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3 LANCE RAYGOR AND JAMES :

4 GOODCHILD, :

5 Petitioners :

6 v. : No. 00-1514

7 REGENTS OF THE UNIVERSITY OF :

8 MINNESOTA. :

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10 Washington, D.C.

11 Monday, November 26, 2001

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:01 a.m.

15 APPEARANCES:

16 HOWARD L. BOLTER, ESQ., Minneapolis, Minnesota; on behalf
17 of the Petitioners.

18 MARK B. ROTENBERG, ESQ., Minneapolis, Minnesota; on behalf
19 of the Respondent.

20 PAUL D. CLEMENT, ESQ., Deputy Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf of
22 the United States, as amicus curiae, supporting
23 Respondent.

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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 00-1514, Lance Raygor and James Goodchild v.
5 the Regents of the University of Minnesota.

6 Mr. Bolter.

7 ORAL ARGUMENT OF HOWARD L. BOLTER

8 ON BEHALF OF THE PETITIONER

9 MR. BOLTER: Mr. Chief Justice, and may it
10 please the Court:

11 Section 1367 is a constitutional and sensible
12 response by Congress to the serious procedural problems
13 that were facing the Federal courts prior to 1990. Those
14 procedural problems arose due to State claims that were
15 pending in the Federal courts at that time under this
16 Court's, what was then called, pendent jurisdiction and is
17 now called supplemental jurisdiction. The problem
18 specifically was what happens to those State claims that
19 are pending in Federal court when the expiration of the
20 statute of limitations on those claims occurs.

21 The courts were faced with a dilemma at that
22 point, do they dismiss these claims and risk having them
23 not be refiled in the State court or do they retain those
24 -- the supplemental jurisdiction over those claims and
25 decide issues that might be better suited for the State

1 courts when they don't -- when the Federal court no longer
2 wants to exercise that jurisdiction.

3 QUESTION: What -- what's wrong with, as some
4 courts did, conditioning dismissal upon -- upon the
5 plaintiff's -- upon the defendant's agreement to -- to
6 waive the statute?

7 MR. BOLTER: The problem with that solution,
8 Justice Scalia, is that there is no guarantee that there
9 would be an agreement to waiver. The defendant is -- it's
10 up to the defendant to agree to that waiver and to say
11 that they will -- they will not bring up that statute of
12 limitations defense in State court.

13 QUESTION: Right, and if he doesn't waive, then
14 -- then you proceed in Federal court because it's just not
15 -- not a proper -- proper basis for dismissing it. What's
16 -- what's the matter with that solution?

17 MR. BOLTER: In that -- in that situation, it
18 might work. There might be supplemental jurisdiction and
19 the plaintiffs will not lose their claims.

20 However, that is just one court's potential
21 solution. There were a number of solutions that were
22 being attempted at the time with varying effectiveness.
23 It didn't guarantee, across the board, that plaintiffs
24 would be able to bring those State claims in Federal court
25 and be assured that they would be -- that they wouldn't be

1 forfeited if the statute of limitations ran out.

2 One -- one possible solution to the problem
3 doesn't make 1367 unconstitutional. 1367 was a -- was a
4 general response to a general problem that was occurring
5 below.

6 QUESTION: How about the Solicitor General's
7 suggestion that we construe the statute so as not to apply
8 to nonconsenting -- actions against nonconsenting States?

9 MR. BOLTER: To do that, the Court needs to
10 address the threshold question of whether the statute
11 abrogates in -- in the first place, whether tolling is an
12 abrogation of the State's immunity, and we contend that it
13 is not.

14 QUESTION: Well, but the Solicitor General says,
15 as I understand his brief, that we would avoid that
16 constitutional question if we construed the statute in the
17 manner that he asked us to construe it.

18 MR. BOLTER: If the -- if that scenario was
19 taken and -- and the construction is -- is construed not
20 to apply to the States, there will be serious
21 constitutional problems that will be created by that
22 construction, particularly depriving the -- the Federal
23 litigants of their access to the Federal forum.

24 QUESTION: Well, what constitutional provision
25 do you say would be violated if we followed that

1 suggestion?

2 MR. BOLTER: The right -- the due process rights
3 of a plaintiff to have their cause of action heard in a --
4 in a certain forum, to make sure that they would have
5 those claims heard.

6 QUESTION: What case supports your position
7 there? What case from this Court?

8 MR. BOLTER: I don't know if there's a case
9 that's -- oh, I'm sorry. I take that -- that's the Logan
10 case that -- that shows that a -- that a plaintiff has a
11 right to have their -- their cause of action heard.

12 QUESTION: But not to have a cause of action
13 heard in Federal court against a State.

14 MR. BOLTER: That -- that's correct, not to have
15 -- not to have it heard in -- in the Federal court against
16 the State, but to have it heard in some forum. The way --

17 QUESTION: But suppose the State decided it
18 wasn't going to waive its immunity. As I understand it,
19 in Minnesota, you could bring this claim within 45 days.
20 The State has waived its immunity for suit in its own
21 court.

22 MR. BOLTER: That's -- that's right.

23 QUESTION: So -- but it -- you're not suggesting
24 that it had to do that, otherwise there would be a due
25 process violation. If that were so, then the State

1 doesn't have any immunity because due process would compel
2 it to -- to answer.

3 MR. BOLTER: What we are saying is that the due
4 process violation would be if you construe the statute not
5 to apply to the States, you don't have the protection of
6 tolling a State claim against a State in Federal court.
7 And if a State asserts its constitutional defense of
8 sovereign immunity, that claim could be barred, but be --
9 in --

10 QUESTION: But it wouldn't have been if you had
11 filed a protective action. Suppose you had -- with this
12 uncertain question of Eleventh Amendment immunity from
13 suit in Federal court, you could have, on the same day you
14 filed in Federal court and took a chance on that, filed a
15 protective action in Minnesota State court.

16 MR. BOLTER: We -- we could have filed a
17 protective action, but the -- that has -- I think there
18 are two parts to that -- that answer.

19 First, we could have filed a protective action,
20 but there's no guarantees that the State would have stayed
21 that action. It might have -- it might have forced
22 litigation on that matter, creating res judicata and
23 claims preclusion issues in the Federal court. It might
24 have sought to dismiss it because of claims splitting.

25 And the next part of the question is that the --

1 the Supreme Court of Minnesota said that this was a
2 facially unconstitutional -- section 1367 --

3 QUESTION: But wouldn't it -- it wouldn't have
4 occasion to say that -- as I understand it, when
5 duplicative actions are brought, the second court, the one
6 where you file second, generally although it's not
7 compelled to do this, will say, okay, prior action
8 pending. We'll stay this case till the other one is
9 finished.

10 MR. BOLTER: They -- they could do that, but the
11 point is that it wasn't -- there was no guarantee that
12 they will. They might also choose not to stay it and not
13 to clog up their dockets and have -- have cases affecting
14 their statistics.

