No. 18-566

In The
Supreme Court of the United States

HERIBERTO MENENDEZ,

Petitioner,

v.

MARSHALL GARBER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state statute that tolls limitations while the defendant is absent from the state imposes constitutionally impermissible burdens on interstate commerce when applied to a resident who permanently departs the state after the events giving rise to suit, yet remains amenable to service under the state's long-arm statute.

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INTRODUCTION

In a reasoned and unanimous decision, the Sixth Circuit determined Ohio Revised Code § 2305.15, which tolls the statute of limitations when residents leave the state, does not violate the dormant Commerce Clause under the facts presented. The Sixth Circuit carefully examined the recent precedent of this Court in finding that the application of § 2305.15 in this case did not violate Congress's power to regulate interstate commerce found in the Commerce Clause of the U.S. Constitution. As Judge Sutton's opinion persuasively concludes, the application of § 2305.15 to this case does not lead to favoritism toward in-state residents over out-of-state residents, but rather creates a benefit for residents and thus survives review on these facts.

As the Court acknowledged in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), Ohio Rev. Code § 2305.15 does not explicitly discriminate against interstate commerce nor does it have a protectionist purpose or effect. It will be upheld unless it imposes burdens on interstate commerce that clearly exceed its local benefits. *Id.* at 891 (citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-79 (1986)). *See also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 144-46 (1970)).

The Court's decision in *Bendix* shaped the review of this case. But the facts of this case presented a scenario far different than *Bendix*. A requirement of *Bendix* is a defendant who is "engaged in commerce."

486 U.S. at 893. This case does not fit nicely into the *Bendix* formula. So, the Sixth Circuit was obliged to seek additional guidance from the Court, which it found in *McBurney v. Young*, 569 U.S. 221 (2013).

The Sixth Circuit properly weighed the relevant *Pike* factors concerning the application of § 2305.15 to the facts of this case. Far from the petitioner's characterization of the Sixth Circuit's decision, Judge Sutton carefully examined the Court's decision in *Bendix* and also found the Court's recent dormant Commerce Clause reasoning from *McBurney* to be applicable under the facts presented. Pet.App. 11a. Employing both *Bendix* and *McBurney*, the court concluded that the application of § 2305.15 to Menendez does not violate the dormant Commerce Clause.

Petitioner's attempt to manufacture a circuit split between the Sixth Circuit's opinion and the Eighth Circuit's opinion in *Rademeyer v. Farris*, 284 F.3d 833 (2002), is without merit. The *Rademeyer* decision involved different facts and was decided long before *McBurney*, which helped guide the underlying decision. More telling, petitioner did not raise *Rademeyer* or any alleged circuit split to the Sixth Circuit.

The state court decisions offer little additional support to the necessity for review of this case. Each case was decided on its merits under the particular state statute. For instance, the Missouri statute was invalidated by the state supreme court following the Eighth Circuit's decision in *Rademeyer*. *State ex rel. Bloomquist v. Schneider*, 244 S.W.3d 139, 141 (Mo.

2008). The Nebraska Supreme Court invalidated a California tolling law by reviewing how California courts interpreted its tolling statute and by its application to non-residents engaged in the interstate commerce. *First Tennessee Bank National Association v. Newham*, 859 N.W.2d 569, 574 (2015). Each of these state court cases presented different factual circumstances, and pre-date or failed to apply the Court's decision in *McBurney*, which guided the Sixth Circuit's decision here.

Finally, the application of *Pike* balancing creates a narrow issue for review. Inherent in this review is the narrow consideration of whether the statute imposes burdens on interstate commerce that clearly exceed its local benefits under the facts of the case. Further, the issue presented does not rise to the level of national importance and does not provide a compelling vehicle for review.

COUNTERSTATEMENT

This case presents a narrow issue bound to the facts presented—namely whether the dormant Commerce Clause is implicated when an Ohio resident moves from Ohio to another state for retirement. Under the facts presented, the statute may be permissibly applied to Menendez's move from Ohio to Florida for retirement.

