101st Cong., 2nd Sess. (1990), 1990 U.S. Code Cong. & Admin. News 6802, 6804. Congress further recognized that “[h]igh costs, long delays and insufficient judicial resources all too often leave this time-honored process unfulfilled.” *Id.*

Accordingly, Congress intended that § 1367(d) would provide “a straightforward tolling rule” that is “conducive to the administration of justice.” *Jinks*, 538 U.S. at 463. The interpretation of § 1367(d) that the Petitioners advocate in this case fulfills those objectives, whereas the interpretation adopted by the Court of Appeals of Maryland does not. Interpreting § 1367(d) as providing a 30-day period for refiling of otherwise time-barred state law claims after their dismissal by a district court creates a straightforward

rule that is simple for litigants to understand and for courts to apply consistently. By contrast, the alternative interpretation of § 1367(d) that the Court of Appeals has adopted 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 in instances where the discovery rule applies.

The Maryland court’s interpretation of 28 U.S.C. § 1367(d) also creates perverse incentives to prolong federal litigation in order to maximize the time period available for prosecuting state law claims. In the present case, for example, Respondent’s persistent protraction of her federal lawsuit, by filing multiple requests for reconsideration and a meritless appeal, has inured to her benefit, and to the State and County Parties’ detriment, by greatly prolonging the time period during which she may pursue her state law claims. The federal district court dismissed those claims on March 26, 2002, more than a year *before* the applicable limitations period expired. Respondent neither refiled her state law claims in state court at that time, nor subsequently asked the Fourth Circuit to review the district court’s dismissal of those state law claims. Instead, she awaited the ultimate disposition of her *federal* suit, then refiled her *state* claims in state court when the result of the federal litigation proved unsatisfactory to her. The Court of Appeals of Maryland concluded that through

such tactics, by means of the operation of 28 U.S.C. § 1367(d), Respondent permissibly could revive and refile her state law claims, almost five years after the events that prompted them, and almost two years after the limitations period expired.

Respondent thus has obtained advantages unavailable to similarly situated litigants who file their state law claims initially in state court, to the detriment of defendant Petitioners. The quality and quantity of evidence inevitably diminish over time, and so to does the ability of defendants to mount an effective defense.² *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, *reh'g denied*, 415 U.S. 952 (1974) (“[S]tatutory 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.”) (citation and internal quotation marks omitted).

28 U.S.C. § 1367(d) is intended not only to promote efficiency, but to apply fairly to all litigants. The statute is protective of claimants, in that it “prevent[s] the limitations period on [dismissed] supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court.” *Jinks*, 538 U.S. at 459. Nevertheless, the statute also is meant to “promote for *all citizens*,” including defendants, “the just, *speedy*, and inexpensive

² As an instance of the diminishing availability of witnesses over time, at least one defendant in this action, Theresa L. Hicks, no longer is in the employ of the County.

resolution of civil disputes.” S. Rep. 101-416, 101st Cong., 2nd Sess. (1990), 1990 U.S. Code Cong. & Admin. News 6802, 6804 (emphasis added). The interpretation of § 1367(d) that Petitioners advocate appropriately balances those interests by allowing a claimant to refile otherwise time-barred claims in state courts after their federal dismissal, but also reasonably limiting the permissible time for refiling to 30 days following that dismissal. *See Kolani*, 75 Cal. Rptr. 2d at 261 (holding “30 days is ample time for a diligent plaintiff to refile his claims and keep them alive”).

The interpretation of the Court of Appeals of Maryland, by contrast, unjustifiably favors claimants to the detriment of defendants and runs contrary to the sound policies underlying statutes of limitation. Statutes of limitation “represent a public policy about the privilege to litigate” and “are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.” *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). They thereby serve the policy of “ensuring essential fairness to defendants.” *See Am. Pipe*, 414 U.S. at 554.

28 U.S.C. § 1367(d) also reflects a careful and considered balance between state and federal interests. *See Jinks*, 538 U.S. at 464 (rejecting argument that § 1367(d) “violates principles of state sovereignty”); *but see Raygor*, 534 U.S. at 544 (concluding that interpreting § 1367(d) “to extend the time period in which a state sovereign is amenable to suit in its own

courts at least affects the federal balance in an area that has been a historic power of the States.”). The Court of Appeals of Maryland and other courts adopting its view of § 1367(d) have disrupted that balance, contrary to congressional intent, by applying § 1367(d) to extend state-enacted limitations periods beyond the 30-day period stated in the statute. In this case, for example, the Court of Appeals of Maryland concluded that § 1367(d) “prevails” over a state procedural rule, Maryland Rule 2-101(b), which expressly provides that an action filed in federal district court, subsequently dismissed on jurisdictional grounds, then refiled in state court “within 30 days after the entry of the order of dismissal shall be treated as timely filed.” *See Turner*, 406 Md. at 190, 957 A.2d at 997 (quoting Md. Rule 2-101(b)) (App. 30-31). Courts that have adopted such positions, whether from a desire to safeguard the interests of claimants at the expense of defendants or from a mistaken belief that federal law compels that result, have created an unwarranted tension between federal and state law.

State statutes of limitation represent a State’s careful legislative balancing of competing policy interests. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) (“A State’s interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations.”); *see also id.* at 736 (Brennan, J., concurring in part and concurring in the judgment) (“The statute of limitations a State enacts represents a balance between, on the one hand, its substantive

interest in vindicating substantive claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law.”).

It is error, and contrary to principles of federalism, for courts to construe a federal procedural statute in a fashion that needlessly overrides the policy determinations manifested in state statutes of limitations. The Court of Appeals of Maryland, and other state courts that have interpreted 28 U.S.C. § 1367(d) in the same fashion, have thus committed error that merits this Court’s attention and correction.

CONCLUSION

For the stated reasons, the petition for a writ of certiorari to review the judgment of the Court of Appeals of Maryland should be granted.

Respectfully submitted,

LEON RODRIGUEZ
County Attorney for
Montgomery
County, Maryland

PATRICIA P. VIA
EDWARD B. LATTNER
101 Monroe Street
Third Floor
Rockville, MD 20850
(240) 777-6700

Counsel for County
Parties

DOUGLAS F. GANSLER
Attorney General of
Maryland

AUSTIN C. SCHLICK
STEVEN M. SULLIVAN
KATHLEEN E. WHERTHEY*
Office of the Attorney
General
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6324

Counsel for State Parties

** Counsel of Record*