No. _____

In the Supreme Court of the United States

Keith Allen Kiefer,

Petitioner,

v.

Isanti County, State of Minnesota.

ON PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Erick G. Kaardal
Counsel of Record
Gregory M. Erickson
MOHRMAN, KAARDAL & ERICKSON, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
Tel: (612) 341-1074
kaardal@mklaw.com
erickson@mklaw.com

Counsel for Petitioners

2025– BACHMAN LEGAL PRINTING – PHONE (612) 339-9518

QUESTION PRESENTED

To protect the right of access to the courts under the First Amendment's Petition Clause, during the petition stage of this Court seeking review of federal constitutional claims arising from a federal court action with supplemental state tort claims, whether this Court's petition stage is a statutory right to petition under 28 U.S.C. §2101(c) (granting 90 days to file a petition for a writ of certiorari) as a "federal court proceeding" and hence, a filed petition a matter "pending" sub judice as declared in 28 U.S.C. § 1367(d) to continue the tolling of state tort statute of limitations until a final Court order is issued.

PARTIES TO THE PROCEEDING

Petitioner Keith Kieferwas the plaintiff-appellant below.The Respondents below were Isanti County and the State of Minnesota. The State of Minnesota was a named defendant only to the extent that in the lower court action Kiefer' challenged the constitutionality of a state statute,the Minnesota's Imprisonment and Exoneration Remedies Act, Minn. Stat. § 590.11, which is not at issue in this petition.

CORPORATE DISCLOSURE STATEMENT

The petitioner is an individual. So, there is no petitioner-entity with a parent public or private corporation owning any interest.

RELATED PROCEEDINGS

Minnesota Supreme Court:

Kiefer v. Isanti Cnty., Or. denying review (Sept. 17, 2025)

Minnesota Court of Appeals:

Kiefer v. Isanti Cnty., No. A24-1574, 2025 WL 1732743, at *1 (Minn. App. June 23, 2025)

Cnty. of Isanti v. Kiefer, No. A17-0326, 2017 WL 3469521, at *1 (Minn. App. Aug. 14, 2017)

Cnty. of Isanti v. Kiefer, No. A15-1912, 2016 WL 4068197, at *1 (Minn. App. Aug. 1, 2016)

United States Supreme Court:

Kiefer v. Isanti Cnty., Minnesota, 144 S. Ct. 353 (2023)

United States Court of Appeals:

Kiefer v. Isanti Cnty., Minnesota, 71 F.4th 1149 (8th Cir. 2023)

United States District Court:

Kiefer v. Isanti Cnty., Minnesota, No. 20-CV-2106 (WMW/ECW), 2022 WL 607397, at *1 (D. Minn. Mar. 1, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Rules

In The
Supreme Court of the United States

Keith Allen Kiefer,
Petitioner,
v.
Isanti County, State of Minnesota

On Petition for Writ of Certiorari to the Minnesota Supreme Court

PETITION FOR WRIT OF CERTIORARI

Keith Kiefer respectfully petitions for a writ of certiorari to review the judgment of State of Minnesota Supreme Court order denying review of the judgment of the Minnesota Court of Appeals.

OPINION BELOW

The decision of the Minnesota Court of Appeals is reported at *Kiefer v. Isanti Cnty.*, No. A24-1574, 2025 WL 1732743, (Minn. App. June 23, 2025), *review denied* (Sept. 17, 2025). App., *infra,* 4a-14a; 1a.

JURISDICTION

The denial of the Minnesota Supreme Court's review of the Minnesota Court of Appeals decision was entered into on September 17, 2025. The Minnesota Court of Appeals decision was entered on June 23,

2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted at App., *infra*, 25a–26a.

