SUPREME COURT OF THE UNITED STATES

No. 00–1514

LANCE RAYGOR AND JAMES GOODCHILD, PETITIONERS *v.* REGENTS OF THE UNIVERSITY OF MINNESOTA ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

[February 27, 2002]

JUSTICE GINSBURG, concurring in part and concurring in the judgment.

I join the Court's judgment and its opinion in principal part. I agree with the decision's twin rulings. First, prevailing precedent supports the view that, in the absence of a clear statement of congressional intent to abrogate the States' Eleventh Amendment immunity, 28 U. S. C. §1367(a)'s extension of federal jurisdiction does not reach claims against nonconsenting state defendants. See *ante*, at 6–7. Second, absent "affirmative indicatio[n]" by Congress, see *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 787 (2000), §1367(d)'s tolling provision does not reach claims "asserted," but not maintainable, under §1367(a) against nonconsenting state defendants. See *ante*, at 7–11.

The pathmarking decision, it appears to me, is *Vermont Agency*.[1] There, the Court declined to read the word "person," for purposes of *qui tam* liability, to include a nonconsenting State. Bolstering the Court's conclusion in *Ver-*

[1] This Court's majority, in contrast to the Minnesota Supreme Court, does not invoke *Alden* v. *Maine,* 527 U. S. 706 (1999), in support of today's decision. I joined the dissent in *Alden* and, in a suitable case, would join a call to reexamine that decision. Cf. *post*, at 6–7 (STEVENS, J., dissenting).

mont Agency were the two reinforcements pivotal here: first, "'the ordinary rule of statutory construction' that 'if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute,'" 529 U. S., at 787 (quoting *Will* v. *Michigan Dept. of State Police,* 491 U. S. 58, 65 (1989)); and second, "the doctrine that statutes should be construed so as to avoid difficult constitutional questions," 529 U. S., at 787. I would not venture further into the mist surrounding §1367 to inquire, generally, whether §1367(d) "appl[ies] to dismissals for reasons unmentioned by the statute," *ante*, at 11.[2]

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[2]The supplemental jurisdiction statute, well-reasoned commentary indicates, "is clearly flawed and needs repair." Oakley, Prospectus for the American Law Institute's Federal Judicial Code Revision Project, 31 U. C. D. L. Rev. 855, 936 (1998); see generally *id.,* at 936–945 (canvassing problems with 28 U. S. C. §1367). For a proposed repair of §1367, see ALI, Federal Judicial Code Revision Project (Tent. Draft No. 2, Apr. 14, 1998).