



1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STEPHANIE C. ARTIS, )

4 Petitioner, )

5 v. ) No. 16-460

6 DISTRICT OF COLUMBIA, )

7 Respondent. )

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9

10 Washington, D.C.

11 Wednesday, November 1, 2017

12

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 10:03 a.m.

16

17 APPEARANCES:

18 ADAM G. UNIKOWSKY, Washington, D.C.; on

19 behalf of the Petitioner

20 LOREN L. ALIKHAN, Deputy Solicitor General,

21 Washington, D.C.; on behalf

22 of the Respondent

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 16-460, Artis  
5 versus the District of Columbia.

6 Mr. Unikowsky.

7 ORAL ARGUMENT OF ADAM G. UNIKOWSKY

8 ON BEHALF OF THE PETITIONER

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

11 Title 28 Section 1367(d) specifies  
12 that the period of limitations on a  
13 supplemental jurisdiction claim shall be tolled  
14 while the claim is pending in federal court and  
15 for a period of 30 days after it is dismissed.

16 The question before the Court this  
17 morning, is what does it mean for a period of  
18 limitations to be tolled? The Court should  
19 hold that "tolled" means suspended, an  
20 interpretation that accords with the plain  
21 meaning of the word "tolled." That is the  
22 definition given in Black's Law Dictionary, and  
23 that is the way "tolled" is used in every other  
24 statute that uses the word "tolled," none of  
25 which would make any sense under Respondent's

1 interpretation.

2 JUSTICE KENNEDY: If that's the -- if  
3 that's the way the statute operates, it seems  
4 to me that the provision at the end which says  
5 the state can provide for a longer tolling  
6 period is generally un- -- unnecessary, if the  
7 -- if the -- if -- under your position, it  
8 would seem to be quite unnecessary for the  
9 state to have a longer tolling period.

10 MR. UNIKOWSKY: Your Honor, states  
11 could --

12 JUSTICE KENNEDY: Now, it -- it could  
13 be, of course, that they have concern about  
14 there being only a week left or something, but  
15 in most cases, under -- under your view, I just  
16 don't see the necessity for the last clause.

17 MR. UNIKOWSKY: Your Honor, it's true  
18 that typically the state savings clause won't  
19 necessarily be triggered, but there are  
20 certainly many sets of facts in which it would  
21 be triggered. First of all, a state could  
22 enact a tolling period that's even longer than  
23 the federal tolling period. Louisiana, for  
24 instance, actually restarts the clock.

25 JUSTICE KENNEDY: But they couldn't

1 enact a shorter one?

2 MR. UNIKOWSKY: They could not, that's  
3 correct. I think this is a federal floor.

4 JUSTICE KENNEDY: In other words, your  
5 -- your position gives the states zero  
6 flexibility. The Respondent gives the states  
7 maximum flexibility; states can have it any way  
8 they want. But you don't give any protection  
9 to the states that don't want to have  
10 long-delayed suits.

11 MR. UNIKOWSKY: Yeah, that is -- it is  
12 certainly the case that this statute provides a  
13 federal floor, and we're debating about the  
14 length of the federal floor, and we believe  
15 that the federal floor is longer than  
16 Respondents do. And the effect of that is that  
17 it's true that under our position the state  
18 tolling -- the -- the savings clause will be  
19 triggered less frequently under our view. But  
20 that's simply the necessary implication of the  
21 plain text of the statute in our view.

22 JUSTICE ALITO: The statute --

23 JUSTICE GINSBURG: Why the plain text?  
24 Because 1367(d) refers to the 30-day period as  
25 a tolling period too, but that period is

1 recognized as a grace period, the 30-day  
2 add-on. The -- the federal statute types that  
3 as a tolling period, but it isn't, is it?

4 MR. UNIKOWSKY: Your Honor, the way we  
5 interpret the statute is that the clock stops  
6 while the claim is pending in federal court and  
7 for 30 days after it's dismissed. So we  
8 understand the phrase "tolling period" to refer  
9 to the -- the period during which the -- the  
10 clock stops. So we view that 30 days as part  
11 of the tolling period.

12 JUSTICE ALITO: Does -- does "toll"  
13 and -- do "toll" and "tolling" mean the same  
14 thing?

15 MR. UNIKOWSKY: I think that in the  
16 context of this particular statute, "tolled"  
17 means "suspended." So I think that it's true  
18 that in general when, you know -- there are --  
19 for instance, the Chardon case says that in  
20 general the word "toll" can carry different  
21 types of meanings. But I think that we have to  
22 look at the words of this particular statute as  
23 to how --

24 JUSTICE ALITO: Yeah, well, let's look  
25 at the words of this particular statute.

1 Unless state law provides for a longer tolling  
2 period. So does that refer only to those state  
3 statutes that suspend the period, or does it  
4 also include those state statutes that simply  
5 stop the clock?

6 MR. UNIKOWSKY: So, Your Honor, I  
7 think that's a -- a debatable proposition. The  
8 position we took in our reply brief is that if  
9 a state grace period statute would produce the  
10 arithmetic equivalent of a longer tolling  
11 period than the federal statute, then that does  
12 qualify as a longer tolling period.

13 JUSTICE ALITO: Well, I don't know  
14 what's a debatable -- a debatable position. I  
15 think you have to take a position on it because  
16 you're making a textual argument. And it's  
17 hard to make a textual argument that "tolled"  
18 means something different from "tolling." Most  
19 of the state statutes stop the clock. They  
20 don't suspend the period.

21 MR. UNIKOWSKY: So let me state our --

22 JUSTICE ALITO: So, unless tolling  
23 includes the stop-the-clock statutes, it  
24 doesn't do very much. And as Justice Kennedy's  
25 question pointed out, if it only includes the



1 ones that suspend the tolling period, it does  
2 virtually nothing.

3 MR. UNIKOWSKY: So let me answer that  
4 question. So the way I understand the phrase  
5 "longer tolling period" is that it would  
6 encompass a state statute that is the  
7 arithmetic equivalent of a longer tolling  
8 period.

9 So the example in our reply brief we  
10 give is as follows: Suppose you file a Texas  
11 suit with five days left in the limitations  
12 period and Texas gives you a 60-day grace  
13 period. So the application of the 60-day grace  
14 period in that case is the arithmetic  
15 equivalent of a tolling period of the pendency  
16 of the federal suit plus 55 days because the  
17 five more days will get you to 60.

18 So the way I interpret those words is  
19 that that is a longer tolling period. Now,  
20 that's debatable. You may disagree with me on  
21 that, but our case certainly doesn't depend on  
22 that. First of all, if you disagree with  
23 everything I just said, I still think that the  
24 grace -- state grace period statutes might  
25 still apply according to their own terms. It's

1 not obvious that this federal statute would  
2 preempt the state from applying its own grace  
3 period statute if it's longer. So, in my view,  
4 I think the state might be able to apply the  
5 grace period one way or the other.

6 And even if you disagree with that, it  
7 wouldn't affect our primary position, which is  
8 that the word "tolled" means suspended. It may  
9 be that the necessary concomitant, if you  
10 disagree with both of the things I just said,  
11 is that the state tolling statutes would rarely  
12 apply under the savings clause. And if that's  
13 what the statute means, so be it. And I think  
14 that there's very powerful textual clues in  
15 this statute that --

16 JUSTICE SOTOMAYOR: Well, my problem  
17 is that I look at statutory history; not  
18 legislative history, statutory history. And  
19 the statutory history is that the ALI report  
20 set forth a very clear grace period or -- or --  
21 grace period.

22 And Congress didn't adopt that  
23 language. It adopted this language. And so,  
24 if it changed it and it changed it so  
25 dramatically, aren't I -- shouldn't I be

1 looking at the plainer text as it reads, rather  
2 than something that would have given you what  
3 you wanted in a different way?

4 MR. UNIKOWSKY: Yes, Justice  
5 Sotomayor. That is our exact position in this  
6 case. I think this ALI report, had Congress  
7 enacted it, would have done the trick for a  
8 grace period.