A. Factual Background

In 2010, 15-year-old Marshall Garber went to his pediatrician, Heriberto Menendez, at his office in Ashland, Ohio, with a several-day history of fever, constipation, and acute radiating back pain. Pet.App. 20a. Dr. Menendez ordered a urine test, and sent Marshall home. *Ibid.* Three days later, Marshall presented to the local hospital with the same complaints, but had developed a loss of neurological function in his legs. *Ibid*. After an aggressive workup, Mr. Garber underwent an MRI, which revealed a spinal epidural abscess that had compromised his spinal cord. *Ibid.* Mr. Garber underwent surgery to remove the mass, however, his neurologic function could not be restored rendering him paraplegic. *Ibid.*

Unbeknownst to Mr. Garber, Menendez retired from the practice of medicine on April 4, 2014, and subsequently moved from Ohio to Florida. Pet.App. 32a. Mr. Garber first learned of Dr. Menendez's move in March 2017. *Id.* at 33a.

One year after Mr. Garber reached 18, he initiated a claim against Dr. Menendez for medical negligence. *Id.* at 20a. The first case was dismissed by the trial court for failure to attach an affidavit of merit, as required by Ohio Rule of Civil Procedure 10(D)(2). *Ibid.*

Mr. Garber subsequently refiled his case in February 2016 with the affidavit of an expert pediatrician to substantiate his claims. Pet.App. 34a. Mr. Garber served process to Dr. Menendez at his office in Ashland, Ohio. Pet.App. 2a. In March 2017, Menendez filed a

motion to dismiss for failure of service of process.[1] *Id.* at 20a. In support, Menendez submitted an affidavit that he had retired from medicine and moved to Florida in April 2014. *Id.* at 32a. Before the court ruled on the motion, Mr. Garber voluntarily dismissed his case.

Mr. Garber, relying on § 2305.15, refiled his claims in 2017. This permitted the statute of limitations to toll while Menendez was out of the state and preserved the statute of limitations on the original claim. OHIO REV. CODE § 2305.15. The case was removed to the district court and Menendez filed a motion to dismiss, arguing § 2305.15 was unconstitutional and could not operate to toll the statute of limitations after he had left the state. The trial court agreed and dismissed the case. Pet.App. 17a-27a. Mr. Garber appealed.

B. Decision Below

The tolling provision of Ohio Rev. Code § 2305.15 is triggered by petitioner's move out of Ohio—and so the Sixth Circuit, following this Court's decision in *Bendix*, examined whether his move implicated the dormant clause at all, and by weighing the state's interests. The Sixth Circuit faithfully reviewed the law's implications in this case within the *Pike* framework, as

[1] The timing of Menendez's motion is critical. Ohio Rule of Civil Procedure 3(A) states: "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant. . . ." By waiting a year before raising his defense, Menendez virtually eliminated Mr. Garber's ability to correct the service error.

the Court in *Bendix* did, and concluded it did not violate the dormant Commerce Clause. In coming to its conclusion, the Sixth Circuit examined the facts of this case to determine whether the statute imposes burdens on interstate commerce that clearly exceed its local benefits.

Petitioner argued that § 2305.15 violated the dormant Commerce Clause by virtue of the fact that his retirement to Florida was commerce. Pet.App. 10a. In this, he argued that the statute discourages people from moving from state to state by adding a cost to relocating. *Ibid.* Conversely, he argued that by not being able to move, he would deprive other States of the commercial benefits he would bring. *Ibid.*

The court found guidance in these circumstances in *McBurney*. Pet.App. 11a. States frequently stop benefits to residents when they choose to leave. The court noted several examples of this: taxes, tuition, licensing fees, and public records requests. *Ibid.* The "common thread" among cases finding a violation of the dormant Commerce Clause is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. *Ibid.* (citation omitted). Applying this standard, the Court in *McBurney* upheld the Virginia law that provided access to Virginia residents but not out-of-state residents as it did not "prohibit[] access to an interstate market nor impose[] burdensome regulation on that market." *Ibid.* (citation omitted). Accordingly, the removal of such benefits is "not governed by

the dormant Commerce Clause." *Id.* at 12a (citation omitted).

