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## To Be or Not to Be: The Validity of Pendent Party Jurisdiction Remains Unanswered After *Finley v. United States*

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## NOTES AND COMMENTS

### To Be or Not to Be: The Validity of Pendent Party Jurisdiction Remains Unanswered After *Finley v. United States*

#### I. INTRODUCTION

Before the Supreme Court decided *Finley v. United States*,<sup>1</sup> most federal courts chose to exercise pendent party jurisdiction in Federal Tort Claims Act (FTCA)<sup>2</sup> actions when presented with the opportunity to consolidate related claims in a single forum.<sup>3</sup> In contrast, *Finley v. United States* arose from the Ninth Circuit, the only circuit to consistently oppose pendent party jurisdiction in FTCA and all other federal actions.<sup>4</sup> For more than a decade, the Supreme Court's dicta in *Aldinger v. Howard*<sup>5</sup> fueled judicial debate on the validity of pendent party jurisdiction in FTCA actions. In *Aldinger*, the Court specifically named the FTCA as an example of a federal statute which might properly support a pendent party jurisdiction claim.<sup>6</sup> While the 5-4 decision in *Finley* suggests that the *Aldinger* dicta was but one vote short of becoming law, the Court held that the FTCA does not permit the exer-

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1. 109 S. Ct. 2003 (1989).

2. 28 U.S.C. §§ 1346(b), 2671-80 (1988).

3. Cases allowing pendent party jurisdiction in FTCA actions include *Brown v. United States*, 838 F.2d 1157 (11th Cir. 1988) (affirming *Lykins*); *Lykins v. Pointer, Inc.*, 725 F.2d 645, 647 (11th Cir. 1984) (there is "no express or implied negation of the federal courts' power to hear pendent party claims" in the FTCA); *Stewart v. United States*, 716 F.2d 755, 758 (10th Cir. 1982) (pendent party jurisdiction is proper under the FTCA since the "waiver of immunity, granting jurisdiction to the federal district courts of such tort suits against the Government, was made in sweeping language"); *Ortiz v. United States*, 595 F.2d 65, 73 (1st Cir. 1979) (joining additional parties to an FTCA action will not "contravene any congressional statute").

4. Ninth Circuit cases denying pendent party jurisdiction include *Carpenters S. Cal. Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999 (9th Cir. 1984); *Safeco Ins. Co. of Am. v. Guyton*, 692 F.2d 551 (9th Cir. 1982); *Idaho ex rel. Trombley v. United States*, 666 F.2d 444 (9th Cir. 1982); *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977) (Ninth Circuit does not recognize the existence of pendent party concept); *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969).

5. 427 U.S. 1 (1976). In *Aldinger*, the plaintiff tried to join Spokane County as an additional defendant to a claim against her employer based upon 42 U.S.C. § 1983 (1982), the Civil Rights Act. The Court held that the Civil Rights Act specifically excluded counties from liability and thus denied pendent party jurisdiction. *Id.* Two years after the *Aldinger* decision, the Court in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), overruled prior cases holding that municipal corporations are not persons within the meaning of 42 U.S.C. § 1983.

6. 427 U.S. at 18-19. See *infra* note 16 and accompanying text.

cise of pendent party jurisdiction over additional parties who have no independent basis of federal jurisdiction.<sup>7</sup>

This casenote reviews the history and development of pendent party jurisdiction as a valid, essential judicial tool. Next follows an examination of the Court's reasoning for prohibiting pendent party jurisdiction in the FTCA context in *Finley*. The note then explores the inconsistencies between the Court's reasoning in *Finley* and its reasoning in past pendent party decisions. Finally, the note examines the significance of the holding in the application of pendent party jurisdiction to other federal claims.

## II. HISTORY OF PENDENT PARTY JURISDICTION

### A. *Definition and Debate*

For years federal courts have struggled with the application of pendent party jurisdiction, a judicially-created concept which evolved from pendent and ancillary jurisdiction.<sup>8</sup> Pendent, ancillary and pendent party jurisdiction all address the issue of whether federal courts may adjudicate nonfederal claims and/or claims involving nonfederal parties.<sup>9</sup>

*Pendent jurisdiction* allows a claimant to attach a related claim

7. 109 S. Ct. at 2010.

