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COMMENT

ARTIS V. DISTRICT OF COLUMBIA— WHAT DID THE COURT ACTUALLY SAY?

*Doron M. Kalir**

INTRODUCTION

On January 22, 2018, the Supreme Court issued *Artis v. District of Columbia*.¹ A true “clash of the titans,” this 5–4 decision featured colorful comments on both sides, claims of “absurdities,” uncited use of *Alice in Wonderland* vocabulary (“curiouser,” anyone?), and an especially harsh accusation by the dissent that “we’ve wandered so far from the idea of a federal government of limited and enumerated powers that we’ve begun to lose sight of what it looked like in the first place.”²

One might assume that the issue in question was a complex constitutional provision, or a dense, technical federal code section. Far from it. The sole issue in *Artis* was the interpretation of 28 U.S.C. § 1367(d), an obscure tolling provision dealing with the time period allowed for plaintiffs who filed their claims in federal court and were dismissed to refile their claims in state court.³ The majority—authored by Justice Ginsburg and joined by Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan—provided a generous interpretation, allowing plaintiffs some more time to refile.⁴ The dissent—authored by Justice Gorsuch and joined by Justices Kennedy, Thomas, and Alito—thought that, in most cases, plaintiffs should receive no more than thirty days to refile.⁵

This Comment does not follow the many constitutional and jurisprudential intricacies of this fascinating battle. Instead, it intends to point to what seems to be

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* Clinical Professor of Law, Cleveland-Marshall College of Law. I would like to thank my students in Federal Courts class, especially Ms. Erika Molnar, for their probing questions. I would also like to thank Professors Michael Dorf and James Pfander, as well as participants in the North Eastern Ohio (NEO) Faculty Workshop, for their carefully worded comments.

¹ 138 S. Ct. 594 (2018).

² *Id.* at 617 (Gorsuch, J., dissenting).

³ *Id.* at 598 (majority opinion).

⁴ *Id.*

⁵ *Id.* at 611–12 (Gorsuch, J., dissenting).

a glaring misunderstanding of the majority opinion by the dissent. This Comment also raises the possibility that the majority itself did not understand the full implications of its own opinion, as evidenced by its response to the dissent. If this is indeed the state of affairs, an inevitable question arises: What did the Court actually say in *Artis v. District of Columbia*?

I. SUBSECTION 1367(D): TWO INTERPRETIVE OPTIONS

In civil cases, section 1367 grants federal courts power over state claims “that are so related to” the federal claims at issue “that they form part of the same case or controversy under Article III of the United States Constitution.”⁶ Such power is known as “supplemental jurisdiction.”⁷ Thus, the federal district court may entertain a complaint containing both federal- and state-law claims, as was the case in *Artis*.⁸

At times, however, the federal court will dismiss the federal claim. At that point, the rationale for exercising supplemental jurisdiction over state claims disappears.⁹ But those claims are usually dismissed without prejudice, allowing the plaintiff an opportunity to refile them in state court. The question presented by subsection 1367(d), therefore, is *how much time* plaintiffs have to refile.¹⁰ The answer could be, conceivably, thirty days, or another reasonable period of time. But the text of subsection 1367(d) is concerned with another issue altogether: the lapse of the statute of limitations for the state-law claims included in the complaint, while the case is pending in federal court. The answer thus offered by this subsection is as follows:

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.¹¹

Or, as Justice Ginsburg put it in her majority opinion: “The period of limitations for any [state] claim [joined with a claim within federal-court competence] shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.”¹²

The subsection’s inelegant prose offers two possible interpretations. The first reading suggests that while the claim is pending in federal court, the state-granted period of limitations continues to run, and likely will lapse while the federal litigation is pending.¹³ The plaintiff, however, would still have *some* time to refile

6 28 U.S.C. § 1367(a) (2012).

7 *Id.*

8 Petitioner filed a complaint alleging a *federal* gender discrimination claim under Title VII of the Civil Rights Act, as well as several *state law* claims. *See Artis*, 138 S. Ct. at 599.

9 *See* 28 U.S.C. § 1367(c)(3).

10 *Id.* § 1367(d).

11 *Id.*

12 *Artis*, 138 S. Ct. at 598 (alteration in original) (quoting 28 U.S.C. § 1367(d)).

