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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

City of Los Angeles, Responsible Biosolids Management, Inc., R&G Fanucchi, Inc., Sierra Transport, Inc., County Sanitation District No. 2 of Los Angeles County, Orange County Sanitation District, California Association of Sanitation Agencies
Plaintiffs and Respondents
v.
County of Kern and Kern County Board of Supervisors
Defendants and Appellants

RESPONDENTS' ANSWER ON THE MERITS

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INTRODUCTION

This Court should apply the plain language of 28 U.S.C. § 1367(d) to find timely the claims of three major Southern California public agencies and their contractors, claims that five state and federal judges have now found meritorious. All four of the judges in this case who have reviewed the timing issue raised by Appellant Kern County ("Kern") have further agreed that § 1367(d) suspended the running of the statute of limitations on the Respondents' state claims while the case was in federal court, allowing the state limitations period to resume running after the federal court declined supplemental jurisdiction. This suspension approach to § 1367(d), adopted by the trial court and the unanimous Court of Appeal below as the "natural interpretation," best applies the plain language of § 1367(d) that "[t]he period of limitations for any claim . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed . . . ." The suspension approach also best serves the statutory purpose of enabling litigants to pursue state law claims after a federal court declines supplemental jurisdiction. Kern strains to interpret § 1367(d) as replacing the remaining state limitations period with a maximum 30 day deadline, a position endorsed by a declining minority of courts and which the Court of Appeal found lacked support in the language of the statute and the intent of Congress.

In interpreting federal law, this Court accords "great weight" to federal precedent and accordingly should look to the unequivocal decisions adopting the suspension approach of both federal courts that have analyzed and ruled on the meaning of §1367(d) – a unanimous, published decision of the Sixth Circuit Court of Appeals earlier this year, which affirmed the published decision of the Northern District of Ohio. A growing majority of state courts that have discussed the issue, including in California, also favor the suspension approach. The Fifth District Court of Appeal panel below

and the Third District both published opinions supporting the suspension approach, as have the highest courts of Minnesota and Maryland. Kern's "extension approach," by comparison, relies on a territorial court decision and three older intermediate state appellate courts, including a fifteen year-old decision by the Second District.

Kern argues that § 1367(d) is ambiguous because it uses the word "toll," that recourse to legislative history is necessary, and that the Court must resolve that ambiguity by imposing the shortest possible limitations period on state law claims brought after a federal court declines supplemental jurisdiction. Kern errs on all three points. The federal courts and the majority of state courts, while acknowledging that the word "toll" standing alone could have multiple meanings, have had little difficulty finding that the best reading of § 1367(d) is the suspension rule. This majority approach embraces suspension because (1) the word "toll" usually means suspension, (2) § 1367(d)'s text mandates tolling in all cases unconditionally, and (3) the statute uses mandatory language to "toll" the state statute of limitations for two separate periods, both while the federal claim is pending and for 30 days thereafter. The federal courts, the Court of Appeal, and the trial court all have found suspension to be the clear, plain meaning of the statute, and this Court should too.

Moreover, if this Court determines there is ambiguity in the text, principles of statutory construction suggest that the Court look to California's endorsement of the suspension approach in applying tolling statutes. The legislative history of the Judicial Improvements Act of 1990 says little about § 1367(d), and as the Court of Appeal below pointed out, Kern's focus on the general purpose of statutes of limitations to protect defendants is completely balanced, if not outweighed, by the interest in allowing a determination of supplemental state law claims on the merits.

Finally, even if the Court were to decide its question presented in Kern's favor, the preliminary injunction would remain proper on other grounds not reached by the courts below, including the restarting of the statute of limitations based on Kern's renewed enforcement effort and California Code of Civil Procedure § 355, which provides a one-year period for claims to be refiled after a non-merits reversal in the appellate court, and thus falls within § 1367(d)'s language "unless State law provides for a longer tolling period."

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The ultimate issue in this case is whether Kern County can ban the use of biosolids as a farm fertilizer, a recycling practice used throughout the United States, California, and even in Kern County's largest cities. The Court of Appeal, the trial court, and a federal district court have all ruled against Kern County on the merits on several grounds.

Local governments across the country, including Respondents, are obliged as a basic public health duty and under the Clean Water Act to collect and treat wastewater from homes, businesses, and institutions, and to manage the solid byproducts, principally sewage sludge. *City of Los Angeles v. Cnty. of Kern*, No. F063381, slip op. (Cal. Ct. App. Feb. 13, 2013) ("Slip Op"), at 4. Biosolids are produced by the treatment of sewage sludge to federal and state standards, resulting in a useful fertilizer product, which is rich in plant nutrients and adds useful bulk organic matter to the soil. Encouraging biosolids recycling has long been federal and state policy and the environmental benefits of land application are well recognized, as found by the district court and superior court in this case.

Respondent City of Los Angeles has been recycling its biosolids at its Green Acres Farm, a remote 4,700-acre farm southwest of Bakersfield that grows feed crops for dairy cows, for nineteen years. 1 Appellants'

App. ("AA") 8 (¶28); Resp'ts App. ("RA") 057 (¶9). The City contracts with Respondent Responsible Biosolids Management to oversee the transport of the City's biosolids to Green Acres and to manage land application there. RA 074 (¶8). Respondent Sierra Transport, under a contract with Responsible Biosolids Management, trucks the biosolids to Green Acres. RA 093 (¶5). Respondent Fanucchi conducts the farming operations. RA 089 (¶1).

Respondent Orange County Sanitation District ("OCSD") land applied biosolids in unincorporated Kern County beginning in 1996, and Respondent Los Angeles County Sanitation District No. 2 ("CSD No. 2") began providing biosolids to County farmers for fertilizer in 1994. As with the City of Los Angeles, the biosolids generated from OCSD's and CSD No. 2's wastewater treatment processes meet Class A EQ standards and other Kern County requirements and have been used as a fertilizer and soil conditioner to grow animal feed crops. RA 120 (¶6). RA 119 (¶4), 111-112 (¶11).

Respondent California Association of Sanitation Agencies ("CASA") is a non-profit mutual benefit association representing over 115 cities, counties, and special districts statewide that expend tens of millions of dollars annually to recycle the majority of the biosolids generated in their communities for beneficial uses. 1 AA 5-6 (¶16); RA 097 (¶4). CASA's members have many years of experience with successful land application and its benefits. Land application remains an indispensable option for many CASA members' biosolids recycling programs. RA 101-102 (¶¶16-20).