The Sixth Circuit, applying the "common thread" rationale of *McBurney*, found that the one-year statute of limitations was a benefit for remaining in the State, and did not fit within the Court's dormant Commerce Clause cases. *Id.* at 12a. Removing such a benefit did not fall within the purview of the dormant Commerce Clause. *Ibid.*

Turning to the burdens on interstate commerce, the court found little, if any, cognizable burden on interstate commerce under these facts. Pet.App. 12a. Petitioner offered little evidence of how interstate commerce was affected by the application of the tolling statute to his departure from the state. *Id.* at 13a. Since the party challenging the law has the burden of proving that the burden on interstate commerce outweighs the statute's benefits, Pet.App. 13a (citing *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 805 (6th Cir. 2005)), the statute survived *Pike* balancing. *Ibid.*

Petitioner advanced other theories concerning the burden on interstate commerce, including the right to travel, and protections under the Privileges and Immunity Clauses. Pet.App. 13a-14a. The court rejected these arguments because § 2305.15 does not restrict the right to travel and nor does it deny out-of-state residents' "fundamental" rights. *Id.* at 14a.

The court also considered whether the statute could survive following *Bendix*. As opposed to the interstate business transaction between an out-of-state

corporation and an Ohio corporation in *Bendix*, the transaction that formed the basis of this case occurred between two residents of Ohio, within Ohio. Pet.App. 15a. The underlying transaction did not involve interstate commerce. *Ibid*. Thus, the application of the tolling statute here does not lead to favoritism toward in-state residents over out-of-state residents. It creates a benefit for those in Ohio, just as in *McBurney*. *Ibid.* To rule otherwise, the court concluded, would require the court to begin reviewing all state laws that reserve benefits to in-state residents. *Id.* at 15a-16a.

The panel reversed and denied petitioner's petition for rehearing *en banc.* Pet.App. 16a-18a.

REASONS FOR DENYING THE PETITION

The question presented fails to meet the stringent criteria for granting certiorari. The Sixth Circuit's decision carefully and correctly applied the relevant law of the Court and came to a reasoned and proper decision. In spite of petitioner's insistence otherwise, the underlying decision does not create a "full-blown" division, Pet. 14, between the federal circuits. Nor does the decision create conflict with other states. Rather, the Sixth Circuit's opinion was crafted to follow the Court's evolution of dormant Commerce Clause review beginning with *Bendix*.

The Sixth Circuit's analysis and application of the law does not conflict with any federal circuits. Any perceived circuit split is easily remedied by a close

examination of the Sixth Circuit's decision. The precedent the panel borrows from did not exist at the time of the Eighth Circuit's decision. And the facts of this case present a different issue altogether than the issue confronted by the Eighth Circuit.

Beyond the underlying decision, the petitioner's question is narrow and fact-specific, making it a poor candidate for review. The standard for reviewing § 2305.15 under the dormant Commerce Clause, *Pike* balancing, invariably leads to fact-specific application of the law. The issue presented here—better characterized as whether the dormant Commerce Clause is implicated by petitioner's retirement to Florida—does not rise to the level of national importance.

I. The Sixth Circuit's Decision Is Correct.

The Sixth Circuit's decision followed the Court's precedent concerning review of § 2305.15 under the dormant Commerce Clause. This required the court to review *Bendix* and apply the same standard the Court applied. *Bendix* did not determine § 2305.15 to be either facially or purposefully discriminatory on interstate commerce. 486 U.S. at 891. Rather, the proper dormant Commerce Clause analysis is to weigh the state's interests against the effects on interstate commerce. *Ibid.*

The Sixth Circuit did just that. Weighing the law's burdens on interstate commerce against its local benefits in this case, the court found § 2305.15 did not impose burdens on interstate commerce that exceeded the local benefits.

1. By utilizing *Pike* balancing, the Sixth Circuit employed the same analysis the Court accepted in *Bendix* as the proper method review of § 2305.15. 486 U.S. at 891. In order to invalidate the statute, the law burdens on interstate commerce must clearly exceed the local benefits. *Pike*, 397 U.S. at 144-46.

The application of *Pike* required the petitioner to show the law's burden on interstate commerce. But petitioner could not demonstrate such a burden. Pet.App. 13a. Under *Pike* review of these facts, the Sixth Circuit found the burden on interstate commerce to be practically zero. Pet.App. 12a.