15 QUESTION: You have -- you're using a lot of
16 mights. Do you have any -- do we know how Minnesota State
17 courts treat the prior action pending plea? Do they
18 dismiss or do they keep it?

19 MR. BOLTER: They -- if the claim is filed in
20 Minnesota on -- they will not dismiss if it was clear that
21 the Federal court would not have exercised jurisdiction
22 over that Federal -- over that State claim.

23 And in Minnesota, it was not clear at that time,
24 and it's still not clear because the -- the university and
25 the States have this constitutional defense which they can

1 assert or not assert. It's at their discretion. In fact,
2 some of the cases that we've cited show that Minnesota,
3 the university, has litigated cases, on the merits in
4 Federal court, State and Federal claims.

5 So, the point there is that we didn't know that
6 the court would not exercise jurisdiction over the State
7 claims, and if we were to file with that knowledge in --
8 in State court, they could have dismissed on claims
9 splitting or claim preclusion ground -- or claims
10 splitting grounds because the Federal court might have
11 exercised jurisdiction. It was not clear.

12 QUESTION: It seems to me the principle you're
13 arguing for -- I'm just not sure what its -- what its
14 boundaries are. The principle, as I take it, is when --
15 when the Federal Government creates a Federal cause of
16 action, any State law that impedes -- and -- and allows
17 that Federal action to be brought in Federal court, any
18 State law that impedes the bringing of that action in
19 Federal court can be repealed by the Federal Government.

20 How does that apply, for example, to simple
21 statutes of limitations? Let's -- let's assume you -- you
22 have a Federal statute of -- of a year for certain -- for
23 a certain transaction or occurrence. The State statute
24 for the same transaction or occurrence and the State's
25 cause of action is just 6 months. Now, would you argue

1 that because of the difficulty of claims splitting and so
2 forth, the Federal Government can prescribe by statute
3 that the State cause of action shall be extended to 12
4 months?

5 MR. BOLTER: No, that's not what we are saying.

6 QUESTION: Well, why not? If you say no, then
7 you acknowledge the principle that, you know, there are
8 some problems that have no solution, and -- and the mere
9 fact that you're making the Federal cause of action more
10 difficult has nothing to do with whether there's Federal
11 power to -- to solve that particular problem.

12 MR. BOLTER: The -- the scenario that you just
13 posed about the 6-month and the 1-year time limits -- you
14 could still file that State claim in Federal court within
15 6 months. You have to comply with the -- the State cause
16 -- the State statute of limitations. It's just in a forum
17 that maybe the State will ultimately object to.

18 QUESTION: Yes, but the Federal Government wants
19 to give you 12 months in its courts. That's -- that's the
20 policy that it's decided. We want to give you 12 months,
21 and here's a State which has a State cause of action. It
22 is -- it is putting you to the choice. You either forego
23 the -- the State cause of action or -- or you -- you file
24 within 6 months. Doesn't that impede, to some extent,
25 what the Federal Congress wanted to happen?

1 MR. BOLTER: I think in your -- in that
2 hypothetical, it probably would impede, but that's not the
3 situation that we have in front of us.

4 QUESTION: Oh, I understand it isn't, but -- but
5 I -- but the principle you're arguing for, it seems to me,
6 leads to that conclusion, that the Federal Government can
7 -- can reconfigure State causes of action willy-nilly so
8 that they don't impede the bringing of Federal causes of
9 action in Federal court as Congress wishes.

10 MR. BOLTER: What the -- what the statute does
11 here, if it's applied to a State, is it tolls the time
12 limit. It doesn't -- it doesn't change the time limit for
13 the -- the statute of limitations. If we were to file
14 this claim on the 50th day, 1367(d) wouldn't apply.

15 QUESTION: Well, I -- I wonder about that. My
16 understanding is -- correct me if I'm wrong, please --
17 that the Federal statute gives you an extra 30 days.

18 MR. BOLTER: It gives you the -- the tolling --
19 the tolling provision runs for 30 days after the time
20 after the dismissal.

21 QUESTION: Well, and so if you -- if -- if as in
22 this case, I think you file on the last day or the next-
23 to-the-last day in the Federal court, then you're given an
24 extra 30 days. So, you do reconfigure the State statute,
25 contrary to your suggestion. And -- and I have a

1 significant problem with that. It might be that the
2 tolling provision is necessary in order to make the
3 Federal courts operate and exercise their jurisdiction in
4 an efficient manner, but this statute goes beyond that and
5 gives a longer statute of limitations.

6 MR. BOLTER: Well, it gives a longer tolling --

7 QUESTION: It does reconfigure the statute of
8 limitations.

9 MR. BOLTER: I would respectfully disagree that
10 it reconfigures the -- the statute of limitations because
11 it's -- the statute -- the State statute has to be
12 complied with in order for 1367 to -- to be triggered. It
13 has to be filed within the appropriate time period. And
14 -- and that meets the statute of limitations objectives
15 that the State was seeking when it -- when it created that
16 45-day period. The fact that it's being tolled after it's
17 been timely filed is not -- that's -- that's not a core
18 interest that's protected by the State sovereign immunity.
19 Tolling a statute that has been complied with, in this
20 case filing within that 45 days --

21 QUESTION: Well, it hasn't been complied with
22 under State law. If -- if the State law acknowledged the
23 filing in Federal court as -- as satisfying the statute of
24 limitations, you wouldn't be here. The problem is the
25 State law says you have to file the action in State court

1 within the statute of limitations period, and we're not
2 going to give you any grace period for a false start that
3 you made in Federal court.

4 MR. BOLTER: Well, the -- the State statute is
5 silent on tolling. It's not a condition of -- of the
6 State's waiver of that 45-day period and --

7 QUESTION: But the State court here found that
8 the State district court did not abuse its discretion in
9 saying there wouldn't be any tolling, did it not?

10 MR. BOLTER: That's what -- they found that
11 there was no abuse of discretion, but that was -- that --
12 the State court's initial decision there was based on a --
13 an erroneous interpretation of Pennhurst II when --

14 QUESTION: Well, but that presumably is up to
15 the Minnesota courts to decide when the -- when the State
16 statute is tolled.

17 MR. BOLTER: They have the discretion to decide
18 that, but it's our position that the tolling provision of
19 1367(d) can also toll that time period because it's not
20 abrogating the State's sovereign immunity. It's not --

21 QUESTION: Well, but you know, you say it isn't
22 tolling because it's -- it doesn't really go to the length
23 of the statute of limitations, one. But it does, you
24 know. If you say the -- if you want to say a statute of
25 limitations is tolled for a year, obviously that extends

1 the time that the State law would have allowed.

2 MR. BOLTER: But it doesn't defeat the purpose
3 of -- of the statute of limitations and -- and the need to
4 file in a timely fashion with that State statute to begin
5 with. And I think that's what the -- the State -- the --
6 if the State has a core interest in the statute of
7 limitations, that's what it would be, is that claims are
8 filed within that time period. Now, whether it's filed in
9 a -- in a jurisdiction to which the State ultimately
10 objects is -- is another point.