In 2006, Kern County voters passed a ballot measure ("Measure E") that banned use of Respondents' biosolids on Kern County farms. The initiative ordinance did not affect ongoing land application of biosolids by the cities in the County within their city limits, where most of the voters

reside. Slip Op. at 8-10. Twenty-four days after Measure E's July 22, 2006 original effective date, Respondents filed suit in the United States District Court for the Central District of California challenging Measure E's validity on several federal and state law grounds. 1 AA 139.

The district court entered a preliminary injunction against Measure E in November 2006, ruling that the voter initiative likely violated the Commerce Clause of the United States Constitution, was preempted by California's Integrated Waste Management Act ("IWMA"), and exceeded Kern's police power under the California Constitution. *City of Los Angeles v. Cnty. of Kern*, 462 F. Supp. 2d 1105, 1108-1109 (C.D. Cal. 2006). The court also found that the balance of hardships tipped sharply in Respondents' favor. *Id.* at 1119. In 2007 the district court granted summary judgment for Respondents on the IWMA preemption and Commerce Clause claims. *City of Los Angeles v. Cnty. of Kern*, 509 F. Supp. 2d 865, 870 (C.D. Cal 2007). Among other findings, the district court found that Measure E discriminated against biosolids generators located outside of Kern County and that the voters were motivated by "antagonism toward Los Angeles in particular and Southern California in general," as evidenced by a strident anti-Southland political campaign in favor of Measure E. *Id.* at 885.

On appeal, the Ninth Circuit ruled that Respondents lacked prudential standing to pursue their Commerce Clause claim in federal court, but expressly declined to reach the merits of that claim or the IWMA claim. *City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841, 849 (9th Cir. 2009). On November 9, 2010, the district court declined supplemental jurisdiction, leaving Respondents to pursue their challenge in state court. 1 AA 274.

On January 19, 2011, Kern County sent Respondents an enforcement notice stating that, as of the date of the notice, "you are *now* subject to the provisions of Measure E," and affording Respondents "six (6) months from

the date of this letter to discontinue the land application of biosolids." 2 AA 413 (emphasis added). Respondents filed this action one week later on January 26, 2011, bringing claims for IWMA preemption, violation of police power limits, and federal and state Commerce Clause violations. 1 AA 1. The case was filed in Kern County and transferred by agreement of the parties to the neutral venue of Tulare County.

Kern demurred to the complaint, primarily arguing that Respondents' IWMA and police power claims were time-barred under 28 U.S.C § 1367(d). 1 AA 110. The Tulare Superior Court overruled Kern's demurrer, agreeing with the Second District's 2001 opinion in *Bonifield v. Cnty. of Nevada*, 94 Cal. App. 4th 298 (2001), that § 1367(d) suspends the operation of the state statute of limitations during the pendency of the federal case and for 30 days thereafter, with the remaining limitations period recommencing after the federal court declines supplemental jurisdiction. Judge Hicks wrote that the suspension approach "is consistent with the plain language of the statute. The court agrees with the analysis in *In re Vertrue Mktg. & Sales Practices Litig.*[, 712 F. Supp. 2d 703 (N.D. Ohio 2010) ("*Vertrue I*")]. Although there is a split in authorities, the court finds this federal case is better reasoned in adopting the suspension of the statute as opposed to the alternatives which do not credit the clear, plain language of the statute." 2 AA 514.

On June 9, 2011, the trial court granted Respondents' preliminary injunction motions. 3 AA 662. The court found that Respondents were likely to prevail on their IWMA and police power claims. The court did not reach Respondents' federal and state Commerce Clause claims, which remain pending. 3 AA 665. Judge Hicks also found that the balance of harms strongly favored Respondents. 3 AA 666 ("Kern presents no evidence of any actual harm to the environment: to the air, water, or soil, as a result of LA's continued application of biosolids. . . . LA presents

evidence of substantial monetary harm and the inability to quickly adapt to alternatives. Individual Respondents present evidence of irreparable harm consisting of job losses.").

Kern took an interlocutory appeal of the preliminary injunction. Kern disputed that Respondents were likely to succeed on the merits of their preemption and police power claims, in part based upon Kern's contention that those claims were time-barred by 28 U.S.C. § 1367(d). Kern did not challenge the trial court's factual findings.

The Court of Appeal unanimously affirmed the trial court's ruling in a published 34-page opinion. *City of Los Angeles v. Cnty. of Kern*, 214 Cal. App. 4th 394 (2013), *review granted, depublished*, 158 Cal. Rptr. 3d 259 (June 26, 2013). The Fifth District panel held that the Measure E biosolids ban likely was preempted by the IWMA's recycling mandates, that Kern's ban likely violated the regional welfare doctrine limits on local police powers, and that Respondents' claims were not time-barred by 28 U.S.C. § 1367(d).

In weighing the competing suspension and extension interpretations of § 1367(d), Justice Wiseman wrote that "[t]he two approaches are not equally plausible readings of the statutory language" and sided with "the natural interpretation of this language: The statute of limitations stops running while the claim is pending in federal court and for 30 days after it is dismissed; then the statute of limitations begins to run again from the point where it left off." Slip Op. at 18, 20. By contrast, the Fifth District found that Kern's extension approach "is obscure and would be an obtuse way of expressing the meaning for which Kern contends. The fact that other meanings of 'toll' have been identified in case law therefore sheds no light on what 'toll' means here. If Congress had intended the rule Kern supports, it could have written that the 'period of limitations for any claim that would otherwise expire while it is pending or during a period of 30

days after it is dismissed shall be extended by 30 days from the time of dismissal,' or something similar. It did not." *Id.* at 20.

The Court of Appeal was also unpersuaded by Kern's legislative intent arguments: "There is no rule that, where one interpretation of a statute results in a longer limitations period and another results in a shorter, a court should always choose the shorter. There being no policy factor favoring either side here, the linguistic considerations discussed above carry the day." *Id.* at 21.

On April 22, 2013, Kern petitioned for review by this Court. On June 26, 2013, this Court declined review of the Court of Appeal's ruling on the IWMA and police power claims. The Court granted review to resolve a conflict between the decision below and a 2001 Third District decision on one hand, and a 1999 decision by the Second District on the other, over the interpretation of 28 U.S.C. § 1367(d). *City of Los Angeles v. Cnty. of Kern*, 158 Cal. Rptr. 3d 259 (2013).