STATEMENT OF THE CASE

The issue of tolling the statute of limitations for state tort claims during the U.S. Supreme Court's petition stage as matter pending in federal court seeking review of federal constitutional claims is an essential component to the procedural right to access the Court under the First Amendment under 28 U.S.C. § 2101(c). Indeed, although discretionary, a petition to this Court is part of the federal appellate process. U.S. Const. art. III. As statutory law, Congress established the time for filing a petition as an opportunity to obtain jurisdiction to this Court. Yet, this Court has not opined on defining "pending" as sub judice under 28 U.S.C. § 1376(d) as applied to the petition stage until this Court issues a final order while time expires for the prosecution of a state tort claim.

However, the Minnesota state appellate court's decision, dismissed a state court complaint alleging state tort claims previously asserted in federal court for supplemental jurisdiction purposes on grounds that the statute of limitations had run. The federal action was dismissed on different federal constitutional claims asserted through 28 U.S.C. § 1983 with prejudice; the state claims without prejudice. The state appellate court, while not finding nor relying upon any case *on point,* determined that

28 U.S.C. § 1367(d), governing the 30 day tolling period of state claims after dismissal of a federal court action, excludes the period during the petition stage for writs of certiorari seeking review of federal constitutional claims. Citing, *Carlson v. Hyundai Motor Co.,* 222 F.3d 1044(8th Cir. 2000). Petitioner Kiefer had filed a petition within the statutory 90-day timeframe under 28 U.S.C. § 2101(c).

1. Prosecutors in Isanti County, Minnesota, in December 2008, cited and relied upon an inapplicable civil Solid Waste Ordinance governing solid-waste management operations to criminally prosecute the Petitioner Keith Kiefer. 5a. The prosecution led to Kiefer's conviction in 2009 and subsequent incarceration for 60 days. *Id.* But Kiefer did not operate a solid-waste management operation. The County contended it used a "reasonable" interpretation of the inapplicable civil ordinance as the basis of Kiefer's criminal conviction and subsequent incarceration. This began Kiefer's 16-year journey through the courts.

2. Three years after his conviction and imprisonment, in March 2011, Isanti County sued Kiefer in a civil action under the exact same Solid Waste Ordinance provision that resulted in his crimination conviction. Isanti County used the Ordinance to remove personal property stored outside on his rural 52.94 acre real property. Kiefer challenged the applicability of the Ordinance regarding his land-use. and ultimately won. Initially, the state district court agreed with the County. However, Kiefer would win a reversal on appeal. *Id.*

A state appellate court reversed the district court's decision finding that the Ordinance could not apply to Kiefer because the plan language of the Ordinance applied only to solid-waste management

operations, which Kiefer was not. *Cnty. of Isanti v. Kiefer*, No. A15-1912, 2016 WL 4068197(Minn. App. Aug. 1, 2016). The appellate court remanded the case back to the state district court for further consideration regarding the County's remaining civil independent zoning violation claim. On remand, the Minnesota district court found Kiefer in violation of the different independent zoning claim. The Minnesota Court of Appeals affirmed. *Cnty. of Isanti v. Kiefer*, No. A17-0326, 2017 WL 3469521 (Minn. App. Aug. 14, 2017) ("*Kiefer II*").

In July 2018, after the appellate court decision, Kiefer moved for post-conviction relief to vacate his criminal conviction. In October 2018, the state district court granted the vacation. 6a.

3. With his criminal conviction vacated, in 2020, Kiefer sought retribution from Isanti County for its illegalities for his criminal prosecution and incarceration under the inapplicable Solid Waste Ordinance and filed a federal lawsuit. *Id.* Kiefer sued Isanti County for unlawful seizure in violation of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment through 28 U.S.C. § 1983. Kiefer also sued for state tort claims of false imprisonment; malicious prosecution, and common law abuse of process as supplemental jurisdictional claims. *Id.* In March 2022, the U.S. District Court for the District of Minnesota, on the pleadings, dismissed the federal constitutional claims with prejudice and the remaining state court claims without prejudice. *Kiefer v. Isanti County*, No. 20-cv-2106, 2022 WL 607397 (D. Minn. Mar. 1, 2022), *aff'd*, 71 F.4th 1149 (8th Cir. 2023), *cert. denied*, 144 S. Ct. 353 (Oct. 30, 2023)