11 QUESTION: That isn't self-evident. I mean, if
12 what you're saying is true, every State would
13 automatically allow tolling when suit is filed in a
14 Federal court within the State statute period. If it were
15 self-evidently true that the State policy is not at all
16 offended by that, you wouldn't have a problem and you
17 wouldn't be here because every State would say, well, it
18 was filed in Federal court. That's good enough for us.

19 But it isn't good enough for a lot of States.
20 And -- and, you know, it's their policy we're talking
21 about, and their policy is you must file in State court
22 within the limitations period.

23 QUESTION: May I ask you a sort of preliminary
24 question I'm kind of puzzled about? What is the source of
25 the Federal Government's power to enact the statute at

1 all?

2 MR. BOLTER: Article III to control the lower
3 Federal courts gives the -- the Government the power to
4 create these -- these Federal practices and procedures, in
5 this case, the -- the way to address combined Federal and
6 State claims, as well as its -- its -- the powers to
7 protect individuals from losing their due process rights
8 to have their claims heard and -- and burdening the access
9 to the Federal courts.

10 QUESTION: So, it's Article III you rely on.

11 MR. BOLTER: Yes, Article III and -- and partly
12 on the equal -- equal protection for -- to allow
13 plaintiffs to have access to Federal courts and bring
14 their Federal claims and their State claims if they -- if
15 they need to do that as well.

16 QUESTION: It would just -- when Congress passed
17 this, Congress I -- I assume was just thinking it was
18 regulating the procedure in Federal courts, that it was
19 exercising that power to implement Article III.

20 And what you said about due process, I didn't
21 see any sign of that in the history of 1367. But you're
22 not suggesting that before 1367, people were denied due
23 process because there wasn't a tolling provision.

24 MR. BOLTER: In some circumstances, they were
25 because of the claims -- the combination of the claims

1 splitting and claims preclusion laws in the State courts
2 and States and the statute of limitations on those pendent
3 claims if they were brought in Federal court could result
4 in a denial of a forum for that State claim if -- if a
5 Federal claim was also asserted.

6 QUESTION: Is there -- is there any indication
7 that Congress, when it amended 1367, relied on anything
8 other than Article III? Are you suggesting it relied on
9 section 5 of the Fourteenth Amendment?

10 MR. BOLTER: I don't think it's -- that it's
11 explicit in the congressional --

12 QUESTION: Well, is it implicit?

13 MR. BOLTER: I think it's implicit in there that
14 they're --

15 QUESTION: Where do you find that?

16 MR. BOLTER: Well, the protections that it --
17 that it provides --

18 QUESTION: I mean, I'm -- I'm talking about what
19 Congress thought, not what you think.

20 MR. BOLTER: I -- I'm not sure I understand your
21 question, Mr. Chief Justice.

22 QUESTION: Well, my question was, is there any
23 reason to think that Congress, when it made this
24 amendment, was relying on section 5 of the Fourteenth
25 Amendment, in addition to Article III?

1 MR. BOLTER: Aside from nothing explicit, I
2 don't -- I don't know what Congress was thinking other
3 than what I could speculate.

4 QUESTION: Well -- well, don't we know that this
5 came out of the Federal Courts Study Committee?

6 MR. BOLTER: Yes, it did come out of the Federal
7 Courts Study Committee?

8 QUESTION: And so -- and Congress took the
9 suggestion of that Federal Courts Study Committee, and as
10 far as I recall, in that report, they were talking about
11 the authority of Congress to regulate the procedure in
12 Federal courts.

13 MR. BOLTER: That's right. I think that goes to
14 the Article III, I guess I -- if I'm not -- if I'm
15 misunderstanding Mr. Chief Justice.

16 QUESTION: Suppose we were to conclude that this
17 statute must rest upon Article III. We -- we reject your
18 due process and equal protection suggestions. What's the
19 closest case that you have where we have sustained a power
20 like this pursuant to Congress' authority to establish
21 tribunals under Article III?

22 MR. BOLTER: I have to think about that for just
23 a second.

24 QUESTION: Is it Terrell/Taro v. Burt
25 Construction Company where the State cannot condition the

1 filing of articles of incorporation on a waiver of the
2 right to go to Federal court? It can't burden the right
3 to go to Federal court?

4 MR. BOLTER: That -- I think that is an example.
5 I think probably Nash is also an example.

6 QUESTION: Although I think Terrell/Taro was
7 probably a Commerce Clause case.

8 MR. BOLTER: I'm not sure, Justice Kennedy, if
9 it was or not.

10 I think Nash, though, was also -- I think Nash
11 gets to your question as well.

12 QUESTION: Which -- which case?

13 MR. BOLTER: The Nash -- the Nash --

14 QUESTION: Florida Industrial Commission.

15 MR. BOLTER: Nash v. Florida Industrial
16 Commission.

17 QUESTION: Nash.

18 MR. BOLTER: I -- I couldn't hear Mr. Chief
19 Justice. But I think that case also talks about burdening
20 the Federal rights in an NLRB case.

21 QUESTION: Going back to the statute of
22 limitations point, I -- I should know this, but if I file
23 a complaint in the Nevada State courts and the Nevada
24 court said, this doesn't belong here, there's no
25 jurisdiction, the cause of action arose exclusively in

1 California, and it dismisses, and you then file in
2 California, is there tolling as a general matter?

3 MR. BOLTER: In that situation with -- with two
4 States, I would say that unless it was within the time
5 period of California, it would probably not be tolled in
6 that situation.

7 QUESTION: All right. Well, that -- that seems
8 to me very similar to what we have here.

9 MR. BOLTER: Well, we have a filing in Federal
10 court here with -- with a statute that -- that directly
11 addresses the tolling --

12 QUESTION: Well, but you're -- you're -- well,
13 it does or it doesn't. But you -- you indicated earlier
14 that the statute of limitations was not in any way
15 extended because it was tolled by the filing. But it is
16 extended by this additional 30 days. You basically have
17 -- what was it? 45 -- the 45 plus 30. You have 75 days
18 now, almost double.

19 MR. BOLTER: Well, I think that the tolling
20 provision is different. I mean, it does give additional
21 time, but it doesn't extend the time period that the State
22 was open and exposed to liability. It doesn't extend that
23 45-day period. They were already notified of it. They --
24 they were put on notice. They had the -- they knew that
25 they were going to be sued and it was brought in -- within

1 that 45-day period.

2 The fact that it was suspended during a time
3 period where the State was in Federal court at its own --
4 its own discretion, it would be -- it would be harmful to
5 the plaintiffs to have the State be able to use the delay
6 in time that it's pending in Federal court to bar the
7 claim from being brought after that in State court.

8 QUESTION: Mr. Bolter, what you said might be so
9 if the only purpose of the statute of limitations were
10 repose, being notified on time that you're subject to
11 suit.