ARGUMENT

I. STANDARD OF REVIEW

The parties agree that this Court's interpretation of 28 U.S.C. § 1367(d) is a legal question subject to de novo review. In cases of statutory interpretation, primacy is placed on the text Congress enacted; courts must "presume that [Congress] says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). "If the language is unambiguous, the plain meaning controls." *People v. Leiva*, 56 Cal. 4th 498, 506 (2013). The question before the Court is interpretation of a federal statute, and this Court has recognized that lower federal court interpretations of federal law are persuasive and are afforded "great weight." *See, e.g., Venegas v. Cnty. of Los Angeles*, 32 Cal. 4th 820, 835 (2004). "[W]hen Congress has not

prescribed a clear and definite meaning for an operative term in a federal statute, its meaning can be supplied by reference to local law." 2 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 37:2 (7th ed. 2009).

II. RESPONDENTS' PREEMPTION AND POLICE POWER CLAIMS ARE TIMELY UNDER 28 U.S.C. § 1367(d).

Kern's analysis of § 1367(d) complicates the statute, arguing that "tolling" of the statute of limitations period means letting it run, and if it expires during the pendency of the federal litigation, extending it by 30 days. Kern advocates for this interpretation on the ground that a policy to speed the termination of lawsuits should trump the common reading of the term "tolled." Respondents submit that the wording of §1367(d) and federal and California precedent support applying tolling in the usual manner of suspending the running of the clock, which serves the equally, if not more, valid legislative goal of allowing state claims to be decided on the merits after supplemental jurisdiction in the federal court ends.

A. The Common Meaning of "Toll" Is Suspend or Interrupt.

Kern contends "tolled," standing alone, can take on a myriad of different meanings, making § 1367(d) ambiguous. But viewing the word "tolled" in isolation is contrary to well-established principles of statutory interpretation placing primacy on statutory context (*see* § II.B, *infra*). Moreover, the term "toll" is in fact commonly understood in the federal courts, California, and elsewhere to "stop the clock." This widely accepted meaning of tolling is decisive of the question before the Court.

The consensus meaning of the term "toll" is to suspend or interrupt the operation of the statute of limitations. *See, e.g., Turner v. Kight*, 406 Md. 167, 181 (Md. 2008) (the suspension approach is the "more commonly applied conception of tolling [and] is correct"). For example, Black's Law Dictionary defines a "tolling statute" as "a law that *interrupts* the running

of a statute of limitations." *Black's Law Dictionary* at 1525 (8th ed. 2004) (emphasis added). *See also* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 884 (2d ed. 1995) ("in the context of time limits – especially statutes of limitation – *toll* means 'to abate' or 'to stop the running of (the statutory period)'"). Furthermore, the standard dictionary definition of "toll" is "to suspend or interrupt (as a statute of limitations)." *Random House Webster's Dictionary* 1991 (2d ed. 1998).

Many cases also articulate the suspension definition of tolling, including the United States Supreme Court decision relied on heavily by Kern, *Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1 (1983) (using "'tolling' to mean that, during the relevant period, the statute of limitations ceases to run"). *See also, e.g.*, *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (per curiam) ("Principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped."); *Heard v. Sheahan*, 253 F.3d 316, 317 (7th Cir. 2001) ("Tolling interrupts the statute of limitations after it has begun to run . . . ."); *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1195 n.8 (10th Cir. 1998) ("We note that the term "tolling" means 'to suspend or stop temporarily . . . .'") (citations omitted).

Principles of statutory interpretation and federalism, particularly in the context of interpreting the running of state statutes of limitation, allow this Court to also look to California law in interpreting the meaning and operation of § 1367(d). This Court directly endorsed tolling as suspension under California law in its 1998 decision in *Cuadra v. Millan*: "Clarity of thought will be promoted by reserving the use of the phrase, 'the statute of limitations is tolled,' for instances in which the running of the statute is temporarily suspended by a specified condition--e.g., the plaintiff's

minority ([Code Civ. Proc.] § 352) or incarceration (id., § 352.1), the defendant's absence from the state (id., § 351), an injunction or stay of the action (id., § 356), or a state of war (id., § 354)--and will resume when that condition is lifted." 17 Cal. 4th 855, 864 (1998), *overruled in part on other grounds*, *Samuels v. Mix*, 22 Cal. 4th 1, 16 n.4 (1999). Similarly, this Court's 1991 decision in *Woods v. Young*, cited by the Third District's *Bonifield* decision adopting the suspension approach, stated that "[t]olling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended." 53 Cal. 3d 315, 326 n.3 (1991) (interpreting the relationship between the State's 90 day notice requirement for medical malpractice suits and the statute of limitations for malpractice).

Earlier this year, in the course of interpreting the meaning of a Penal Code provision that tolled the running of term of probation, this Court "conclude[d], as we have previously, that the most common understanding of the term 'toll' in a legal context is 'to stop the running of; to abate ... .'" *Leiva*, 56 Cal. 4th at 507 (quoting Black's Law Dictionary). The Court reasoned that "[i]n light of the overwhelming weight of authority that defines 'toll' in the legal context as to 'abate' or 'stop the running of,' rather than 'to extend,' we reject the claim that 'toll' unambiguously means to 'extend.' . . . We remain convinced that the commonsense, plain meaning of 'toll' in the context of legal time limits is 'to abate' or 'to stop the running of.'"). *Id.* 508-09.[1]

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[1] In fact, long before § 1367(d) was passed, California applied equitable tolling to suspend the running of the limitations period for state claims while a plaintiff's case was pending in federal court. *See Addison v. State of Cal.*, 21 Cal. 3d 313, 322 (1978) (noting suspension of limitations period avoided forfeiture of claims and resulted in minimal uncertainty or delay). Kern, AOB at 17, incorrectly looks to this Court's 1977 opinion in *Wood v.*

The Court should apply the nearly universally accepted meaning of toll as suspend in its analysis of § 1367(d), which leads to the adoption of the suspension approach adopted by most courts.

B. The Plain Language of 28 U.S.C. § 1367(d) Requires Suspension of the Statute of Limitations.

Understanding the common meaning of "toll," the interpretation of § 1367(d) to suspend the running of the statute of limitations follows easily. The context of the operative language of the section further compels this conclusion. The full text of § 1367(d) supplies the necessary context:

> The period of limitations for any claim asserted under [federal supplemental jurisdiction], and for any claim in the same action that is voluntarily dismissed at the same time or after the dismissal of the claim under [federal supplemental jurisdiction], *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) (emphasis added).

