

1-1-2011

Civil Procedure - Supplemental Jurisdiction and the Expansion of the Independent Basis for Subject Matter Jurisdiction Requirement - Global Naps, Inc. v. Verizon New England, Inc., 603 F.3D 71 (1st Cir. 2010)

Randall Gleason

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

16 Suffolk J. Trial & App. Advoc. 308 (2011)

This Comments is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

**CIVIL PROCEDURE—SUPPLEMENTAL
JURISDICTION AND THE EXPANSION OF THE
INDEPENDENT BASIS FOR SUBJECT MATTER
JURISDICTION REQUIREMENT—*GLOBAL NAPS,
INC. V. VERIZON NEW ENGLAND, INC.*, 603 F.3D 71
(1ST CIR. 2010)**

In order for a United States federal district court to exercise jurisdiction over claims brought by a plaintiff, the claims must either be of sufficient federal substance, or be based on diversity between the parties with an amount in controversy exceeding \$75,000.¹ When the parties are in federal court based on a federal question, the court’s supplemental jurisdiction extends to other non-federal compulsory counterclaims that a defendant is required to bring, and the court *may* exercise jurisdiction over so called “permissive counterclaims” so long as they form part of the same Article III case or controversy as the original claim.² In *Global Naps, Inc. v. Verizon New England, Inc.*,³ the United States Court of Appeals for the First Circuit addressed whether a federal court could properly exercise jurisdiction over a permissive counterclaim that did not have its own independent basis for subject matter jurisdiction, but rather was related to another counterclaim raised by the defendant.⁴ The court held that it could properly exercise supplemental jurisdiction over the defendant’s counterclaim because according to the language of 28 U.S.C. § 1367 the jurisdictional limit for counterclaims is the Article III case or controversy

¹ See 28 U.S.C. § 1331 (2006) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); 28 U.S.C. § 1332(a)(1)-(3) (2006) (outlining amount in controversy and diversity requirements).

² See 28 U.S.C. § 1367(a) (2006) (describing court’s supplemental jurisdiction where original jurisdiction is based on federal law). This section allows federal courts to exercise jurisdiction over claims that form part of the same Article III case or controversy and includes “claims that involve the joinder or intervention of additional parties.” *Id.* The court has the discretion not to exercise supplemental jurisdiction over a claim if the claim raises a “complex issue of State law,” the claim “substantially predominates” over the anchor claim brought under the court’s original jurisdiction, the other claims have been dismissed, or for “other compelling reasons.” 28 U.S.C. § 1367(c)(1)-(4) (2006); *see also* FED. R. CIV. P. 13(a)(1)(A) (mandating pleadings state counterclaims arising out of same “transaction or occurrence” of plaintiff’s claim); FED. R. CIV. P. 13(b) (granting court discretion over non-compulsory counterclaims). *See generally* U.S. CONST. art. III, § 2, cl. 1 (granting federal jurisdiction to cases and controversies arising under United States Constitution, laws, and treaties).

³ 603 F.3d 71 (1st Cir. 2010).

⁴ *Id.* at 85-86 (outlining issues on appeal).

standard.⁵

Appellant Global NAPS, Inc. (“GNAP”) and appellee Verizon New England, Inc. (“Verizon”) disagreed about an interconnectivity agreement (“ICA”) they entered into in 2002 that determined how payments would be made to each company regarding charges for Internet service provider (“ISP”) traffic.⁶ Later in 2002, as a result of arbitration, the Massachusetts Department of Technology and Energy (DTE) ordered a new agreement whereby GNAP would have to pay Verizon for ISPs located outside of the local calling area.⁷ Following that decision, GNAP filed, and lost, a series of lawsuits against Verizon attempting to avoid enforcement of the new ICA.⁸ In addition to the many lawsuits it already had pending against Verizon, GNAP also filed suit in 2005 seeking payment for charges GNAP claimed Verizon owed it under the ICA.⁹ Verizon subsequently filed a compulsory counterclaim for breach of contract and sought recovery of access charges Verizon claimed it was owed under the 2002 ICA.¹⁰ After

⁵ *Id.* at 86-87. The court made clear that it has jurisdiction regardless of whether a claim is compulsory or permissive because 28 U.S.C. § 1367(a) is broad and does not distinguish between permissive and compulsory claims. *See id.* at 85; *see also id.* at 77 (noting § 1367(a) allows “jurisdiction over compulsory and at least *some* permissive counterclaims”).

⁶ *Id.* at 78. A disagreement arose over what was actually owed under the ICA. *Id.* According to the agreement, Verizon was to pay a reciprocal fee to GNAP for any local “calls” that were generated through GNAP’s ISPs and GNAP was to pay Verizon for any long distance “calls.” *Id.* GNAP was exploiting this agreement by issuing their ISP customers local telephone numbers even though they were outside of the calling area. *Id.* This tactic generated substantial fees owed from Verizon through the reciprocal fee agreement of the ICA because the calls showed up as local calls. *Id.*

⁷ *Id.* The agreement took effect in early 2003 and Verizon immediately began to bill GNAP. *Id.* at 79.