Petitioner repeatedly decries perpetual liability as an impermissible burden on interstate commerce. Pet.App. 23. His argument is that imposing perpetual liability discourages him from moving from state to state, which burdens interstate commerce. *Ibid.* But as the panel found, this is merely conjecture—it is more of a hypothetical burden than an actual burden. Pet.App. 12a-13a.

The reality is that the law's application here imposed virtually no burden on interstate commerce. Menendez was not engaged in interstate commerce when he treated Mr. Garber. Both were residents of Ohio at the time of the transaction. And Menendez did not leave the state for any commercial reason. Instead, he left the state for retirement.

All of these facts differentiate this case from *Bendix*. The Sixth Circuit could not merely apply the holding of *Bendix* to the facts presented here. The burden

on interstate commerce was significantly different and unique from *Bendix*. The panel also had to consider whether the dormant Commerce Clause can be used to invalidate the law in this application at all following *McBurney*.

The statute embodies several local benefits which makes it difficult to invalidate under *Pike* balancing. The main purpose of the tolling provision is to protect plaintiff's rights who have been injured by a tortfeasor who has subsequently left the state without notice.

The existence of a long-arm statute does not erase this benefit, as illustrated by this case. Mr. Garber was not aware Menendez had moved to Florida until Menendez filed a motion to dismiss after the timeframe to perfect service had run. Ohio Civ.R. 3; Pet.App. 20a. In effect, Menendez used his absence from the state as shield from liability, even though he may have been subject to personal jurisdiction through the Ohio long-arm statute.

Based on this record, the Sixth Circuit was correct in upholding the statute. The record did not establish that imposition of the tolling provision of § 2305.15 imposed a burden on interstate commerce that clearly exceeded the local benefits. *Pike*, 397 U.S. at 144-46; Pet.App. 16a.

2. If the Sixth Circuit had summarily applied *Bendix*, it would have failed to follow the law. In the period between *Bendix* and the Sixth Circuit's decision, the Court's dormant Commerce Clause jurisprudence has evolved. Pet.App. 7a. This bound the Sixth

Circuit to analyze not only *Bendix* but also subsequent decisions of the Court that are instructive in answering the question presented here.

Committing itself to the evolution of dormant Commerce Clause from 1988 until 2018 required the court to analyze and apply *McBurney*. Petitioner's argument that *Bendix*'s decision can be applied with no further analysis belies the fact the Sixth Circuit is bound to apply the law of its superior court.

In this, the Sixth Circuit united decades of precedent from the Court concerning the dormant Commerce Clause. In 2013, *McBurney v. Young* undoubtedly changed the landscape of dormant Commerce Clause review. 569 U.S. at 235-36. *McBurney* effectively recalibrated how the Court reviewed cases under the dormant Commerce Clause. Rather than applying the dormant Commerce Clause to all instances where a law differentiates between in-state and out-of-state residents, *McBurney* shifted the focus to whether the statute prohibited access to an interstate market or imposed burdensome regulation on that market. 569 U.S. at 235; Pet.App. 11a. If the statute does neither, it is not governed by the dormant Commerce Clause. *Id.* at 236; Pet.App.12a.

The circumstances of *McBurney* lend support to the facts here. Virginia limited FOIA requests to citizens only. 569 U.S. at 224. It certainly favored in-state residents over out-of-state residents. *Id.* But the law's effect did not interfere with the interstate market. *Id.*

at 235. It merely created a benefit for those who remained in state.

Just as in this case. The statute is not being applied to regulate interstate commerce. It does not have a hidden protectionist effect, such as acting as an "embargo." Pet.App. 10a. Rather, it confers a benefit to those who remain in the state. Without more, it is doubtful that statute even falls within dormant Commerce Clause review. Pet.App. 12a.