9 JUSTICE SOTOMAYOR: Exactly.

10 MR. UNIKOWSKY: And in this case,  
11 Congress didn't use those words. And I think  
12 that that underscores that it would have been  
13 so easy for Congress to enact a grace period.  
14 This is not the kind of concept that's  
15 difficult to express in words.

16 Congress could have enacted that ALI  
17 report. It could have enacted all those state  
18 statutes that are cited by Respondent, none of  
19 which use the word "toll." Or it could have  
20 just said you get 30 days after the claim is  
21 dismissed. And then we wouldn't be here today.  
22 But instead Congress chooses this very  
23 particular wording in which it says that the  
24 period of limitations is tolled while the claim  
25 is pending in federal court and for a period of

1 30 days after it's dismissed.

2           And when you try to figure out what  
3 that means, you look at the -- the way every  
4 other federal statute uses the same phrasing  
5 and it's very clear from those statutes that  
6 they have to mean that the clock stops. And  
7 so, if Congress really wanted to enact a grace  
8 period, it is impossible to imagine a more  
9 oblique way and misleading way of doing that  
10 than the words of this statute.

11           JUSTICE GINSBURG: What do you do with  
12 the Jinks case where everybody seemed to assume  
13 that what 30 -- 1367(d) provided was a short  
14 30-day extra time?

15           MR. UNIKOWSKY: Your Honor, I'm not  
16 sure there is really a basis for saying that  
17 the -- the members of the Court made that  
18 assumption. There are some statements in the  
19 petition for certiorari in that case in one of  
20 the merits briefs that seem to imply that  
21 interpretation. There's certainly nothing in  
22 the opinion of the Court suggesting that the  
23 constitutionality of the statute depending on  
24 adopting this rather strained construction,  
25 and, in fact, there's actually language in the

1 opinion pointing in the opposite direction.

2 The Court in that opinion was  
3 discussing this old Civil War era statute which  
4 stopped the clock, and in the Court's opinion  
5 the Court talked about that statute as tolling  
6 limitations periods.

7 So, again, that's a pretty weak  
8 inference, too, but I just don't see anything  
9 in this opinion supporting the view that the  
10 Court's decision was dependent on the fact that  
11 the statute could only carry the grace period  
12 interpretation.

13 I think that -- I have been talking  
14 about these, the Jinks case and the statutory  
15 history. I'd like to focus a little bit on the  
16 text because I actually think that the text is  
17 extremely clear that tolling means suspending.

18 So if I could just make two points  
19 about the text. The first is that the statute  
20 says that the period of limitations shall be  
21 tolled. Not the statute of limitations, not  
22 the limitations bar, the period of limitations.

23 So Respondent's interpretation is that  
24 the word tolled means removed. So that would  
25 produce the phrasing, a period of limitations

1 is removed.

2 And that's just improper English. So  
3 just to give an example, suppose Congress were  
4 enacting a statute in which it said that the  
5 bar associated with filing suit in a particular  
6 place was lifted, so, you know, the Court of  
7 Federal Claims or something.

8 The statute would never say that the  
9 Court of Federal Claims is removed. It would  
10 say that the bar associated with filing suit in  
11 the Court of Federal Claims is removed.

12 And likewise here, the statute does  
13 not say that the bar is removed. It says that  
14 -- excuse me, is tolled. It says that the  
15 period of limitations is tolled and, therefore,  
16 we think that is only consistent with an  
17 interpretation that means suspended.

18 So even in the abstract the word toll  
19 can carry different meanings. We don't think  
20 that's consistent with tolling the period of  
21 limitations.

22 And I think that the other textual  
23 point I'd like to make is that the period of  
24 limitations is tolled for two distinct periods:  
25 while the claim is pending in federal court and

1 for a period of 30 days after it's dismissed.

2 And we don't think that that  
3 interpretation is in any way consistent with  
4 construing tolled to mean removed because you  
5 don't need the tolling while the claim is  
6 pending in federal court if tolled, in fact,  
7 means removed. You only need the 30 days.

8 And, in fact, the concept of removing  
9 a statute of limitations while a claim is  
10 pending in federal court is -- is incoherent.  
11 The statute of limitations is completely  
12 irrelevant when you have a presumably timely  
13 claim that's already been filed.

14 And so, therefore, we think that the  
15 -- the correct interpretation is to say that  
16 the clock stops, which is perfectly consistent  
17 with the fact that the statute defines the  
18 tolling period as both the pendency of the  
19 federal claim and 30 days thereafter.

20 And just one other comment about the  
21 fact that the period of limitations is tolled  
22 while the claim is pending in federal court.  
23 So, if the statute just said that, if the  
24 statute just said the period of limitations is  
25 pending -- is tolled while the claim is pending

1 in federal court, period, full stop, then I  
2 think there would be no debate as to what it  
3 means. I think we all agree that it means the  
4 clock is suspended.

5 So Respondent's position is  
6 essentially that by increasing the length of  
7 the tolling period, by adding 30 days, that  
8 radically changes what tolling means. It  
9 changes the meaning of tolling from stops the  
10 clock to continues the clock. And that's just  
11 not the way the Court reads statutes.

12 Tolloed means what it means. The  
13 tolling length -- excuse me, if the period of  
14 tolling is shorter, then -- then you have a  
15 shorter period, and if it's longer, then you  
16 have a longer period of tolling, but increasing  
17 the tolling period doesn't alter what it means  
18 to toll a period of limitations.

19 If there are no further questions, I'd  
20 reserve my time. Oh, sorry, Your Honor.

21 JUSTICE ALITO: Do you admit that  
22 there are definitions of the term "toll" that  
23 are consistent with Respondent's argument? If  
24 we look in dictionaries, are there not  
25 definitions that are consistent with their



1 argument?

2 MR. UNIKOWSKY: So I don't actually  
3 think that there is. So Respondent cites some  
4 dictionaries that talk about the word toll  
5 meaning remove. But I don't think that really  
6 advances the ball very much because it seems to  
7 me that on both sides, in some sense the  
8 statute of limitations or the limitations bar  
9 is being removed.

10 The question is, what's the precise  
11 mechanism behind which the limitations bar is  
12 removed? And so Respondent's position is that  
13 the clock keeps running while the period of  
14 limitations is tolled, and I have been unable  
15 to find any dictionary or any case that  
16 understands the word tolling that way.

17 And so, therefore, I understand that  
18 in the abstract, toll, especially in the  
19 context of, for instance, rights of entry,  
20 which is a definition offered by Respondent,  
21 might mean remove. But in the context of  
22 statutes of limitations, the concept of the  
23 clock continuing to run while the period of  
24 limitations is tolled seems to me completely  
25 alien to the law. I haven't seen any statute

1 or any case understanding the word tolling that  
2 way.

3 JUSTICE ALITO: Do you think there are  
4 any constitutional limitations on Congress's  
5 authority to extend state statutes of  
6 limitations?

7 MR. UNIKOWSKY: Yeah, I think that  
8 there probably are. So just to take the  
9 extreme example, if Congress said that the  
10 statute of limitations for a supplemental  
11 jurisdiction claim is completely eliminated, so  
12 after the claim is dismissed by -- from federal  
13 court you can just bring it forever into  
14 infinity. That probably would be  
15 unconstitutional or at least raise serious  
16 questions under the -- under the necessary and  
17 proper clause.

18 JUSTICE ALITO: But why is your  
19 interpretation more appropriate under the  
20 necessary and proper clause than Respondent's?

21 MR. UNIKOWSKY: Well, I think that the  
22 way to analyze the question is to say this: So  
23 I think Jinks gets you a lot of the way there  
24 in terms of upholding the constitutionality of  
25 the statute. It's true that Jinks didn't

1 resolve what the statute means, but Jinks does  
2 hold that some kind of tolling rule is okay.

3 And so I think the question is, is  
4 this tolling, can Congress elect to use a  
5 suspension approach rather than a grace period  
6 approach? I think the answer is yes, because  
7 all members of the Court have agreed that  
8 Congress gets some degree of latitude on how to  
9 implement its enumerated powers.

10 There is some debate among the members  
11 of the Court in the Comstock case about how  
12 much latitude, but everyone agrees that there  
13 is some latitude. So I think we have a very  
14 modest position here under the necessary and  
15 proper clause.