⁸ *See, e.g.,* Global NAPS, Inc. v. Verizon New England, Inc., 489 F.3d 13, 24-25 (1st Cir. 2007) (upholding district court’s termination of injunction against Verizon and release of \$16 million in security); Global NAPS, Inc. v. Verizon New England, Inc., 444 F.3d 59, 75 (1st Cir. 2006) (holding state authority not preempted by FCC order where FCC admits preemption issue is ambiguous); Global NAPS, Inc. v. Verizon New England, Inc., 396 F.3d 16, 28 (1st Cir. 2005) (affirming lower court’s decision to uphold ICA); Global NAPS, Inc. v. Mass. Dep’t of Telecomms. & Energy, 427 F.3d 34, 48-49 (1st Cir. 2005) (holding Massachusetts not bound by Rhode Island court’s decision on identical ICA).

⁹ *Global NAPS, Inc.*, 603 F.3d at 79 (stating GNAP was seeking its reciprocal fees under the agreement). This case was consolidated with GNAP’s prior case claiming federal preemption of the state’s judgment enforcing the ICA. *Id.* (noting procedural posture of case).

¹⁰ *Id.* The court ruled against GNAP, thereby leaving Verizon’s counterclaim still pending. *Id.* In late 2006, shortly after the ruling, discovery on Verizon’s counterclaim commenced. *Id.* In 2007, GNAP “argued for the first time” that Verizon’s counterclaim had to be reviewed by the State DTE prior to going to federal court, but that argument was rejected by the district court. *Id.* Subsequently, the FCC issued a new remand order regarding the Telecommunications Act of 1996, of which the ICA between Verizon and GNAP was bound. *Id.* GNAP again tried to make the argument that the federal court was preempted from hearing Verizon’s counterclaim and the district court again rejected their argument. *Id.* *See generally* Federal Telecommunications Act

finding that the district court had jurisdiction to enforce the ICA, the court next found that jurisdiction was proper over the first count of Verizon's counterclaims based on supplemental jurisdiction.¹¹

The district court addressed Verizon's counterclaim in 2008 and held that, under the ICA, GNAP owed Verizon \$57,716,714.¹² Prior to this judgment, Verizon, concerned about GNAP's ability to pay, attached GNAP's assets and amended its counterclaim to assert two additional claims.¹³ Count two asserted that GNAP had commingled funds, and count three claimed "alter ego liability and disregard of the corporate form."¹⁴ Count three required joining additional parties to the lawsuit: Global NAPs New Hampshire, Global NAPs Networks, Global NAPs Realty, Ferrous, a holding company, and Frank Gangi "[the] founder and sole shareholder of Ferrous."¹⁵ After an unsuccessful attempt by GNAP to have counts two and three dismissed as permissive counterclaims, the court entered a default judgment for Verizon based on GNAP's discovery violations and held all of the defendants jointly and severally liable for the full amount of the judgment.¹⁶ On appeal, the First Circuit considered whether Verizon's counterclaims were permissive, and if so, whether they required an independent basis for subject matter jurisdiction.¹⁷

Prior to the 1990 enactment of 28 U.S.C. § 1367, district courts addressed compulsory and permissive counterclaims through what was deemed pendent and ancillary jurisdiction.¹⁸ While pendent jurisdiction

of 1996, 47 U.S.C. § 252 (2008) (codifying standards for arbitration agreements between common carriers).

¹¹ See *Global NAPs, Inc.*, 603 F.3d at 85 (noting "Verizon's counterclaim is more than sufficiently related to GNAPs' complaint"). The court refused to consider whether original jurisdiction is proper over count one. *Id.* at 84 n.15.

¹² See *id.* at 80 (discussing procedural posture of case). The court arrived at this amount by having the parties determine how many minutes were outstanding, how many of those minutes were local calls, what rate those minutes should be charged, and what interest, if any, was owed. *Id.*

¹³ *Id.* Verizon became concerned after attaching GNAP's assets and learning there was less than one million dollars in the company's name. *Id.* In addition, while Verizon's counterclaims were pending, GNAP was not cooperating with the discovery ordered by the court. *Id.* at 81. Further, the court and Verizon became aware of a matter pending in Connecticut where the court there found substantial spoliation of the evidence by GNAP in a similar action. *Id.* (citing *S. New England Tel. Co. v. Global NAPs, Inc.*, 251 F.R.D. 82, 90-95 (D. Conn. 2008)).

¹⁴ See *Global NAPs, Inc.*, 603 F.3d at 80 (enumerating Verizon's counterclaims).

¹⁵ *Id.* GNAP New Hampshire handles the financial interests of GNAP, GNAP Networks manages the company's infrastructure, and GNAP Realty handles the property transactions of the company including holding property and leases. *Id.*

¹⁶ See *Global NAPs, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 81 (1st Cir. 2010) (qualifying judgment in favor of Verizon). GNAP subsequently appealed. *Id.*

¹⁷ See *id.* at 83 (outlining jurisdictional issues of case).