Kern finds ambiguity in the word "tolled" standing alone. However, long-standing maxims of statutory interpretation provide that the meaning of individual words derives from their specific statutory context. *See, e.g., Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("[A] word is known by the company it keeps – a rule that is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended

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Elling Corp., 20 Cal. 3d 353, 359, which held that the factors for equitable tolling were not met in that case and recognized that "in the absence of a statute" the common law ordinarily does not toll the running of the statute of limitations on a claim that is dismissed without prejudice and is later refiled. This principle is unremarkable and inapposite, because of course here there is a statute that directs tolling. Moreover, the following year this Court decided *Addison*, finding tolling appropriate in the specific context here – a federal court's non-merits dismissal of state law claims.

breadth to the Acts of Congress.") (internal quotations omitted); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). The Court of Appeal recognized this fundamental principle, as have other cases that analyzed the text of § 1367(d). Slip Op. at 20 ("The fact that other meanings of 'toll' have been identified in case law therefore sheds no light on what 'toll' means *here*.") (emphasis in original); *Goodman v. Best Buy*, 777 N.W.2d 755, 759 (Minn. 2010) ("*Goodman II*") ("'tolled' has a plain meaning in the statute that can be resolved by examining the specific context in which it is used.").

Accordingly, the appropriate inquiry is not what "tolled" means "in different contexts," but what it means here. *See* AOB at 2. As the Court of Appeal unanimously held, the "natural interpretation" of § 1367(d), applying all the terms and commands of the statute, is to suspend the running of the limitations period for state law claims during the pendency of the claims in federal court and for 30 days afterward. Under this suspension approach, the time remaining on the state limitations period when the federal claims were filed remains available to a plaintiff after the federal claims are dismissed. The 30 day provision, in turn, exists to ensure a minimum period for plaintiffs with federal and state claims who file a federal suit with little or no time remaining on their state limitations period that is suspended during the federal action. *Goodman II*, 777 N.W. 2d at 761. The context that supports tolling as suspension includes the mandatory wording requiring tolling on all statutes of limitations that are running when the suit is filed, the addition of 30 days more tolling as a safety valve, and the unsuitability of § 1367(d)'s language to an extension approach, which could have been achieved in a much more direct and simple manner.

1. Section 1367(d) Applies Unconditionally to All Supplemental State Law Claims.

As Kern would have it, § 1367(d) operates only if the state statute of limitations expires during the pendency of the federal case (in that event providing 30 days to file in state court after dismissal of a federal case), and is meaningless if the state statute of limitations does not expire during that time. This is contrary to the mandatory language in § 1367(d) that "[t]he period of limitations . . . *shall* be tolled." 28 U.S.C. § 1367(d) (emphasis added). This command is unconditional. *See Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 440 (1995) (use of "shall" in statute means its application is unconditional); *Vertrue I*, 712 F. Supp. 2d at 724 ("On its face, Section 1367(d) must have a tolling effect on all supplemental state law claims."). Once the 30 days after dismissal have passed, the limitations period starts to run again, and the claimant has the same number of days to file as the claimant did when the tolling began. The effect is the same in every case. As the first federal appellate court case to analyze the text likewise recognized earlier this year, "[t]he extension approach fails to give any operative effect to § 1367(d) in a number of cases in which the state statute of limitations does not expire during the course of federal litigation." *In re Vertrue Mktg. & Sales Practices Litig.*, 719 F.3d 474, 481 (6th Cir. 2013) ("*Vertrue II*").

Kern is forced to adopt the position that § 1367(d) tolls the running of statutes of limitations in some cases and not others because of its unorthodox definition of toll as meaning "shall not expire" rather than "suspend" or "interrupt." By contrast, the courts below and the growing majority of judges agree that the statute acts uniformly to interrupt the

running of all state statutes of limitations until 30 days after supplemental jurisdiction is declined.[2]

Kern's effort to substitute "shall not expire" for "shall be tolled" impermissibly attempts to alter the language of the statute and has scant support. AOB at 11. Kern cites only a sentence from a New Jersey intermediate appellate court opinion that does not support its proposition. *Id.* (quoting *Berke v. Buckley Broadcasting Corp.*, 821 A.2d 118, 123 (N.J. Super. Ct. App. Div. 2003)). *Berke* did not define the phrase "shall be tolled," or use Kern's phrase "shall not expire," but instead expressly refused to follow § 1367(d)'s plain language. 821 A.2d at 123 (opining that § 1367(d) is not a "'true' tolling statute . . . [d]espite its ambiguous use of the word 'tolling'" because "we do not believe that the federal statute intends a result that would permit a gross protraction of the limitations period"). This Court should not look to *Berke*, but instead to the plain meaning of the phrase in its statutory context.

Kern argues that interpreting § 1367 to uniformly apply the common meaning of tolling as suspension, which is contrary to having the statute of limitations expire, somehow "bootstraps" the desired result in statutory interpretation. AOB at 11. To the contrary, it is Kern that does not address the accepted meaning of toll that fits better within the context of § 1367 in its rush to argue that there is a Congressional preference to terminate state supplemental claims 30 days after federal declination of jurisdiction.

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[2]The simplicity that Kern claims for the extension approach over the suspension approach does not exist, because for each claim the statute of limitations still has to be calculated in order to determine whether it has expired or not during the time the case is in federal court.

2. Section 1367(d) Tolls the Limitations Period for State Supplemental Claims While They Are Pending in Federal Court.

Kern's extension approach would require a plaintiff to file a state court complaint within 30 days of dismissal from federal court "when, as in this case, a state statute of limitations *expires while a supplemental claim is pending in federal court.*" AOB at 1-2 (emphasis added). But § 1367(d) requires that "[t]he period of limitations . . . shall be *tolled while the claim is pending*" in federal court. 28 U.S.C. § 1367(d) (emphasis added). If the state limitations period is tolled while the federal case is pending, it cannot "expire" during that time. Indeed, Kern agrees that § 1367(d)'s purpose was to "prevent the limitations on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." AOB at 1, 5 (*citing Jinks v. Richland Cnty.*, 538 U.S. 456, 459 (2003)). Kern also concedes that, at the very least, "tolling" means that "during the relevant period, the statute of limitations ceases to run." AOB at 9, *citing Fumero Soto*, 462 U.S. at 652 n.1 (defining "tolling" to mean "the statute of limitations ceases to run," but noting that, depending on statutory context, one of three "tolling effects" is possible, *see* § II.D, *infra*). Kern's argument is inconsistent internally and with the statute's text.