16 We're saying that inasmuch as that  
17 latitude exists, it extends to using the  
18 suspension approach, which is the common law  
19 approach, according to this Court, it's the  
20 approach that this Court has said is usually  
21 used, and it's also an approach that's  
22 ubiquitous across the United States Code.

23 JUSTICE ALITO: But what's notable  
24 about your argument so far this morning is that  
25 you haven't said one word about why your

1 approach is more appropriate as a -- as a  
2 policy matter than the other. And, of course,  
3 it's not our job to adopt policy, but in  
4 determining, you know, keeping an eye on the  
5 Constitution and interpreting this provision,  
6 why is your approach more necessary? Why is it  
7 more justified under the necessary and proper  
8 clause than the Respondent's? What is the  
9 necessity in any sense of the word for your  
10 approach?

11 MR. UNIKOWSKY: Your Honor, I agree  
12 that it's not absolutely necessary in the same  
13 way that even a grace period does not have to  
14 --

15 JUSTICE ALITO: Why is it more  
16 fitting?

17 MR. UNIKOWSKY: I think it's more -- I  
18 think it makes perfect sense that Congress  
19 would have wanted to stop the clock. I think  
20 there is very solid policy justifications for  
21 using this ubiquitous approach.

22 First of all, I think that what  
23 Congress is trying to do is ensure that  
24 litigants are no worse off from a litigation --  
25 from a limitations perspective on the day the

1 claim is dismissed, relative to the day the  
2 claim was filed. So what Congress felt was  
3 that if a litigant is diligent and files suit  
4 one month into a three-year limitations period  
5 or something like that, and then the federal  
6 court sits on the case for years and years and  
7 years before declining to exercise jurisdiction  
8 over the -- over the state law claim, then the  
9 litigants shouldn't be forced to scramble to  
10 refile within 30 days.

11 To protect that federal litigant, the  
12 litigant should get all the benefit of the time  
13 that was left on the clock when the claim was  
14 originally filed. And I think that's  
15 especially compelling when one understands  
16 statute of limitations as kind of measuring  
17 periods of dormancy that extinguishes a claim.

18 In other words, if you sleep on your  
19 rights for X amount of time, then you lose your  
20 rights.

21 JUSTICE ALITO: But the claim has  
22 already been filed in federal court. Why --  
23 why does the -- the plaintiff need all that  
24 additional time to refile in state court or in  
25 this instance in the District?

1           MR. UNIKOWSKY: Well, first of all, I  
2 think 30 days is a pretty limited amount of  
3 time. There's a lot of things that you might  
4 have to do to refile. It's not necessarily --

5           JUSTICE GINSBURG: It's not -- it's  
6 not just refiling. It's a different claim.  
7 The state-law claim would be a different claim  
8 than the one that was brought in federal court.

9           MR. UNIKOWSKY: Well, you do have to  
10 refile the -- the -- the supplemental  
11 jurisdiction claim over which the federal court  
12 declined to exercise jurisdiction.

13           But it's not as simple as just  
14 refiling a new complaint. There's a lot of  
15 things that you have to do.

16           First of all, you might have to  
17 rewrite your complaint based on things that  
18 came out in discovery or maybe the state has  
19 different pleading rules and you might have to  
20 plead the claims differently.

21           You might have to figure out which  
22 court to file in. There might be a question of  
23 which court within a particular state, you  
24 know, Superior Court versus Chancery Court, or  
25 which -- which state to file in.

1           You might have to figure out whether  
2 your client is willing to pay and fund a new  
3 round of litigation. Also, the client might  
4 have to find a new lawyer. There's plenty of  
5 federal practitioners who don't know their way  
6 around state court. And so 30 days really  
7 isn't that much time to do that.

8           And I think Congress may well have  
9 said: Look, if you wait until the last day of  
10 the limitations period in order to file your  
11 federal suit, then, fine, you get 30 days. You  
12 were -- you were dilatory in the first place,  
13 so you get this bare minimum.

14           But if you were diligent, if you filed  
15 your federal suit very quickly into the state  
16 limitations period, and the federal court just  
17 sat on your claim for years, then you shouldn't  
18 get 30 days. You should have the full benefit  
19 of all the time you had left. Because you were  
20 diligent at the front end, you had extra time  
21 on the back end.

22           CHIEF JUSTICE ROBERTS: Well, I don't  
23 know that that makes much sense. The purpose  
24 of the statutes of limitations are to protect  
25 the defendants to a large extent, not just the

1 plaintiffs.

2 MR. UNIKOWSKY: Well, that's true, but  
3 I think -- first of all, I think that the --  
4 the defendants do have a measure of protection  
5 in that the defendant's already seen these  
6 claims. So it's not like there's very  
7 surprising --

8 CHIEF JUSTICE ROBERTS: Yeah, but you  
9 just said that, well, you need 30 days because  
10 the claims might be different, all sorts of  
11 other things, you've learned new information.  
12 I -- I'm just not sure that that makes much  
13 sense.

14 MR. UNIKOWSKY: Well, I think that  
15 statutes of limitations reflect a balance. And  
16 as this Court has said many times, it's true  
17 that one purpose is to protect defendants, and  
18 there's another purpose, to give plaintiffs a  
19 sufficiently long time to sue.

20 And in preparing for this case --

21 JUSTICE SOTOMAYOR: There's a third,  
22 protecting the state. So how do you -- from  
23 having to look at stale and old claims.

24 MR. UNIKOWSKY: Certainly --

25 JUSTICE SOTOMAYOR: Because it's a



1 burden on the state as well.

2 MR. UNIKOWSKY: I -- I agree with  
3 that, Your Honor. I think that statutes of  
4 limitations reflect a balance. And in  
5 preparing for this case, I -- I've had the  
6 pleasure of going through the U.S. Code and  
7 seeing lots and lots of different statutes of  
8 limitations.

9 And they're all different. Congress  
10 draws the balance differently in every case.  
11 Some are long. Some are short. Some have  
12 longer tolling periods. Some have shorter  
13 tolling periods. I think it's very hard to --

14 JUSTICE SOTOMAYOR: Have you found any  
15 statute similar to this one?

16 MR. UNIKOWSKY: Yes, so there's lots  
17 of statutes that stop the clock. Statutes that  
18 stop the clock and give you a little extra time  
19 are a little bit less common. We found  
20 something like one and a half such statutes.  
21 So one statute we cite in our opening brief, 46  
22 U.S.C. 53911. It does stop the clock during  
23 the pendency of an administrative claim, and  
24 then you get 60 days thereafter. And there's  
25 one other statute that stops the clock during

1 the pendency of another claim, and then you  
2 sometimes get 30 days, depending on whether  
3 certain conditions are met.

4           So it's certainly the case that this  
5 particular scheme isn't particularly common.  
6 However, there's lots and lots of statutes that  
7 talk about tolling periods of limitation. And  
8 I don't think there's much debate that in  
9 context those statutes have to stop the clock,  
10 because if a statute just says that while your  
11 administrative claim is pending the period of  
12 limitations is tolled, the only way that makes  
13 sense is if the clock stops. And so -- and  
14 that is a very common scenario.

15           And, in fact, not only in the context  
16 of statutes, this Court has characterized the  
17 suspension approach as the common law approach.  
18 It's the approach used in the American Pipe  
19 context. In equitable tolling contexts, this  
20 Court has said that that's what is usually  
21 used. So this is not an unusual way of running  
22 a railroad.

23           And to some extent, I think Congress  
24 just kind of took a tolling approach off the  
25 shelf and incorporated it into this statute

1 because that's what it does all the time. I  
2 think that's a pretty common way of enacting  
3 legislation, and I don't think that that  
4 encounters any constitutional problem.

5 If there are no further questions, I'd  
6 reserve my time. Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Ms. AliKhan.

10 ORAL ARGUMENT OF LOREN L. ALIKHAN

11 ON BEHALF OF THE RESPONDENT

12 MS. ALIKHAN: Mr. Chief Justice, and  
13 may it please the Court:

14 Because a supplemental claim dismissed  
15 from federal court under 1367(c) is treated for  
16 statutes of limitations purposes as if it had  
17 never been filed, there needed to be a  
18 mechanism to ensure that those disappointed  
19 federal litigants could return to state court  
20 and file their claims. 1367(d) does just that,  
21 by providing a brief window of tolling such  
22 that the claim will not expire by ordinary  
23 operation of state law while the claim is  
24 pending in the federal court and for 30 days  
25 thereafter.