¹⁸ See William A. Fletcher, "Common Nucleus of Operative Fact" and Defensive Set-Off:

over plaintiffs' claims was generally accepted in federal court, an exercise of ancillary jurisdiction required separate examination.¹⁹ After enactment of the Federal Rules of Civil Procedure, federal courts were unsure about their jurisdiction regarding the ability of one party to join additional parties under so-called "pendent-party jurisdiction."²⁰ In *United Mine Workers v. Gibbs*²¹ the United States Supreme Court finally established some ground rules to clear up confusion among the circuit courts regarding supplemental jurisdiction.²² The Court in *Gibbs* gave federal courts jurisdiction over federal *and* state claims that "derive from a common nucleus of operative

Beyond the Gibbs Test, 74 IND. L.J. 171, 174-75 (1998) (explaining origins of pendent and ancillary jurisdiction); Wendy C. Perdue, Finley v. United States: *Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539, 541-51 (1990) (discussing judge-made ancillary and pendent jurisdiction); 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3523 (3d ed. 2010) (observing historical use of pendent and ancillary jurisdiction). Traditionally pendent jurisdiction was used to describe state law claims brought by a plaintiff in addition to their federal claim, and ancillary jurisdiction was used to describe state law claims brought by a party other than the plaintiff. *Id.*; see also Perdue, *supra* at 541 (discussing same). In 1933 the United States Supreme Court began to define *pendent* jurisdiction in the case of *Hurn v. Oursler*, and held jurisdiction over a non-federal claim is proper where "two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question." 289 U.S. 238, 246 (1933), *overruled by* *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The Court went on to distinguish improper jurisdiction as "where two separate and distinct causes of action are alleged, one only of which is federal in character." *Id.*; see also *Gibbs*, 383 U.S. at 722-26 (citing *Hurn* and overturning this portion of the opinion as "unnecessarily grudging"); WRIGHT ET AL., *supra* at § 3523 (discussing *Hurn* and noting question was superseded by *Gibbs*).

¹⁹ See WRIGHT ET AL., *supra* note 18, at § 3523 (tracing separate body of case law in this area). The United States Supreme Court addressed the issue of ancillary jurisdiction in the seminal case of *Moore v. New York Cotton Exchange*, exercising jurisdiction over a compulsory counterclaim by the *defendant* for injunctive relief after dismissing the plaintiff's claim, stating, "the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim." *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926); see also Perdue, *supra* note 18, at 544 (citing Court's reason for exercising jurisdiction in *Moore* as relatedness between claim and counterclaim). The Court defined "transaction" as "a word of flexible meaning . . . [that] may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Moore*, 270 U.S. at 610.

²⁰ See WRIGHT ET AL., *supra* note 18, at § 3523 (concluding adoption of the Federal Rules expanded supplemental jurisdiction through joinder). See generally FED. R. CIV. P. 13(a)-(b) (defining compulsory and permissive counterclaims respectively); FED. R. CIV. P. 13(h) ("Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim."); FED. R. CIV. P. 20(a)(2).

Persons . . . may be joined in one action as defendants if: any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all defendants will arise in the action.

FED. R. CIV. P. 20(a)(2).

²¹ 383 U.S. 715 (1966).

²² See *id.* at 725 (expanding pendent jurisdiction definition).

fact.”²³ *Gibbs* primarily dealt with the issue of pendent jurisdiction but some commentators suggest the decision encompasses ancillary jurisdiction as well.²⁴

While this proposition may seem obvious today, many courts struggled with *Gibbs*' breadth in the wake of that landmark decision.²⁵ In fact, several decisions following this seminal case rejected applying the *Gibbs* formulation to determine proper jurisdiction in certain instances.²⁶ Adding to the confusion of pendent and ancillary jurisdiction was whether permissive counterclaims, under Federal Rule of Civil Procedure 13(b), came in under the court's supplemental jurisdiction.²⁷ While several courts

²³ *Id.* The Court defined this statement by saying that once a federal court has jurisdiction based on a federal claim of sufficient substance under Article III of the U.S. Constitution, a closely related state law claim may also be heard by the court if the claims “considered without regard to their federal or state character . . . are such that [they] would ordinarily be expected to [be tried] . . . in one judicial proceeding.” *Id.* The *Gibbs* Court, however, did not mandate that these claims be heard, but instead gave federal courts discretion to hear such claims based on “considerations of judicial economy, convenience and fairness to litigants.” *Id.* at 726.

²⁴ See WRIGHT ET AL., *supra* note 18, § 3523 (noting *Gibbs* addressed pendent jurisdiction but clearly expanded supplemental jurisdiction to claims by non-plaintiffs).

²⁵ See Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 78 MARQ. L. REV. 973, 980 (1995) (opining pendent and ancillary jurisdiction well established but pendent party jurisdiction not).