12 But there are certain statutes that have been
13 called so-called built-in statute of limitations where the
14 limitation is considered part and parcel of the right
15 itself usually when it's in the very same statute, and
16 that seems to be the kind of limitation that we have here.
17 We have a State that is giving up its sovereign immunity,
18 but only on these terms. So, why isn't this a built-in
19 statute of limitations? So, by necessity there would be
20 harm when the State says it's the right -- we condition
21 the right on you bringing suit within 45 days.

22 MR. BOLTER: They didn't make, as a part of that
23 condition, anything about tolling. That's -- that's I
24 think the -- the first point, and -- and that's what this
25 statute is doing, is tolling. It's not changing that --

1 that right, that built-in right that you talk about, to
2 the 45-day period. That -- that still has to be complied
3 with. But this is talking about tolling, which is a
4 different -- it's a different animal here, but it doesn't
5 extend that time limit, that -- that built-in time limit
6 simply by tolling. It suspends it from running out but it
7 doesn't extend it. I couldn't have filed that claim 75
8 days after it was sued. I had to file it within 45 days
9 or else it would have been barred, and 1367 would not have
10 attached.

11 QUESTION: But I take it you're saying that
12 whether you regard it as built in or whether you regard
13 the policy as simply a policy of repose, Article III power
14 or section 5 power is what it is, and -- and it can
15 accomplish what this statute wants to accomplish.

16 MR. BOLTER: Yes.

17 QUESTION: I don't know why you rely just on
18 Article III or on section 5, which I think is pretty
19 remote in this situation. Why -- why don't you rely on
20 the underlying Federal statute? There will always be some
21 Federal power that justified the Federal cause of action
22 which is the subject of this extension provision.

23 Let's assume it's a Commerce Clause cause of
24 action. Under the Commerce Clause, the Federal Government
25 could have, if it wanted, eliminated the State cause of

1 action entirely, couldn't -- couldn't it? It could have
2 said, we -- we preempt any State action in this field, and
3 the whole State cause of action would be washed away. If
4 it can do that, why can't it do the lesser act of not
5 washing away the State cause of action, but just saying,
6 you know, if you bring suit in Federal court on this
7 Commerce Clause cause of action, you get another 30 days
8 or whatever, 45 days, whatever it is?

9 MR. BOLTER: Well, it doesn't -- it doesn't --

10 QUESTION: Wouldn't that work? That -- that
11 makes me feel a lot more comfortable than just relying on
12 Article III.

13 MR. BOLTER: Well, I don't think that it
14 washes --

15 QUESTION: I'm trying to help you.

16 (Laughter.)

17 MR. BOLTER: I don't know that I understand.
18 Are you saying that they had power under the Commerce --
19 if they had power under the Commerce Clause, could they do
20 this?

21 QUESTION: This statute itself piggy-backs on
22 whatever substantive Federal statute exists out there, you
23 know, whether it's under the Commerce Clause or under any
24 other Federal power. And -- and that Federal power would
25 allow the total elimination of the cause of -- of the

1 State cause of action. Why -- why is it unreasonable to
2 allow a mere extension of the -- of the State limitations
3 on that State cause of action?

4 MR. BOLTER: Well, I guess I don't disagree that
5 it's not unreasonable to toll this -- these statutes of
6 limitations.

7 QUESTION: Do you know of any case in which this
8 Court has held that Congress, when passing a statute of
9 its own, could totally forbid a State to enact a similar
10 statute?

11 MR. BOLTER: I'm not aware of a case like that,
12 Your Honor.

13 QUESTION: Neither am I.

14 QUESTION: Mr. Bolter, in any event, that
15 wouldn't take you very far because so often these pendent
16 State claims are garden variety State tort law, contract
17 claims, are they not? I mean, there's the big Federal
18 claim, and then you latch onto that the State common law
19 claims. So, the State common law claims could arise out
20 of the same transaction and occurrence, depend on the same
21 nucleus of facts, and yet not be just a State counterpart
22 of the Federal statute.

23 Don't you -- don't you have that in -- in civil
24 rights cases? Let's say, bring a 1983 claim against a
25 police officer and then you latch onto it State common law

1 claims for assault and battery?

2 MR. BOLTER: Yes, and -- and that's what we have
3 done in this case, or that's what we -- that's what this
4 -- and that's what this statute protects against, losing
5 those claims.

6 I -- I'm not sure if I understood your question,
7 Justice Ginsburg, about can you do that in Federal court,
8 I mean, latch onto those Federal claims? Yes. I mean,
9 that -- that is what supplemental jurisdiction is about in
10 this situation. So, I don't think that that's -- that's
11 appropriate to do that. And -- and it goes back to giving
12 the State a choice of whether it wants to be there or not
13 by exercising its constitutional defense of sovereign
14 immunity.

15 I mean, I think the key -- one of the key things
16 here is that this -- that the tolling does not abrogate
17 the State's sovereign immunity because it's in a
18 jurisdiction that it wants to be in at all times. The
19 choice is its own. And the sovereign immunity core
20 principles described by this Court in its jurisprudence
21 have been whether and where a State can be sued, and it
22 doesn't infringe on those core interests. Tolling has
23 never been identified as a core interest of -- of
24 sovereign --

25 QUESTION: Just whether and where and not when.

1 Right? So, the Federal Government could -- could override
2 State statute of limitations on sovereign immunity cases
3 no matter what because it's not really part of sovereign
4 immunity.

5 MR. BOLTER: I don't --

6 QUESTION: The State says, I'm willing to be
7 sued for 1 year, and you say the Federal Government
8 doesn't have to observe that 1 year. It can say, well,
9 you know, it's 2 years instead.

10 MR. BOLTER: No. I think that the -- that 1
11 year has to be respected, but this is about tolling. It's
12 not about changing a statute of limitations. This is
13 about tolling the time period for it to run out.

14 If there are no further questions at this time,
15 I'd like to reserve the remainder for rebuttal.

16 QUESTION: Very well, Mr. Bolter.

17 Mr. Rotenberg, we'll hear from you.

18 ORAL ARGUMENT OF MARK B. ROTENBERG

19 ON BEHALF OF THE RESPONDENT

20 MR. ROTENBERG: Mr. Chief Justice, and may it
21 please the Court:

22 Your Honors, it's critical to focus on the
23 fundamental issue of federalism presented in this case;
24 namely, is it Congress or the State that has the power to
25 decide when that State can be sued by its own citizens in

1 its own courts?

2 QUESTION: So, in your view, the Soldiers and
3 Sailors Relief Act -- all of the soldiers in Afghanistan,
4 when they come back and they find that their statute of
5 limitations has run out, Congress does not have the power
6 to extend the statute. Is that right --

7 MR. ROTENBERG: Your Honor --

8 QUESTION: -- in your opinion?

9 MR. ROTENBERG: Under --

10 QUESTION: I mean, there's presently a statute
11 that says when they come back, people who are in the armed
12 forces, they will discover that the statute of limitations
13 in the States has been extended for 6 months. In your --
14 or however long necessary. In your opinion, that's
15 unconstitutional.

