No. 18-566

In the Supreme Court of the United States

HERIBERTO MENENDEZ, M.D.,

Petitioner,

v.

MARSHALL GARBER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT IN REPLY

A. There is a clear and intractable split.

1. As the petition established, the conflict among the circuits and state courts is clear, undeniable, and entrenched—and includes an intolerable split between the Sixth Circuit and the Ohio Supreme Court. Pet. 15-22. The Sixth Circuit squarely held that the dormant Commerce Clause does not prohibit states from enacting laws that toll limitations against residents who permanently depart the state after the events giving rise to suit. Pet. App. 2a. Eight other courts disagree. The dispute hinges on the proper application of *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888 (1988), and fundamental principles about Congress's power to regulate interstate commerce. The courts are intractably divided on each, and the Respondent's attempts to prove otherwise are unavailing.

2. Respondent begins with a broadside against the all the cases on Petitioner's side of the split, contending that *McBurney* v. *Young*, 569 U.S. 221 (2013) so "changed the landscape of dormant Commerce Clause review," Opp. 12, that it is "speculative" to suggest how Petitioner's pre-*McBurney* cases would come out today, *id.* 16. Respondent insists that *McBurney* introduced a new requirement for triggering dormant Commerce Clause scrutiny: that state laws differentiating between residents and non-residents must "interfere[] with the natural functioning" of an "interstate market." *Id.* 6, 12, 16. But the cases tell a different story.

McBurney did not create the "interstate market" requirement. On the contrary, it recognized that this requirement existed before both *Bendix* and *McBurney*,

traceable to a "'common thread'" in dormant Commerce Clause jurisprudence that the Court had identified back in 1976—more than a decade before *Bendix* was decided. 569 U.S. at 235 (quoting *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806). *Bendix* itself picked up that thread and identified the interstate market whose function was distorted by state laws withdrawing limitations defenses from non-residents: Ohio's "legal system," "relied upon to protect the liabilities of persons * * * active in the commercial sphere." 486 U.S. at 891; Pet. 6, 29. Petitioner's cases thus cannot be criticized for failing to apply the "interstate market" requirement—they rely on *Bendix*, and therefore *do* apply it.

Nor can it be said that *McBurney*'s application of the "interstate market" requirement at all impugned *Bendix's* analysis. There was no real "market" under the program at issue in *McBurney*. No one traded the copies of state records that Virginia "creates and provides to its own citizens." 569 U.S. at 235. They were mere benefits provided to locals subsidized with local tax dollars. *Id.* at 237. Besides, any such market in those records would not be "interstate;" it was cordoned off and prevented from expansion across state lines by the fact that non-residents could not participate on the program. The same cannot be said of Ohio's legal system, which is not a benefit created for, or restricted to, state residents. It reaches across state lines to protect all who engage in commerce in the state, residents and non-residents alike. Accordingly, neither the rules nor the rationale applied in *McBurney* call *Bendix* into question, and have nothing to do with the Question Presented.

There is proof in the more than 40 decisions applying *Bendix* since *McBurney* was decided. Other than the

Sixth Circuit's decision here, none deigned *McBurney* even worth mentioning—much less held that it forced some sea-change in *Bendix*'s application of dormant Commerce Clause law. That includes this Court's decision in *Franchise Tax Bd. of California* v. *Hyatt*, 136 S. Ct. 1277, 1283 (2016) and the two other post-*McBurney* cases to consider the Question Presented: *Knappenberger* v. *Davis-Stanton*, 351 P.3d 54 (Or. Ct. App. 2015) and *First Tennessee Bank Nat'l Ass'n* v. *Newham*, 859 N.W.2d 569 (Neb. 2015). When even *Knappenberger*, the lone decision to reach the same result as the Sixth Circuit, found *McBurney* of no help getting there, there is no chance that any of Petitioner's cases will suddenly reverse themselves. The split is intractable.