3. The Sixth Circuit's decision does not permit open commercial warfare. Pet.App. 29. In its review of these facts, the Sixth Circuit found that the application of the tolling statute conferred a benefit to remaining in state as opposed to imposing a burden on interstate commerce. Pet.App. 12a. It also noted that any "burden" imposed against Menendez by discouraging him from relocating for retirement was marginal and speculative at best. *Ibid.*

At its most basic level, the court decided that discouraging movement across state lines, without more, does not affect interstate commerce. The petitioner essentially asks the Court to review and stretch the dormant Commerce Clause further than ever before by applying it to his retirement. There is no interstate commercial interest being regulated by § 2305.15 here. Menendez's decision to leave the state for retirement does not implicate the dormant Commerce Clause under *McBurney.*

Petitioner attempts to place this case squarely within the *Bendix* realm, but it just does not fit. *Bendix* prevented states from engaging in commercial warfare by prohibiting tolling where the parties were

engaged in interstate commerce. 486 U.S. at 893. And it continues to prevent states from tolling the limitations in the context of interstate commerce. *Id.*

But what if the underlying transaction is intrastate and there is no interstate commerce being regulated by the statute? This no doubt is a different circumstance than *Bendix*. The Sixth Circuit's decision does not condone open commercial warfare because the statute's application in this context does not burden interstate commerce in any demonstrable manner.

Petitioner lastly argues that moving between states, by itself, is commerce subject to Commerce Clause review. Pet.App. 27. Yet the cases on which he relies do not support his proposition. Neither *Hoke v. United States*, 227 U.S. 308 (1912), nor *Caminetti v. United States*, 242 U.S. 470 (1917) impose such a condition. Each case involved a law that interfered with the *channels* of interstate transportation. *Hoke*, 227 U.S. at 283; *Caminetti*, 242 U.S. at 484, 490; *see also Edwards v. California*, 314 U.S. 160, 177 (1941). Ohio's statute in this application does not interfere with any such channels. And it cannot be said that by providing a disincentive to move to Florida for retirement is the type of burden recognized by either case.

* * *

The Sixth Circuit diligently applied the law in reaching its conclusion. It followed the precedent of the Court. The panel's review on these facts did not rise to the level necessary to invalidate § 2305.15 under the dormant Commerce Clause.

II. The Sixth Circuit's Decision Does Not Conflict with Other Courts' Decisions on the Question Presented.

Central to petitioner's argument for certiorari is that the Sixth Circuit's decision created a split between the Eighth Circuit and several state courts. However, for several reasons, the underlying decision does not create a split with either the federal circuits or the state courts.

A. The Federal Circuit Split Is Illusory.

The underlying decision in this case does not create a conflict between the circuits. Quite to the contrary, the underlying decision unites decades of precedent of the Court regarding the dormant Commerce Clause.

The illusory circuit split begins with the Eighth Circuit's decision in *Rademeyer v. Farris*, 284 F.3d 833 (2002). The case involved shareholder dispute between a minority and majority shareholder of a medical company. During the limitations period, the majority shareholder left the state for unknown reasons. *Id.* at 838. The Eighth Circuit, applying *Bendix*, invalidated the tolling statute—but not for the reasons petitioner suggests.

In contrast to this case, the court in *Rademeyer* was bound by the Missouri Supreme Court's decision construing the tolling provisions broadly—applying the statute to all out-of-state defendants. *Rademeyer*,

284 F.3d at 839. The statute also applied exclusively to residents of the state. MO. REV. STAT. § 516.200. Due to the breadth of the Missouri Supreme Court's interpretation of the statute, the Eighth Circuit invalidated the law. 284 F.3d at 839.

None of these facts are present here. Unlike the Missouri statute, § 2305.15 applies to all persons, not just Ohio residents, making it facially neutral. And, the Ohio Supreme Court has not interpreted § 2305.15 in a manner that violates the dormant Commerce Clause. *Johnson v. Rhodes*, 733 N.E.2d 1132 (Ohio 2000).

Perhaps more importantly, *Rademeyer* was decided in 2002, long before *McBurney*. The Sixth Circuit's decision was formed in large part by analyzing both *Bendix* and *McBurney*. The Eighth Circuit did not have that luxury.

As stated above, *McBurney* changed dormant Commerce Clause review. The dormant Commerce Clause does not apply to all instances where a law differentiates between in-state and out-of-state residents. 569 U.S. at 235. State policy laws, when they provide benefits to in-state residents and not to out-of-state residents, do not always implicate interstate commerce. *Id.* If the law does not prohibit access or impose burdensome regulation on an interstate market, the law does not fall within dormant Commerce Clause review. *Id.* at 236.