8. See, e.g., *Jacobson v. Atlantic City Hosp.*, 392 F.2d 149 (3d Cir. 1968) (allowed plaintiff to meet the diversity statute's \$10,000 amount in controversy threshold by aggregating claims against two separate defendants); *Wilson v. American Chain & Cable Co.*, 364 F.2d 558 (3d Cir. 1966) (also allowed aggregation of claims and multiple parties to meet the diversity amount in controversy threshold); *Newman v. Freeman*, 262 F. Supp. 106 (E.D. Pa. 1966) (allowed joinder of an additional plaintiff in diversity suit although plaintiff was not diverse from defendants). The Supreme Court refused to allow courts to use pendent jurisdiction to join parties together to meet the amount in controversy threshold for federal diversity in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

9. "A considerable body of recent literature suggests that there is no meaningful distinction between pendent and ancillary jurisdiction." Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 34 DUKE L.J. 49 (1987) [hereinafter Freer] (citing Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103, 150-57 (1983); Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935, 1937 (1982); Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 UCLA L. REV. 1263, 1271-87 (1985)). The Supreme Court has refused to distinguish among the different types of judicially-created federal jurisdiction:

[W]e think it quite unnecessary to formulate any general, all-encompassing jurisdictional rule. Given the complexities of the many manifestations of federal jurisdiction, together with the countless factual permutations possible under the Federal Rules, there is little profit in attempting to decide, for example, whether there are any "principled" differences between pendent and ancillary jurisdiction.

*Aldinger*, 427 U.S. at 13. But see *Finley*, 109 S. Ct. at 2007 ("We specifically disapproved application of the *Gibbs* [pendent jurisdiction] mode of analysis [to pendent party jurisdiction in *Aldinger*] finding 'a significant legal difference.'" (citing *Aldinger*, 427 U.S. at 15)).

with no independent basis for federal jurisdiction to a claim with proper basis so that all related claims against a defendant can be adjudicated in a single proceeding.<sup>10</sup> *Ancillary jurisdiction* allows a party to the suit, usually a third-party defendant, to assert a claim against another party to the suit after the original claim has been filed,<sup>11</sup> such as in "situations involving impleader, cross-claims or counterclaims."<sup>12</sup> *Pendent party jurisdiction* is a hybrid, drawing from pendent jurisdiction's claim-adding concept and ancillary jurisdiction's party-adding concept. Pendent party jurisdiction allows a party to the suit, usually a plaintiff, to assert a related state claim against a new party not named in the original federal suit.<sup>13</sup>

The pendent party jurisdiction debate pits the pragmatic proponent against the theory-bound critic. Pendent party jurisdiction extols the practical virtues of convenience to litigants and consolidation of claims in an ever-crowded judicial system. Contrarily, opponents stand solidly behind the defense of federalism: federal courts are courts of limited jurisdiction, and thus the adjudication of state claims among state parties is clearly beyond their constitutionally- and congressionally-granted powers.<sup>14</sup>

The pendent party jurisdiction issue takes on even greater significance when the federal claim is a Federal Tort Claims Act (FTCA) action. The FTCA mandates exclusive federal jurisdiction,<sup>15</sup> forcing a claimant to split one lawsuit between state and federal court when it

10. Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases*, 62 VA. L. REV. 194, 195 n.2 (1976).

11. *Id.* Neither pendent nor ancillary jurisdiction joins a new party to the suit. A pendent claim is one asserted in the complaint by plaintiffs against defendants to the suit. In contrast, an ancillary claim is asserted usually by a nonplaintiff after the original complaint has been filed. *Id.*

12. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 (1978). Ancillary jurisdiction requires that the relationship between the primary federal claim and the ancillary nonfederal claim be one of "logical dependence." *Id.* at 376. For example, "[a] third-party complaint depends at least in part upon the resolution of the primary lawsuit." *Id.*

13. See *Aldinger*, 427 U.S. at 6, 10.

14. *Kroger*, 437 U.S. at 374. "It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Id.*

15. 28 U.S.C. § 1346(b) (1982). The text of 28 U.S.C. § 1346(b) reads as follows:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

includes other defendants in addition to the United States.<sup>16</sup> For many claimants, no choice of forum amounts to no choice but to abandon either the state or the federal claim if limited resources prevent them from pursuing both. Even if a claimant can finance two claims simultaneously, he or she must further contend with the effects of collateral estoppel and *res judicata* upon the claim adjudicated later in time.<sup>17</sup> Indeed, these are the very concerns which prompted the creation of pendent party jurisdiction.