16 MR. ROTENBERG: Your Honor, the -- the logic --
17 it may be unconstitutional is the direct answer to your
18 question. The logic --

19 QUESTION: All right. Now, what about -- what
20 about tort reform? Suppose in the tort reform statutes
21 that pass, there is a provision that somehow in there is
22 favorable to a plaintiff. That could happen. And if that
23 does happen, then the State doesn't want to follow it,
24 unconstitutional to apply it.

25 MR. ROTENBERG: Justice Breyer, the -- the

1 thrust of Alden against Maine is that Congress does not
2 have the power under Article I to force a State to submit
3 to a private suit for damages in its own courts.

4 QUESTION: All right. Is it constitutional for
5 Congress to pass a copyright law or a -- any of these tort
6 statutes that are federalized and say that the States
7 cannot pass a statute that gives a cause of action in tort
8 that is different?

9 MR. ROTENBERG: Your Honor, the answer to that
10 question would depend on Federal preemption principles.

11 QUESTION: Correct.

12 MR. ROTENBERG: Under the Commerce Clause --

13 QUESTION: Now, they -- they can preempt. Fine.

14 Then if they can do that, why can't they shape
15 the cause of action in the State so that it corresponds
16 with Federal law by, for example, extending a little bit
17 or not extending too much the statute of limitations?

18 MR. ROTENBERG: The reason they cannot do -- the
19 Congress cannot do that, Justice Breyer, is because this
20 statute, 1367(d), represents a blanket attempt by Congress
21 to extend statutes of limitations without regard to the
22 existence of an independent power in Article I, such as
23 the war power which may suffice to protect --

24 QUESTION: That -- that power will always exist
25 in the Federal cause of action that has been brought in

1 Federal court.

2 MR. ROTENBERG: It will exist, Your -- Your
3 Honor, in -- in the --

4 QUESTION: In every case to which this -- this
5 statute applies, there will be involved a Federal power
6 under Article I.

7 MR. ROTENBERG: Well, not in this case, Your
8 Honor, and this case is a perfect example of the -- of the
9 situation. This -- this Court held that, in fact, there
10 was no power under Article I to hail the State into
11 Federal court in an age case. So -- and -- and
12 petitioners here --

13 QUESTION: No, but that's -- essentially you're
14 going back to the Eleventh Amendment. I mean, your -- I
15 understand your Eleventh Amendment argument, but you're
16 trying to overlay an Article I argument on that, and I
17 think that's where we're having -- having our difficulty.
18 But as I understand it, your ultimate answer to the
19 difficulty is the Eleventh Amendment.

20 MR. ROTENBERG: We -- Justice Souter, we have
21 two arguments, yes. The -- the essential point of -- of
22 Alden relates to causes of action against the State
23 sovereign, and this Court in Alden has established a
24 categorical rule that a State's power to condition its
25 waiver of immunity is -- is not subject to the Article I

1 power of Congress to amend. In Alden, this Court held
2 that, to the extent Maine chose to consent to certain
3 types of suits, while maintaining immunity in other types
4 of suits, it has done no more than exercise its privilege
5 of sovereignty concomitant to its constitutional immunity
6 from suit. So, that is the first and most important point
7 here.

8 With regard to the -- the plenary authority of
9 Congress to adopt a sweeping statute of limitations
10 alteration in -- in the States that applies to an
11 unlimited type of claim, you have to look at whether there
12 was an express intent to abrogate and --

13 QUESTION: May I interrupt you?

14 MR. ROTENBERG: -- and that would take you into
15 a -- a section 5, Fourteenth Amendment type analysis.
16 And --

17 QUESTION: May I ask you this question as a
18 preliminary matter? Putting the Eleventh Amendment to --
19 to one side just for a moment, because I do understand
20 your position there, assume this was a suit against a
21 public utility and the -- and they -- Minnesota provided
22 an especially short statute of limitations for that public
23 utility. Would -- would you think the -- the Federal
24 statute would be unconstitutional as applied in such a
25 case, or would it be valid?

1 MR. ROTENBERG: The -- the statute is
2 unconstitutional if the Court needs to address the
3 question of legislative power, Justice Stevens, because
4 there is no case upholding a congressional power to enact
5 a sweeping expansion of statute of limitations --

6 QUESTION: There's no case upholding it, no case
7 striking it down. But -- but in any event, you think the
8 statute would be unconstitutional even if you didn't have
9 a State defendant.

10 MR. ROTENBERG: That's right, Your Honor.

11 QUESTION: Well, that -- that goes quite far.
12 What -- what is your reasoning there?

13 MR. ROTENBERG: The reasoning there, Mr. Chief
14 Justice, is simply that since the Founding Convention,
15 it's been clear that the powers of Congress are defined
16 and limited, and the residual legislative power does not
17 rest with Congress. It rests with the States under the
18 Tenth Amendment under this Court's decisions in Marbury
19 and the -- as recently as United States against Morrison.

20 The -- the point of the matter is, Your Honors,
21 that my able petitioners' counsel here has -- has failed
22 to suggest any case law that supports the enactment of a
23 -- of a change in the State statutes of limitations that's
24 unhinged from a particular exercise of power --

25 QUESTION: But -- but Article III is certainly a

1 particular power.

2 MR. ROTENBERG: Yes, Your Honor. But the
3 tribunal --

4 QUESTION: Mr. Rotenberg, did -- did the
5 Minnesota Supreme Court go that far? I thought that their
6 decision as to the unconstitutionality of 1367 related
7 only to cases in which the State was the defendant.

8 MR. ROTENBERG: Justice --

9 QUESTION: And to the extent that you're asking
10 us to consider this broader theory, you're asking us to
11 take that up -- to go beyond where the Minnesota Supreme
12 Court left off.

13 MR. ROTENBERG: Yes, Justice Ginsburg, that's
14 correct. The Minnesota Supreme Court did not hold that
15 the statute was unconstitutional as applied in all --

16 QUESTION: And your position -- your position
17 would, as Justice Breyer suggested, mean that the Soldiers
18 and Sailors Civil Relief Act is invalid, insofar as it
19 tolls State statute of limitations as well.

20 QUESTION: In actions against the State.

21 QUESTION: This would -- this -- this would be a
22 big surprise, I think --

23 MR. ROTENBERG: Justice O'Connor --

24 QUESTION: -- to members of the armed forces.

25 MR. ROTENBERG: Justice O'Connor, the -- the --

1 QUESTION: Why -- why do you want to go that
2 far? Why don't you stick with what the lower courts did
3 and talk about the Eleventh Amendment? What -- what
4 possible advantage is it to you to make this sweeping
5 argument you're making?

6 MR. ROTENBERG: Justice O'Connor, it is
7 certainly sufficient for this Court to address only the
8 Alden principle, as Justice Kennedy just mentioned, and
9 restrict the holding to a State sovereign --

10 QUESTION: And in that regard, what's the matter
11 with the Solicitor General's approach that says the
12 statute was never intended to cover nonconsenting States?
13 Don't interpret as applying. What's the matter with that?

14 MR. ROTENBERG: Justice O'Connor, we agree with
15 the Solicitor General that the statute can and, indeed,
16 should be so construed.

