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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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

APPELLANTS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

Respondents' Answer Brief on the Merits ("RB") boils down to a single premise: that "the term 'toll,' as it is used in its context within § 1367(d), is only susceptible to a single meaning." RB 17. This premise is demonstrably false. It is contradicted by the fact that more than ten cases interpreting Section 1367(d) have reached diametrically opposite conclusions as to what the statute means. Indeed, even the cases that have upheld Respondents' interpretation have recognized that the statute is ambiguous. That is not surprising, for "tolling" has different "tolling effects" in different contexts.

Respondents' interpretation of Section 1367(d) is flawed because it violates the rule that "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). In *Dolan*, for example, the Court held that the "ordinary meaning and usage" of the phrase "negligent transmission" did not control the meaning of the statute where "both context and precedent require[d] a narrower meaning." *Id.* Moreover, the language of a federal statute must be construed with reference to both "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). As a result, the Court must "ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law." *People v. Leiva*, 56 Cal. 4th 498, 506 (2013) (citation and internal quotation marks omitted).

Here is where Respondents' interpretation of Section 1367(d) falls fatally short. While Respondents acknowledge the proposition that "the meaning of individual words derives from their specific statutory context" (RB 12), they pay little heed to the fact that Section 1367(d) is part of a statute enacted to promote "the just, speedy, and inexpensive resolution of civil disputes." S. Rep. 101-416, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804.

Appellants' interpretation of Section 1367(d) advances this goal because it requires the prompt refiling of federally dismissed claims in state court while simultaneously giving plaintiffs enough time to accomplish the simple task of putting a new caption on an existing complaint. In contrast, Respondents' interpretation of the statute frustrates this goal because it would permit plaintiffs to delay refiling for months—or even years—after a case had been extensively litigated in federal court regardless of how long the dismissed claims had been pending in federal court and without any showing that such delays are necessary. Indeed, under Respondents' interpretation of Section 1367(d), they could have sat on their hands and postponed refiling this case until October 2013—*i.e.*, more than the entire period of time it took this case to reach this Court. Congress could not have intended this statute to permit such an untoward and unwarranted result.

ARGUMENT

I.

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

A. The Word "Tolled" Is Susceptible To More Than One Interpretation.

Respondents devote much of their brief to proving that "the most common understanding of the term 'toll' in a legal context is 'to stop the running of; to abate . . . .'" RB 11 (quoting *Leiva*, 56 Cal. 4th at 507) (some internal quotation marks omitted). But that does not mean that this is its only meaning. For example, one legal dictionary defines "toll" as "'stop from running'" (WEBSTER'S NEW WORLD LAW DICTIONARY 257 (2006)), which can mean "stop from expiring." Moreover, *Leiva refused* to interpret "tolled" as meaning "suspended" where to do so would have led to "absurd consequences that the Legislature could not have intended." 56 Cal. 4th at 508 (citation and internal quotation

marks omitted); *accord, id.* at 516 (Court's interpretation of tolling statute "reinforced by consideration of the unreasonable consequences that would flow from a contrary interpretation").

Moreover, the ambiguity inherent in "tolling" is amplified by the fact that, as the Supreme Court recognized in *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), the "tolling" of a statute of limitations can have several different "tolling effects." *Id.* at 652 n.1; *accord, id.* at 661 ("*American Pipe* does not answer the question whether, in a § 1983 case in which the filing of a class action has tolled the statute of limitations until class certification is denied, the tolling effect is suspension rather than renewal or extension of the period"). Respondents assert that *Fumero Soto* supports their position because "[t]he list of possible 'tolling effects' in *Fumero Soto*—suspension, renewal, and annulment . . . . *excludes* Kern's preferred extension approach." RB 23 (emphasis in original). Not so. The third "tolling effect" described in *Fumero Soto* is not "annulment"—whatever that means—but instead "a fixed period . . . 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." 462 U.S. at 652 n.1. That precisely describes Kern's interpretation of Section 1367(d). Nor is it true that "no court has adopted that approach." RB 23. As Respondents elsewhere acknowledge, four courts have done so. *See* RB 21 (disparaging but acknowledging the four decisions that have adopted the Extension Approach).[1]

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[1] Nor can Respondents find solace in the fact that *Fumero Soto* looked to state law to determine the tolling rule applicable there. RB 24. In that case, the relevant federal statute expressly provided that, where federal law did not supply the means for enforcing liability under the federal civil rights statutes, "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ." 462 U.S. at 656 n.7 (citation and

(continued . . .)