3. Respondent's attempt to show the conflict to be "manufacture[d]" (Opp. 2) also does not hold up. Respondent first attacks the cases examining Missouri's out-of-state tolling statute, Mo. Rev. Stat. § 516.200—*Rademeyer* v. *Farris*, 284 F.3d 833 (8th Cir. 2002) and *State ex rel Bloomquist* v. *Schneider,* 244 S.W.3d 139 (Mo. 2008) (en banc). This is no easy task when both came out exactly opposite the Sixth Circuit. Pet. 15-16. And *Bloomquist* dismantled the reasoning the Sixth Circuit adopted—from the nonsensical idea that tolling limitations against "those who became non-residents after the statute of limitations began to run" has no effects on commerce, to the "cabined" conception of interstate commerce that would demand an interstate *transaction* for those statutes to have interstate *effects*. 244 S.W.3d at 142. *Bloomquist* also did so on virtually identical facts to this

case—involving a doctor who permanently left Missouri after his treatment of a patient. *Id.* at 140-141.[1]

Unable to dispute any of this, Respondent changes the subject, insisting that the outcome in both cases was *really* driven by particular characteristics of Missouri's statute. Opp. 15-16, 19. But the features Respondent focuses on played no role in either court's invalidation of the statute. That § 516.200 makes tolling available only to in-state plaintiffs does not make it "facially neutral," Opp. 16, because what matters is not its treatment of non-resident *plaintiffs*, but its treatment of non-resident *defendants*, and in that respect, § 516.200 is decidedly non-neutral.

§ 516.200's "breadth" was likewise irrelevant. While *Rademeyer* considered the fact that the statute applied to all "out-of-state" defendants, that was not among its grounds for *invalidating* the statute; it simply thwarted an attempt at *saving* it through a narrowing construction that would make defendants "absent" from the state only when they are beyond reach of Missouri's long-arm statute. 284 F.3d at 839. In this, Missouri's tolling statute is no different than Ohio's, which has never been construed to exempt defendants subject to service through Ohio's long-arm statute, despite Respondent's suggestion (Opp. 16) that *Johnson* v. *Rhodes*, 733 N.E.2d 1132 (Ohio 2000) somehow did so.

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[1] *Rademeyer*'s factual similarity to this case makes Respondent's complaint that none of Petitioner's cases involves the "intrastate transaction" "present here" particularly odd. Opp. 20. That complaint is also wrong—*all* of Petitioner's cases involve "intrastate" transactions. It is irrelevant too, because *Bendix* itself was "intrastate." Pet. 26.

4. Indeed, Respondent's reliance on *Johnson* to mitigate the Sixth Circuit's conflict with *Rademeyer* and *Bloomquist* is puzzling, because the Sixth Circuit conflicts with *Johnson* too. *Johnson* restricted the scope of § 2305.15's permissible application to only those who "*temporarily* leave[] * * * Ohio for non-business reasons," *Johnson*, 733 N.E.2d at 1134 (emphasis added), not those who *permanently* leave, as the Sixth Circuit allows. Respondent insists that it is "blatantly false" (Opp. 19) to characterize *Johnson* as imposing any constitutional limits. That would be news to Justice Cook, who's concurrence in *Johnson* decries the court's holding as adding "qualifying phrase[s]" to the statute "in an effort to meet *Bendix*." 733 N.E.2d at 544. That confirms an intolerable intracircuit split exists over Ohio's statute—which, after the Sixth Circuit's denial of en banc rehearing, can be rectified only by this Court.[2]

5. Respondent next attempts to dispel the conflict with *Newham* by highlighting its statement that Newham "was a non-resident of California during the limitations period," Opp. 19 (citing 859 N.W.2d at 575), apparently hoping to distinguish the case on the basis that Newham left California *before* defaulting on his mortgage, thereby triggering limitations, 859 N.W.2d at 527, while Menendez left *after* his limitations-triggering treatment of Garber. But Respondent overlooks that *Newham* squarely rejects the relevance of this distinction, noting that the California statute penalizes *all* "people who move out of state by

[2] It is also odd that Respondent insists Petitioner failed to point out the split to the Sixth Circuit, when Petitioner's rehearing petition raised both the inter-circuit conflict with *Rademeyer* and *Bloomquist* and the intracircuit conflict with *Johnson*. Pet. 14; C.A. Reh'g Pet. 9, 14.

imposing a longer statute of limitations on them than on those who remain in the state," regardless of when they depart. *Id.* at 575 (internal quotation omitted).

Newham also contradicts Respondent's assertion that the case turned on whether the defendant "left the state to pursue several employment opportunities." Opp. 19. *Newham* expressly rejected any notion "that interstate commerce is *not* affected when persons simply move out of state"—even for non-economic reasons. 859 N.E.2d at 575-76 (citation omitted, emphasis in original). Respondent's efforts to distinguish *Newham* thus cannot be squared with *Newham* itself.