²⁶ See *Finley v. United States*, 490 U.S. 545, 553-54 (1989), *superseded by statute*, 28 U.S.C. § 1367, *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (declining jurisdiction over state law claims against separate defendants without specific congressional authorization); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978), *superseded by statute*, 28 U.S.C. § 1367, *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (declining jurisdiction over plaintiff's amended complaint asserting claim against third-party defendant); *Aldinger v. Howard*, 427 U.S. 1, 13-15 (1976), *superseded by statute*, 28 U.S.C. § 1367, *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (declining jurisdiction over plaintiff's attempt to join additional party and assert state-law claim). In these cases the U.S. Supreme Court specifically rejected the use of the *Gibbs* formulation to determine whether jurisdiction was proper over pendent-party claims. See Murphy, *supra* note 25, at 986. Commentators believe that *Finley* particularly presented a perfect fit for pendent jurisdiction: first the plaintiff was properly in federal court under the Federal Tort Claims Act with her claims against the United States, second plaintiff's state law claims against the state government arose out of the same common nucleus of operative fact, the plane crash. See WRIGHT ET AL., *supra* note 18, at § 3523 (“*Finley* presented an overwhelming case for supplemental jurisdiction because the claim against the United States invoked *exclusive* federal jurisdiction”); Murphy, *supra* note 25, at 984 (observing *Finley* presented a “strong case for recognizing pendent-party jurisdiction.”); Perdue, *supra* note 18, at 551-52 (noting *Aldinger* opened the door for these types of pendent claims).

²⁷ See *Ambromovage v. United Mine Workers*, 726 F.2d 972, 988-89 (3d Cir. 1984) (exercising jurisdiction over permissive counterclaim based on ancillary jurisdiction, not defensive “set-off” exception); *McCaffrey v. Rex Motor Transp., Inc.*, 672 F.2d 246, 248 (1st Cir. 1982) (stating permissive counterclaims require independent basis for subject matter jurisdiction); *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1080 (2d Cir. 1970) (finding permissive counterclaims require “independent jurisdictional grounds”). Defensive “set off” is a counterclaim brought by a defendant that allows a defendant to reduce the size of plaintiff's

focused on the language of 13(a) regarding the “same transaction or occurrence” to distinguish between compulsory and permissive, other courts began to move away from this trend.²⁸

Because of the perplexity of this judge-made law, in 1990, Congress acted to explain and codify *Gibbs* with the enactment of 28 U.S.C. § 1367.²⁹ The inclusion of pendent, ancillary, and pendent-party jurisdiction under supplemental jurisdiction has alleviated *some* of the burden on courts to decipher between these claims.³⁰ Nevertheless, circuit courts remain divided on the issue of whether permissive counterclaims can be heard under the court’s supplemental jurisdiction, while it is a generally accepted principle that compulsory counterclaims must be heard due to the preclusive effect of *res judicata*.³¹ 28 U.S.C. § 1367(a) explains that claims

damages by asserting a counterclaim for monies owed it by plaintiff. See Fletcher, *supra* note 18, at 172 (defining defensive set-off). This doctrinal exception was invented at the same time the Federal Rules of Civil Procedure were adopted, as an exception to the independent jurisdictional basis requirement of permissive counterclaims. See *Ambromovage*, 726 F.2d at 988 (discussing origins of defensive set-off); Fletcher, *supra* note 18, at 172-73.

²⁸ See *Ambromovage*, 726 F.2d at 990 (observing Rule 13(a) does not necessarily “[define] the outer limits of ancillary or pendent jurisdiction”). Judge Becker, in this decision, opines that the tests of “common nucleus of operative fact” and “same transaction or occurrence” are not necessarily dispositive of one another: there may be many *separate* transactions occurring over a period of time that share a common nucleus of operative fact. *Id.* Judge Friendly in his concurrence in *United States v. Heyward Robinson Co.*, rejects the conventional wisdom that permissive counterclaims require their own independent basis for subject matter jurisdiction, and particularly rejects the so-called “set-off” exception. *Heyward-Robinson Co.*, 430 F.2d at 1088 (Friendly, J., concurring). Judge Friendly posits that exceptions such as this one “[carry] the seeds of destruction of the supposed general rule” articulated in *Gibbs*, and in the wake of that decision many believe that it is proper in certain instances for courts to hear state-law claims related to the federal claim at issue. *Id.* However, Judge Friendly does caution against a snowball effect through a series of permissive counterclaims that would perhaps expand federal courts’ jurisdiction beyond its constitutional scope. *Id.*

²⁹ See *Ambromovage*, 726 F.2d at 989 (observing codification of pendent, ancillary, and pendent party jurisdiction under supplemental jurisdiction); WRIGHT ET AL., *supra* note 18, at § 3523 (discussing the consolidation of pendent, ancillary, and pendent party jurisdiction within supplemental jurisdiction); see also *Perdue*, *supra* note 18, at 543 (opining there is “no meaningful distinction between pendent and ancillary jurisdiction”); *supra* note 2 and accompanying text (discussing supplemental jurisdiction under 28 U.S.C. § 1367 and court’s discretion to hear such claims).