The fact that tolling can have several tolling effects is also demonstrated by the cases addressing equitable tolling. The federal courts disagree regarding the effect of equitable tolling, a disagreement that could not exist if "tolling" had a single, fixed meaning. *Compare Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193-96 (9th Cir. 2001) (en banc) (tolling stops the clock), *and Cabello v. Fernández-Larios*, 402 F.3d 1148, 1156 (11th Cir. 2005) ("the statutory clock is stopped while tolling is in effect"), *with Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993) ("[A]lthough courts often speak vaguely of the doctrine's suspending the operation of the statute until the tolling circumstance is corrected, tolling does not bring about an automatic extension of the statute of limitations by the length of the tolling period. It gives the plaintiff extra time *only* if he needs it. . . . The purposes of the doctrine are fully achieved if the court extends the time for filing by a reasonable period after the tolling circumstance is mended") (citation

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(. . . continued)

internal quotation marks omitted). In other words, the federal statute expressly provided that state law applied where federal law was silent. That is not true here, where the relevant federal statute expressly provides a federal rule preventing the limitations period from expiring when a state law claim is filed in federal court under that court's supplemental jurisdiction. Indeed, the command in Section 1367(d) that the federal tolling rule applies "unless state law provides for a longer tolling period" necessarily embodies a Congressional determination that federal law governs interpretation of the statute.

State law is therefore irrelevant to determining how that federal statute should be interpreted. If the rule were otherwise, Section 1367(d) would have a different meaning depending on the tolling rules of the particular jurisdiction in which the supplemental claim had been filed. Respondents offer no authority supporting such a bizarre result. *Compare Marcus v. Director, Office of Workers' Comp. Programs*, 548 F.2d 1044, 1047 & n.4 (D.C. Cir. 1977) (deferring to state law definition of "husband" in federal statute because "there is no general federal common law of domestic relations"). For that reason, Respondents cannot rely on cases such as *Pearson Dental Supplies, Inc. v. Superior Court*, 48 Cal. 4th 665 (2010), which discuss the meaning of "toll" in the context of state law.

omitted; emphasis in original); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1992) ("We do not think equitable tolling should bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term. It is, after all, an equitable doctrine. It gives plaintiff extra time if he needs it") (citation omitted); *see also Mangum v. Action Collection Serv. Inc.*, 575 F.3d 935, 947-48 (9th Cir. 2008) (O'Scannlain, J., specially concurring) (criticizing *Socop-Gonzalez*). This conflict would not exist if, as Respondents contend, "tolling" always means "suspended."[2]

B. 28 U.S.C. §1367(d) Is Susceptible To More Than One Interpretation.

Implicitly acknowledging that "tolling" is ambiguous, Respondents argue that any ambiguity in the meaning of "tolled" disappears in the context of Section 1367(d). RB 12-13 ("the appropriate inquiry is not what 'tolled' means 'in different contexts,' but what it means here"). Accordingly, as noted above, their whole brief is based on the premise that "the term 'toll,' as it is used in its context within § 1367(d), is only susceptible to a single meaning." RB 17.