Kiefer then appealed the federal constitutional claims to the Court of Appeals for the Eighth Circuit

which affirmed, in 2023, the district court's 2022 decision. *Id.* Kiefer, soon thereafter, petitioned the U.S. Supreme Court for a writ of certiorari. This Court denied the petition on October 30, 2023. *Id.*

4. After this Court denied Kiefer's petition, in November 2023, he filed a state district court civil complaint for the remaining tort law claims. In the same 2023 state civil action, Kiefer challenged the constitutionality of Minnesota's Imprisonment and Exoneration Remedies Act (MIERA), Minn. Stat. § 590.11, as violative of the equal protection clause of both the United States and Minnesota Constitutions. *Kiefer v. Isanti Cnty*., No. A24-1574, 2025 WL 1732743 (Minn. App. June 23, 2025), *review denied* (Sept. 17, 2025).[1] Kiefer contended that the Act provided remedies only for those convicted of felonies, and did not provide a remedy for a person illegally incarcerated for any time less than 364 days like himself. *Id.* Because Kiefer challenged the constitutionality of MIERA, Minn. Stat. § 590.11, seeking declaratory judgment, he named the State of Minnesota as a defendant party.

Isanti County moved to dismiss Kiefer's complaint for claims associated with false imprisonment and malicious prosecution for failure to state a claim for which relief could be granted, Minn. R. Civ. P. 12.02(e), and the State, moved to dismiss the constitutional challenge to MIERA (Minn. Stat. § 590.11) for lack of subject matter jurisdiction. Minn. R. Civ. P. 12.02(a). The district court granted all motions with prejudice. *Id.* at *2. The court concluded the

---

[1] In the underlying state action, because Kiefer challenged the constitutionality of MIERA, Minn. Stat. § 590.11, seeking declaratory judgment, he named the State of Minnesota as a defendant party.

statute of limitations period for the state tort claims had run.

Kiefer argued that although the statute of limitations for his state tort claims was two years, *see* Minn. Stat. § 541.07(1) (2024), the state claims remained timely because his earlier federal lawsuit—filed on October 2, 2020—remained pending before another court— the U.S. Supreme Court. Kiefer contended the tolling of the statute of limitations continued until the Court denied his timely filed petition for a writ of certiorari on October 30, 2023, just over a month after he filed the petition on September 27, 2023 citing 28 U.S.C. § 1367(d) (2018) (tolling the limitation period on state claims over which a federal court exercises supplemental jurisdiction while the claims are pending and for 30 days afterward). *Id.* at *1.

5. The Minnesota Court of Appeals disagreed, affirming the district court's decision that Kiefer's claims against the county were untimely. 11a. The appellate court concluded that nowhere under § 1367(d) "does the statute suggest that a party petitioning for a writ of certiorari once a claim is no pending in the lower federal courts, and after the 30-day grace period ends, alters or reinitiates the tolling period." 10a–11a. The court further found, to the contrary, that the 90-day deadline to file a petition for a writ of certiorari "enables a party to file…long after the tolling period under section 1367 ends." 11a. Yet, the appellate court would also conclude that "if a party wishes to pause entry of judgment, it may pursue a stay on judgment 'for a reasonable time,'" citing 28 U.S.C. § 2101(f).[2] 10a. Notably, with six days

[2] The discretionary stay, § 2101(f), states in part: "[T]he execution and enforcement of such judgment or decree may be stayed for a

remaining on Kiefer's state tort statute of limitations claims, the Eighth Circuit entered the mandate as its final judgment on the same day of its decision affirming the district court on July 20, 2023. *Id.* Kiefer did not seek a stay.