Beyond its incompatible premise and terminology, Kern's argument also ignores exactly what is tolled and when that tolling occurs. Section 1367 tolls the "*period* of limitations *while* the claim is *pending and* for a *period* of 30 days after it is dismissed." (Emphasis added). "Because this language designates a period of time, it must refer to an ongoing occurrence," and "can reasonably be understood only as intending a suspension." *Goodman v. Best Buy*, 755 N.W. 2d 354, 358 (Minn. Ct. App. 2008) ("*Goodman I*"), *aff'd*, *Goodman II*, 777 N.W. 2d at 759. Kern's construct is that "shall be tolled" does not stop the running of the statute of

limitations at all; the statute is not tolled as the word is usually understood, and instead if the statute expires while the claims are in federal court, then the tolling occurs, and 30 days is allowed to bring suit.

In effect, Kern asks this Court either to read "the period" and "while the claim is pending" out of the statute, or to judicially amend the statute to read "the *expiration of* the statute of limitations . . . shall be *extended.*" Neither is a sensible reading of the actual words that Congress chose, and the Court of Appeal agreed. Slip Op. at 20. The term "toll," as it is used in its context within § 1367(d), is only susceptible to a single meaning – the statute of limitations clock is temporarily stopped.[3]

3. Section 1367(d) Tolls Claims Over Two Periods, Rather Than Merely Imposing a Thirty Day Maximum Tolling.

Kern's argument for a maximum (rather than minimum) 30 day period to refile supplemental state law claims ignores that § 1367(d) mandates two tolling periods. Under § 1367(d), the statute of limitations is tolled during two distinct periods: (1) while the claim is pending in federal court, "*and*" (2) for a 30 day period after the claim is dismissed. That is, the statute first ensures that state law claims remain alive while pending in

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[3] This Court has rejected a nearly identical argument in an analogous context where claims are "tolled" during a prior proceeding. *See Pearson Dental Supplies v. Sup. Ct. of Los Angeles Co.*, 48 Cal. 4th 665, 675 (2010) ("The only way to make sense of defendant's position is to understand it as asserting that what is being tolled is not the running of the one-year contractual limitations period, but the contractual one-year deadline itself. . . . What makes this interpretation untenable is not only that it is at variance with the common understanding of the term 'tolling,' but also that it contradicts the express language of [Code Civ. Proc.] 1281.12 that tolling starts 'from the date the civil action is commenced.' This language establishes that what is being tolled is the running of the contractual limitations period itself, as plaintiff argues. . . . [T]he end of the tolling period simply means that the contractual limitations clock began to run again, not that the limitations period ended.").

federal court, and then confers a minimum 30 day refiling period to accommodate plaintiffs who initially commence an action near the end of the limitations period. *Goodman II*, 777 N.W. 2d at 761.

A key contradiction in Kern's position is that Kern asks this Court to hold that the state statute of limitations period *continues running* while the federal case is pending because Kern's view requires that the statute "expires" while the federal claim is pending, and then can only receive a 30 day extension. AOB at 11. Kern's imposition of a maximum 30 day refiling window impermissibly negates the first tolling period in § 1367(d), and renders the word "tolled" superfluous. Every word of the statute should be given effect. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Leiva,* 56 Cal. 4th at 506 ("[W]henever possible, significance must be given to every word [in a statute] in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage.") (internal citations and quotations omitted).

Under Kern's view, Congress would not have needed to include a "toll" term at all, but rather would have only needed to extend any covered claim by 30 days, and nothing more. As the Court of Appeal recognized below, "[i]f Congress had intended the rule Kern supports, it could have written that the 'period of limitations for any claim that would otherwise expire while it is pending or during a period of 30 days after it is dismissed shall be extended by 30 days from the time of dismissal,' or something similar. It did not." Slip Op. at 20. Kern's arguments – styled as statutory interpretation – are in fact advocacy for a different statute.

4. The Statute as Written by Congress Is Amenable Only to the Suspension Approach.

For the above reasons, individually and combined, the context of § 1367 defines tolling to mean suspension, or stopping the clock. The terms "toll" and "suspend" are easily interchangeable within the statute.

One cannot, however, substitute "extend" for "toll" and maintain the statute's functionality. The Court of Appeal attempted this exercise and found the result was an "obscure" and "obtuse" statute that Congress would not have enacted if it intended to adopt the extension approach. Slip Op. at 20. The Minnesota Supreme Court in *Goodman II* likewise found the extension approach depended on "creating an ambiguity where none exists by reading missing words or conditions into the statute. Such reasoning would make any statute ambiguous." *Goodman II*, 777 N.W.2d at 760. The suspension approach is the only interpretation faithful to all of the statutory language of § 1367(d). Because the text of the statute is clear, the Court need look no further in affirming the Court of Appeal.[4]

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[4] Kern also cites a series of statutes using "suspended" or similar terms to argue that Congress intends the suspension approach only when it uses such language, not "toll," in a statute. AOB at 11-12 n.5. This has little bearing on § 1367(d) and Kern's authority does not support its position. The "suspension" statutes Kern cites either directly use or have been applied using the synonymous term toll. *See* 50 U.S.C. app. § 526(a) ("*Tolling* of statutes of limitation during military service") (emphasis added); *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 316 (1965) (finding 15 U.S.C. § 16(i), which states "the running of the statute of limitations . . . shall be suspended during the pendency [of any civil or criminal proceeding instituted by the United States under antitrust laws]," "*tolls* the statute of limitations set out in § 4B from the time suit is instituted by the United States regardless of whether a final judgment or decree is ultimately entered") (emphasis added).

The Court of Appeal here noted that Congress would have omitted "tolled" if it meant extension. Slip Op. at 20. Other statutes likewise suggest that Congress is just as, if not more, likely to eschew the use of "tolled" when it intends to "extend." *See, e.g.* 28 U.S.C. § 2415(e) ("In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, *the action may be recommenced within one year* after such dismissal, regardless of whether the action would otherwise then be barred by this section.") (emphasis added); 49 U.S.C. § 11705(d) ("[t]he limitation periods under subsections (b) and (c) of this section *are extended* for 90 days from the time the rail carrier begins a civil action under subsection (a) of this section) (emphasis added); 15 U.S.C.