That argument fails in light of the long-standing split of authority regarding the meaning of Section 1367(d). As the Court recognized in *People v. Leiva*, construing a tolling statute that had been interpreted differently by two Courts of Appeal, "the split between the Courts of Appeal reflects uncertainty over what the phrase 'toll the running of the probationary period' means." 56 Cal. 4th at 510 (citation and some internal quotation marks omitted). Moreover, here, as in *Leiva*, "[t]he term 'toll' is

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[2] While California law, unlike federal law, equates equitable tolling with suspension (*see Lantzy v. Centrex Homes*, 31 Cal. 4th 363, 370-71 (2003)), as noted above, state law is irrelevant to determining the meaning of a federal statute. *See* note 1, *supra*.

not specifically defined in [the relevant statute] or anywhere else in [the relevant code]." *Id.*

Respondents' claim that Section 1367(d) has only one possible meaning also contradicts the cases upholding the Suspension Approach. For example, in *Turner v. Kight*, 957 A.2d 984 (Md. Ct. App. 2008), the court recognized that "[m]ost of the courts that have been called upon to construe the meaning of 'tolled' as used in the context of statutes of limitations, *including under § 1367(d)*, have recognized that the term can have more than one meaning." *Id.* at 989 (emphasis added). Consequently, most courts have recognized that the statute is ambiguous. *See id.* ("Several of the cases dealing with the application of § 1367(d) acknowledge, tacitly or directly, that the phrase in question could be construed in different manners, and, indeed, the courts have split on what the proper interpretation should be. If the learned appellate judges around the country cannot agree on the meaning and application of the phrase, it cannot be said to have only one reasonable interpretation"); *Berke v. Buckley Broad. Corp.*, 821 A.2d 118, 123 (N.J. Super. Ct. App. Div. 2003) (referring to the statute's "ambiguous use of the word 'tolling'"). Indeed, as *Turner* demonstrates, even the cases that support Respondents' interpretation of the statute reject their conclusion that "'toll' . . . is only susceptible to a single meaning." RB 17.[3]

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[3] Respondents rely on cases stating that the California courts should accord "great weight" to the decisions of the lower federal courts when construing a federal statute. RB 8 (citing *Venegas v. Cnty. of Los Angeles*, 32 Cal. 4th 820, 835 (2004)). But such decisions are not binding; indeed, in *Venegas* itself the Court refused to follow two Ninth Circuit decisions. *See also Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 828-31 (1981) (refusing to follow two unreported federal district court decisions); *cf. People v. Memro*, 11 Cal. 4th 786, 882 (1995) ("Federal circuit court opinions do not bind us" on issues of federal constitutional law. "They may serve as persuasive authority, of course, but only when they are just that—persuasive"). And it is risible to suggest that two federal decisions in the same case represent some sort of "consensus" to which this Court must defer. RB 20 n.5.

(continued . . .)

Respondents contend, notwithstanding these cases, that no conflict of interpretation exists because *Berke v. Buckley Broadcasting Corp.*, 821 A.2d 118, 123 (N.J. Super Ct. App. Div. 2003), "expressly refused to follow § 1367(d)'s plain language." RB 15. To the contrary, as just noted, *Berke* expressly recognized that the statute's "use of the word 'tolling'" was "ambiguous." 821 A.2d at 123. Moreover, *Berke* squarely held that "we are satisfied that the 'tolling' provision of the statute refers to the period between the running of the statute while the action is pending in the federal court and thirty days following the final judgment of the federal court declining to exercise supplemental jurisdiction." *Id.* Similarly, in *Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. Nov. 19, 2001), the court stated that "§ 1367(d) operates only to toll the limitations statute during the specified period, and to allow a party to refile within 30 days after dismissal from federal court." *Id.* at *4. Accordingly, the court recognized that "tolling" can mean "prevent from expiring." *Berke* and *Zhang Gui Juan* therefore contradict Respondents' claim that "tolling," as used in Section 1367(d), can have only one meaning.[4]

(. . . continued)

Moreover, the principle invoked by Respondents doubtless makes sense when construing most federal statutes, which presumably are applied most often by federal courts. In this case, however, the federal statute applies to proceedings in state, not federal, court; and has therefore been construed most often by the state courts. Accordingly, there is no reason to give greater weight to the two federal courts that have construed Section 1367(d) than the nine state courts that have done so.

[4] In addition, Respondents have no answer to Kern's argument (AOB 11) that Section 1367(d) should be construed in light of *Fumero Soto*'s then-recent recognition that the "tolling" of a statute of limitations can have several different "tolling effects."