Kiefer filed his writ for a writ of certiorari on September 27, 2023. This Court denied the petition on October 30, 2023. *Id.*

REASONS FOR GRANTING THE PETITION

While this Court has declined to suggest or recognize a constitutional due process right to appeal in either civil or criminal cases, the federal statutory provision under 28 U.S.C. § 2101(c), governing the timeframe of this Court's petition stage, falls within the petition protections of the First Amendment. Congress preserved as a statutory right the opportunity of parties to participate in the federal appellate process, of which this Court is a part of, by allowing the exercise of that opportunity to file a petition on federal issues within 90-days. In short, if a state tort statute of limitations is about to expire but a party seeks further review of this Court of a constitutional issue through 28 U.S.C. § 2101(c) procedural protections, and the limitations period is

---

reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

not paused during that time, the congressional procedural protections are merely symbolic and thus, non-existent. The loss of the statutory right to petition, would mean the loss of state claims as well and at best would require parties to commence parallel state litigation proceedings wasting judicial and party resources, especially if a writ is granted.[3]

The questions presented provide the framework for this Court to (a) definitively clarify the law regarding the "petition stage" for a writ of certiorari under 28 U.S.C. § 2101(c) as part of the federal appellate process; (b) the meaning of "pending" under 28 U.S.C. § 1376(d), as sub judice under 28 U.S.C. § 1376(d), inclusive of the 90-day petition stage as it affects the statutory procedural right to petition when seeking review of federal constitutional claims until a final order of this Court; and (c) how § 1376(d) affects the tolling of the statute of limitations for supplemental jurisdiction of state tort claims within the context of the congressional statutory protections of 28 U.S.C. § 2101(c) under the Petition Clause of the First Amendment whether the petition is granted or denied.

There also appears to be confusion among the Circuits and in the state courts regarding the applicability of 28 U.S.C. § 1376(d). The Court of Appeals for the Eighth Circuit evidently holds the position that if a petition is timely filed to the U.S. Supreme Court, the statute of limitations remains tolled during the pendency of a rendered decision on the petition—whether granted or denied. Other courts find that the issued federal appellate court decision

---

[3] Stays of judicial proceedings are also discretionary and no guarantee to pause the proceedings. *See e.g.,* 28 U.S.C. § 2101(f); Fed. R. Civ. App. P. 41.

ends federal court jurisdiction and the tolling of any state statute of limitation starts to run on the filing date of the court's mandate.

A. Seeking review from the Supreme Court falls within the First Amendment's Petition Clause preserved by federal statute.

A petition to the U.S. Supreme Court is a normal and established part of the federal appellate process as a court of final review.[4] *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012), quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("Ours is 'a court of final review and not first view.'" (internal quotation marks omitted)). No case law suggests the U.S. Supreme Court is not part of the federal appellate process. U.S. Const. art. III, § 2. Indeed, the First Amendment's Petition Clause establishes an individual's right to "to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough*

[4] Indeed, this Court in *Lawrence v. Fla.*, 549 U.S. 327 (2007) noted it is not a part of a "State's post-conviction procedures." *Id.* at 332. This Court noted that "State review ends when the state courts have finally resolved an application for state postconviction relief." *Id.* Hence, once the state's highest court issues its mandate or denied review, any application for state-postconviction no longer exists. "All that remains is a separate certiorari petition pending before a *federal* court. The application for state postconviction review is therefore not "pending" after the state court's postconviction review is complete, and § 2244(d)(2) *does not toll the 1–year limitations period during the pendency of a petition for certiorari*." Emphasis added. Although applicable to state-postconviction relief, this Court appearsto recognize that in another context, the statute of limitations period would toll or pause *during the pendency of a petition for certiorari*.

of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 387(2011). As the First Amendment's Petition Clause provides, "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend. I.