³⁰ See WRIGHT ET AL., *supra* note 18, at § 3523.1 (noting question of whether a claim is pendent or ancillary is moot today). The United States Supreme Court has since weighed in stating “[t]he terms of § 1367 do not acknowledge any distinction between pendent jurisdiction and . . . ancillary jurisdiction.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005). However, this statement was made in the context of a class action lawsuit in which the *plaintiff* was seeking to join additional parties who did not meet the amount in controversy requirement under the court’s supplemental jurisdiction. *Id.* at 549.

³¹ See WRIGHT ET AL., *supra* note 18, § 1420 (distinguishing permissive claims from compulsory counterclaims as generally not precluded when omitted from pleadings). Compare *Oak Park Trust & Sav. Bank v. Therkildsen*, 209 F.3d 648, 651 (7th Cir. 2000) (dismissing

may be heard if they form part of the same Article III case or controversy, but defining the meaning of that statement has remained elusive.³² In lieu of this lack of a definitive standard some courts are now taking the view that “same case or controversy” under 1367(a) is broader in scope than the “transaction or occurrence” standard of Rule 13 to justify exercising jurisdiction over permissive counterclaims.³³

In *Global NAPs, Inc. v. Verizon New England, Inc.*, the First Circuit addressed whether jurisdiction was proper where a permissive counterclaim was related, not to the plaintiff’s claim, but to a compulsory

counterclaim and stating permissive counterclaims require “independent basis [for] federal jurisdiction”), and *Iglesias v. Mut. Life Ins. Co. of N.Y.*, 156 F.3d 237, 241 (1st Cir. 1998), *superseded by statute*, 28 U.S.C. § 1367 (2006), as recognized in *Global NAPs, Inc. v. Verizon New England, Inc.*, 603 F.3d 71 (1st Cir. 2010) (noting compulsory counterclaims may be heard under supplemental jurisdiction while permissive counterclaims may not), with *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 207 (2d Cir. 2004) (holding “supplemental jurisdiction . . . may be available for . . . permissive counterclaims”), and *Channell v. Citicorp Nat’l Servs., Inc.*, 89 F.3d 379, 385 (7th Cir. 1996) (noting “[a] loose factual connection between the claims’ can be enough”) (quoting *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995), and *Campos v. W. Dental Servs., Inc.*, 404 F. Supp. 2d 1164, 1168 (N.D. Cal. 2005) (agreeing that supplemental jurisdiction may extend to permissive counterclaims but nevertheless declining jurisdiction).

³² See Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 802-04 (2004) (citing Chief Justice Marshall’s famous quote regarding “ingredient of the original cause” to confer jurisdiction); Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 447-50 (1994) (detailing the historical definitions of “case” and “controversy”). Bellia states that by “ingredient,” Marshall was describing an “essential component of a cause of action,” and not referring to “something that might arise in connection” with it. See Bellia, *supra*, at 802; see also C. Douglas Floyd, *Three Faces of Supplemental Jurisdiction After the Demise of United Mine Workers v. Gibbs*, 60 FLA. L. REV. 277, 290-91 (2008) (agreeing scope of supplemental jurisdiction is broad but suggesting limitations on rule drafters). But see Richard A. Matasar, *Rediscovering “One Constitutional Case”: Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1478-79 (1983) (observing supplemental jurisdiction is very broad and may extend to limits of joinder); Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 986-88 (1998) (advocating “liberalized” pleading under Federal Rules and expanded substantive legal rights from same fact set).

³³ See *supra* note 31 (characterizing *Channell*, *Jones*, and *Campos* decisions as expanding court’s jurisdiction over permissive counterclaims); *supra* notes 27-28 and accompanying text (discussing *Ambromovage* and *Heyward-Robinson*); see also Floyd, *supra* note 32, at 291-96 (acknowledging historical transaction or occurrence test, but discussing the trends in these more recent cases). Floyd deduces that based on previous cases, such as *Jones* and *Channell*, there are three types of claims being brought within the rules of joinder under the court’s supplemental jurisdiction: (1) these are “claims that arise out of the ‘same transaction or occurrence’ because they have a ‘logical relationship,’ (2) claims that fail to satisfy that standard but nonetheless have a ‘loose factual connection,’ and (3) claims that have no factual relationship at all.” Floyd, *supra*, at 296. Floyd goes on to argue that these recent Second and Seventh Circuit decisions extend the scope of Article III to the second category and, in the case of the Second Circuit, it may even extend to the third. *Id.*

counterclaim asserted by the defendant.³⁴ The court upheld the district court's exercise of jurisdiction over this counterclaim stating jurisdiction was proper "regardless of whether [the claim] is compulsive or permissive."³⁵ The court based this holding on its view that the enactment of 28 U.S.C. § 1367 "supersedes case law" that had previously made a distinction between permissive and compulsory counterclaims.³⁶ The court posited that even subsequent to the enactment of § 1367, prior case law had embraced the distinction between these types of claims, however, the Supreme Court had resolved this issue in *Exxon Mobil Corporation v. Allapattah Services*.³⁷

In so holding, the court embraced the view of the Second and Seventh Circuits that supplemental jurisdiction extends to claims forming part of the same Article III case or controversy.³⁸ While the court

³⁴ See *Global Naps, Inc. v. Verizon New England, Inc.*, 603 F.3d 71, 85 (1st Cir. 2010) (describing appellant's argument as to why jurisdiction was improper).