### B. *Development*

Pendent jurisdiction is rooted in the Supreme Court's interpretation of article III, section 2 of the Constitution, the federal courts' fundamental grant of power over cases and controversies arising under the Constitution, laws or treaties of the United States.<sup>18</sup> In the 1824 case *Osborn v. Bank of the United States*,<sup>19</sup> the Supreme Court determined that federal court power over cases and controversies included authority to adjudicate "incidental nonfederal substantive questions" which contain issues forming "an ingredient of the original cause" of action.<sup>20</sup> The Court reasoned that "[t]here is scarcely any case, every part of which depends on the Constitution, laws or treaties of the United States."<sup>21</sup> *Osborn* thus became the standard authority for the validity of

16. See *Aldinger*, 427 U.S. at 18 ("When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together." (footnote omitted)); *Finley*, 109 S. Ct. at 2011 (Blackmun, J., dissenting) ("Where, as here, Congress' preference for a federal forum for a certain category of claims makes the federal forum the *only* possible one in which the constitutional case may be heard as a whole, the sensible result is to permit the exercise of pendent-party jurisdiction. *Aldinger* imposes no obstacle to that result, and I would not reach out to create one.").

17. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966) ("[T]he weighty policies of judicial economy and fairness to parties reflected in *res judicata* doctrine [are] in themselves strong counsel for the adoption of a rule which would permit federal courts to dispose of the state as well as the federal claims.").

18. U.S. CONST. art. III, § 2, cl. 1 states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another state;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

19. 22 U.S. 738 (1824).

20. *Id.* at 822-23.

21. *Id.*

pendent jurisdiction.

Lower federal courts gradually expanded pendent jurisdiction, the addition of claims, into pendent party jurisdiction, the addition of parties.<sup>22</sup> After 1966, courts exercised pendent party jurisdiction with more confidence and frequency after the Supreme Court upheld pendent jurisdiction in *United Mine Workers v. Gibbs*,<sup>23</sup> specifically noting in the opinion that the Federal Rules of Civil Procedure “strongly encourage” the “joinder of claims, parties and remedies.”<sup>24</sup> Pendent party jurisdiction, unlike pendent jurisdiction, was not created in the Supreme Court, and has had to fight for legitimacy through Supreme Court review.<sup>25</sup> In the pre-*Finley* case, *Aldinger v. Howard*,<sup>26</sup> the Supreme Court impliedly validated the existence of pendent party jurisdiction. It did not strike down the concept altogether, but simply denied application of pendent party jurisdiction to a specific federal statute. The *Aldinger* Court held that the claimant could not join a county as an additional defendant in a Civil Rights Action<sup>27</sup> because the Act expressly excluded counties from liability thereunder.<sup>28</sup> Similarly, the Court did not approve the addition of parties under an ancillary jurisdiction theory in *Owen Equipment & Erection Co. v. Kroger*.<sup>29</sup> Therein, the Court held that the federal diversity statute<sup>30</sup> did not allow the plaintiff to join a “new and independent” claim against a nondiverse third-party defendant. The Court reasoned that since the diversity statute is traditionally narrowly construed to require complete diversity, such a situation would contravene clear congressional intent.<sup>31</sup>

*Aldinger* and *Kroger*, together with the *Gibbs* pendent jurisdiction case, appeared to provide lower courts with a series of tests for determining whether pendent party jurisdiction properly could be applied to

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22. See *supra* note 8.

23. 383 U.S. 715. See *supra* note 8.

24. 383 U.S. at 724.

25. Note, *Pendent Party Jurisdiction and Section 1983: When Has Congress 'By Implication Negated' Jurisdiction?*, 14 *FORDHAM URB. L.J.* 873, 898 (1986) [hereinafter *By Implication*].

26. See *supra* note 5 and accompanying text.

27. 42 U.S.C. § 1983 (1982).

28. *Aldinger*, 427 U.S. at 16. See *supra* note 5 and accompanying text.

29. 437 U.S. 365 (1978).

30. 28 U.S.C. § 1332 (1982).

31. *Kroger*, 437 U.S. at 373-74. The Court reasoned:

“Over the years Congress has repeatedly re-enacted or amended the statute conferring diversity jurisdiction, leaving intact this rule of complete diversity. Whatever may have been the original purposes of diversity-of-citizenship jurisdiction, this subsequent history clearly demonstrates a congressional mandate that diversity is not to be available when any plaintiff is a citizen of the same State as any defendant.