C. Respondents' Remaining Arguments That Section 1367(d) Has Only One Possible Meaning Are Meritless.

Respondents' other textual arguments are nothing more than disguised iterations of their "'tolled' means 'suspended'" argument. For example, they argue that their interpretation of the statute is preferable because it applies in every case. RB 14-15. But, as Appellants pointed out in their Opening Brief, this argument presumes the very point it seeks to prove: that "tolled" means "suspended." AOB 11. If it does not, this argument disappears. For example, if "shall be tolled" means "shall not expire," the statute will apply in all cases where it is operative—*i.e.*, all cases where the statute would otherwise expire during the tolling period—no more and no less. The Suspension Approach is therefore unnecessary to give effect to all the words in the statute.

Nor are Respondents helped by their claim that "Kern asks this Court to hold that the state statute of limitations period *continues running* while the federal case is pending" (RB 18 (emphasis in original)), thereby somehow contradicting its "tolling" provision. Appellants have never made any such argument. No one—neither Appellants nor Respondents—contends that the statute of limitations for a supplemental claim expires while the claim is being litigated in federal court. All Appellants contend is that if the statute *would otherwise have* expired while the case is pending but for the statute, the plaintiff has thirty days from dismissal in which to refile its case. There is nothing inconsistent about that.

Respondents next argue that Appellants' interpretation contradicts the fact that, in their view, Section 1367(d) "mandates two tolling periods." RB 17. This argument, too, attacks a straw man. No one disputes that the operative period of the statute begins when a federal lawsuit is filed and ends thirty days after the supplemental claim is dismissed. But the statute does not distinguish between the two portions of this "tolling period"—*i.e.*, the period when the federal case is pending and the thirty-day

period after dismissal. To the contrary, if the statute of limitations would otherwise expire, or run, at any point during that period, the thirty-day deadline becomes operative.

The same is true for Respondents' claim that "Kern's imposition of a maximum 30 day refiling window impermissibly negates the first tolling period in § 1367(d)"—*i.e.*, the portion of the statute that provides for tolling while the state claim is pending in federal court. RB 18. That, too, is wrong. No one disputes that the main purpose of Section 1367(d) is to "prevent the limitations on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks v. Richland Cnty.*, 538 U.S. 456, 459 (2003). Consequently, the first "tolling period" contained in Section 1367(d) does just that, and is not meaningless or "negated" under Appellants' interpretation.

D. The Extension Approach Best Accommodates The Competing Interests At Stake By Avoiding The Forfeiture Of State Law Claims Dismissed By A Federal Court While Giving Plaintiffs Ample Opportunity To Refile Such Claims After Dismissal.

Once the Court concludes, as it must, that Section 1367(d) is ambiguous, it may then consider which interpretation of the statute best serves the policies that the statute was enacted to promote. That issue is not even close, because Respondents' interpretation of the statute permits interminable delays in prosecuting litigation for no good reason.

"When a term or phrase in a statute is unclear or contains a latent ambiguity, we may look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." *Leiva*, 56 Cal. 4th at 510 (citation and internal quotation marks omitted); *Coan v. State*, 11 Cal. 3d 286, 294 (1974) (ambiguity is condition for resort to extrinsic aids but finding federal statute not ambiguous on point at issue); *Bldg. Indus. Ass'n v. State Water Res. Control Bd.*, 124 Cal. App. 4th

866, 883-84 (2004) (analyzing extrinsic aids to determine meaning of federal statute). For example, in *Leiva*, the Court construed an ambiguous tolling statute by looking at "the legislative history behind the language, the objectives of the statute, and relevant public policy considerations." 56 Cal. 4th at 511. Each of these factors supports Appellants' interpretation of Section 1367(d).