It is entirely speculative to suggest how the Eighth Circuit would decide *Rademeyer* following *McBurney*. But this defines the illusory nature of

petitioner's circuit split. Comparing the Eighth Circuit's opinion and the Sixth Circuit's decision here is an exercise in futility.

The fact that petitioner did not raise the potential circuit split to the Sixth Circuit is more evidence of the perceived split. Despite his assertion that the Sixth Circuit's decision cements a widespread circuit split, petitioner failed to even mention the *Rademeyer* decision at any stage of the appeal below. In fact, neither the Eighth Circuit's decision nor any of the state court decisions were raised by the petitioner below.

B. The State Court Decisions Do Not Conflict with the Sixth Circuit.

1. The Sixth Circuit's decision does not conflict with the Supreme Court of Ohio's interpretation of § 2305.15. Contrary to petitioner's assertion otherwise, the Ohio Supreme Court has always upheld the statute, including subsequently to the Court's decision in *Bendix*. *Johnson v. Rhodes*, 733 N.E.2d 1132 (Ohio 2000).

The Ohio Supreme Court's decision in *Johnson* upheld the statute under the dormant Commerce Clause where a resident left the state during the statute of limitations period. In doing so, the court wrote that *Bendix* was limited to its facts, and "stops far short of declaring R.C. 2305.15 unconstitutional in any other application." *Id.* at 1134.

In order to apply the statute in the case before it, the Ohio Supreme Court focused only on the facts presented by the appeal. The defendant, an Ohio resident, had left Ohio during the limitations period for non-business reasons. Under those circumstances, the court applied the tolling provisions of § 2305.15.

Far from invalidating the statute, the Ohio Supreme Court found *Bendix* was narrow and did not declare § 2305.15 unconstitutional outside of its facts. *Id.* at 1134. The court did not limit the statute either. The court instead ruled on the statute's application to the facts of the case—where a resident temporarily left the state for non-business reasons. The court did not explicitly impose any restrictions on the statute. *Id.* at 1135 (Cook, J., concurring).

Not only does this argue against petitioner's position, it also provides support for the local interests protected by § 2305.15. The state supreme court had an opportunity to invalidate § 2305.15 following *Bendix*, but did not. Instead, it found that the statute preserves local interests that are worthy of protection and upheld it.

This follows a history of cases from the Supreme Court of Ohio upholding § 2305.15 and preserving the protections it provides to its citizens. *Couts v. Rose*, 90 N.E.2d 139 (Ohio 1950); *Seely v. Expert*, 269 N.E.2d 121 (Ohio 1971). The Supreme Court of Ohio has never invalidated § 2305.15 under any circumstances. Petitioner's allegation that it has held the statute "cannot be constitutionally applied to residents who

permanently depart the state," Pet.App. 15, is blatantly false. *Johnson*, 733 N.E.2d at 1134. Ohio Revised Code § 2305.15 and its predecessors have existed in Ohio in some form or another since 1810. An Act for the Limitations of Actions, ch. 213 § 2 (1810), *reprinted in* 1 The Statutes of Ohio and of the Northwestern Territory 656 (Salmon P. Chase, ed. 1833).

2. The other state court decisions interpreting other tolling statutes offer little additional support for the so-called "rift" with the underlying decision. To be clear, only two state courts (Missouri and Nebraska) have invalidated similar tolling laws under *Bendix*. Pet.App. 15.

The Missouri cases involved a statute that was far more facially restrictive than Ohio Revised Code § 2305.15. The Missouri statute applied exclusively to residents of Missouri only, in sharp contrast to Ohio's § 2305.15. MO. REV. STAT. § 516.200. Further, the Missouri Supreme Court had interpreted its statute broadly and applied it to all out-of-state defendants. *Poling v. Moitra*, 717 S.W.2d 520, 522 (Mo. 1986).

The Nebraska Supreme Court invalidated a California tolling provision in *First Tennessee Bank National Association v. Newham*, 859 N.W.2d 569, 574 (2015). However, unlike this case, *Newham* involved a defendant who was a non-resident of California during the limitations period. *Id.* at 575. The defendant in *Newham* also pursued several employment opportunities outside of California during the limitations period. *Id.* at 576.