*Id.* (citations omitted).

specific federal causes of action. Upon these precedents, most courts of appeals found pendent party jurisdiction proper in FTCA actions,<sup>32</sup> with the exception of the Ninth Circuit, which consistently held that pendent party jurisdiction simply did not exist.<sup>33</sup> While *Finley v. United States* settled the FTCA controversy, it left open, as before, the question of whether a federal statute exists which is amenable to pendent party jurisdiction.

### III. *Finley v. United States*: FACTUAL SUMMARY

On the night of November 11, 1983, Petitioner Barbara Finley's family was killed when their airplane struck electric transmission power lines owned by San Diego Gas and Electric (SDG&E) and crashed. Finley originally filed an action in San Diego Superior Court against SDG&E for negligent placement of the transmission lines and against the City of San Diego for negligence in maintaining and operating the runway approach lights.<sup>34</sup> When Finley discovered that the FAA, not San Diego, was responsible for the runway lights, she filed an FTCA action against the United States and then tried to add SDG&E and San Diego as codefendants. San Diego and SDG&E filed indemnity actions against the United States in state court.<sup>35</sup>

The district court granted the motion to amend and chose to exercise pendent party jurisdiction over the two additional defendants.<sup>36</sup> The United States appealed to the Court of Appeals for the Ninth Circuit, which summarily reversed.<sup>37</sup> Finley's subsequent appeal was granted certiorari.<sup>38</sup> Upon review, the Supreme Court affirmed, holding that the FTCA does not authorize the use of pendent party jurisdiction.<sup>39</sup>

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32. See *supra* note 3 and accompanying text.

33. See *supra* note 4.

34. 109 S. Ct. at 2005.

35. *Id.*

36. The district court based its assertion of jurisdiction on *Gibbs*, "finding it 'clear' that 'judicial economy and efficiency' favored trying the actions together and concluding that they arose 'from a common nucleus of operative fact.'" *Id.* (citing App. to Pet. for Cert. A-8 to A-9).

37. *Id.*

38. *Finley v. United States*, 109 S. Ct. 52 (1988).

39. 109 S. Ct. at 2010.

## IV. THE SUPREME COURT'S REASONING

A. *Gibbs Test Inapplicable*

After the Supreme Court outlined a test for pendent jurisdiction in *Gibbs*,<sup>40</sup> lower federal courts frequently applied it to determine whether claims involving pendent parties were sufficiently related to the federal claims to invoke jurisdiction. Likewise, Finley's attorneys relied upon *Gibbs* to demonstrate that Finley's claim against San Diego and SDG&E and her claim against the United States together comprised a single interrelated suit. They did not anticipate the Supreme Court's quick, blunt severance of pendent party jurisdiction from pendent jurisdiction. The Court flatly refused to extend the *Gibbs* approach to pendent parties,<sup>41</sup> noting that a "'significant legal difference'"<sup>42</sup> exists between the two concepts. The Court dismissed the tight fit of the *Gibbs* test to the *Finley* facts as a demonstration that the added claims and original complaint had "'mere factual similarit[ies]'"<sup>43</sup> an insufficient basis for jurisdiction.

B. *Statutory Language Does Not Support Jurisdiction*

When creating statutes, Congress does not always extend the power of the federal courts to the limits of the Constitution.<sup>44</sup> To determine whether Congress intended the FTCA to support pendent parties, the *Finley* Court examined the jurisdiction-granting portion of the Act rather than assume that Congress had authorized full constitutional power.<sup>45</sup>

The FTCA mandates that "'the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States'" which allege that federal employees have committed tortious activity in the scope of their employment.<sup>46</sup> Construing the FTCA jurisdictional

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40. 383 U.S. 715, 725 (1966). The *Gibbs* test mandated that (1) the federal claim must be substantial so as to solidly invoke federal subject matter jurisdiction; (2) the state and federal claims must "derive from a common nucleus of operative fact"; and (3) the claimant would ordinarily expect the two claims to be tried together in the same proceeding. *Id.*

41. 109 S. Ct. at 2010.

42. *Id.* at 2007.

43. *Id.* at 2008.

44. For example, while the Constitution requires only minimum diversity (at least one plaintiff and one defendant must be citizens of different states), the Supreme Court has interpreted the diversity statute, 28 U.S.C. § 1332 (1982) as requiring complete diversity (no plaintiff and defendant can be citizens of the same state). See *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). This meaning, however, is derived from implied congressional intent with a judicial gloss rather than from express congressional intent codified as statute.