This Court has sometimes stated that " '[t]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.' " *Borough of Duryea, Pa. v. Guarnieri,* 564 U.S. 379, 387, (2011) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984)). *See also BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002); *Cal. Motor Transp. Co. v. Trucking Unltd.,* 404 U.S. 508, 510 (1972). Nevertheless, the "basis of the constitutional right of access to courts" remains "unsettled." *Christopher v. Harbury*, 536 U.S. 403, 415 & n.12 (2002). But, as described below, when Congress establishes a statutory timeframe for review, as it does under 28 U.S.C. § 2101(c), it provides for the right to *petition* this Court within 90-days, and *not* mandating a grant of review which remains within the discretionary purview of this Court.

While the Petitioner Keith Kiefer has no right to have a petition *reviewed* in the U.S. Supreme Court through the grant of a writ remains discretionary, he does have a right to pursue iscretionary review to raise preserved federal constitutional claims through the petitioning process and procedures of the Court. *See, e.g.*, U.S. Sup. Ct. Rule 10; 28 U.S.C. § 1254.[5] *See also,*

---

[5] While review is discretionary, 28 U.S.C. § 1254, subd. 1, provides the right to pursue a petition for review when the conditions stated are met: "By writ of certiorari granted upon the

Sure–Tan, Inc., 467 U.S. at 896–897 ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. '[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.'"); *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (The right "to petition for a redress o[f] grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights."); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. at 510 ("Certainly the right to petition extends to all departments of the Government.").

B. Congress granted the statutory right to seek jurisdictional review of this Court within 90-days.

Certainly, the grant of a writ is the Court's discretionary decision but, Congress codified in 1948 the statutory timeframe to exercise an appeal process to obtain jurisdiction of this Court and to do so within 90 days. Under 28 U.S.C. § 2101(c):

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree….

---

petition of any party to any civil or criminal case, before or after rendition of judgment or decree…".

26a.

Indeed, the congressional timeframe is a preservation of a statutory right for an opportunity to petition this Court as it is jurisdictional. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) ("This 90–day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits."[6]) The statutory "right" preserved is the right to petition within 90 days. Granting jurisdiction of this Court is a different matter and not at issue. Congress did not mandate this Court to take jurisdiction upon a petition leaving it to the discretion of this Court, while preserving the right to petition of a party.

Under *Blessing v. Freestone,* 520 U.S. 329, 340 (1997), this Court declared that to determine whether a federal statute creates and confers a federal right (1) "Congress must have intended that the provision in question benefit the plaintiff"; (2) the asserted right must not be "so vague and amorphous that its enforcement would strain judicial competence"; and (3) "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." Certainly, the preserved timeframe to petition is intended to benefit the petitioner, and to do so "within 90-days" is neither vague nor amorphous. 26a. Finally, by the use of "shall be taken," the phrase is couched in mandatory terms. *Id.* Therefore, Congress did confer a federal right via a timeframe to petition this Court consistent with protections afforded with the Petition Clause.

---

[6] In this regard, 28 U.S.C. §2101(c) permits an extension for filing: "A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Hence, if a petition for a writ of certiorari is filed within the Congressional conferred statutory right within the 90-day timeframe, and since this Court is part of the federal appellate process, the petition itself is a matter pending before a federal court. This Court opined in *Artis v. D.C.*, 583 U.S. 71 (2018), that under § 1367(d) a statute of limitation is tolled where the claim is "sub judice elsewhere." 583 U.S. at 80.

First, there should be little no doubt that § 1367(d) is phrased as a tolling provision. *Artis*, 583 U.S. at 80–84. Second, in discussing the grace-period formulation, this Court noted that Congress, when enacting § 1367(d), did not adopt the American Law Institute's grace-period formulation (tolling of statute of limitations), but "[i]nstead, [Congress] ordered tolling of the state limitations period 'while the claim is pending' in federal court. Although the provision the ALI proposed, like § 1367(d), established a 30–day federal floor on the time allowed for refiling, it did not provide for tolling the period of limitations while a claim is pending." *Id.* at 86. Emphasis added.