Importantly, none of these state court cases presented the same factual scenario present here where two residents were involved in an intrastate transaction. And the courts each failed to apply the lessons from *McBurney*. The Missouri cases pre-dated *McBurney* and the Nebraska Supreme Court did not even consider its value. *See Bloomquist*, 244 S.W.3d 139 (2008); *Newham*, 859 N.W.2d at 574-76. In this, the panel's decision below stands apart in deciding a different factual scenario and correctly applying *McBurney*.

3. The Sixth Circuit decision follows other courts. The Ninth Circuit employed the same reasoning as the Sixth Circuit in *Abramson v. Brownstein*, 897 F.2d 389 (1990). It tracked the plain language of *Bendix* which required the person to be engaged in interstate commerce in order to fall within the dormant Commerce Clause's protections. 897 F.2d at 392 (citing *Bendix*, 486 U.S. at 893). Other California courts agree with this reasoning. *Dan Clark Family Ltd. v. Miramontes*, 122 Cal. Rptr. 3d 517, 524 (Cal. Ct. App. 2011); *Filet Menu, Inc. v. Cheng*, 84 Cal. Rptr. 2d 384 (Cal. Ct. App. 1999); *Pratali v. Gates*, 5 Cal. Rptr. 2d 733 (Cal. Ct. App. 1992).

An Oregon appellate court adopted the same rationale in *Knappenberger v. Davis Stanton*, 351 P.3d 54, 65 (Or. Ct. App. 2015). The Oregon tolling statute was challenged under the dormant Commerce Clause where the defendant had moved from Oregon to Washington for non-business reasons. *Id.* at 64. The Oregon Court of Appeals held that simply moving from state

to state without more does not invoke the Commerce Clause. *Id.* at 66.

In factual circumstances nearly identical to this case, other courts have agreed that the predicate to the application of the dormant Commerce Clause is engagement in interstate commerce. Where, as here, there is no such interstate engagement courts have upheld similar tolling laws. *See*, *e.g.*, *Knappenberger*, 351 P.3d at 68.

Given all of the considerations, the Sixth Circuit's decision does not create widespread conflict between the federal circuits and state courts. The case, instead, followed other courts' reasoning considering the breadth of the application of the dormant Commerce Clause to "interstate commerce." As *McBurney* plainly indicates, even when a state law treats out-of-state residents differently than in-state residents, the dormant Commerce Clause is only applicable to invalidate the statute when it regulates interstate commercial activity. 569 U.S. at 224, 235-36. Such regulation did not occur here, and the Sixth Circuit's decision was consistent with *McBurney*.

III. The Question Presented Is Not of National Importance and Does Not Present an Ideal Vehicle for Review.

1. This case poses a very narrow question—whether the dormant Commerce Clause invalidates a law when it discourages a person from moving out of the state for retirement. *Pike* balancing requires the

court to give weight to certain facts to determine whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike*, 397 U.S. at 144-46.

The question presented in this case is not nearly as broad as petitioner suggests. Petitioner's assertion that this case would impact laws in at least eight other states, Pet.App. 32, is misguided. If that were the case, it is unclear why *Bendix* did not have such an effect. Nevertheless, the underlying decision represents a correct statement of the law within its facts. It can be applied, with *Bendix*, on any state issue that may arise. As the two decisions do not conflict with one another, there is ample guidance for the states in the event review is required.

2. This case also presents a poor vehicle for review. The trial court granted petitioner's motion to dismiss under Fed.R.Civ.P. 12(b)(6), so no evidence of any burdens on interstate commerce were ever presented. Any application of *Pike* balancing on this record is extremely limited given the lack of facts in the record. Even the Sixth Circuit was hamstrung by the lack of evidence contained in the record. Pet.App. 12a. Review of this case would only lead to the same hypotheticals petitioner advanced in the court below. *Ibid.*

The petitioner's conduct does not provide an attractive vehicle either. Petitioner is using his retirement as a way to evade liability in a case where a young man was severely injured. Despite receiving notice of the complaint and participating in the case, he

waited until Mr. Garber could not perfect service before using his departure as a shield from liability. Moreover, he stretches to suggest that his movement from Ohio to Florida for retirement purposes is conduct that should implicate the dormant Commerce Clause. This is not the ideal scenario for the Court to review § 2305.15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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