45. 109 S. Ct. at 2007.

46. *Id.* at 2005 (quoting 28 U.S.C. § 1346(b) (1982)).

statute narrowly, the Court read the inclusion of the United States as defendant as an exclusion of any other defendants. Analogizing the narrow interpretation given the federal diversity statute language to the FTCA language, the Court reasoned, “Just as the statutory provision ‘between . . . citizens of different States’ has been held to mean citizens of different States and no one else, so also here we conclude that ‘against the United States’ means against the United States and no one else.”<sup>47</sup>

### C. *Legislative History Devoid of Intent*

The Court also struck down Finley’s attempt to infer FTCA amenability to pendent party jurisdiction from legislative history. Finley argued that a 1948 statutory language change from “‘exclusive jurisdiction to hear, determine, and render judgment on *any claim* against the United States’” to “‘exclusive jurisdiction of *civil actions on claims* against the United States’” implied a broadening of the court’s jurisdiction to hear all claims within a civil action as long as the United States was a defendant to one claim.<sup>48</sup> However, the Court characterized the difference as a minor wording change rather than an express substantive change.<sup>49</sup> Furthermore, the Court noted that legislative history from 1948 was not relevant to pendent party jurisdiction, since the concept “was not considered remotely viable until *Gibbs*” in 1966.<sup>50</sup>

### D. *State Sovereignty and Federalism*

In *Kroger*, the Court had recognized that the limitation of an exclusive federal forum was a factor to consider in determining proper application of pendent party jurisdiction.<sup>51</sup> However, in *Finley*, the Court retreated from that view and instead took a strong federalism stance. The Court abandoned judicial pragmatism in the face of a perceived threat to state sovereignty, observing that “‘neither the convenience of the litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction.’”<sup>52</sup>

47. *Id.* at 2008 (citations omitted).

48. *Id.* at 2009 (emphasis in original).

49. *Id.* “We have found no suggestion, much less a clear expression, that the minor rewording at issue here imported a substantive change.” *Id.*

50. *Id.* at 2010.

51. 437 U.S. at 376-77.

52. 109 S. Ct. at 2008.

### E. *Charting a Clear Course for Congress*

Finally, the *Finley* Court bolstered its decision by declaring that the FTCA jurisdiction interpretation would reinforce the pattern of uniform interpretations the Court had established in *Zahn v. International Paper Co.*,<sup>53</sup> *Aldinger*,<sup>54</sup> and *Kroger*.<sup>55</sup> *Finley*, the Court reasoned, would give Congress “a background of clear interpretive rules” against which to legislate, “so that it may know the effect of the language it adopts.”<sup>56</sup>

Continuing in the vein of previous pendent party denials, the Court held that the FTCA, as a grant of jurisdiction over claims involving a particular party, the United States, “does not itself confer jurisdiction over additional claims by or against different parties.”<sup>57</sup> This holding, however, seems to defeat the very purpose of pendent jurisdiction. If a statute expressly authorizes the joinder of parties, as the Court requires, parties do not need to request an exercise of pendent party jurisdiction. While the Court may have cleared the surface analysis of the issue for Congress and perhaps for the lower courts, it seems to have muddied the underlying purposes of the pendent party jurisdiction theory. That a statute would explicitly grant pendent party jurisdiction seems an oxymoron. After *Finley*, it remains to be seen which statutes, if any, support pendent party jurisdiction.

## V. ANALYSIS: INCONSISTENCIES IN THE COURT’S REASONING

### A. *Aldinger Standard Abandoned Without Discussion*

With good reason, the *Finley* dissenters charged the new Court with essentially ignoring the test for pendent party jurisdiction the previous Court had fashioned over a 12-year period in the *Gibbs-Aldinger-Kroger* line of cases. “The Court’s holding is not faithful to our precedents and casually dismisses the accumulated wisdom of our best judges,” wrote Justice Stevens.<sup>58</sup>

Indeed, the majority opinion did not “so much as acknowledg[e]” the *Aldinger* holding, which designated the test for pendent party jurisdiction to be whether Congress had expressly or impliedly negated the

53. 414 U.S. 291 (1973). Therein, the Court determined that in a class action, each plaintiff individually had to satisfy the \$10,000 minimum claim requirement of the diversity statute and that plaintiffs could not satisfy the minimum by grouping together their claims to add up to \$10,000. *Id.* at 301.