13 Though not explicitly, both the majority and the dissent assumed that while the case is pending in federal court, the state statute of limitations would likely lapse. *See Artis*, 138 S. Ct. at

her claim in state court after dismissal, because the federal statute grants her a refiling period of thirty days (“grace period”). In addition, state law may grant her a separate grace period to refile. Whichever is longer—the thirty-day federal grace period or the state-law (optional) grace period—is the time period during which a plaintiff may refile her claim in state court.¹⁴ This is the narrower reading of the subsection (the “grace-period reading”).¹⁵

According to the second reading, once a claim is filed in federal court, the state-granted limitation period for refiling is suspended (“tolled”).¹⁶ Only after the claim is dismissed does the limitation clock begin to run again; thus, the plaintiff may refile her case in state court during a much longer period. To begin with, she may use the remaining time until the state limitations period lapses; to that she may add the subsection’s federally mandated thirty days. Alternatively, recall that state law may accord a separate time period to refile the claim in state court (dubbed “grace period” earlier). Thus, the plaintiff may use one of two time periods to refile her claim: either the federally based time period (consisting of the state-tolled remaining period plus the federally mandated thirty days), or the state-based grace period as provided by state law. Whichever period is longer is the time allowed to refile. This is the more generous reading of the subsection (the “stop-the-clock reading”).¹⁷

Artis itself provides a nice illustration of the difference between the two readings. Plaintiff filed her claim in federal court with “nearly two years remain[ing] on the applicable [state] statute of limitations.”¹⁸ The case remained in federal court for two-and-a-half years, essentially running out the clock on the state statute of limitations.¹⁹ The state claims were then dismissed without prejudice.²⁰ Plaintiff refiled her claims in state court fifty-nine days later.²¹ If the grace period reading were to control, then since Plaintiff had essentially only thirty days to file (assuming state law did not provide a longer refiling grace period)²², her claims were time-barred. But if the stop-the-clock reading were to control, then Plaintiff had plenty of time to file—the period that remained on the state statute of limitations (nearly

616 (Gorsuch, J., dissenting) (“[F]ederal litigation is no quick business . . .”). This is a crucial assumption for our purposes.

14 *See id.* at 598 (majority opinion) (stating that “plaintiff is accorded a grace period of 30 days to refile in state court post dismissal of the federal case”); *id.* at 608 (Gorsuch, J., dissenting) (“[T]he law ensures the party will enjoy whatever time state law allows, or at least 30 days, to refile the claim in state court.”).

15 *Id.* at 598 (majority opinion).

16 *See id.*

17 *Id.*

18 *Id.* at 600. As the dissent points out, that period was actually twenty-three months. *Id.* at 613 (Gorsuch, J., dissenting).

19 *Id.* at 600 (majority opinion).

20 *See id.* at 599.

21 *Id.* at 600.

22 The Court—neither in the majority opinion nor in its dissent—provided any information on the relevant state grace period law. The same is true for both lower courts’ decisions, the parties’ briefs, and the two amici. Since it is hard to prove a negative, I will assume, for purposes of this Comment, that pertinent state law did not provide a grace period longer than thirty days.

two years), plus the statutory thirty days.²³ Assuming that latter timeframe, the fifty-nine-day filing period was well within her rights.

The majority in *Artis* adopted the stop-the-clock reading, allowing the filing to proceed.²⁴ The dissent, vehemently objecting, adopted the grace-period reading, barring the claim from being refiled.²⁵

The two readings differ in two pertinent ways, both crucial for the misunderstanding later perpetuated by the dissent. First, under the grace period approach, the refiling period will mostly be a choice between two *fixed* periods—the federal statutory thirty-day period, and the state’s statutory refiling grace period, whichever is longer. In contrast, under the stop-the-clock reading, the choice would always be between one fixed period—the state’s statutory grace period for refiling—and one variable—the period of time between the filing date in federal court and the expiration of the state limitations period, plus the federally mandated thirty days.