³⁵ *Id.* (emphasis added) (stating court's holding regarding count three of Verizon's counterclaims). The court elucidates that this is the first time the issue of *statutory* supplemental jurisdiction has been addressed in the First Circuit, as all of the court's previous decisions involving supplemental jurisdiction were predicated on case law and prior to the enactment of 28 U.S.C. § 1367. *Id.* at 85-86.

³⁶ *Id.* at 87 (observing statute does not distinguish between permissive and compulsory claims).

³⁷ *Id.*; *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 559 (2005). The court also cites previous First Circuit decisions such as *McCaffrey* and *Iglesias*, which required permissive counterclaims to have their own independent basis for subject matter jurisdiction. *Global Naps, Inc.*, 603 F.3d at 86 n.18. The court noted that the *McCaffrey* decision was handed down in the First Circuit prior to the enactment of 28 U.S.C. § 1367, and it adopted the view that permissive counterclaims required their own independent basis for subject matter jurisdiction. See *supra* note 27 and accompanying text (discussing *McCaffrey* and other decisions concerning permissive counterclaims); see also *McCaffrey v. Rex Motor Transp., Inc.*, 672 F.2d 246, 248 (1st Cir. 1982), *superseded by statute*, 28 U.S.C. § 1367, as recognized in *Global Naps, Inc. v. Verizon New England, Inc.*, 603 F.3d 71 (1st Cir. 2010) ("Permissive counterclaims may not be entertained under a federal court's ancillary jurisdiction unless there is some independent jurisdictional base such as a federal question upon which federal jurisdiction may be . . . founded." (citation omitted)). The *Global Naps* court explains that the *Iglesias* decision, handed down after § 1367 was enacted, incorporated the judge-made distinctions between pendent and ancillary jurisdiction, which the Supreme Court had clarified in *Allapattah*. See *Global Naps, Inc.*, 603 F.3d at 86 n.18 (noting issue will be reconsidered given the holding of the Supreme Court). The court's reasoning relies heavily on language in the Supreme Court's decision in *Allapattah*, which stated that "nothing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between . . . pendent and ancillary [jurisdiction]." See *id.* at 87 (quoting *Allapattah Servs., Inc.*, 545 U.S. at 559).

³⁸ *Global Naps, Inc.*, 603 F.3d at 87 (noting the Second and Seventh circuits as well as numerous commentators have adopted this view). The court cites two decisions, *Jones* and *Channell* of the Second and Seventh Circuits respectively, that have already adopted this broader interpretation of supplemental jurisdiction. See *id.*; *Matasar supra* note 32, at 1479 (extending supplemental jurisdiction to the limits of joinder); *Molot supra* note 32, at 986-88 (advocating same); *supra* note 31 (comparing these decisions with others upholding the independent basis

recognizes there is much debate over the meaning of the terms “case” and “controversy,” it stops short of defining these terms, stating the Article III standard is broader than the “same transaction or occurrence test.”³⁹ The court notes that the Supreme Court never endorsed the “same transaction or occurrence test,” and opines all that is required under *Gibbs* is that the claims “ar[is]e from a ‘common nucleus of operative fact.’”⁴⁰ Based on the court’s expanded view of supplemental jurisdiction, it finds that § 1367(a) is applicable and that the alter-ego claim was “sufficiently related to the underlying litigation” so that jurisdiction under the statute was proper.⁴¹ Similarly, the court concludes that while § 1367(c) provides discretionary factors for courts to consider before exercising jurisdiction over a supplemental claim, the district court did not abuse its discretion in this instance.⁴²

requirement for permissive counterclaims); *supra* note 33 and accompanying text (articulating the various tests commentators have suggested in the wake of cases like *Channell* and *Jones*). Nevertheless, *Jones* and *Channell* were decided in the context of comparing the defendant’s counterclaim to the *plaintiff’s* claim to determine whether they formed part of the same Article III case or controversy. See *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 214 (2d Cir. 2004) (noting Ford’s state law counterclaim was sufficiently related to plaintiff’s ECOA claim); *Channell v. Citicorp Nat’l Servs. Inc.*, 89 F.3d 379, 384 (7th Cir. 1996) (comparing Citicorp’s state-law counterclaims to plaintiff class’ claims).