(1) The Legislative History. As Appellants stressed in their Opening Brief (AOB 12-13), Section 1367(d) is part of a statute—the Judicial Improvements Act of 1990—that Congress enacted "to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes." S. Rep. 101-416, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804. Respondents ignore this purpose, contending that "Kern's professed concern about delay" ignores the fact that when "there is no pending lawsuit," there is no increase in the cost of litigation. RB 28. In fact, however, as the quoted language from the Senate Report reveals, Congress wanted to reduce *both* the delay and the costs of litigation. Appellants' interpretation of Section 1367(d) does just that because it requires plaintiffs to promptly refile dismissed claims in state court. In contrast, Respondents' interpretation permits litigants to sit on dismissed claims for months, or years, for no good reason.[5]

Nor are Respondents aided by the House Report on which they rely. That report states that the Section 1367(d)'s purpose "is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations

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[5] Respondents also imply that the Senate Report is irrelevant because it concerned the Judicial Improvement Act as a whole, of which Section 1367(d) is only a part. RB 26. However, as noted at the outset of this brief, this contention (like Respondents' brief as a whole) ignores the fundamental rule of statutory construction requiring that statutes be construed in their statutory context. *See* p.1, *supra*.

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. 6860, 6876; *accord*, *Jinks*, 538 U.S. at 459 (Section 1367(d)'s purpose was to "prevent the limitations period on . . . supplemental claims from expiring *while the plaintiff was fruitlessly pursuing them in federal court*") (emphasis added). Contrary to Respondents' claim (*see* RB 27), the Suspension Approach furthers this purpose no better than the Extension Approach. That is because both approaches prevent state law claims from expiring while they are being pursued in a federal forum. And while the Suspension Approach "provides greater protection of plaintiffs' claims *after* dismissal from federal court" (*id.* (emphasis added)), nothing in the legislative history of Section 1367(d) even remotely suggests that Congress meant to prevent claims from expiring while the plaintiffs sat on their hands for months, or even years, after their claims had been filed and then dismissed.

(2) The Legislative Purpose. Because Respondents cannot show that the express purpose of Section 1367(d) supports their interpretation of the statute, they make one up, contending that "the purpose of § 1367(d) is to preserve state law claims. RB 27. But as the snippet they quote from the House Report acknowledges, the purpose of Section 1367(d) was narrower: to keep state law claims from expiring while they were being litigated in federal court. Both the Suspension Approach and the Extension Approach do that. But this purpose is served as long as plaintiffs with dismissed supplemental claims are given an adequate opportunity to refile. It is not furthered by giving them additional and unnecessary months or years to litigate their claims in state court.

Respondents' argument to the contrary is based on the premise that it takes more than thirty days to refile a dismissed state law claim in state court. Indeed, they give this case as an example, contending that a thirty-day deadline "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." RB 28. Indeed, they claim that "[a]uthorizing, 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." *Id.*

Respondents seem not to have read their own brief. Despite the supposedly enormous burdens that they faced in trying to refile their state-law claims, by their own account they somehow managed to refile this case a week after the County allegedly "first stated its intent to enforce Measure E against Respondents." RB 30-31. If Respondents can refile this case in a week, surely other plaintiffs will be able to refile their claims in thirty days, particularly since those claims, by definition, will already have been subject to the pre-trial investigation required by Rule 11(b) of the Federal Rules of Civil Procedure and then litigated (often for years) in federal court. Indeed, Respondents themselves acknowledge that plaintiffs who promptly file in federal court—as they did—are likely to promptly refile in state court. RB 27-28.

The Suspension Approach thus ignores the reality that refiling a dismissed claim in state court is not the initiation of a new lawsuit. Instead, it requires only the refiling of claims that have already been investigated and litigated and that typically require nothing more than a change of caption. Consequently, Respondents advance no plausible argument that the elastic time

limits created by the Suspension Approach serve *any* useful purpose.[6]

(3) The Relevant Public Policy Considerations. Because the Suspension Approach is unnecessary to further Section 1367(d)'s stated goals, Respondents are left to assert that Appellants' interpretation of the statute "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." RB 27. No such "punishment" exists. Under Appellants' interpretation, no plaintiff would *ever* have to file a state court complaint in less than the limitations period provided by state law. And while the plaintiff who files his or her federal case promptly and the dilatory plaintiff would both have thirty days after dismissal to refile their state-law claims, such even-handed treatment hardly constitutes "punishment."