17 QUESTION: I guess then the next case -- then
18 the next case we'll have is where the soldiers and sailors
19 come back and they would like to sue the State. Maybe
20 it's a pension. Maybe it's a tort. Maybe it's a
21 contract. There can be many, many things in States that
22 -- where the residents have a cause of action, and I guess
23 even your minimal position would make it unconstitutional
24 for them to do so.

25 MR. ROTENBERG: Justice Breyer, this Court has

1 not addressed the intersection between its holding in
2 Alden against Maine, which establishes a categorical rule
3 that Congress is disempowered from forcing a State to
4 defend itself against its own citizens in its own State
5 courts, and the -- the war power. That case has not been
6 presented, and I would suggest to Your Honors --

7 QUESTION: Well, the war power is -- is an
8 Article I power. I mean, a minute ago I thought you were
9 making a -- a flat Article I argument.

10 MR. ROTENBERG: Yes, Justice Souter. The -- my
11 -- my understanding of this Court's jurisprudence in this
12 area -- and Alden isn't the only case that stands for this
13 proposition, of course -- is that Congress, acting within
14 its Article I power, is -- has no authority to abrogate
15 sovereign immunity.

16 Now, it hasn't -- Your Honors have not
17 specifically faced what I would submit is a very
18 challenging issue, as suggested by Justice O'Connor's
19 question. Do we really mean each and every exercise of
20 Article I power, even and including the war power to
21 protect sailors abroad?

22 QUESTION: Well, what would -- what would
23 possibly be the ground for distinguishing. The State has
24 sovereign immunity or it doesn't.

25 MR. ROTENBERG: Justice Kennedy, I agree, and I

1 think that the practical answer in our federalism is to
2 allow the States to exercise good judgment with respect to
3 their tolling provisions. It -- it strains the
4 imagination --

5 QUESTION: Precisely. They can waive if they
6 want to.

7 MR. ROTENBERG: Exactly.

8 QUESTION: Well, that's what bothered me. This
9 may just be a misprint or something, but quite clearly the
10 State of Minnesota has the power to say that our consent
11 extends to this tolling provision, doesn't it? It could.
12 It could come out the other way if it wants to. And,
13 indeed, they say that the equitable tolling applies to
14 their statute, don't they?

15 All right. Now, I read their opinion. I've
16 read this six times. Not six, but only two. Let me not
17 exaggerate.

18 (Laughter.)

19 QUESTION: But -- but when they get to the --

20 QUESTION: It seemed like six. Right?

21 (Laughter.)

22 QUESTION: When -- when they get to the point,
23 this very point, it says, however, we read Alden to
24 require the university's waiver of immunity be limited to
25 the -- be limited to the parameters set forth in the

1 statute; i.e., 45 days.

2 Well, Alden has nothing to do with that. But
3 they seem to think -- and after all, they did say that
4 this statute says 45 days, but it doesn't mean 45 days in
5 respect to equitable tolling. But they seem to think that
6 our case Alden required them to limit it to the 45 days,
7 which of course it doesn't.

8 So, they seem to be under a misapprehension in
9 that respect, and I would like you to address that, what
10 we should do about that.

11 MR. ROTENBERG: Justice Breyer, I agree with you
12 that Alden does not compel a particular interpretation of
13 State law. That's certainly true.

14 It is also true that the Minnesota Supreme Court
15 unanimously determined that the 45-day limitation on its
16 waiver of sovereign immunity is -- is part and parcel of
17 the statute, as Justice Ginsburg previously mentioned, and
18 is an aspect of its -- of its sovereign immunity and in --
19 in addition said that the equitable tolling principle
20 could be applied. But it's important to recall that the
21 Minnesota courts apply the equitable tolling principles in
22 an extremely conservative fashion.

23 QUESTION: Yes, but my question, of course, is,
24 what do we do about that sentence in the opinion which
25 says, we read Alden to require that the waiver of immunity

1 be limited to 45 days?

2 MR. ROTENBERG: Well --

3 QUESTION: That's -- that's -- if they had said
4 exactly what you just said, I wouldn't have my question.

5 MR. ROTENBERG: Justice Breyer, this Court need
6 not affirm every sentence of the Minnesota Supreme Court's
7 decision. It only need affirm the judgment, and the
8 judgment can be affirmed simply by reference to the fact,
9 the constitutional fact, that Alden proscribes
10 congressional alterations of -- of State waivers of
11 sovereign immunity.

12 QUESTION: Mr. Rotenberg, because sovereign
13 immunity is kind of a peculiar objection -- that is, the
14 State -- it's up to the State to waive it or not. It's
15 not like a case where the Federal court wouldn't have
16 subject matter jurisdiction. Shouldn't, at least for the
17 period that the State stood silent, which I understand was
18 about 9 months, in Federal court -- at least for that
19 period, shouldn't the State be treated as having been
20 legitimately before the Federal court not complaining
21 about it? So, for those 9 months, at least, the
22 limitation ought to be tolled.

23 MR. ROTENBERG: No, Your Honor. It -- it isn't
24 true that Minnesota stood silent for 9 months. The
25 university asserted its sovereign immunity defense at the

1 earliest opportunity, namely in its answer, and -- and
2 never in any way suggested a waiver of such a -- of such a
3 defense. This Court has held repeatedly that waivers of
4 sovereign immunity by the States is not to be inferred and
5 not to be implied.

6 QUESTION: What was going on? I understand, at
7 least from the dates, that this was raised 9 months after
8 the litigation commenced. What was going on? Usually an
9 answer is in -- how many days?

10 MR. ROTENBERG: 20 days, Your Honor.

11 QUESTION: Yes.

12 MR. ROTENBERG: And we filed our answer
13 asserting sovereign immunity within that time frame.
14 There's nothing the university could have done to save
15 their claim. The -- they filed in Federal court merely 48
16 hours before the statute of limitations would -- the 45-
17 day rule would have expired even under their
18 understanding, meaning that a filing in the wrong court
19 suffices to be a filing in the correct court. So, there's
20 nothing the university did to delay whatsoever.

21 Moreover, we filed a dispositive motion at -- in
22 a timely way, consistent with the normal course of
23 litigation in this case. Most Federal trial courts prefer
24 that dispositive motions not be filed seriatim. And we --
25 we noticed the motion, and there was a scheduling order,

1 which plaintiff knew about, in the spring of 1997, and we
2 filed the dispositive motion asserting our sovereign
3 immunity in June of '97.

4 And even if you would say that -- that somehow
5 the petitioners here were not fully aware, as they should
6 have been, that the university was asserting its sovereign
7 immunity from the get-go, by June 3, they had a motion, a
8 dispositive motion, and the filing in the State forum
9 still exceeded the 45 days.

10 QUESTION: Well, I -- I suppose under the rule
11 you're suggesting that we adopt the State could -- let's
12 assume that the claim is filed in the Federal court on the
13 fifth day, and there's 40 days more left. I suppose the
14 State could just sit back and wait for 60 days before it
15 moves to dismiss to allow the claim to go stale, under
16 your submission.