Third, in addressing concerns about the statutes of limitations as fundamental to a "'well-ordered judicial system," this Court declared that "[w]henever § 1367(d) applies, the defendant will have notice of the plaintiff's claims within the state-prescribed limitations period. Likewise, the plaintiff will not have slept on her rights. She will have timely asserted those rights, endeavoring to pursue them in one litigation." *Id.* 91–92. Filing a separate state action to pursue state claims while seeking a writ of certiorari is not "one litigation" and wastes presumed limited resources of the plaintiff.

Finally, as mentioned, in *Artis,* this Court examined the definition and application of "tolling" a statute of limitation within the context of § 1367(d).

This Court opined that a statute of limitation is tolled where the claim is "sub judice elsewhere":

> [T]he period (or statute) of limitations may be "tolled" while the claim is pending elsewhere. Ordinarily, "tolled," in the context of a time prescription like § 1367(d), means that the limitations period is suspended (stops running) while the claim is sub judice elsewhere, then starts running again when the tolling period ends, picking up where it left off.

Artis, 583 U.S. at 80 (2018). "Sub judice" means "before the court or judge before determination." *Black's Law Dictionary* 1466 (Bryan A. Garner ed., 8th ed., Thomson-West 2004).

C. A petition for a writ of certiorari is a matter pending elsewhere, sub judice.

A petition for a writ of certiorari is a "sub judice elsewhere" as a pending federal appellate matter awaiting decision. As previously stated, while Kiefer has no right of review to invoke the jurisdiction of the Supreme Court, he does have a right to pursue a discretionary review to raise preserved federal constitutional claims through the petitioning process as Congress preserved, and the procedures of this Court.

Other courts disagree. However, contrary to the Minnesota state appellate court's interpretation, the Court of Appeals for the Eighth Circuit, suggests that a petition before this Court is a "pending" federal court matter. *Carlson v. Hyundai Motor Co.,* 222 F.3d 1044, 1045 (8th Cir. 2000).

The Minnesota legislature in *Carlson,* amended a statute regarding the right of a person to bring an action for damages based on a defective seat-belt claim applicable to pending or commenced actions on or after the amended statute's effective date of May 18. 222 F.3d at 1045. The federal appellate court issued a mandate on Carlson's failed federal appeal on March 15. Meanwhile, Carlson filed a Federal Rule 60(b) motion to vacate the district court's final judgment on the basis of the new statute. *Id.* The district court denied that motion because Carlson's original action was neither *pending* on nor commenced *on or after* the statute's effective date May 18. *Id.*

The Eighth Circuit *Carlson* panel affirmed. It opined that no case was *pending* before *any* court, notably the U.S. Supreme Court. The panel decision indicated that if a matter is in the petition stage of a timely filed petition for a writ of certiorari, the court would consider the case as *pending*:

> Her case was not pending in the district court because that court filed [the appellate court's] mandate [of March 15] as its final judgment on March 17, signaling conclusion of proceedings. And her case was *not pending* in the Supreme Court because Carlson *did not petition* on or before [the effective date of the amended statute on May 18]…Thus,

> on May 18, Carlson's case was *not awaiting decision by any court*.

Id. Emphasis added. The court relied upon Black's Law Dictionary to define "pending:" "'Pending' means 'awaiting decision.' BLACK'S LAW DICTIONARY 1154 (7th ed. 1999)." *Id.*

As for Kiefer, the Minnesota state appellate court found that Carlson stood for the proposition that "a claim is no longer pending in a federal court of appeals when the court issues a mandate affirming judgment, and it is no longer pending in federal district court when the court enters that mandate as its final judgment." 10a. But, the *Carlson* decision seems to modify or at the very least, causes confusion of the actual state of the law.