C. Courts Interpreting "Tolling" Within the Text of § 1367 Have Confirmed the Suspension Approach.

The common definition of "toll" as "suspend" and the textual analysis supporting the suspension approach are endorsed by the weight of authority, including decisions by a federal court of appeals, a federal district court, and the highest courts of two other states that address the text of § 1367(d). In particular, the federal court decisions merit "great weight" in this Court's analysis. *See, e.g., Venegas*, 32 Cal. 4th at 835; *Barrett v. Rosenthal*, 40 Cal. 4th 33, 58 (2006) ("While we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight.").[5] Though not discussed by Kern, the U.S. Court of Appeals for the Sixth Circuit – the only federal appellate court to analyze the statute's text – in April 2013 affirmed the suspension approach interpretation of § 1367(d). *Vertrue II*, 719 F.3d at 481 ("We are persuaded that the suspension approach properly gives effect to both § 1367(d) and the state statute of limitations."). The court affirmed the ruling of the district court, which held that "[t]he suspension approach is the only approach that comports with the plain meaning of the statute." *Vertrue I*, 712 F. Supp. 2d at 724 ("In order to give effect to the plain meaning and mandatory nature

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§ 1691e(f) ("[t]hen any applicant who has been a victim of the discrimination which is the subject of such proceeding or civil action may bring an action under this section *not later* than one year after the commencement of that proceeding or action.") (emphasis added).

[5] Some of this Court's decisions have suggested that a factor in the weight to be accorded federal authority in interpreting federal statutes is the number of federal courts adopting a position. *See, e.g., Coral Construction, Inc. v. City and Cnty. of San Francisco*, 50 Cal. 4th 315, 329-30 (2010). ("While the lower federal courts' decisions do not bind us, we give them "great weight" when they reflect a consensus . . . ."). The Sixth Circuit and the Southern District of Ohio in *Vertrue II* and *Vertrue I* represent such a consensus, as all four federal judges to analyze the text of §1367(d) have agreed on the suspension interpretation.

of the language, this Court finds that [the] extension approach must be rejected. . . . The only reading . . . that gives meaning to all of the words chosen by Congress is the suspension approach.").

The suspension approach is also favored by the majority of appellate decisions in California and other states. The Fifth District Court of Appeal (and trial court) in this case, Third District Court of Appeal, the highest and intermediate appellate courts of Minnesota, and the highest court of Maryland all have rejected the extension approach in favor of the suspension approach. *Id.*; Slip Op. at 17-21; 2 AA 514 (trial court's overruling of Kern's demurrer); *Bonifield*, 94 Cal. App. 4th at 303; *Goodman I,* 755 N.W.2d at 358-59, *aff'd, Goodman II*, 777 N.W. 2d at 761-762; *Turner*, 957 A.2d at 992.

Kern counts no federal court decisions disavowing the suspension approach in favor of Kern's extension approach. Kern relies on a territorial court decision and three dated decisions of intermediate state appellate courts, including a fifteen-year-old Second District decision decided without the benefit of jurisprudence on point. AOB at 6; *Kolani v. Gluska*, 64 Cal. App. 4th 402, 410-411 (1998); *Huang v. Ziko*, 511 S.E. 2d 305, 308 (N.C. Ct. App. 1999); *Berke*, 821 A.2d at 123; *Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. Nov. 19, 2001). These decisions (all over a decade old) based their rulings on policy grounds divorced from the statutory language. *Kolani*, 64 Cal. App. 4th at 410-11 (extension approach sufficient to avoid forfeiture of claims); *Huang*, 511 S.E. 2d at 307 (N.C. Ct. App. 1999) (relying on "the policy in favor of prompt prosecution of claims"); *Berke*, 821 A.2d at 123 (despite the statutory language, "we do not believe that the federal statute intends a result that would permit a gross protraction of the limitations period"). The Third District in *Bonifield* specifically considered and refuted *Kolani* in a decision just three years later, as did the Fifth District decision under

review here, and *Kolani* has not been favorably cited since on § 1367(d) grounds. Slip Op. at 17-21 (adopting the "natural interpretation" of § 1367(d)); *Bonifield*, 94 Cal. App. 4th at 303-04 (2001) ("Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended.") (internal citation omitted).[6]

D. The Supreme Court's 1983 *Fumero Soto* Opinion Does Not Change the Meaning of Tolling or the Interpretation of § 1367(d).

Throughout its brief, Kern heavily relies on dicta in a single footnote from the U.S. Supreme Court decision in *Fumero Soto*, which states that, depending on context, a tolling provision can have one of three possible "tolling effects." 462 U.S. at 652 n.1.[7] Kern extrapolates from this general statement to argue that, in § 1367(d), "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." AOB at 9. Kern's argument fails because *Fumero Soto* does not bear on the meaning of tolling in § 1367(d) and cannot insert ambiguity into § 1367(d) where none exists. Moreover, it

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[6] There are a handful of additional reported federal and state cases that apply 28 U.S.C. § 1367(d), using either the extension or the suspension approach, but those decisions lack any meaningful discussion of the issue.

[7] The *Fumero Soto* footnote in its entirety reads: "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.*, 462 U.S. at 652 n.1.

does not yield Kern's preferred result; if anything, *Fumero Soto* supports suspension, consistent with California law.

At the outset, *Fumero Soto* has nothing to say regarding the meaning of "toll" within § 1367. *Fumero Soto* predated the passage of § 1367 and thus did not consider tolling in that statutory context. Its footnote's explanation of different possible effects of tolling did not assert that any individual tolling statute is amenable to all of them. Moreover, *Fumero Soto* did not even involve the same issue Congress later addressed in § 1367(d), *i.e.*, tolling of state law claims after a non-merits dismissal from federal court. Rather, there the Supreme Court examined whether the pendency of a class action where class certification was ultimately denied either suspended or renewed the limitations period for putative class members to file individual actions under 42 U.S.C. § 1983.

The list of possible "tolling effects" in *Fumero Soto* – suspension, renewal, and annulment – also provides no help to Kern. Notably, it *excludes* Kern's preferred extension approach. 462 U.S. at 652 n.1. Indeed, the effects of the options would be the same on all claims. *Fumero Soto* does not endorse any conditional or selective application principle, which is at the heart of Kern's extension approach. In that way, *Fumero Soto* is consistent with § 1367(d) which, as discussed above, applies equally to all state law claims where federal courts decline supplemental jurisdiction. Kern's insistence that 30 days is enough time to refile state claims more closely resembles the annulment or substitution example offered in *Fumero Soto.* But no court has endorsed that approach. AOB at 9; *Vertrue I*, 712 F. Supp. 2d at 723 ("It does not appear that any court has adopted that approach [annulment] and the Court finds that the statutory language cannot fairly be read to impose such a dramatic result. . . . This Court finds that this reading is wholly inconsistent with the purpose of the statute, which is to avoid the forfeiture of state law claims."). No party

claims § 1367(d) renews the state statute of limitations. Thus, the only viable tolling effect among the *Fumero Soto* options is the same yielded by the plain text of § 1367(d) – suspension.