Moreover, Respondents' blithe assurance that "the 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" (RB 29) ignores the realities of litigation and the need for finality. While defendants receive notice when a supplemental claim is first filed in federal court, the utility of that notice disappears when a plaintiff lets its state law claims remain in limbo for months or years after dismissal by a federal court. During that period, witnesses can die, become ill or move out of

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[6] Respondents quote *Moore's Federal Practice* as stating that Section 1367(d) "'shows a preference for allowing supplemental state claims to be heard in state court.'" RB 27 (quoting 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE §106.66[3][c] at 106-103 (3d ed. 2013) ("MOORE")). But the whole sentence, which Respondents have conveniently truncated, supports Appellants' interpretation: "the statute shows a preference for allowing supplemental state claims to be heard in state court if the jurisdiction-conferring claim is dismissed, and provides *a brief window of protection* that allows the plaintiff to file in state court without having to face a limitations defense." MOORE, §106.66[3][c] at 106-103 (emphasis added).

state, and memories of healthy witnesses deteriorate. There is thus every reason to require plaintiffs to refile promptly—and, given the adequacy of the thirty-day period—no reason not to. For that reason, the *Kolani* court was correct in holding that the Extension Approach "upholds the policy of the statute of limitations, by *limiting* the time to refile, and thus assuring that claims will be *promptly* pursued in any subsequent action." *Kolani v. Gluska*, 64 Cal. App. 4th 402, 409 (1998) (emphases in original). It therefore is fair to both plaintiffs and defendants, as Congress intended. *See* AOB 13; *cf. People v. Leiva*, 56 Cal. 4th 498, 516 (2013) (adopting construction of tolling language that "does not prejudice or benefit either the prosecution of the defendant"). In contrast, the Suspension Approach "is contrary to the policy in favor of prompt prosecution of legal claims" embodied in state statutes of limitation. *Huang v. Ziko*, 511 S.E.2d 305, 308 (N.C. Ct. App. 1999); *accord*, *Kolani*, 64 Cal. App. 4th at 409 (Suspension Approach is "unreasonable" and "does significant harm to the statute of limitations policy").

Finally, Respondents imply throughout their brief that the policy in favor of deciding claims on the merits outweighs the policy favoring prompt prosecution. *See* RB 2 ("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"); *id.* at 9 ("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"). Contrary to these implications, however, "[t]he two public policies" at issue here—"the one for repose and the other for disposition on the merits—are equally strong, the one being no less important or substantial than the other." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 396

(1999). Accordingly, where no public purpose is served by giving plaintiffs additional and unnecessary months or years to refile a dismissed federal claim, the public policy in favor of resolving claims promptly must prevail.[7]

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[7] Respondents cite the statement in *Lewis v. Superior Court*, 175 Cal. App. 3d 366 (1985), that the "'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." RB 29 (quoting *Lewis*, 175 Cal. App. 3d at 375-76). But *Lewis* did not involve a situation like this case, where the plaintiff files one action that is dismissed for reasons other than the merits and then files a second lawsuit. In those cases, the rules governing equitable tolling require "reasonable and good faith conduct on the part of the plaintiff." *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 45 Cal. 4th 88, 102 (2008) (citation and internal quotation marks omitted). Accordingly, equitable tolling may be unavailable in situations where the plaintiff delays filing the second action *even if the limitations period has not yet run under the Suspension Approach. See Collier v. City of Pasadena*, 142 Cal. App. 3d 917, 932 (1985) (refusing to decide if disability pension claim would have been timely had plaintiff filed it at the end of the suspended limitations period).

CONCLUSION

The Court of Appeal's decision should be reversed.[8]

Dated: November 13, 2013.

Respectfully,

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[8] It is unnecessary to respond to the final section of Respondents' Brief which, in violation of Rule 8.520(b)(3), addresses issues not included in the limited grant of review.

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

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used, I certify that the attached Appellants' Reply Brief on the Merits contains 4,953 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

Date: November 13, 2013.

STEVEN L. MAYER

34207060F

PROOF OF SERVICE

I am over eighteen years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero Center, 10th Floor, San Francisco, CA 94111-4024.

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

Dated: November 13, 2013.

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