Second, and more importantly, one should consider the time period during which the case is pending in federal court (“federal pendency”). According to the grace-period reading, federal pendency is taken into consideration each time the subsection is invoked to examine whether the state limitations period—which, as noted earlier, is not suspended during the proceeding—has run while the case was pending in federal court. If so—that is, if the state limitations period has run (which the Justices assumed will happen in most cases)²⁶—then the choice will be between the federally mandated grace period (thirty days) and the state statutory grace period, if one exists.²⁷ But in the rare instance where the state limitations period has not run during federal pendency, that state limitations period will be added to the thirty-day mandatory period granted by the federal statute.

In contrast to the grace-period reading, federal pendency is not considered *at all* under the stop-the-clock reading. Once the claim has been filed in federal court, the only time period that matters is the one remaining on the state limitations period. That time is now frozen, regardless of the period the case will spend in federal court. Federal pendency, in other words, is immaterial to the stop-the-clock approach. This seems fair, since we would not like to distinguish between plaintiffs based solely on the time their claim was pending—but not adjudged—in federal court. Some federal judges take their time, while others are more efficient. But the rate at which the federal judge dispenses with the case should not affect the time allowed by statute for refiling it in state court. And the case at hand provides a nice illustration: had the federal pendency period (two-and-a-half years) been considered, then Plaintiff would *not* have had fifty-nine days to refile in state court.

Let us consider a simple model to illustrate these points.

23 Surprisingly, neither the majority nor the dissent found time to calculate how much time, precisely, was left for Plaintiff to file.

24 See *Artis*, 138 S. Ct. at 598 at 608.

25 See *id.* at 610 (Gorsuch, J., dissenting).

26 See *supra* note 13 and accompanying text.

27 See 28 U.S.C. § 1367(d) (2012).

II. SUBSECTION 1367(D): THE MODEL

Subsection 1367(d) introduces several terms. For convenience, we can build a simple model describing the relations between them. Going back to Justice Ginsburg’s iteration of the subsection: “The period of limitations for any [state] claim [joined with a claim within federal-court competence] shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.”²⁸

Let the period between the filing date in federal court and the last day of the state’s limitations period be marked $\Delta 1$. (For example, if the claim was filed in federal court two years prior to the run of the state’s statute of limitations, then $\Delta 1 = 2 \text{ years}$.) Let the federal pendency period—the time in which “the claim is pending [in federal court]”²⁹—be marked as $\Delta 2$. Let the federally mandated thirty-day grace period be marked as 30 days . And let the State’s grace period for refiling be marked as STg .³⁰

According to the stop-the-clock reading of the statute, the time period allowed for refiling the case in state court will be determined as follows:

If $STg > (\Delta 1 + 30 \text{ days})$, then STg ;
 If $STg < (\Delta 1 + 30 \text{ days})$, then $\Delta 1 + 30 \text{ days}$.

Note that the federal pendency period— $\Delta 2$ —is *not* a part of the equation under any circumstances according to the stop-the-clock reading. This is an important point. Federal pendency *is* considered under the grace-period reading, but since that view was rejected by the majority, there is no need to present it here in model form.

I turn now to examine the several examples provided in the case, which illuminate the misunderstanding perpetuated by the dissent.

III. SUBSECTION 1367(D): FOUR EXAMPLES

A. Example 1: The Actual Facts of the Case

“When Artis first asserted her state-law claims in the District Court, nearly two years remained on the applicable [state] three-year statute of limitations.”³¹ (As noted earlier, the actual time remaining on the state limitations period was twenty-

²⁸ *Artis*, 138 S. Ct. at 598 (majority opinion) (alteration in original) (quoting 28 U.S.C. § 1367(d)).

²⁹ *Id.*

³⁰ The Court points to at least two states where the grace period (STg) is quite substantial: “Indiana[, which] permits a plaintiff to refile within three years of dismissal. And Louisiana[, which] provides that after dismissal the limitations period ‘runs anew.’” *Id.* at 606 (citations omitted) (quoting LA. CIV. CODE ANN. art. 3466 (West 2018)). Though the language of both pertinent state-law sections is quite vague, courts have interpreted each statute to allow plaintiffs to refile in accordance with the state-based grace period. *See, e.g.*, *Huffman v. Hains*, 865 F.2d 920, 923–24 (7th Cir. 1989) (interpreting a former version of Indiana’s “savings statute” as allowing five years to refile); *Pankratz v. Noble Drilling Corp.*, 501 So. 2d 797, 799 (La. Ct. App. 1986) (Louisiana allows the refiling period to run again).