6. Finally, Respondent entirely ignores the cases from Alaska, South Carolina, and Texas, but that was a mistake. Pet. 19-20. Each of these cases squarely split with the Sixth Circuit over the Question Presented. The fact that these cases resolved that question not by invalidating their states' out-of-state tolling statutes, but instead by rewriting their terms, cannot make them go away.

7. Respondent's attempt to recruit authorities to his side also comes up short. Respondent's reliance (Opp. 20) on *Abramson* v. *Brownstein*, 897 F.2d 389 (9th Cir. 1990) is misplaced because the aspects of the decision favoring his side are merely dicta. Pet. 20-21. His California cases are no help either. The defendant in *Filet Menu, Inc.* v. *Cheng*, 84 Cal. Rptr. 2d 384 (Cal. Ct. App. 1999) was a temporary traveler, and thus California's statute did not put him to the same "unpalatable choice" that permanently departing residents face. *Dan Clark Family P'ship* v. *Miramontes*, 122 Cal. Rptr. 3d 517, 528 (Cal. Ct. App. 2011). *Pratali* v. *Gates*, 5 Cal. Rptr. 2d 733, 740 (Cal. Ct. App. 1992) is similarly inapposite because its reasons for rejecting a dormant Commerce Clause challenge to

California's statute do not apply here: The defendant and the transaction at issue in the lawsuit were not "commercial." *Id.* at 734. Moreover, *Pratali* and *Filet Menu* have been distinguished by later, more relevant California cases involving permanently departing residents, including one case Respondent cites (Opp. 20)—*Dan Clark*, 193 Cal. App. 4th at 234; see also *Heritage Mkt'g & Ins. Servs., Inc.* v. *Chrustawka*, 160 Cal. App. 4th 754, 760-761 (Cal. Ct. App. 2008). Thus, these cases are hardly authoritative, even within California.

That leaves *Knappenberger* as the sole authority supporting the Sixth Circuit's side, and it acknowledges that its holding conflicts with other courts. That does not dispel the conflict.

B. The decision below is incorrect.

1. Respondent's defense of the lower court's decision only confirms the fundamental disagreement over the Question Presented. Contrary to what Respondent contends, the Sixth Circuit's decision did not faithfully apply the Court's precedent—it asks for it to be overhauled. Nor did the Sixth Circuit "properly weigh[] the relevant *Pike* factors." Opp. 2. It upset that balance, disregarding burdens *Bendix* called "significant" by ignoring rules *Bendix* itself established.

The whole point of *Bendix* is that any denial of "ordinary legal defenses" to "out-of-state persons * * * engaged in commerce" triggers dormant Commerce Clause scrutiny, because those defenses have intrinsic interstate commerce connections, as an "integral part of the legal system relied upon to protect the liabilities of [all] persons active in the commercial sphere." Pet. 6 (citing *Bendix*, 486 U.S. at 891). It therefore does not matter, despite what

Respondent contends, *why* Menendez left Ohio, or the timing of his departure relative to the events triggering the limitations period. Opp. 10. Nor does it matter where Menendez's treatment of Garber took place. *Ibid.* The only things that *do* matter under *Bendix* are whether the defendant was a "non-resident" when he experienced § 2305.15's unique burdens, and whether he "engaged in commerce" falling within Congress's exclusive province.

Both of these conditions are satisfied here. Because § 2305.15's tolling rule was triggered when Menendez left the state, he experienced the burden of perpetual liability as a non-resident. And the case is suffused with commercial implications, from Menendez's treatment of Garber in Ohio to Menendez's departure from the state—even if he left solely to retire.

2. Respondent disputes whether Menendez's interstate travel has sufficient connections to interstate commerce to fall within *Bendix*. But his position would dangerously constrict Congress's regulatory authority. Congress's power to regulate interstate travelers is in no way tied to, or limited by, its power to regulate "the *channels* of interstate transportation" (Opp. 14)—the roadways, railways, and skyways connecting the states to one other. Rather, it extends to the "persons" moving "through more States than one" directly. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256-257 (1964). That means state regulations burdening interstate travel are not only *direct* infringements on Congress's power, they are *indirect* interferences too, because they depress "economic activity" in other states that is within Congress's regulatory control because of its interstate effects. *Gonzalez* v. *Raich*, 545 U.S. 1, 25 (2005).