For example, in *Glick v. Ballentine Produce, Inc.*, 397 F.2d 590 (8th Cir. 1968), the Eighth Circuit opined that "a petition for certiorari does not automatically stay proceedings in the District Court to which a mandate affirming the judgment has issued." 397 F.2d. at 594. But, the court was dealing with the application of 28 U.S.C.A. § 2101(f). The Eighth Circuit concluded that it found "no support for the contention that the filing of a petition for a writ of certiorari prevents the judgment of this court from becoming final until the Supreme Court acts upon the petition, where no stay of mandate has been filed under 28 U.S.C.A. § 2101(f)." Indeed, the appellate court did state that "'[i]t is true that the actual granting of a writ of certiorari does operate as a stay, *see United States v. Eisner* [323 F.2d 38 (6th Cir. 1963)] the mere petition for certiorari does not have such an effect,'" it remained in the context of 28 U.S.C.A. § 2101(f) and *not* § 1367. *Glick*, 397 F.2d at 594.

In *Eisner*, the Sixth Circuit discussed how the application of § 2101 affects the petition process and suggests it did not divest this Court's possible jurisdiction regarding the federal district court's judgment under § 2101(f), but identified the party's failure to seek available remedies under then Rules 27 and 51 to obtain a stay as authorized under § 2101(f):

> The time for withholding the issuance of the mandate expired before the ninety days, provided by statute for seeking certiorari, expired, Section 2101(c), Title 28 United States Code, and the Supreme Court was not divested of its possible jurisdiction by the issuance of the mandate before the expiration of such time. But the filing of a petition for certiorari does not automatically stay proceedings in the District Court to which a mandate affirming the judgment has issued. Section 2101(f), Title 28 United States Code, provides for obtaining a stay of execution and enforcement of the judgment by a judge of the court rendering the judgment or by a Justice of the Supreme Court in order to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. Rules 27 and 51 of the Supreme Court regulate the procedure in that court for obtaining such a stay. Eisner did not avail himself of these remedies.

Eisner, 323 F.2d at 42. Emphasis added.

Further, in *U.S. v. Spector*, a federal criminal matter, the court stated that while the appellate process terminated when the appellate court issued its mandate of affirmance, and hence, the two-year-time period for a Rule 33 (criminal new trial) began to run, the court *inferred* the Supreme Court petition process was irrelevant. 888 F.2d 583 (8th Cir. 1989). The court wrote: "In the absence of a stay of mandate granted by the appellate court, the date of the denial of a petition for writ of certiorari by the United States Supreme Court is irrelevant.…*The clear inference of our cases is to this effect.*" *Id.* at 584. Emphasis added. Note the "inference" as the court would further cite to *United States v. Cody,* 529 F.2d 564, 566 (8th Cir.1976) (per curiam) that noted a motion as untimely even viewing the certiorari denial date as a final judgment. Here, the court suggests that a *granted stay* by an appellate court is a prerequisite to exercising the statutory right to file a petition with this Court within 90-days of an appealable decision. The issuance of a stay under 28 U.S.C. § 2101(f) is far from mandatory:

> [T]he execution and enforcement of such judgment or decree *may* be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay *may* be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court.…

Emphasis added.

Thus, if a stay is denied, but falls within the statutory right to petition under § 2101(c) within 90-

days, the earlier Eighth Circuit decisions, pre-*Carlson,* suggest the loss of the statutory right under 28 U.S.C. § 2101(c), which in turn suggests the loss of 28 U.S.C. § 1367(d) protections of tolling or pausing state tort statute of limitations claims. Moreover, Fed. R. App. P. 41(d)(1), governing stays, short circuits the statutory right afforded under § 2101(c) when seeking review:

> A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the petition would present a substantial question and that there is good cause for a stay.

Rule 41 affords the circuit court the authority to decide for the Supreme Court whether a petition presents a substantial question *and* whether there is good cause for a stay. While the running of a statute of limitations might be "good cause," the Rule allows for the circuit court to determine for the Supreme Court the sufficiency of a petition. We note the petition for a writ of certiorari by Ernesto Miranda was a handwritten petition for a writ of certiorari from prison. Indeed, a handwritten petition would defy current rules governing petitions today, but it was the question presented that ultimately changed the law and the rights of citizens.