54. 427 U.S. 1 (1976). *See supra* note 5.

55. 437 U.S. 365 (1978).

56. 109 S. Ct. at 2010.

57. *Id.*

58. 109 S. Ct. at 2011 (Stevens, J., dissenting).

existence of pendent party jurisdiction for a particular statute.<sup>59</sup> Rather, the *Finley* Court required the inverse of that test, that there be an *express affirmation* of party joinder, not a *implied negation*. The difference may mean the demise of the pendent party jurisdiction theory.<sup>60</sup>

*Finley* and the pendent party jurisdiction issues seem to have been decided in a vacuum. That is, the Court seemed to commit the same flaw it pointed out to *Finley* in attempting to justify pendent party jurisdiction in a legislative history that could not possibly have intended the concept.<sup>61</sup> The intent of the jurisdiction-granting portion of the FTCA was not to exclude certain parties from litigation in federal court; rather, it was to exclude state courts from adjudicating tort cases against the United States.<sup>62</sup>

In requiring express affirmation rather than implied negation, the Court now seems to expect the legislature to build into each federal statute a judicially-created concept. However, if Congress designs a statute expressly authorizing joinder of additional parties, the purpose of pendent party jurisdiction is defeated and the need for it dissipates.<sup>63</sup> By definition, pendent party jurisdiction is invoked only *in the absence* of such a grant.<sup>64</sup>

In short, *Finley* leaves open the question of whether pendent party jurisdiction exists at all. The Court has developed an analysis that necessarily reaches a predestined end, rendering the analysis itself a futile

59. *Id.* at 2010 (citing *Aldinger v. Howard*, 427 U.S. 1, 18 (1976); *see id.* (Blackmun, J., dissenting) (“If *Aldinger v. Howard* required us to ask whether the Federal Tort Claims Act embraced ‘an affirmative grant of pendent-party jurisdiction, I would agree with the majority that no such specific grant of jurisdiction is present. But, in my view, that is not the appropriate question under *Aldinger*.”) (citations omitted) (emphasis added). For a discussion of the problems the *Aldinger* test elicits, see Freer, *supra* note 9; *By Implication, supra* note 25; Bagwell, *Federal Pendent Party Jurisdiction and Pendency in Diversity Cases*, 38 ALA. LAW. 333 (1977).

60. *Finley*, 109 S. Ct. at 2011.

61. In requiring courts to review legislative history for an indication of congressional intent to allow or deny pendent party jurisdiction, “[t]he Court has sanctioned an ad hoc search of legislative intent despite the rather obvious fact that Congress, in passing the general jurisdictional statutes, has never expressly considered supplemental jurisdiction.” Freer, *supra* note 9.

62. In statutory interpretation, courts are to presume that concurrent jurisdiction exists unless the presumption is rebutted by explicit statutory language, unmistakable implied intent from legislative history, or clear incompatibility between state court jurisdiction and federal interests. *Claffin v. Houseman*, 93 U.S. 130 (1876).

63. *Finley*, 109 S. Ct. at 2019 (Stevens, J., dissenting).

64. Justice Blackmun argued that the statutory “affirmative grant of pendent-party jurisdiction” the majority required in *Finley* does not make sense like the *Aldinger* “express or implied negation” test. “[T]he *Aldinger* test would be rendered meaningless if the required intent could be found in the failure of the relevant jurisdictional statute to mention the type of party in question, ‘because all instances of asserted pendent-party jurisdiction will by definition involve a party as to whom Congress has impliedly “addressed itself” by not expressly conferring subject-matter jurisdiction on the federal courts.’” *Id.* at 2010-11 (Blackmun, J., dissenting).

effort. If the Court's purpose was to require express jurisdiction, it could have simply invalidated the concept of pendent party jurisdiction in a matter of sentences.