Finally, the actual tolling analysis in *Fumero Soto* relies on state tolling rules to interpret state statutes of limitations, which in California means suspension. *See* § II.A, *supra*. *Fumero Soto* reiterated that because the timeliness of § 1983 civil rights claims is governed by state statutes of limitations, and tolling is interrelated with the length of the limitations period, the state's tolling rules must be borrowed as well. Likewise, § 1367(d) is implicated only when state law claims remain and state statutes of limitations govern; it is appropriate to interpret § 1367(d) in light of the state court's tolling principles. Kern points to nothing in § 1367 or *Fumero Soto* preempting California's clear understanding of tolling as suspension to ensure no state law claim is lost pending a related federal court action including that state law claim.

Fumero Soto's solicitude for state law on tolling and federalism principles support reliance on California's interpretation of tolling as suspension in applying § 1367, as the Second District did in *Bonifield*. AOB at 10 n.3; *Bonifield*, 94 Cal. App. 4th at 303. Kern's criticism of looking to California tolling law has no doctrinal support. In addition to federalism, federal courts have long looked to state law to assist in interpreting terms of federal statutes. *See, e.g., Marcus v. Director, Office if Workers' Comp. Programs*, 548 F.2d 1044, 1047 n.4 (D.C. Cir. 1976) ("Where a [federal] statute fails to define one of its operative terms, and its legislative history cannot dispel whatever reasonable doubt exists as to the proper meaning of the term, a court must assume, in the absence of any applicable federal common law, that the legislature intended for local law to supply the meaning."). And even if Kern were correct that *Bonifield* should have looked exclusively to federal law, the federal cases interpreting

the language of § 1367(d) also follow the suspension approach. Suspension is the uniform result, and this Court should uphold the same conclusion.

E. Kern's Policy Arguments Do Not Justify a Departure from the Suspension Approach.

Kern's foray into the legislative history and goals of § 1367(d) and the Judicial Improvements Act of 1990 yields little for Kern's extension approach and shows equal, if not more, policy favoring the preservation of state law claims after supplemental jurisdiction is declined. As a threshold matter, the "natural meaning" of § 1367(d) obviates any need for recourse to legislative history and policy arguments. "[S]tatutory language is generally the most reliable indicator of legislative intent." *Hassan v. Mercy American River Hospital*, 31 Cal. 4th 709, 715-16 (2003). Unsurprisingly, the legislative history and policies underlying §1367(d) support the plain meaning suspension approach.

Kern's position that "the Court is free to adopt the statutory interpretation that best promotes legislative intent" is incorrect.[8] AOB at 2.

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[8] Kern suggests that this Court ignore the actual holdings of the cases applying the suspension approach, which were faithful to the statutory language, and instead engage in policy-making. As it has many times before, this Court should decline such an invitation. *See, e.g., In re C.H.*, 53 Cal. 4th 94, 108 (2011) ("The question before us, however, is one of statutory construction of two provisions with a plain meaning—not one of policy choice. Our holding must be based on how sections 731(a)(4) and 733(c) are written, not on our view of what could or should have been enacted. Needless to say, the Legislature is free to reconsider the policy set out in the current statutes if it wishes to do so.") (internal citations omitted). Moreover, Kern misrepresents the suspension cases, which in dicta merely acknowledged the extension approach comports with some policy considerations, but did not endorse it. *See* Slip Op. at 21 (noting "[t]he law does encourage prompt filing of clams, but it balances that concern with a concern for ensuring that meritorious claims have their day in court," and finding "no policy factor favoring either side"); *Bonifield*, 94 Cal. App. 4th at 304 (stating an "additional 30 days may not be necessary" for early filed federal actions compared to actions filed at the end of the limitations

Legislative intent is first and foremost informed by the text Congress actually used, and when that text reflects a plain meaning, the interpretive inquiry ends. *In re C.H.*, 53 Cal. 4th at 107 ("[O]nly when a statute's language is ambiguous or susceptible of more than one reasonable interpretation may we turn to extrinsic aids to assist in interpretation. If the text reflects a plain meaning, we need go no further.") (internal citations omitted); *see also Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945) ("The plain words and meaning of a statute cannot be overcome by a legislative history . . . ."). As discussed above, Kern's argument that the word "tolled" in isolation may have multiple meanings does not undo the plain meaning of Congress' text.

In any event, significant legislative history and policy considerations of § 1367(d) favor the suspension approach. First, Kern relies exclusively on a brief statement from the Senate Report on the Judicial Improvements Act of 1990 – an enactment covering eight titles – as articulating the "goal" of § 1367(d) to be the "just, speedy, and inexpensive resolution of civil disputes." AOB at 12-13. Of course, this general goal speaks to the Act as a whole. Kern then attempts to read out the "just . . . resolution of claims" in focusing exclusively on the "speedy . . . resolution of claims." But Kern neglects to mention House Report No. 101-734, which addresses § 1367(d) itself and states that its "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." H. Rep. 101-734, at 30 (1990), reprinted in 1990 U.S.C.C.A.N. at 6876. Likewise, in upholding § 1367(d) against a constitutional attack, the U.S. Supreme Court has explained that § 1367(d) was passed "[t]o prevent the

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period, yet concluding "[b]y no stretch of the imagination can it be said that an additional 30 days unduly compromises the policy in favor of prompt resolution of legal claims").

limitations period on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks*, 538 U.S. at 459. The suspension approach is most consistent with the goal of "prevent[ing] loss of claims," because its longer period provides greater protection of plaintiffs' claims after dismissal from federal court.

Leading treatises also recognize that the purpose of § 1367(d) is to preserve state law claims. "The purpose of § 1367(d) is clear and salutary. It protects plaintiffs who choose to assert supplemental state-law claims in a federal action." 13(d) Charles Alan Wright et al., *Federal Practice and Procedure* § 3567.4 (3d ed. 2008). Indeed, "the statute shows a preference for allowing supplemental state claims to be heard in state court." 16 James Wm. Moore, *Moore's Federal Practice* § 106.66[3][c] at 106-103 (3d ed. 2013).

Kern's suggestion that an explicit goal of § 1367(d) is to avoid delay is simply not echoed in the legislative history of the section, much less is it an overriding goal which requires a view contrary to the plain meaning suspension approach to §1367(d). In fact, Kern's extension approach discourages diligent plaintiffs, because early filing in federal court is in effect punished by a loss of the remaining time in the limitations period, to be replaced by only 30 days. In contrast, the truly dilatory plaintiff, who waits to file its first suit in federal court until end of the state claim limitations period, enjoys the benefit of the full state law period.