Regardless, as the Comments to Rule 41 state, "[a]lthough 28 U.S.C. § 2101(c) permits a writ of certiorari to be filed within 90 days after entry of judgment, seven of the eight circuits which now regulate the matter of stays pending application for

certiorari limit the initial stay of the mandate to the 30-day period provided in the proposed rule." Fed. R. App. P. 41, Notes of Advisory Comm. (1967). The Comments appear to ignore the statutory right of 28 U.S.C. § 2101(c) as previously outlined.

Rule 41 also highlights another issue yet to be decided by this Court. If a stay is denied, but a timely filed petition is granted, there is no statutory provision found to-date to retroactively re-instate a statute of limitations that has run for state tort claims. The *Eisner* court suggests the grant of certiorari *stays* the statute of limitations. But, what if the statute of limitations has run? The resolution of federal questions sought in the petition becomes empty as the recovery for wrongful acts under state law is moot. And to commence a state action during the petition stage is a waste of scarce judicial and party resources and moneys, if affordable, to commence and maintain parallel proceedings.

Meanwhile, confusion among the lower courts continues. In *DeForte v. Borough of Worthington*, No. 2:13-CV356-MRH, 2020 WL 2487133, at *5 (W.D. Pa. May 14, 2020) the court acknowledged that the Supreme Court itself has "spurned an interpretation of § 1367(d) that would cause plaintiffs to abandon their right to a federal forum. [Citing *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 463(2003)]. [Section 1367] eliminates a serious impediment to access to the federal courts on the part of plaintiffs pursuing federal and state-law claims." The same logic and concerns should apply to a plaintiff's right to a federal appeal." The petitioning process before the U.S. Supreme Court is part of the federal appellate process.

State courts likewise add to the confusion. For example, a 2020 decision in *Kendrick v. City of Eureka,*

98 Cal. Rptr. 2d 153 (Cal. App. 1st Dist. 2000) (one of six appellate divisions in California) defined the term "pending" to preclude appeals to the U.S. Supreme Court. *Id*. at 158. The *Kendrick* court concluded that because review is discretionary, and would include the 90-day period for filing (plus the possibility of an addition 60-days if an extension is allowed)(see 28 U.S.C. § 2101(c)), as an "illogical" extension of time to toll a statute of limitation. *Id.* This interpretation deviates from the *Carlson* definition of "pending" of the Eighth Circuit. Moreover, it is this Court's decision to grant or deny a filed petition, and not the Congressional statutory right to file within the jurisdictional mandate of 90-days.

Congress provided a statutory right to file a petition within 90-day timeframe to bring any appeal or writ of certiorari before the Supreme Court. 28 U.S.C. § 2101(c). The Court has the discretion to grant or deny the petition, but not to deny the right (but, can extend the time as Congress intended). When a petition on federal questions is timely filed within that period of time, the petition itself becomes a matter pending before this Court awaiting a final judgment—to deny. If granted, as an order, it should act as a stay for state court tort statute of limitations claims under § 1301(d), but this Court has not explicitly stated this to be true. Meanwhile, will a grant for certiorari review have retroactive effect to preserve the state tort supplemental claims if the statute of limitations have run?

Against the legal backdrop presented, courts have expressed different opinions of whether a petition for a writ of certiorari is a pending matter before this Court, and the effects on state tort statute of limitations claims that were within the supplemental jurisdiction of the original federal district court.

Indeed, clarification of the law will present consistency within the federal court appellate process and applications of federal law when parties seek review of federal constitutional claims before this Court as supplemental state tort statute of limitations claims continue to run.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Erick G. Kaardal, 229647
Gregory M. Erickson, 276522
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074
Email: kaardal@mklaw.com
Email: erickson@mklaw.com

Counsel of Record for Petitioner