### B. *Diversity v. Federal Question: Gibbs Application*

The majority fails to distinguish between diversity and federal question cases in the pendent party jurisdiction issue.<sup>65</sup> The diversity statute expressly negates the addition of nondiverse parties.<sup>66</sup> Conversely, federal question cases do not require each defendant to have an independent basis of jurisdiction; instead, the focus is on the type of case or controversy.<sup>67</sup>

Contrary to the Court's opinion, the *Gibbs* test is especially applicable in federal question cases. In *Aldinger*, the Court found the pendent jurisdiction issue in *Gibbs* to be legally and factually different from the pendent party issue.<sup>68</sup> However, in that same opinion, the Court espoused that pendent party claims should be analyzed under the *Gibbs* article III test and the *Aldinger* congressional intent test: "Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."<sup>69</sup> Likewise, in *Kroger*, the Court stated: "The *Aldinger* and *Zahn* cases thus make clear that . . . the test of *Gibbs*, does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal ones."<sup>70</sup>

Thus, *Gibbs* is not inapplicable to pendent party jurisdiction; it is one-half of an essential test to determine constitutional and congressional intent. Since federal question jurisdiction turns on the nature of the case or controversy, it makes more sense *first* to apply the *Gibbs* test to determine whether all of the claims and parties comprise a single case or controversy and *then* to apply the *Aldinger* test to check for congressional negation, rather than simply to search for a nonexistent affirmative legislative intent, as the *Finley* test mandates.<sup>71</sup> Such a holding would have been consistent with the Court's earlier finding

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65. *Id.* at 2018.

66. See *supra* note 31 and accompanying text.

67. Freer, *supra* note 9, at 63.

68. *Aldinger*, 427 U.S. at 14-15.

69. *Id.* at 18.

70. *Kroger*, 437 U.S. at 373.

71. Where state-law claims against a pendent party are joined to FTCA actions, "the fact that such claims are within the exclusive federal jurisdiction, together with the absence of any evidence of congressional disapproval of the exercise . . . , provides a fully sufficient justification for applying the holding of *Gibbs* to this case." 109 S. Ct. at 2017-18 (Stevens, J., dissenting).

that it is reasonable to assume that “Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit.”<sup>72</sup>

### C. *Implications for Other Federal Statutes*

#### 1. *Strict interpretations analogous to FTCA language*

*Finley* has provided a clear—albeit narrow and theoretically nonsensical—test for determining whether a statute supports pendent party jurisdiction. That is, courts interpreting statutes which refer to either particular types of defendants or particular types of plaintiffs often find that *Finley* has clearly negated pendent party jurisdiction. Two recent examples are the Federal Employers’ Liability Act (FELA),<sup>73</sup> which is aimed at railroad defendants, and the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>74</sup> aimed at plaintiffs injured by specific RICO violations.

In *Lockard v. Missouri Pacific Railroad Co.*,<sup>75</sup> the Eighth Circuit strictly analogized the *Finley* interpretation of the FTCA jurisdiction grant—“against the United States and no one else”<sup>76</sup>—to the Federal Employers’ Liability Act (FELA) when the pendent party was not a railroad.<sup>77</sup> The court held that FELA expressly negates pendent party jurisdiction because it provides that “[e]very common carrier by railroad . . . shall be liable” and that “[u]nder this chapter an action may be brought in a district court of the United States.”<sup>78</sup> It reasoned that this statutory language was “a grant of jurisdiction over claims involving particular parties,” which extended to railroads and no one else.<sup>79</sup> Similarly, in *Hall American Center Associates v. Dick*,<sup>80</sup> the district court did not allow plaintiffs whose federal RICO claims were dismissed to remain in federal court to pursue state contract law claims, noting that the language of RICO “confers jurisdiction over persons

72. *Kroger*, 437 U.S. at 377.

73. See 45 U.S.C. §§ 51, 56 (1981).

74. 18 U.S.C. §§ 1961-86 (1982 & Supp. III 1985).

75. 894 F.2d 299, 302 (8th Cir. 1990).

76. *Finley*, 109 S. Ct. at 2008.

77. 894 F.2d at 302.

78. *Finley*, 109 S. Ct. at 2008 (citation omitted).

79. *Lockard*, 894 F.2d at 302. See *Ezell v. Burlington N.R.R.*, 724 F. Supp. 863, 865 (D. Wyo. 1989) (Court denied pendent party jurisdiction over nonrailroad in FELA action because “[p]laintiff does not allege that [defendant] fits the definition of a common carrier by railroad. The language of FELA clearly restricts the jurisdiction marked out by Congress to employee actions against common carriers by railroad.”).