³⁹ See *Global NAPs, Inc. v. Verizon New England, Inc.*, 603 F.3d 71, 87-88 (1st Cir. 2010) (highlighting debate around “case” and “controversy”); see *supra* note 32 and accompanying text (outlining debate regarding definition of Article III case or controversy). The court states all that is necessary in the present case is to “decide that supplemental jurisdiction is somewhat broader than the transaction-or-occurrence test.” *Global NAPs, Inc.*, 603 F.3d at 88. Additionally, the court notes that jurisdiction over other parties in these instances can be even more complicated but states “those nuances are not relevant in this case.” *Id.* at 86 n.19.

⁴⁰ *Global NAPs, Inc.*, 603 F.3d at 88 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). The court recognizes that other courts have used pendent and ancillary jurisdiction in conjunction with the same-transaction-or-occurrence test to determine whether jurisdiction was proper, but it stresses these cases were “never reconciled.” *Id.* at 86; see also *supra* notes 18-20 (explaining history of pendent and ancillary jurisdiction). In addition, the court explains that while many courts adopted this narrower formula for determining jurisdiction, other courts recognized a broader view, such as the Third Circuit in *Ambromovage*, or Justice Friendly’s concurrence in *Heyward-Robinson*. See *Global NAPs, Inc.*, 603 F.3d at 86 (citing *Ambromovage v. United Mine Workers*, 726 F.2d 972, 988-90 (3d Cir. 1984); *United States v. Heyward-Robinson*, 430 F.2d 1077, 1088 (2d Cir. 1970) (Friendly, J., concurring); see also *supra* note 28 and accompanying text (explaining *Ambromovage* and *Heyward-Robinson*)).

⁴¹ *Global NAPs, Inc.*, 603 F.3d at 88. In making this determination the court opines that the litigation focused on the dispute between the parties regarding what fees were owed each party under the ICA, and Verizon’s alter-ego claim was related to their attempt to collect those fees from GNAP. *Id.*

⁴² *Id.* at 87-88. The court delineates the discretionary factors under 28 U.S.C. § 1367(c) and found no abuse of discretion as the “[t]he case had already consumed years of litigation . . . the district court was familiar with . . . [the] claims at issue . . . [and] thoroughly familiar with GNAPs’ many efforts to avoid [payment].” *Id.* at 88-89; see also *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (“[P]endent jurisdiction is a doctrine of discretion . . . Its justification

Based on the long history of jurisprudence and statutory authority regarding federal supplemental jurisdiction, the First Circuit correctly recognized and adopted an expanded view of supplemental jurisdiction.⁴³ The court appropriately recognized that statutory supplemental jurisdiction is broader than prior judge made law regarding pendent, ancillary, and pendent party jurisdiction.⁴⁴ Because of this realization, it was proper for the First Circuit to reassess prior cases, such as *Iglesias*, decided prior to the enactment of 28 U.S.C. § 1367.⁴⁵ In reversing these previous cases, the First Circuit properly applied United States Supreme Court decisions like *Allapattah*, which held “§ 1367 do[es] not acknowledge any distinction between pendent jurisdiction and . . . ancillary jurisdiction.”⁴⁶ In addition, given the highly fact specific nature of the present case, it may have been appropriate for the court to exercise discretion over count three of Verizon’s counterclaim in the interests of judicial economy, convenience, and fairness to the litigants.⁴⁷

Nonetheless, the First Circuit inappropriately, and perhaps inadvertently, expanded federal supplemental jurisdiction by exercising jurisdiction over count three of Verizon’s counterclaims.⁴⁸ One need only look at the text of § 1367(a) to see that the First Circuit has expanded jurisdiction beyond the intent of the legislature.⁴⁹ In the present case the

lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them.”). The *Global NAPS* court points out that other courts have upheld the exercise of supplemental jurisdiction over alter ego liability claims. *Global NAPS, Inc.*, 603 F.3d at 88 (citing *Bd. of Trs., Sheet Metal Workers’ Nat’l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1037 (7th Cir. 2000)).

⁴³ See *supra* note 19 (discussing *Moore’s* exercise of jurisdiction over defendant’s counterclaim based on close relation to plaintiff’s claim); *supra* notes 23-25 and accompanying text (discussing *Gibbs* formulation and noting discretionary factors); *supra* note 28 and accompanying text (noting trend in the courts expanding supplemental jurisdiction).

⁴⁴ See *supra* notes 29-30 and accompanying text (noting the codification of pendent, ancillary, and pendent-party jurisdiction in § 1367); see also 28 U.S.C. § 1367(a) (2006) (noting supplemental jurisdiction extends to claims “form[ing] part of the same case or controversy under Article III”).

⁴⁵ See *supra* note 37 and accompanying text (rationalizing court’s decision to overturn prior case law distinguishing compulsive and permissive counterclaims). The court specifically noted that there is nothing in the statute that distinguishes these types of claims. See *supra* note 38 and accompanying text.

⁴⁶ *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 559 (2005); *supra* note 30 (discussing *Allapattah* decision).