1           JUSTICE GINSBURG: Do you have any  
2 other federal statute that uses the words  
3 "shall be tolled" to mean what you suggest, it  
4 shall continue to run? Is there any other such  
5 federal statute?

6           MS. ALIKHAN: So, admittedly, there is  
7 no other statute in the U.S. Code that works in  
8 this way, but Petitioner cannot point to one  
9 either, because there are two features of this  
10 statute that set it apart from the normal  
11 "shall be tolled" statutes throughout the U.S.  
12 Code.

13           And that is, first, the provision of  
14 the 30-day window and, second, and I think more  
15 importantly, the express and self-conscious  
16 deference to state law's ability to set longer  
17 tolling periods.

18           And so I think what Congress was doing  
19 was enacting this statute against the backdrop  
20 of the myriad state savings statutes that  
21 operate in precisely this fashion.

22           JUSTICE KAGAN: Well, Ms. AliKhan,  
23 suppose you just had a statute and the "for a  
24 period of 30 days" was excised from it, so it's  
25 "shall be tolled" while the claim is pending

1 unless state law provides for a longer tolling  
2 period. Would anybody read that statute to  
3 mean anything other than the clock is stopped  
4 and resumes again --

5 MS. ALIKHAN: That would --

6 JUSTICE KAGAN: -- once the thing is  
7 dismissed?

8 MS. ALIKHAN: That would certainly be  
9 a tougher case for us. I think still with the  
10 ordinary meaning of "toll" one might think that  
11 there could be a circumstance in which you  
12 might get only a little bit of time to file at  
13 the end of -- when the federal court dismisses  
14 the claim, but that -- you know, if Congress  
15 thought that states, as states were, were  
16 taking care of this problem, it wouldn't  
17 necessarily have to use "tolled" just in the  
18 stop-clock fashion.

19 I think, as this Court has said  
20 throughout the cases, whether it's Hardin or  
21 Chardon, "toll" has an ordinary meaning, which  
22 is to do something to the statute of  
23 limitations.

24 JUSTICE KAGAN: Well, it does have an  
25 ordinary meaning, but, honestly, until I read

1 your brief, I just sort of thought that the  
2 ordinary meaning was "suspend," stop the clock,  
3 so -- and then later, on some trigger point,  
4 the clock starts running again.

5 And, you know, I had to go to the  
6 dictionaries to look up what you were saying it  
7 meant; whereas, you know, if I'm just any old  
8 lawyer, "tolled" means one thing when it's --  
9 when it's referring to a statute of  
10 limitations. I mean, it means something else  
11 when you're driving on the highway, but when  
12 it's referring to a statute of limitations, it  
13 means you stop the clock.

14 MS. ALIKHAN: And I don't think that  
15 is consistent with the ordinary meaning as this  
16 Court has read in Hardin and Chardon. To be  
17 sure, stop-clock tolling -- or, sorry, tolling  
18 can mean to stop the clock, but as this Court  
19 explained in Chardon, it's not the only  
20 meaning. And I think we can look at this  
21 Court's --

22 JUSTICE BREYER: What is the other --  
23 I mean, I -- the -- Justice Kagan -- I had the  
24 same reaction. I said "tolling" means you  
25 suspend it, stop.

1           Now, I asked my law clerk, and he went  
2 to the library, and I said: Find anything,  
3 state or federal, where the word "tolling" is  
4 used to mean something else. They did come up  
5 with one. There is a Virginia statute, but in  
6 the Virginia statute it means what you say.  
7 And in that Virginia statute, however, the  
8 earlier clause speaks specifically about  
9 suspending, and they suspend it under certain  
10 circumstances and then they say "tolling."

11           Now, aside from that, I couldn't find  
12 anything. And there are dozens of uses of the  
13 word "tolling" all over the place.

14           MS. ALIKHAN: So --

15           JUSTICE BREYER: So I can't say yours  
16 is the ordinary meaning. And, therefore, I had  
17 the same questions exactly, and I also had the  
18 question that, take the words out, "and for a  
19 period of 30 days"; then it has to mean what  
20 they say it means, doesn't it?

21           MS. ALIKHAN: A few responses, Justice  
22 Breyer. I concede that that would be a closer  
23 case were there not for the 30-day period,  
24 which is why --

25           JUSTICE BREYER: Not a closer case --

1 MS. ALIKHAN: -- I think the 30 days

2 --

3 JUSTICE BREYER: -- but a case where  
4 there's no argument the other way.

5 MS. ALIKHAN: But let me point you --

6 JUSTICE BREYER: That's how tough I  
7 would be. All right.

8 MS. ALIKHAN: Let me point you to a  
9 few examples where "toll" is used in the  
10 ordinary meaning as not stop-clock.

11 JUSTICE BREYER: Okay.

12 MS. ALIKHAN: As this Court said --

13 JUSTICE BREYER: Well, on a toll booth,  
14 that's where you got that one.

15 MS. ALIKHAN: Certainly there as well.

16 JUSTICE BREYER: All right. All  
17 right. What else?

18 MS. ALIKHAN: But if I were to say  
19 that a timely petition for rehearing in a  
20 circuit court tolls the time for filing a  
21 petition for certiorari in this Court, I'm not  
22 referring to stop-clock tolling. I don't have  
23 to count out the time between when the Court  
24 issues --

25 JUSTICE BREYER: Say that again a



1 little slower.

2 MS. ALIKHAN: A timely petition for  
3 rehearing tolls the time for seeking certiorari  
4 in this Court.

5 JUSTICE BREYER: It tolls the time, a  
6 timely petition for rehearing.

7 MS. ALIKHAN: And that is how this  
8 Court --

9 JUSTICE BREYER: And you mean -- so if  
10 there's 60 days, we have to follow -- let me  
11 just follow this. In 60 days -- I'm sorry to  
12 be slow on this.

13 MS. ALIKHAN: Sure. So you have 90  
14 days --

15 JUSTICE BREYER: So, you have 60 -- 90  
16 days normally.

17 MS. ALIKHAN: -- to file.

18 JUSTICE BREYER: You file a petition  
19 for rehearing, and that rehearing petition  
20 takes four weeks -- or four days, and so now  
21 you only have 86 days?

22 MS. ALIKHAN: You have the full 90.  
23 That's --

24 JUSTICE BREYER: Yeah, that's my  
25 point.

1 MS. ALIKHAN: -- what this Court said  
2 in Jenkins.

3 JUSTICE BREYER: Yeah, so it suspends  
4 it.

5 MS. ALIKHAN: And so -- but you are  
6 not taking the time between when the court of  
7 appeals issues its decision and when the  
8 rehearing petition is filed and saying that  
9 time has ticked down, now you hit pause.  
10 You're saying you get the full 90-day period --

11 JUSTICE BREYER: Yeah.

12 MS. ALIKHAN: -- once the rehearing  
13 petition is denied. That is --

14 JUSTICE BREYER: Right. Isn't that  
15 what they want here?

16 MS. ALIKHAN: That is a use of tolling  
17 that's not stop-clock. No, in their view --

18 JUSTICE BREYER: What --

19 MS. ALIKHAN: -- you don't get the  
20 full statute of limitations once --

21 JUSTICE BREYER: Have you got any  
22 example where -- where it isn't used -- I mean,  
23 sorry, have you got any example where the  
24 period, the limitations period, however it's  
25 phrased, faced with the word "tolling," runs

1 during the period while the statute says it's  
2 tolled?

3 MS. ALIKHAN: So --

4 JUSTICE BREYER: Is there an example  
5 of that?

6 MS. ALIKHAN: -- there is --

7 JUSTICE BREYER: I'm saying I did find  
8 one. I found one in this Virginia statute,  
9 which seems rather special. Did you find any  
10 others anywhere, even in -- I don't know -- I  
11 won't give examples.