80. 726 F. Supp. 1083, 1101 (E.D. Mich. 1989) (citing *Finley*, 109 S. Ct. at 2008).

injured by RICO violations and only over those persons—‘no one else.’”<sup>81</sup>

## 2. Interpretations based upon *Finley dicta*

After 1976, most federal courts followed the *Aldinger* dicta which clearly suggested that the FTCA may support pendent party jurisdiction.<sup>82</sup> The dicta proved unreliable. As in *Aldinger*, the *Finley* Court suggested examples of statutory language which might support pendent parties. The Court stated that jurisdiction-granting statutes which read “‘civil actions on claims *that include* requested relief against the United States’” and “‘civil actions *in which there is a claim* against the United States’” may indicate minimum rather than maximum jurisdiction requirements.<sup>83</sup>

Acting upon this dicta, the Ninth Circuit, in a direct about-face, granted pendent party jurisdiction under the Foreign Sovereign Immunities Act (FSIA)<sup>84</sup> in *Teledyne, Inc. v. Kone Corp.*<sup>85</sup> The FSIA provides for district court jurisdiction over “any nonjury civil action against a foreign state,”<sup>86</sup> language the court found “virtually indistinguishable” from the examples given in *Finley*.

Likewise, in *Rodriguez v. Comas*,<sup>87</sup> the First Circuit determined that the Civil Rights Act<sup>88</sup> allowed the joinder of plaintiff’s wife as a pendent party plaintiff.<sup>89</sup> The statute grants jurisdiction over “any civil action authorized by law to be commenced by any person”<sup>90</sup> and the substantive portion does not exclude plaintiff’s wife. The court found the section 1983 language a “broadly worded jurisdictional grant”

81. The RICO jurisdiction-granting portion of the statute provides that “[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.” 18 U.S.C. § 1964(c).

82. *See supra* note 16.

83. 109 S. Ct. at 2008.

84. 28 U.S.C. §§ 1330(a), 1441(d) (1985).

85. 892 F.2d 1404 (9th Cir. 1990).

86. 28 U.S.C. § 1330(a). The Ninth Circuit also relied upon legislative history which “suggest[ed] that the plain language of the FSIA accurately reflects Congressional intent.” 892 F.2d at 1409-10. For example, the House Report states that a foreign state may remove FSIA actions to federal court even if there are multiple defendants and some of them do not want removal or are citizens of the state in which the action has been brought. *Id.* (citing H.R. REP. NO. 1487, 94th Cong., 2d Sess. 32 (1976)).

87. 888 F.2d 899 (1st Cir. 1989).

88. *See supra* note 27.

89. “Unlike the party in *Aldinger*, [pendent party plaintiff wife] is not a party specifically excluded from actions brought under Section 1983 claims.” 888 F.2d at 905.

90. 28 U.S.C. § 1343(a).

which properly included pendent parties.<sup>91</sup>

Two questions stem from the application of *Finley* to other statutes. First, is the Supreme Court dicta reliable? If reliability is measured by retaining the same justices on the Court, the dicta can be trusted for the duration of the present Court. The 5-4 *Finley* vote seems to assure only that the future of the issue remains open to change. Second, if the statute authorizes the addition of parties, does the joining of parties constitute pendent party jurisdiction or simply original jurisdiction? At least one court has concluded from *Finley* that pendent party jurisdiction "apparently is no longer a viable concept."<sup>92</sup>

## VI. CONCLUSION

Federal courts developed the doctrine of pendent party jurisdiction to bridge the gap between the narrower congressional grant of jurisdiction and the broader constitutional grant of power when one complex case or controversy demands adjudication in a single forum. *Finley* neither recognizes the gap nor the need to overcome it. Instead, the Supreme Court has fashioned a circular test for determining the propriety of pendent party jurisdiction. That is, finding an express grant of jurisdictional power negates the very need for pendent party jurisdiction: the effort to move through an analysis leads the analyst nowhere except to return to the concept of original jurisdiction.

The future for the exercise of pendent party jurisdiction under other federal statutes is unclear and uncharted. While the Supreme Court has given examples of statutory language which may support pendent parties, that language is dicta to which the Court may or may not adhere in the future. While it appears that federal statutes do exist which appear to meet the new *Finley* standard, it is not clear if pendent party jurisdiction remains a necessary bridge over the gap between congressional and constitutional jurisdiction or whether it has been obliterated and absorbed into the concept of original jurisdiction.

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91. 888 F.2d at 906.

92. *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 n.5 (2d Cir. 1989); see *Langston v. Bottlewerks, Inc.*, No. 89 C 5747 (N.D. Ill. Oct. 31, 1989) (summarizing *Finley* as "rejecting doctrine of pendent party jurisdiction").