17 MR. ROTENBERG: Justice Kennedy, that's possible
18 but that was not what happened here, number one, and
19 number --

20 QUESTION: Well, it not only is possible. It's
21 the necessary concomitant -- necessary sequence from the
22 rule you -- you propose.

23 MR. ROTENBERG: Your Honor --

24 QUESTION: It's not possible, it's necessary.
25 That's your rule.

1 MR. ROTENBERG: -- it isn't -- it isn't my rule
2 alone, Your Honor. Pennhurst explicitly --

3 QUESTION: It's the result you want us to adopt.

4 MR. ROTENBERG: Yes, it is, Your Honor. But
5 Pennhurst specifically suggests -- yes. Excuse me.
6 Pennhurst explicitly says that the expedient of filing the
7 claim in the State court will avoid any danger of this
8 kind occurring. And -- and Pennhurst stands clearly for
9 the proposition that a filing of the State claim, a
10 protective claim, which petitioners' counsel here
11 acknowledged would solve the problem, and filing the
12 Federal claim in the Federal forum is a constitutionally
13 appropriate expedient.

14 Any contrary indication brings into question the
15 -- the opinion of this Court in -- in Pennhurst by
16 suggesting that filing concomitantly in the State and
17 Federal forums is somehow a due process problem.

18 Let me conclude with an -- a closing observation
19 about the due process issue. Petitioners have not cited a
20 single case, not a single case, holding that the State's
21 handling of pendent claims, in the absence of section
22 1367, somehow violated due process. And equally
23 important, Your Honors, petitioners do not seriously claim
24 that 1367(d) is a valid exercise of Congress' power under
25 section 5 of the Fourteenth Amendment to address any

1 supposed due process problems. The record is simply bare.

2 Moreover, due process cannot be the basis of any
3 supposed abrogation here because the first element of
4 abrogating the State's sovereign immunity, using section 5
5 of the Fourteenth Amendment, is an explicit statement of
6 Congress. There is no such explicit statement of Congress
7 here. In fact, the record is silent as to any due process
8 claim either in the halls of Congress or in the -- in the
9 case law, at least as cited or referred to by -- by
10 petitioners.

11 And most importantly, Your Honors, and in
12 conclusion, whether there might conceivably be an
13 unfairness in some hypothetical State situation, this
14 question of unfairness does not trump the Alden principle,
15 that Congress cannot, by an observation of unfairness
16 falling short of a due process issue, force a State to
17 submit to suit against itself in its own courts.

18 QUESTION: I suppose unfairness is what
19 sovereign immunity is all about, isn't it?

20 MR. ROTENBERG: It may be seen that way by some
21 plaintiffs, Your Honor.

22 QUESTION: Thank you, Mr. Rotenberg.

23 MR. ROTENBERG: Thank you.

24 QUESTION: Mr. Clement, we'll hear from you.

25 ORAL ARGUMENT OF PAUL D. CLEMENT

1 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
2 SUPPORTING THE RESPONDENT

3 MR. CLEMENT: Thank you, Mr. Chief Justice, and
4 may it please the Court:

5 When this Court confronts a general grant of
6 jurisdiction, like 1367(a), it routinely infers that the
7 statute does not apply to nonconsenting States. Such a
8 construction avoids difficult -- upsetting the balance
9 between Federal and State powers.

10 For similar reasons, this Court should construe
11 section 1367(d)'s tolling provision not to apply to
12 nonconsenting States. That reading avoids the difficult
13 sovereign immunity questions posed by the application of a
14 Federal statute to extend the State statute of limitations
15 against a nonconsenting State in State court.

16 QUESTION: You -- basically you're saying clear
17 statement. Is that -- is that nub of your point?

18 MR. CLEMENT: The nub of the point --

19 QUESTION: The clear statement rule.

20 MR. CLEMENT: -- is this Court should apply a
21 clear statement rule to this statute, the supplemental
22 jurisdiction statute, and since there's no indication in
23 the text or legislative history that Congress had any
24 contemplation that this would apply to nonconsenting
25 States, this Court should construe the provision as not

1 applying to nonconsenting States.

2 QUESTION: Do you -- do you agree that in the
3 absence of a clear statement rule, there is no ambiguity
4 here that -- that would open the door to our giving this
5 kind of a construction?

6 MR. CLEMENT: There is -- there is enough
7 ambiguity in the statute, if the Court wanted to, to reach
8 the second argument that we offer in our brief, but I
9 would suggest that the first argument we offer in the
10 brief, which you could call the clear statement argument,
11 is a more narrowly tailored and focused answer to the
12 constitutional issues that are raised by applying the
13 statute to nonconsenting States.

14 QUESTION: Well, you've only got 10 minutes, and
15 I'll leave it to you to whether you want to get into it.
16 I -- I have trouble with the ambiguity argument. I
17 understand your clear statement argument. I have trouble
18 with the ambiguity.

19 MR. CLEMENT: Well, if I could, I would focus on
20 the clear statement argument because I think it does very
21 narrowly avoid the constitutional issue that's raised.

22 QUESTION: Now, to -- to apply the clear
23 statement argument, do we not have to at least decide that
24 it does constitute an elimination of State sovereign
25 immunity to require the tolling of -- of the action

1 against the State?

2 MR. CLEMENT: I don't think so. I think this
3 Court only needs to decide that it would raise grave
4 constitutional doubts before it would need to apply the --
5 the clear statement rule because, although in some
6 contexts, in the abrogation context, for example, a clear
7 statement rule assumes that -- that the Congress can't
8 constitutionally do something, in other contexts as
9 Gregory v. Ashcroft, Will against the Michigan Department
10 of -- of State -- in those cases, this Court has applied
11 clear statement principles even though they don't assume
12 the answer to the constitutional question. And that, of
13 course, is consistent with the way this Court approaches
14 matter as a general matter and its preference to avoid
15 constitutional questions.

16 The -- the Court, for example, just last term in
17 -- in Vermont against United States ex rel. Stevens,
18 applied similar principles of statutory construction to
19 avoid directly addressing the Eleventh Amendment --

20 QUESTION: It's fine when you're dealing with an
21 ambiguous statute. Sure, just the mere presence of a
22 constitutional doubt will cause you to resolve the
23 ambiguity in such a fashion that it doesn't raise a
24 constitutional principle so you have sort of a clear
25 statement rule, unless it's a clear statement where

1 there's a -- but those are ambiguity cases.

2 You're -- you're purporting to forego reliance
3 upon ambiguity and to say even assuming that the statute
4 is clear, you should not interpret it to apply to the
5 States.

6 And now, do you have any case not involving
7 ambiguity, where we have applied the clear statement rule
8 without first finding that it is clearly an abrogation of
9 State sovereign immunity?

10 MR. CLEMENT: Well, I think, for example, in the
11 Stevens case, this Court interpreted the term person not
12 to include the State. What effectively we're asking the
13 Court to do here is interpret the term, any claim, in
14 section 1367(d) to say any claim except one against a
15 nonconsenting State.