12 MS. ALIKHAN: So, I mean, I --

13 JUSTICE BREYER: The world, I guess.

14 MS. ALIKHAN: -- I can give you more  
15 examples. I will -- I will say this, that by  
16 virtue of normal statutes --

17 JUSTICE BREYER: Yes.

18 MS. ALIKHAN: -- of limitations  
19 principles, this is because when the federal  
20 suit is dismissed, it's as if it had never been  
21 filed. It's as if it had never existed. So,  
22 in that context, yes, the state statute of  
23 limitations was ticking along the entire time.  
24 That's precisely the problem --

25 JUSTICE BREYER: Where is this case?

1 MS. ALIKHAN: These are the cases that  
2 this -- this Court was considering pre-19 --  
3 sorry, pre-1367(d). This Court talked about  
4 it, for example, in the Cohill case, when they  
5 said that that's -- this Court said that is a  
6 reason for remanding a case once it's been  
7 removed, rather than dismissing it, because  
8 otherwise the statute of limitations may have  
9 run.

10 JUSTICE KAGAN: Well, Ms. AliKhan, I  
11 want you to assume something with me, but then  
12 I want to give you an opportunity to do  
13 something, all right?

14 So I want you to assume with me that  
15 if the words "and for a period of 30 days" were  
16 not in the statute, that we wouldn't be here,  
17 that we would read this as a normal stop-clock  
18 tolling period, and -- and that the question  
19 that arises from the statute and the reason we  
20 are all here comes from the addition of these  
21 words "and for a period of 30 days."

22 And I just want you to tell me why you  
23 think the addition of those words should make  
24 us read the statutes differently.

25 MS. ALIKHAN: Sure. So assuming that

1 stop-clock tolling only means stop-clock or  
2 that is the ordinary meaning, then we look at  
3 the next two provisions of the statute. First,  
4 the 30-day provision. I'm aware of none and  
5 Petitioner has pointed to no other statute that  
6 both stops the clock and then adds a fixed  
7 period of time to return to state court.

8 JUSTICE KAGAN: But this is 53911(d)  
9 statute, which does exactly that, used the word  
10 suspended except other than tolled.

11 MS. ALIKHAN: Exactly. And that  
12 statute --

13 JUSTICE KAGAN: But it -- it -- it  
14 basically does exactly that. It stops the  
15 clock and then adds some time.

16 MS. ALIKHAN: And this is an important  
17 point. When Congress means to stop the clock,  
18 they say so. They use language like suspend.

19 JUSTICE KAGAN: No, I don't think that  
20 that's right because they say tolled all the  
21 time --

22 MS. ALIKHAN: But they --

23 JUSTICE KAGAN: -- to say stop the  
24 clock.

25 MS. ALIKHAN: Also, and --

1 JUSTICE KAGAN: What I'm saying is  
2 that the concept of this is used, I mean, it's  
3 not used commonly, but it has been used in at  
4 least one other statute.

5 MS. ALIKHAN: Well, and I submit  
6 that's actually --

7 JUSTICE KAGAN: As kind of stop-clock  
8 plus.

9 MS. ALIKHAN: Because it said  
10 suspended I think it's different from that.  
11 But even if you think that that statute  
12 functions in precisely the same way, then we  
13 have to look to the unless state law provides  
14 for a longer tolling period.

15 Congress was well aware that states  
16 had these tolling periods and, in fact, this  
17 Court has long recognized them. And so, when  
18 Congress was expressly deferring to states'  
19 ability to set these periods, it seems very  
20 strange then that they would have put forth a  
21 statute that as a rule displaces the state law  
22 statutes of limitations and displaces those  
23 state law tolling rules in the mind run of  
24 cases.

25 CHIEF JUSTICE ROBERTS: What do you do

1 with the argument your friend began with the  
2 period of limitations point? I understand your  
3 argument would be a lot stronger if it said the  
4 statute of limitations is tolled. But here it  
5 says the period of limitations is tolled. And,  
6 to me that means you're looking at the period  
7 and it's suspended, as opposed to just that the  
8 provision specifying a period is tolled.

9 MS. ALIKHAN: So I have two responses,  
10 Mr. Chief Justice. The first is that in  
11 Heimeshoff this Court used interchangeably  
12 period of limitations and statute of  
13 limitations. So we don't think there is  
14 anything significant about the use of period  
15 rather than statute here. But I think also it  
16 speaks to a period of limitations which is what  
17 serves as the bar.

18 And I think this is completely  
19 consistent with these background principles  
20 that once the claim, the federal claim is  
21 dismissed, it's as if the statute had been  
22 running the whole time. That is the --

23 CHIEF JUSTICE ROBERTS: Well, but it's  
24 not -- the period doesn't set the bar. It's --  
25 it's the provision that provides it that does.

1 And so, as I acknowledged, your argument would  
2 be stronger if it referred to what it was that  
3 set the bar, the statutory provision. But here  
4 it refers to the period itself.

5 MS. ALIKHAN: But I believe the period  
6 of limitations sets the bar in much the same  
7 way as the statute sets the bar. Once the  
8 period has expired, in this case the three  
9 years that starts from when the claim accrues,  
10 then the litigant is out of time.

11 Now, because the federal dismissal  
12 made it such that the claim had never been  
13 brought for statute of limitations purposes,  
14 when one looks at the date of federal dismissal  
15 and counts back three years, they see the claim  
16 had accrued far before that.

17 And so, as a matter of law, at that  
18 point, the claim is out of time and the  
19 litigant cannot return to state court.

20 JUSTICE GINSBURG: But what -- what do  
21 you do with this Court's apparent understanding  
22 of what -- what 1367(d) means in the Raygor  
23 case, and specifically the Court said 1367(d)  
24 tolls the state statute of limitations --  
25 limitations 30 days, in addition to however



1 long the claim has been pending in federal  
2 court.

3 That -- that -- that was this Court's  
4 statement. It wasn't what the opinion turned  
5 on, but it's a statement of what does 1367(d)  
6 mean. It means 30 days, plus however long the  
7 claim had been pending in federal court.

8 MS. ALIKHAN: And, Justice Ginsburg, I  
9 see that just as a restatement of the language  
10 of the statute, which is that the tolling is  
11 both while the claim is pending and for 30 days  
12 thereafter.

13 This statute is unique in that it's an  
14 instruction manual to state courts on what to  
15 do with these claims once the federal court is  
16 finished with them. And this language makes  
17 clear that regardless of when that limitation's  
18 bar may have fallen, whether it's one day after  
19 the federal suit or whether it's one day before  
20 the federal dismissal, it shall not serve as a  
21 bar to bringing that claim in state court.

22 JUSTICE SOTOMAYOR: Sorry, what --

23 JUSTICE KAGAN: But there's a very  
24 easy way to write a statute like the one that  
25 you think this one is. I mean, Congress has

1 done it. All the states have done it. I'll  
2 just read you one of Congress's: "In the event  
3 that any action is timely brought and is  
4 thereafter dismissed, the action may be  
5 recommenced within one year."

6 I mean, that's a very simple way of  
7 writing a grace period statute. Thirty states  
8 have done the exact same thing. Nobody writes  
9 a grace period statute like this.

10 MS. ALIKHAN: So let me give you two  
11 responses to that. The first is in the example  
12 that you are giving, it's talking about a  
13 federal claim that's going to be rebrought in  
14 federal court.

15 Here, this is an instruction manual to  
16 state courts. They're saying: State Court,  
17 regardless of how you feel about your statutes  
18 of limitations, as -- to encourage federal  
19 claims to be litigated in federal court, we're  
20 not going to let you impose that time bar just  
21 because the litigant came to federal court  
22 first.

23 And I think, secondly, when Congress  
24 means to stop the clock --

25 JUSTICE KAGAN: I guess I'm -- I'm not

1       sure I understand that answer. I mean, I mean,  
2       here, I'm not going to speak in the language of  
3       a statute, but essentially Congress would just  
4       be saying when the pendant claim is dismissed,  
5       the person has 30 days to refile in state  
6       court. That's a pretty easy way to state that  
7       thing.

8               MS. ALIKHAN: That is certainly an  
9       easier way to state it. But, of course, had  
10      Congress wanted to have a stop-clock statute,  
11      they could have done what they do throughout  
12      the U.S. Code. For example, in AEDPA where  
13      they talk about how time shall not be counted  
14      towards any period of limitations.