⁴⁷ See *supra* note 13 and accompanying text (outlining Verizon’s justification for bringing counts two and three); *supra* note 42 and accompanying text (explaining why it may have been appropriate for the court to exercise jurisdiction in this instance).

⁴⁸ See *Global NAPS, Inc. v. Verizon New England, Inc.*, 603 F.3d 71, 86 (1st Cir. 2010) (opining § 1367 applies to *all* claims forming part of the same Article III case or controversy).

⁴⁹ See 28 U.S.C. § 1367(a) (2006) (stating additional claims must be related to claims within

First Circuit specifically stated jurisdiction was proper over count one of Verizon's counterclaims based on *supplemental jurisdiction* only and refused to decide whether the court had original jurisdiction over that claim.⁵⁰ Therefore, it would be a violation of § 1367 for the court to exercise jurisdiction over count three of Verizon's counterclaims, based on its relation to count one, given that the court did not determine that it had original jurisdiction over that claim.⁵¹

In addition the court has erroneously disregarded several key discretionary factors laid out in both § 1367(c), as well as prior case law and scholarly commentary, in its determination to exercise jurisdiction over count three.⁵² The text of § 1367(c) specifically enumerates that courts should refuse to exercise discretion if the state law claims will predominate, or for "other compelling reasons," however, the court glosses over this section by concluding, without explaining, that the district court did not abuse its discretion.⁵³ Expanding the federal court's supplemental jurisdiction beyond its scope through arbitrary and capricious determinations of relatedness, as the First Circuit has done here, is exactly the type of "snowball" effect that Justice Friendly warned about in his famous concurrence in *United States v. Heyward-Robinson Company*.⁵⁴

the *original jurisdiction* of the court).

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims *that are so related to claims in the action within such original jurisdiction* that they form part of the same case or controversy under Article III of the United States Constitution.

Id. (emphasis added).

⁵⁰ See *supra* note 11 and accompanying text (reciting the court's justification for jurisdiction over count one of Verizon's counterclaims).

⁵¹ See *supra* notes 49-50 and accompanying text (discussing scope of § 1367 and court's justification for exercising jurisdiction over Verizon's counterclaims).

⁵² See *supra* note 39 and accompanying text (noting complexities of joining additional parties as not relevant and refusing to define case or controversy); *supra* notes 30, 31, 37-38 (discussing *Jones*, *Iglesias*, *Channell*, and *Allapattah* decisions). The court failed to recognize that these cases were decided regarding the relation of claims or counterclaims to the *plaintiff's* claim(s) that were properly in federal court based on original jurisdiction. *Supra* note 38 (discussing context of the holdings in *Jones* and *Channell*). The court also highlighted the debate surrounding the definition of case and controversy, and subsequently neglected to define these terms. *Supra* note 39 and accompanying text (noting *Global NAPS* court's refusal to define these terms). The court's statement that joining additional parties is irrelevant to this case is perplexing given the fact that numerous additional parties were added as a result of the alter ego liability claim. See *supra* note 15 and accompanying text (listing additional corporate entities joined as a result of count three).

⁵³ See *supra* note 42 and accompanying text (delineating court's reasoning).

⁵⁴ See 430 F.2d 1077, 1088 (2d Cir. 1970) (Friendly, J., concurring); *supra* note 28 (noting expanding jurisdiction through series of permissive counterclaims could be unconstitutional).

Similarly, even the commentators the majority relies upon have argued that there be some limitations on the expansion of federal jurisdiction in the interests of maintaining the autonomy of state courts.⁵⁵ A more appropriate remedy would have been to limit this decision specifically to the facts of this case so as to avoid unconstitutionally expanding the court's jurisdiction beyond the intent of the legislature.⁵⁶

In *Global NAPS, Inc. v. Verizon New England, Inc.*, the First Circuit addressed the issue of whether a federal court can properly exercise supplemental jurisdiction over a permissive counterclaim based on its relation to another counterclaim asserted by the defendant. Relying on recent case law in the Second and Seventh Circuits, as well as numerous commentators' calls for an expanded view of supplemental jurisdiction the majority held jurisdiction was proper over this claim regardless of whether it was permissive or compulsory. In addition, according to the court, § 1367 grants federal courts jurisdiction over *all* claims forming part of the same Article III case or controversy. The majority's broad view that statutory supplemental jurisdiction does not distinguish between permissive and compulsory counterclaims, as well as its conclusion that § 1367 is broader than the "same transaction or occurrence" test both have merit. However, the court's misreading of the statute has erroneously expanded federal courts' jurisdiction beyond its constitutional scope, prior precedent, and the intent of the legislature. While it may have been appropriate in this rare instance to exercise jurisdiction over Verizon's counterclaim, the First Circuit should limit its decision to the facts of this case.

Randall Gleason

⁵⁵ See *supra* note 32 (noting divide among commentators concerning expansion of federal jurisdiction).

⁵⁶ See *supra* note 49 (quoting 28 U.S.C. § 1367(a) which requires counterclaims relate to claims within original jurisdiction).