³¹ *Artis*, 138 S. Ct. at 600.

three months.)³² “But two and a half years passed before the federal court relinquished jurisdiction.”³³ “Fifty-nine days after the dismissal of her federal action, Artis refiled her state-law claims in the D.C. Superior Court, the appropriate local court.”³⁴ Was her filing timely? Let us examine the model:

$$\begin{aligned}\Delta 1 &= 23 \text{ months.} \\ \Delta 2 &= 2.5 \text{ years.} \\ STg &= \text{unknown; assumed to be 30 days.}^{35}\end{aligned}$$

Since $\Delta 1 + 30 \text{ days} > STg$ ($23 \text{ months} + 30 \text{ days} > 30 \text{ days}$), the period allowed for refiling is approximately two years.³⁶ Since Plaintiff refiled her claim within fifty-nine days, she was well within her rights, and her state claims may continue.

B. Example 2: Dissent Hypothetical # 1

The dissent offered several hypotheticals to support its view. Here is one:

[T]ake a plaintiff who files suit in federal court shortly after a six year state law limitations period begins running and the litigation lasts six years before it’s finally dismissed. Under the Court’s approach, federal law will now promise the plaintiff nearly six years more (plus those stray 30 days again) to refile his claim in state court.³⁷

Is that correct? Let us review the model:

$$\begin{aligned}\Delta 1 &= 6 \text{ years.} \\ \Delta 2 &= 6 \text{ years.} \\ STg &= \text{unknown; likely 30 days.}\end{aligned}$$

Since $\Delta 1 + 30 \text{ days} > STg$, then the longer period is the one prescribed by federal law, and the dissent is correct. The plaintiff will have nearly six years, plus thirty days, to refile in state court. Notice, again, that although $\Delta 2$ is mentioned by the dissent, it has no bearing on the result and is not included in the equation.

C. Example 3: Dissent Hypothetical # 2

Here is another hypothetical offered by the dissent:

³² See *supra* note 18 and accompanying text.

³³ *Artis*, 138 S. Ct. at 600.

³⁴ *Id.*

³⁵ The Court, again, provided no information regarding the length of the “longer tolling period,” if any, provided by the District of Columbia. *Id.* at 598 (quoting 28 U.S.C. § 1367(d) (2012)); see *supra* note 22 and accompanying text. According to the dissent, “the great bulk of States provide for grace periods of 30 days or longer; only a few States don’t allow that much or don’t speak to the question.” *Id.* at 616 (Gorsuch, J., dissenting) (emphasis added).

³⁶ Unfortunately, this fundamental—and necessary—finding of fact is missing from the opinion of either the majority or the dissent.

³⁷ *Artis*, 138 S. Ct. at 617 (Gorsuch, J., dissenting).

Say state law provides a 5 year statute of limitations and a 1 year grace period for refiling. The plaintiff files in federal court one day before the statute of limitations expires. The litigation in federal court lasts 1 year. Under the Court's view, the federal "tolling period" would be 1 year plus 30 days—the time the claim was pending in federal court plus 30 days after dismissal. That period is longer than the state tolling period of 1 year and so the federal tolling rule, not the state rule, controls—leaving the plaintiff only 31 days to refile her claim after dismissal even though state law would have allowed a full year.³⁸

Is the dissent correct? Let us review:

$$\begin{aligned}\Delta 1 &= 1 \text{ day.} \\ \Delta 2 &= 1 \text{ year.} \\ STg &= 1 \text{ year.}\end{aligned}$$

Since $\Delta 1 + \text{thirty days} < STg$ (as thirty-one days is less than one year), then the longer (state grace) period is the one allowed by federal law. Accordingly, per the generous state grace period, the plaintiff will have one full year to file. Again, that result is achieved regardless of the federal pendency period ($\Delta 2$), and without including it in the equation. The dissent, however—thinking the plaintiff will have only thirty-one days to refile—is in error. And the reason for that error is simple: Justice Gorsuch includes the federal pendency period— $\Delta 2$ —in his computation of the time allowed for refiling. But as we have seen, federal pendency has nothing to do with the stop-the-clock reading. Not stopping here, Justice Gorsuch continues to fault the majority for his own confused logic, which brings us to the fourth and last example in this case.