15             JUSTICE KAGAN: No, but they wanted a  
16      stop-clock plus 30 days. And that makes some  
17      sense. I mean, it's not the only thing that  
18      makes sense. But Congress might have thought  
19      we want a stop-clock statute for all the  
20      reasons that we often have stop-clock statutes,  
21      and then we want to give people 30 days just to  
22      make sure that the person who's filing on the  
23      last day has a little bit of time.

24             Now, you know, is that the only thing  
25      Congress could have done? No. But, you know,

1 it makes perfect sense.

2 MS. ALIKHAN: I think it would make  
3 sense if we didn't have this express deference  
4 to state law. It's well understood that a  
5 state has the sovereign choice of when to say  
6 claims should not be litigated in their court.

7 And so, if we are going to intrude  
8 upon that historic power of the states, I think  
9 we have to read it consistent with the federal  
10 purpose. Congress --

11 JUSTICE GINSBURG: How does it help  
12 state -- let's say we didn't have this 1367(d),  
13 so you've got arising from the -- the same  
14 episode a federal claim and state claim.

15 So you want to go forward with the  
16 federal claim. You file simultaneously in  
17 federal and state court. You ask the state  
18 court to hold its case in abeyance while --  
19 while the federal case is going forward.

20 So all you get is you get an extra  
21 lawsuit that may be unnecessary to file if you  
22 prevail on the federal claim. You get a case  
23 that's just sitting there and no action is  
24 being taken.

25 I don't see how that's really

1 respectful of the -- the state's interest.

2 MS. ALIKHAN: I mean, no, it's not.  
3 That was one of the unsatisfactory options that  
4 this Court looked at in Jinks and knew that  
5 Congress was trying to remedy that problem by  
6 saying you do not have to bring these parallel  
7 suits. You do not have to take a chance that  
8 you might lose your claims to statute of  
9 limitations by virtue of filing them in federal  
10 court.

11 Instead your state-law claims will not  
12 become time-barred while they're pending in  
13 federal court and for 30 days thereafter. It  
14 was to hold the litigant harmless for having  
15 taken advantage of the federal forum.

16 And so, in doing so, yes, that is a  
17 slight intrusion on state law in that it is  
18 saying: State Courts, you may not say that a  
19 state statute of limitations bars this claim by  
20 virtue of the time it was in federal court or  
21 for 30 days thereafter.

22 But I think it's quite a different  
23 category entirely to say that in every case, as  
24 a rule, the time for filing in state court will  
25 be subject to a federal pause button and then

1 an additional 30 days, where it's not  
2 necessary.

3 JUSTICE BREYER: But is it -- well,  
4 look, aren't there many statutes, or I don't  
5 know how many, but isn't it somewhat normal,  
6 the federal government does say the thing is  
7 tolled, the state law is tolled while it's  
8 pending. Are there no other statutes like that  
9 where it just says the state law is pending --  
10 is tolled while your federal suit is pending?

11 MS. ALIKHAN: There are a handful of  
12 statutes, but those have a very particular  
13 federal purpose.

14 JUSTICE BREYER: All right. There are  
15 some. Okay. You're saying those are  
16 unconstitutional?

17 MS. ALIKHAN: Those are times of  
18 insurrection or when it's to effectuate an area  
19 of federal concern like the Bankruptcy Act.

20 JUSTICE BREYER: Yes.

21 MS. ALIKHAN: This is saying in every  
22 case, in every case in which there is  
23 supplemental jurisdiction --

24 JUSTICE BREYER: So, in other words,  
25 the -- the federal government in your view has

1 the constitutional power to, area-by-area, to  
2 say we will toll the statute of limitations,  
3 i.e., suspend it? But it doesn't have the  
4 power to say it across the board. Is that your  
5 view?

6 MS. ALIKHAN: I'm saying consistent  
7 with principles of federalism, that Congress  
8 may, where it is necessary to encourage a  
9 federal forum, such as in the bankruptcy  
10 context or during times of insurrection, which  
11 is where --

12 JUSTICE BREYER: That's an -- I have  
13 never seen that constitutional question. I'm  
14 sure it's been explored somewhere, I would have  
15 thought. I don't know. I haven't looked into  
16 it.

17 But are you -- is your view that it is  
18 unconstitutional to say across the board that  
19 state statutes are tolled while this is  
20 pending? I mean, in other words, you eliminate  
21 those words about the 30 days.

22 MS. ALIKHAN: I think that it raises  
23 grave concerns.

24 JUSTICE BREYER: Well, grave concerns,  
25 what does that mean? Do you think it is

1 constitutional or do you think it's not  
2 constitutional? What is your view?

3 MS. ALIKHAN: I think that were  
4 Congress to abolish state statutes of  
5 limitations any time there is a federal  
6 supplemental claim --

7 JUSTICE BREYER: No, no, not abolish  
8 them. My question is, do you think it is  
9 constitutional? You heard my question. What's  
10 the answer, in your opinion?

11 MS. ALIKHAN: And I'm --

12 JUSTICE BREYER: And the next question  
13 I'm going to ask you is what source legally --  
14 I mean, I'm not saying you have a -- I think  
15 it's a -- it's a plausible claim, and I'd like  
16 to know what source I should look at to read  
17 about that claim.

18 MS. ALIKHAN: So --

19 JUSTICE BREYER: Because I've never  
20 come across it yet.

21 MS. ALIKHAN: Absolutely, Justice  
22 Breyer. I believe that it would raise  
23 significant concerns under the necessary and  
24 proper clause to, as a rule, displace state  
25 statutes of limitations for no federal purpose.



1 And I think --

2 JUSTICE BREYER: Uh-huh. And here the  
3 federal purpose is what?

4 MS. ALIKHAN: Here, the federal  
5 purpose is to ensure a federal forum for  
6 federal claims --

7 JUSTICE BREYER: No, not the statute.  
8 But, I mean, in the stat -- suppose it just  
9 didn't have those last words about the 30 days.

10 MS. ALIKHAN: If it didn't have the --  
11 but it did have the deference to state law?

12 JUSTICE BREYER: Yeah -- no. No.  
13 What it has is just the one that Justice Kagan  
14 started with. It just says, "while a federal  
15 suit is pending and there is supplemental  
16 jurisdiction, state statute on the state claim  
17 is tolled until this case, federal or the state  
18 supplemental case, is dismissed".

19 MS. ALIKHAN: So, I admit that would  
20 be a closer case.

21 JUSTICE BREYER: No, not closer. I  
22 want to know --

23 MS. ALIKHAN: I --

24 JUSTICE BREYER: -- if there's a  
25 constitutional question.

1           JUSTICE ALITO: But is it necessary to  
2 your argument to -- that -- that it would be  
3 unconstitutional to do this? I -- I -- is  
4 federalism not a relevant concern in  
5 interpreting this statute in determining  
6 whether interpretation A or interpretation B is  
7 the correct interpretation?

8           MS. ALIKHAN: It absolutely is.  
9 Assuming that we think the language of "toll"  
10 is ambiguous, either in and of itself or when  
11 you look at a 30-day provision and the  
12 deference to state law, then that ambiguity can  
13 be resolved by virtue of federalism.

14           JUSTICE BREYER: Okay. Now, all I  
15 want to get at, which is a serious I haven't  
16 come across that claim anywhere. There are  
17 lots of things I haven't come across, many  
18 constitutional arguments I haven't come across.

19           So, what I want to know is what should  
20 I read in order to see that your  
21 constitutional, grave concern has also, in  
22 fact, they have -- we have a country with  
23 probably 4,000 law professors and there must be  
24 a few that -- that it appealed to, so what do  
25 you want me to read?

1 MS. ALIKHAN: So, if we are in the  
2 land where you're assuming that toll is  
3 ambiguous, then I think we look to Bond, I  
4 think we look to Gregory, I think we look to  
5 numerous cases in which this Court has said  
6 where a term does not expressly set how it's  
7 entrenching on state law, one needs to read  
8 that narrowly, consistent with principles of  
9 federalism, and that there needs to be a clear  
10 statement.