3. Further, limitations defenses are no mere "locals-only benefits" lacking connections to "interstate markets." Indeed, when out-of-state tolling statutes like § 2305.15 deprive departing residents of limitations defenses, it interferes with "interstate markets" to an even greater extent than in *Bendix*. Not only does that deprivation interfere with the natural functioning of the legal system, as *Bendix* establishes. It also interferes with the broader "market" for interstate travel—which encompasses not only the relocating traveler himself, but all the individuals and businesses in other states that would provide goods and services to him. Accordingly, those burdens trigger dormant Commerce Clause scrutiny, and weigh heavily in the *Pike* balance, given that Respondent agrees that the statute imposes "perpetual" liability on Petitioner, Opp. 10, thereby conceding that its burden is just as "significant" as in *Bendix*, and is not mere "conjecture," Opp. 10.

4. Respondent's attempt to show that § 2305.15 still provides any legitimate benefit to counterbalance these significant burdens is completely off-base. Respondent insists that tolling was essential for him, and for plaintiffs like him, because he claims not to have learned of Menendez's interstate move until 2017, after expiration of the one-year period provided under Ohio Rule of Civil Procedure 3(A) for him to properly effectuate service after his second suit. Opp. 5, 11. But if that is so, it is only because Respondent ignored several forms of notice that would have directed him to the failure.

Perhaps Respondent's chosen method of service—certified mail sent to Menendez's former medical practice—caused his service failure to slip by him. Even so, Respondent never denied that Menendez asserted failure of

service as a defense both his answer to the first suit in 2014, and in his answer in the second suit in 2016. Appellee's C.A. Br. 2-3 (citing R. 4-1, PageID#32, 4-2, PageID#32). Had Respondent paid heed to those pleadings and tested those defenses in discovery, he would have been able to locate and serve Menendez long before Ohio's one-year service window had expired. And because other Ohio defendants must raise service in their original answer filed at the outset of the case, that virtually guarantees that no other plaintiffs will fall through the cracks. Accordingly, tolling in these circumstances would serve no purpose except to save Respondent from himself—and that is not a legitimate reason for retaining § 2305.15.

5. Finally, Respondent cannot disprove that § 2305.15 has a facially discriminatory impact. His sole contention (Opp. 1) that *Bendix* resolved that question in the negative mischaracterizes the opinion. *Bendix* actually held that the statute *could* have been deemed facially discriminatory "without extended inquiry," 486 U.S. at 891—but ultimately decided that the statute could not survive even more deferential *Pike* scrutiny. The same discriminatory impact that existed in *Bendix* also exists here, so even if *Pike* balancing somehow fails, the statute is *still* invalid.

C. The Question Presented is important and this case provides an ideal vehicle to decide it.

1. Respondent's transparent posturing cannot diminish the importance of the Question Presented. Respondent insists that this case involves only the narrow issue of the dormant Commerce Clause's impact on laws that "discourage[] a person from moving out of the state for retirement," and only affects eight states. Wrong both times. The question is live in at least *11* states—the eight states

that have yet to narrow their statutes since *Bendix*, and the three that did so only in response to the Question Presented. Pet. 6, 19-20. The case thus effects every one of the roughly 2.1 million people that leave those states every year.[3]

2. This case is also about far more than retirement. If Respondent and the Sixth Circuit are right and limitations defenses have become mere local's-only benefits that states can give or withhold at their pleasure, then a departing resident's reasons for moving are irrelevant. Indeed, under that logic, *Bendix* itself is called into doubt.

3. Furthermore, Respondent's idea that *Pike* balancing "invariably leads to fact-specific application" is wrong. Opp. 9. In some cases, like this one, the balance is already settled and need only be applied. Yet even when *Pike* balancing turns fact-specific and discretionary, that discretion exists downstream of the choice to apply the proper legal standards in determining whether commerce is implicated. All this brings into question the very future of dormant Commerce Clause review itself, making this case very important indeed.

4. Finally, the alleged "vehicle" problems Respondent raises are not problems at all. Despite what Respondent insists, there is no need to wait until final judgment, nor is there any injustice in using Menendez's case as the opportunity to resolve the intransigent split in the courts, because Menendez has not used "his retirement as a way to evade liability." Opp. 22. What would be unfair would be forcing Menendez to wait until final judgment to collect a

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[3] U.S. Census Bureau, *State-to-State Migration Flows* table 1 (2017).

factual "record" that *Bendix* has already determined to be unnecessary, or leaving the Sixth Circuit's erroneous judgment uncorrected when the fault in allowing limitations to lapse lies squarely, and solely, on Respondent's shoulders.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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