The hypothetical argument that the suspension approach would lead to "excessive delays" is unrealistic. AOB at 15. The only reason there would be significant time left under the statute of limitations is if the federal action were filed early in the accrual period. Kern's theory that a plaintiff who files its claim quickly in federal court, using little of the state limitations period, would then wait until nearly the end of the limitations period after supplemental jurisdiction is declined to refile in state court is

unlikely to be borne out in practice. Indeed, it is contradicted by the record in this case (which Kern ignores), where Respondents promptly filed their state and federal claims in both federal and state court, with only 102 combined days of their three-year statute of limitations having run. Moreover, Kern's professed concern about delay misconstrues the language of the Senate Report upon which is it based, which concerns *costs* and specifically how *delays contribute to costs*. AOB at 16 (referring to the "plague[]" of "the costs of civil litigation, and delays that contribute to those costs . . . ."). The suspension approach does no violence to this notion, as during the period of so-called "delay" there is no pending lawsuit, and therefore no contribution to judicial costs. Kern's approach on other the hand would encourage waste, as in this case where it would have forced Respondents to file a new state court action before knowing whether and when Kern County would seek to enforce Measure E.

Kern's facile assertion that filing a new complaint in state court is "ministerial," AOB at 13, ignores the realities of litigation involving large public agencies and multiple parties, particularly in the uncommon circumstances here where Respondents had prevailed on the merits of multiple claims, were dismissed from federal court on unusual standing grounds, retained a successful federal claim to be decided anew in state court, and hoped for non-judicial resolution of the matter. Authorizing, organizing and staffing major litigation among multiple large government agencies, private parties, and a trade association is a big undertaking, often requiring decisions made by government boards at regularly-held public meetings, which would be difficult to accomplish in 30 days under any circumstances.

Kern also argues that the extension approach is needed to further the general goal of statutes of limitations to "protect defendants from [] stale claims," and to "enable defendants to marshal evidence while memories

and facts are fresh . . . ." AOB at 15-16. However, this policy to protect defendants from stale claims does not apply where a prior action has been filed, because the defendant is already on notice of the claims. *See Am. Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 554 (1974) (because of notice of claims provided by filing of the class, suspension of running of statute of limitations for individual claims by members of a class that is not certified "is in no way inconsistent with the functional operation of a statute of limitations"); *Lewis v. Super. Ct. of Los Angeles Cnty.*, 175 Cal. App. 3d 366, 375-76 (1985) ("purpose of statutes of limitations – to protect defendants from prejudices resulting from stale claims – does not operate to compel strict application of the statute where the plaintiff has diligently acted so as to provide the defendant with prompt notice of the claim"); *Collier v. City of Pasadena,* 142 Cal. App. 3d 917, 925 (1986) ("So long as the two claims are based on essentially the same set of facts timely investigation of the first claim should put the defendant in position to appropriately defend the second. Once he is in that position the defendant is adequately protected from stale claims and deteriorated evidence.").

Accordingly, the suspension rule does not prejudice defendants, and tellingly Kern does not allege *any* prejudice in this case. Kern's own authority admits that "[d]efendant receives notice of the claims, from the filing and service of the federal suit," and "[d]efense is not prejudiced, since defendant, if diligent, will interview witnesses and gather evidence to meet the claims in the federal suit." *Kolani*, 64 Cal. App. 4th at 409. In sum, Respondents timely filed their state claims, and Kern has identified no prejudice it has suffered as a result of the Court of Appeal's ruling, other than it must defend Measure E on the merits.

F. Respondents' IWMA and Police Power Claims Are Timely on Additional Grounds Which the Courts Below Did Not Reach or Decide.

Regardless of whether the Court follows the suspension approach or Kern's extension approach, Respondents' claims are timely and the preliminary injunction may be upheld on other grounds raised by Respondents and briefed by the parties, but not reached by the courts below. *See* 2 AA 392-95. Accordingly, if the Court does not simply affirm the decision below, at most it should remand the case for consideration of these other grounds.

As a threshold matter, Kern's timeliness argument should not prevail because it is not an appeal of the preliminary injunction entered by the trial court, but rather is an impermissible interlocutory appeal of a separate trial court demurrer ruling.[9] Next, § 1367(d) preserves "[s]tate law that provides for a longer tolling period." In California, Code of Civil Procedure § 355 provides a longer period. Under that provision, Respondents' claims are timely if filed within one year after reversal of a judgment for plaintiffs if that reversal is other than on the merits. Since the Ninth Circuit's reversal became effective upon issuance of the mandate on June 4, 2010 pursuant to Federal Rule of Appellate Procedure Rule 41, and Respondents filed this state court action before June 4, 2011, the action is timely.

In addition, neither court below addressed Respondents' argument that their claims accrued on January 19, 2011. On that date, Kern first

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[9] *See* Code Civ. Proc. § 904.1 (appealable judgments and orders do not include demurrers); *Fontani v. Wells Fargo Invs.*, 129 Cal. App. 4th 719, 736 (2005) (refusing to review trial court demurrer ruling on appeal of later order that required consideration of likelihood of success on underlying merits). *Cf. Aiuto v. City & Cnty. of San Francisco*, 201 Cal. App. 4th 1347 (2011) (considering on appeal a timeliness argument made before the trial court on the same preliminary injunction motion, not on an unsuccessful demurrer).

stated its intent to enforce Measure E against Respondents by sending a letter stating that Respondents "are *now* subject to the provisions of Measure E," and that Respondents had "six (6) months from the date of this letter to discontinue the land application of biosolids." 2 AA 413 (emphasis added); Slip Op. at 12. Plaintiffs filed their suit a week later. This January 19 letter was an enforcement action that caused Respondents' claims to accrue anew and started a new three-year clock.

CONCLUSION

This Court should apply "the clear, plain language of the statute," as found by Judge Hicks, 2 AA 514, and affirm his and the Court of Appeal's ruling that Respondents' claims were timely under the plain terms of 28 U.S.C. § 1367(d).

Dated: September 23, 2013

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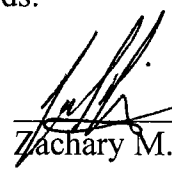
CERTIFICATION

Pursuant to California Rules of Court 8.516(c)(1), and in reliance upon the word count feature of the software used and not counting words excluded under Rule 8.504(d)(3), I certify that this ANSWER contains 8,877 words.

Dated: September 23, 2013



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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 456 Montgomery Street, Suite 1800, San Francisco, California 94104.

On September 23, 2013, I caused the:

ANSWER ON THE MERITS

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Dated: September 23, 2013

Sheila Griffin

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