11 I mean, this Court --

12 CHIEF JUSTICE ROBERTS: It's not --  
13 it's not a radical proposition to say it's a  
14 serious intrusion on the state when the state  
15 says this is a state claim, these are our  
16 courts, we don't want our claim brought in our  
17 court if it's more than three years or  
18 whatever.

19 And for the federal government to come  
20 in and say: Well, you may not like it, but  
21 you've got to do it, I -- I think that raises  
22 serious constitutional concerns.

23 MS. ALIKHAN: I mean, I -- I do as  
24 well. And especially because there are no --

25 JUSTICE BREYER: All right. I grant

1 you that --

2 MS. ALIKHAN: -- federal --

3 JUSTICE BREYER: -- there are some  
4 people. I just wanted a reading list.

5 (Laughter.)

6 JUSTICE KAGAN: Well, here, how about  
7 this? How about -- Ms. AliKhan, I mean, maybe  
8 one thing that -- that Justice Breyer should  
9 read is Jinks, where the Court already upheld  
10 Congress's authority to pass 1367(d) under the  
11 necessary and proper clause. And in doing so,  
12 it relied on an earlier decision of this Court,  
13 which upheld a federal provision that tolled  
14 state statutes of limitations by means of  
15 stop-clock suspension.

16 So, that would seem to sort of put the  
17 kibosh on this argument, wouldn't it?

18 MS. ALIKHAN: No. I mean, if -- if  
19 you're referring to Jinks' reliance on Stewart  
20 v. Kahn, that was an area in which there was  
21 insurrection. If there is a federal purpose --

22 JUSTICE KAGAN: Well, but if it was  
23 used --

24 MS. ALIKHAN: -- that is met by  
25 displacement --

1 JUSTICE KAGAN: -- I mean, it was --  
2 that Jinks was talking about this very statute  
3 and relied on Kahn to make the point that  
4 federal provisions that toll state statutes of  
5 limitations are perfectly constitutional under  
6 the necessary and proper clause, didn't it?

7 MS. ALIKHAN: What Jinks held is that  
8 it was appropriate as far as that case went.  
9 There was not -- there was not a question in  
10 that case of whether this statute should be  
11 read to displace in every case as a rule state  
12 statutes of limitations with no federal  
13 purpose.

14 JUSTICE KAGAN: Yes, point's taken,  
15 point's taken, but it upheld -- but it -- but  
16 it cited and relied on a case where exactly  
17 this kind of suspension was at issue.

18 And you can say yes that was in a  
19 different context, but Jinks was using it for  
20 this context.

21 MS. ALIKHAN: And I think context  
22 matters. In the case of insurrection where the  
23 federal government is declaring war, there is a  
24 significant federal interest in making sure  
25 that time in which the courts are closed would

1 not be discounted from people pursuing their  
2 claims.

3 JUSTICE BREYER: There's another --  
4 there's another reading list I need. But here  
5 I can draw on your experience if you don't have  
6 the reading list.

7 My impression, which is not an  
8 informed one, is that a lot of these cases come  
9 up in the area of torts. And the state claim  
10 is probably -- may be a tort claim or may be an  
11 employment discrimination claim, and that the  
12 state statutes on those things or maybe the  
13 D.C. statutes and so forth are fairly short.

14 The limitations period is a year,  
15 maybe 90 days, maybe -- maybe two years. Where  
16 they're long, it's usually property cases. And  
17 when you have a property case, probably  
18 unlikely there was a federal claim involved.

19 Now that's a very vague impression,  
20 you see, but if it's normally a short  
21 limitations period, you could understand why  
22 Congress would want to say suspend it. It  
23 won't hurt the defendants that much. They're  
24 short anyway.

25 And -- and -- and give them 30 days

1 because if the person, as he said, his argument  
2 was, well, he slept on his rights, you know,  
3 there are only four days left because he's  
4 sleeping on his rights. We're not going to  
5 give him the whole rest of the limitations  
6 period, because there is none. We'll give him  
7 30 days.

8 And if, in fact, he has another few  
9 months under the state law, then forget it,  
10 forget the whole business, he has the state law  
11 period. Okay. I can see that.

12 But I have no empirical experience.  
13 You have some. So -- so -- so is it -- is it  
14 true that this arises mostly in a state law  
15 tort area or an employment discrimination area  
16 where the statutes are fairly short? Do you  
17 know?

18 MS. ALIKHAN: So --

19 JUSTICE BREYER: Is there any  
20 experience I can get on that?

21 MS. ALIKHAN: I -- I have my own  
22 experience --

23 JUSTICE BREYER: Yeah.

24 MS. ALIKHAN: -- but there's not  
25 considerable empirical data on supplemental

1 claims. I think the best source for this is  
2 pages 20 and 21 of the state's brief, which  
3 talk about a variety of circumstances in which,  
4 if Petitioner's reading were correct, the  
5 litigant would have between two years and  
6 nearly six years after the federal dismissal --

7 JUSTICE BREYER: In what kind of a  
8 case?

9 MS. ALIKHAN: So those included  
10 employment cases, tort cases, Fourth Amendment  
11 1983 cases.

12 JUSTICE BREYER: Two to six years is  
13 probably this period.

14 MS. ALIKHAN: And so two to six years  
15 after the federal court suit was dismissed, not  
16 two to six years after the claim accrued.

17 JUSTICE BREYER: Well, that's because  
18 they have that much time left. That's because  
19 they had that much time left under the statute.

20 MS. ALIKHAN: And I would submit that  
21 that's inconsistent with purposes of statutes  
22 of limitations. To be sure, to encourage  
23 litigants to exercise their right to bring  
24 federal claims in a federal forum, Congress may  
25 say: Yes, states, you cannot treat these



1 claims as time-barred for a -- finite period of  
2 time, but I think to then say you have nearly  
3 six years after your federal claim is dismissed  
4 to wait for memories to fade, witnesses to  
5 move, documents to no longer be easily  
6 accessible, to then come in and bring that  
7 claim, especially when it's against a state  
8 defendant in a state court and to say that --

9 JUSTICE GINSBURG: And you say to give  
10 the -- give -- bring that claim, meaning the  
11 purposes of statutes of limitations is, one, to  
12 give the defendant notice, defendant has notice  
13 from the federal complaint, that has both  
14 federal and state claims; and the other is to  
15 prevent plaintiffs from sleeping on their  
16 rights.

17 Plaintiff has moved promptly. It has  
18 a complaint that has two classes of claims,  
19 state and federal. So the plaintiff, this is  
20 -- this is not -- the litigant has acted  
21 timely.

22 MS. ALIKHAN: Yes, Justice Ginsburg,  
23 but I don't understand why acting diligently on  
24 the front end gives the plaintiff the ability  
25 to be dilatory by a period of two, three, four,

1 five, six years on the back end, because there,  
2 yes, there is notice of the claim at the time  
3 of federal filing, but once the federal suit  
4 has resolved, a period of time has gone by, we  
5 would submit 30 days, then the defendant thinks  
6 she's not going to refile her state suit.

7 But then she could surprise a  
8 defendant by saying two years, three years,  
9 four years, and I think this is especially  
10 significant in employment cases where you're  
11 looking at back-pay awards that run from the  
12 time of the adverse employment action, there is  
13 a chance for gamesmanship by the plaintiff,  
14 which would not happen if we were looking at  
15 this as a 30-day period from while the claim is  
16 pending and after its dismissal.

17 But I -- I do want to get back to just  
18 the structure of the statute as a whole because  
19 I think that the provision of this 30-day  
20 period, because it is a rarity within the U.S.  
21 Code, suggests Congress was doing something  
22 other than stop-clock tolling.

23 And I think combined with this  
24 self-conscious legislation that defers to state  
25 tolling periods, of which this Court was aware,

1 of which Congress was aware, when they were  
2 enacting this statute.

3 And so 1367(d) is a precise fit to the  
4 problem created by 1367(c). And that comes  
5 from the fact that a -- a case dismissed  
6 without prejudice is treated as if it had never  
7 been brought. That means the statute of  
8 limitations has been ticking by the whole time.