16 QUESTION: Well, I think in Atascadero we
17 interpreted the word person so that it did not include the
18 State, even though you could say person means a lot.

19 MR. CLEMENT: No. That's exactly right.

20 And in Will against Michigan where the Court had
21 already held that 1983 did not implicate Eleventh
22 Amendment issues, this Court nonetheless held that in
23 State courts, the term person in 1983 does not apply to --
24 to States or to State officers acting in their official
25 capacities.

1 And I think all of those cases and the -- the
2 Court's decision in Gregory against Ashcroft and in Will
3 all stand for the proposition that this Court can apply a
4 clear statement type principle to avoid a
5 constitutional --

6 QUESTION: How -- how do you respond to the
7 Soldiers and Sailors Civil Relief Act as applied to States
8 in tolling causes of action against the State?

9 MR. CLEMENT: Well, I -- I think that -- that in
10 order to maintain consistency with our position in this
11 case, we would have to ask this Court to apply a clear
12 statement rule in that case, and the current version of
13 the statute would probably not apply to States under that
14 -- under that theory.

15 QUESTION: So, has that been happening? I mean,
16 is it the case that the armed forces members have been
17 suing States or not under the act?

18 MR. CLEMENT: We haven't seen that the -- that
19 the issue of sovereign immunity arising in those contexts,
20 and it very well -- well --

21 QUESTION: And it could be just that --

22 MR. CLEMENT: It very well may be, as counsel
23 for the University of Minnesota suggested, that States
24 will have the good sense in those instances to waive their
25 sovereign immunity defense. I mean, the same principles

1 that are going to motivate the Federal Government to pass
2 the Soldiers and Sailors Civil Relief Act are going to
3 motivate State governments to waive their sovereign
4 immunity defenses in those claims.

5 Now, it seems to me that -- two points I'd like
6 to make. First of all, it's worth focusing on the fact
7 that even before 1367(d), the informal Federal court
8 practices for dealing with potentially untimely State
9 claims did not apply to nonconsenting States. Justice
10 Scalia, you raised the -- the problem of conditioning a
11 dismissal on a withdraw -- of statute of limitations
12 defenses. But, of course, under Pennhurst II, a State has
13 an absolute right to insist that the pendent claims
14 against it be dismissed. So, in that context, the Federal
15 court would not be able to condition the dismissal on a
16 waiver of a statute of limitations defense, nor would it
17 be able to retain jurisdiction over the claim. So, it
18 stands to reason that 1367(d) should no more apply to
19 cases against nonconsenting States than the Federal court
20 practices it replaced.

21 Lastly, I would emphasize that this
22 interpretation of section 1367(d) does not place
23 plaintiffs in an untenable position or in an
24 unconstitutional bind. Plaintiffs, in cases where the
25 State objects to Federal court jurisdiction as a blanket

1 matter, have the same rights that they would have under
2 Pennhurst II. They can file both claims in State court,
3 the Federal and the State, which seems a complete answer
4 to any due process objections, or they can file parallel
5 proceedings.

6 Even if the State makes a decision whether to
7 consent on a case by cases, as Minnesota appears to do,
8 the State -- the plaintiff can still attempt to get
9 consent in the first instance, and if it's not, it can
10 make a protective filing along the lines that Justice
11 Ginsburg suggested.

12 In the end, it seems that plaintiffs lack any
13 case law to support their due process arguments. I think
14 that respondent, in fairness, lacks any case law to
15 support its -- its Article I legislative power argument.
16 There's really no need for this Court to make any
17 significant case law in order to decide this case if it
18 simply applies the clear statement test we suggest in our
19 brief.

20 If there's no other questions, I'll submit.

21 QUESTION: Thank you, Mr. Clement.

22 Mr. Bolter, you have 2 minutes remaining.

23 REBUTTAL ARGUMENT OF HOWARD L. BOLTER

24 ON BEHALF OF THE PETITIONER

25 MR. BOLTER: Thank you, Mr. Chief Justice.

1 I'd like to address something that was brought
2 up on -- again in questioning the university about being a
3 nonconsenting State. It is -- their arguments -- the --
4 the university and the Solicitor General's arguments rely
5 on the fact that they were a nonconsenting State
6 throughout this whole procedure. And that's not an
7 accurate characterization of what went on here. When they
8 were sued in Federal court, they were not a nonconsenting
9 State until 9 months later when they brought that motion
10 to dismiss.

11 QUESTION: But they said they put it in their
12 answer within 20 days.

13 MR. BOLTER: They did do that.

14 QUESTION: And I think Mr. Rotenberg was quite
15 right that the whole impulse of the Federal rules is you
16 bring all of your motions at once and not seriatim.

17 MR. BOLTER: They --

18 QUESTION: But they -- if they raised that --
19 that Eleventh Amendment in their answer within the time
20 allotted, I don't think that you can say that it was a
21 9-month thing that they --

22 MR. BOLTER: Raising the defense in the answer
23 was just like raising any other defense in that answer.
24 They had to assert it or else they would risk a waiver
25 argument later on. All that did was preserve their right

1 to bring the -- the motion 9 months later.

2 QUESTION: Yes, but in preserving that right, it
3 -- it certainly does not put them in the position of being
4 a consenting State.

5 MR. BOLTER: Well, they were not a nonconsenting
6 State.

7 QUESTION: Look, what it boils down to is they
8 hadn't filed the motion to dismiss yet. That's what we're
9 arguing about, isn't it?

10 MR. BOLTER: Yes, they had not filed the motion
11 and until that motion was filed, the court can't rule on
12 it. The court can't -- is not going to dismiss the claim,
13 and there will be supplemental jurisdiction over all the
14 claims that are --

15 QUESTION: Yes, but by the same token, you know
16 by the answer that they are not consenting to
17 jurisdiction.

18 MR. BOLTER: All we knew by the answer is that
19 they were asserting an affirmative defense, just like they
20 asserted a statute of limitations defense or laches or
21 waiver. And none of those can be ruled upon by the court
22 until they are affirmatively brought before them to rule
23 on. They might have just decided not to do anything with
24 it until the matter was tried on its merits, and they have
25 done that in another case, the Eldeeb case, which they

1 received summary judgment on the merits of both State and
2 Federal claims.

3 QUESTION: Didn't you know also that you were at
4 risk of an interpretation of 1367? Justice Souter
5 suggested that there is no ambiguity, but at least there's
6 a respectable authority for saying there is and that the
7 tolling of 1367(d) is limited to cases covered by 1367(c)
8 and would not take in sovereign immunity.

9 MR. BOLTER: We did not anticipate that that
10 could be a construction of -- of 1367 -- of 1367(d),
11 otherwise we might have reevaluated whether or not to
12 bring it. But that wasn't -- there was nothing to suggest
13 that that was the status of the case law --

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bolter.
15 The case is submitted.

16 (Whereupon, at 10:58 a.m., the case in the
17 above-entitled matter was submitted.)

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