D. Example 4: Dissent Hypothetical #3

That may be curious enough, but curiously it gets. Now suppose the litigation in federal court lasts only 10 months. That makes the federal tolling period only 11 months (10 months plus 30 days). Under the Court's view, state law now provides a longer tolling period (1 year) and the litigant gets a full year to refile in state court instead of 31 days.³⁹

Is the dissent correct? Clearly, the only difference between the two hypotheticals is in the federal pendency period— $\Delta 2$. In this example it equals ten months, while in the previous example it equaled one year. That, again, is of no moment, as the federal pendency period is *not relevant* to the computation under the stop-the-clock reading. While the dissent happens to be correct regarding the result in this example—the plaintiff has one year, as in the previous example, to refile in state court—its analysis demonstrates a complete misunderstanding of the majority's opinion (and of the way the refiling period should be calculated).

But Justice Gorsuch had more: "No one has offered a reason why the happenstance of how long the federal litigation lasted should determine how much time a litigant has to refile in state court. Yet that is what the Court's reading of

38 *Id.* at 612.

39 *Id.*

section 1376(d) demands.”⁴⁰ But as we have explained, that is *not* what the majority requires. Quite the opposite: the federal pendency period, $\Delta 2$, is never part of the refiling-calculation equation. The dissent, in other words, misunderstands the rule announced by the majority.

IV. SUBSECTION 1367(D): THE MAJORITY’S RESPONSE

According to Justice Gorsuch, the two (wrong) examples he conjured were intended to show the “absurdities” that followed the Court’s stop-the-clock approach.⁴¹ One would assume, therefore, that as soon as the majority viewed these examples for the errors they represent they would be quick to point out the mistakes and correct them. Thus, one would expect the majority to write a short paragraph explaining why federal pendency is irrelevant to the equation, correcting both the logic and the result of the dissent.

But that is not what happened. Responding to the dissent’s examples (in customary fashion, by a footnote), the majority makes quite a confusing statement of its own:

The dissent . . . conjures up absurdities not presented by this case, for the District of Columbia has no law of the kind the dissent describes. All agree that the phrase “unless State law provides for a longer tolling period” leaves room for a more generous state-law regime. The dissent posits a comparison between the duration of the federal suit, plus 30 days, and a state-law grace period. But of course, as the dissent recognizes, . . . the more natural comparison is between the amount of time a plaintiff has left to refile, given the benefit of § 1367(d)’s tolling rule, and the amount of time she would have to refile under the applicable state law. *Should the extraordinary circumstances the dissent envisions in fact exist in a given case, the comparison the dissent makes would be far from inevitable.*⁴²

From the majority reply one can assume that “the extraordinary circumstances the dissent envisions” may happen, but that would *never be* the case since the federal pendency period ($\Delta 2$) is *never counted* in the process of computing the time allowed for refiling, no such “extraordinary circumstances” will ever occur.

Thus, the majority’s comment—responding to one misunderstanding with another—may leave us scratching our head: Is it possible that not only the dissent, but the majority itself fails to fully understand the implication of the rule it just announced?

CONCLUSION

In *Artis*, the Court was asked to perform a simple task: provide guidance to lower courts, legal counsel, and prospective plaintiffs as to the time period allowed for a plaintiff to refile her claim in state court once her federal claims were dismissed. The Court—bitterly divided 5–4—seems to have provided an answer, which it dubbed the stop-the-clock approach. Under that approach, the period allowed for refiling will be the greater of two periods: either the grace period provided by state

40 *Id.*

41 *Id.*

42 *Id.* at 606 n.12 (majority opinion) (emphasis added) (citations omitted).

law (STg), or the sum of the federally granted thirty-day grace period plus the time period between the filing date in federal court and the last day of the state's limitation period ($\Delta I + 30$). Importantly, that interpretive approach explicitly *excludes* any consideration of the time the case was pending in federal court—the federal pendency period ($\Delta 2$). The dissent seems to have failed to understand that simple logical implication. The majority, or so it seems, did not fully grasp the implications of its rule either.

Supreme Court Justices—especially the newest of them—would be better advised to use their time concentrating on the judicial task at hand. They should refrain from using their considerable firepower to deepen the divides within their sacred institution. Especially so when, as in this case, such divides were completely unnecessary.