9 And to save that litigant from being  
10 ousted out of a state forum by virtue of that  
11 state statute of limitations, Congress said no,  
12 we will toll your claim so it will not expire  
13 during the federal litigation, and you will  
14 have a 30-day window in which to refile.

15 If there are no further questions,  
16 thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Eleven minutes, Mr. Unikowsky.

20 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY

21 ON BEHALF OF PETITIONER

22 MR. UNIKOWSKY: Thank you, Mr. Chief  
23 Justice.

24 I'd like to make just two rebuttal  
25 points, one about the plain text of this

1 statute and one about the federalism  
2 considerations raised by Respondent.

3           So, first of all, on the text, picking  
4 up on a question by Justice Breyer, it really  
5 is never the case that the phrase "period of  
6 limitations is tolled" ever means that the bar  
7 associated with the expiration of the period of  
8 limitations is temporarily rendered  
9 unenforceable while the clock continues to run,  
10 which is the interpretation given by  
11 Respondent.

12           Respondent offers the example of the  
13 phrase that the -- a petition for rehearing  
14 tolls the time to file a petition for  
15 certiorari. But in that context, you wouldn't  
16 say that the period of limitations, the 90-day  
17 period, is tolled during the entire 90-day  
18 delay between the dismissal of the -- of the  
19 petition for rehearing and the cert petition.

20           Maybe you would say that the start of  
21 the 90-day clock is delayed until the petition  
22 for rehearing is denied, but that's not  
23 Respondent's position. Respondent's position  
24 is that the tolling period consists of the  
25 pendency of the petition for rehearing and the

1 entire 90-day period.

2           And the word "tolled" is never used  
3 that way. Not in a case, not in a statute, I  
4 have not found a single reference to the -- to  
5 the word being used in that context. Even that  
6 Virginia statute, which we actually cite in our  
7 reply brief at page 14, note 3, even that  
8 Virginia statute which we acknowledge also  
9 doesn't use the word "tolling" that way,  
10 because even in that statute, the statute does  
11 not define the period of tolling to include the  
12 grace period, which is what Respondent does.

13           So the word "tolling" literally never  
14 means what Respondent claims it means. And, in  
15 fact, I -- I actually think that the 46 U.S.C.  
16 53911 statute, which Justice Kagan mentioned,  
17 is very good for us. It's almost like a  
18 Rosetta Stone for us because the title of that  
19 statute is tolling of limitations period. And  
20 then the statute explains what it means. It's  
21 says that the running of the -- of the clock is  
22 suspended while this administrative claim is  
23 pending and for 60 days. And so I think that  
24 just underscores that tolling of a period of  
25 limitations means one thing. It means that the

1 clock stops.

2           So, the second point I'd like to  
3 mention is this argument about federalism. And  
4 we're certainly mindful about the federalism  
5 concerns. We're not trying to undermine them.  
6 But, first of all, constitutional avoidance is  
7 not a reason to rewrite a statute. I think  
8 that the way to adjudicate the constitutional  
9 concerns is to allow the constitutional  
10 argument to be aired and decide whether the  
11 statute's unconstitutional, rather than  
12 rewriting the statute to mean something it  
13 plainly does not mean.

14           JUSTICE GORSUCH: Mr. Unikowsky, let's  
15 say I'm with you on constitutional avoidance  
16 and -- and using it to rewrite things. But  
17 what -- what about the presumption against  
18 preemption?

19           MR. UNIKOWSKY: Your Honor --

20           JUSTICE GORSUCH: Separate doctrine,  
21 similar point of view.

22           MR. UNIKOWSKY: Well, a few things  
23 about that, Your Honor. First of all, again, I  
24 don't think that the presumption against  
25 preemption is a tool to rewrite statutes. It's

1 -- it's merely a presumption that can be  
2 overcome by the text of the statute.

3           Second of all, I -- I don't think that  
4 the Court has typically applied the presumption  
5 against preemption against statutes that so  
6 plainly are intended to apply a federal rule.  
7 So here's a statute that just says that the  
8 federal tolling period is X. And that's  
9 plainly intended to supply a federal standard.

10           And so the question is whether this  
11 federal tolling rule is -- excuse me, the  
12 federal tolling period, is longer or shorter.  
13 On its face, that question has nothing to do  
14 with state law, and so the Court has not  
15 applied the presumption against preemption in  
16 that context. We cite the -- we cite the  
17 Puerto Rico versus Franklin case from last  
18 year, where there was clearly a federal rule  
19 and the Court said that there's no presumption  
20 against preemption in just interpreting a  
21 plainly federal standard. You just look at the  
22 text of the statute. And so I think that that  
23 Court should just do the same thing here.

24           The other thing is I think that this  
25 statute doesn't really infringe on state

1 sovereignty sufficiently to apply the sort of  
2 extreme presumption that in our view would  
3 essentially rewrite the text. We think the  
4 statute is readily understood as regulating  
5 litigation in federal court.

6 All it's saying is that when you have  
7 a claim that can be filed in federal court,  
8 that has been filed in federal court, that the  
9 period of limitations tolled while that claim  
10 is pending in federal court.

11 Again, I think that's readily  
12 understood as regulating federal court  
13 litigation. It's not reaching out into state  
14 law to a significant -- to a sufficient extent  
15 to justify effectively rewriting the statute.  
16 So in our view -- but, anyway, any presumption  
17 against preemption could not be overcome in  
18 this case given that we think the text is just  
19 so clear.

20 And in terms of those state statutes  
21 that Respondent cites, so first of all, those  
22 are just general state statutes that apply to  
23 what happens when a claim is dismissed --  
24 dismissed without prejudice. So most of the  
25 time, those statutes will apply as written.



1 They'll only be displaced in the particular  
2 scenario where you have a claim that's brought  
3 in federal court.

4           And I think Congress could conclude  
5 that it has a special relationship with  
6 litigants who bring suit in federal court. It  
7 wants to protect those litigants by ensuring  
8 that while the claim is pending in federal  
9 court before a federal judge, the clock won't  
10 be running down. I think that Congress can  
11 regulate the federal courts in that manner.

12           I agree that there are some federalism  
13 implications here. That's why I acknowledged,  
14 in response to Justice Alito, that you can't  
15 make these periods of limitations forever,  
16 but --

17           JUSTICE GORSUCH: Well, when would we  
18 have a problem on federalism if it's not this  
19 case? How far would it have to go before we'd  
20 actually have a problem, either under a  
21 presumption against preemption or straight-up  
22 constitutional issue?

23           MR. UNIKOWSKY: Well, I gave the  
24 example of -- of eliminating statutes of  
25 limitations altogether. Maybe making them 100

1 years or something might also pose a similar  
2 constitutional problem. But I think that the  
3 relevant line --

4 JUSTICE GORSUCH: A hundred years is  
5 too much, six years is too little I mean, in  
6 our case, right? So --

7 MR. UNIKOWSKY: I -- I --

8 JUSTICE GORSUCH: -- so where -- where  
9 do we draw the constitutional -- where would  
10 you have us draw that constitutional line?

11 MR. UNIKOWSKY: So I can't, standing  
12 here right now, say that this is the -- the  
13 constitutional limit. But what I can say is  
14 this: this is a statute that takes a  
15 traditional, ubiquitous, common law approach  
16 off the shelf. So I think that there should be  
17 a safe harbor, from a constitutionality  
18 perspective, for a tolling rule that has been  
19 used throughout history. It was used dating  
20 back to the Civil War. It's -- when -- when  
21 Congress just takes a traditional tolling rule  
22 off the shelf in that manner and doesn't reach  
23 out to enact some extreme, unusual legislation  
24 that -- that overturns state law in this  
25 unexpected way, I think that that should be a

1 safe harbor for Congress.

2 And so, I can't say, standing here  
3 right now, that there's a 10-year clause or a  
4 20-year clause in the Constitution that creates  
5 the line, but I just don't think that this  
6 statute should be interpreted as approaching  
7 those limits when it's just such a traditional  
8 approach to tolling.

9 If there are no further questions,  
10 we'd ask the Court to reverse.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel. The case is submitted.

13 (Whereupon, at 10:56 a.m., the case was  
14 submitted.)

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## Official - Subject to Final Review

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