No. 18-128

IN THE

Supreme Court of the United States

MOHAMED ABOUELMAGD,

Petitioner,

v.

DEBRA NEWELL

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

REPLY BRIEF

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PARTIES TO THE PROCEEDING

Petitioner, Mohamed Abouelmagd, the Defendant and Respondent in the state trial and appellate proceedings below, was at all relevant times, an individual and citizen of New York. He is currently a citizen of New Jersey.

Respondent, Debra Newell, the Plaintiff and Appellant in the state trial and appellate proceedings below, was at all relevant times, an individual and citizen of California.

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INTRODUCTION

Ms. Debra Newell ("Respondent") has utterly failed to demonstrate that review by this Court is not warranted. Like her showing to the trial court in opposing Mohamed Abouelmagd's ("Petitioner") successful demurrer and judgment against her complaint at that level, Respondent's Opposition to the instant Petition relies extensively and primarily on California state law, without meaningfully assessing *federal* law, including this Court's seminal decision in *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988) and its progeny. Such is the same error committed by the California Court of Appeal, which gave, at best, a superficial reading of this Court's binding precedent.

Respondent (at 1-2, 19) concedes that the loans of nearly one million dollars that she allegedly made to Petitioner were for business purposes, at least in part. Respondent fails to address, however, that her subsequent pleadings were shams since her initial filing made abundantly clear that the loans she made to Respondent while she lived in California were for business purposes for Respondent's out of state business. App. I. Instead, Respondent claims that federal law does not apply because she and Petitioner were once lovers. Thus, Respondent posits to this Court that because individuals engage in sex, a business loan between them, even one of nearly a million dollars and where both parties concede that the purpose was for business purpose, can never constitute interstate commerce. Such is absurd and neither Respondent, nor the California appellate courts support such conclusions with citations to federal law. The issue of whether the dormant Commerce Clause applies to any given transaction does not depend on the interpersonal relationships of the parties involved. The analysis focuses solely on whether

the business transaction itself can be said to constitute interstate commerce. Here, the participants hail from two different states engaged in business transactions while in those respective states. The loans and the repayments crossed interstate lines. The Commerce Clause applies.

California state law benefits its own citizenry while denying the same right to an out of state resident. Here, it is clear that California's tolling statute, Code of Civil Procedure Section 351, burdens interstate commerce because it deprives out of state residents such as Petitioner of the benefit of limitations defenses that its own citizenry possesses. Respondent does not and cannot challenge this unassailable fact, hence her repetition of irrelevant character attacks, (at i, 1-3, 8, 9, 24) *e.g.*, that Petitioner is a supposed bad person because he was a married man when Respondent ***voluntarily*** loaned him nearly one million dollars. The undisputed fact remains that if a California resident loaned nearly a million dollars to an in state resident for a business purpose in whole or in part, and the California resident waited to file an action nine, ten and eleven years after the expiration of the California state statutes of limitations for breach of written contract and common counts (which both have a four-year statute of limitations), fraud (three-year statute of limitations) and breach of oral contract (two-year statute of limitations), the case would have been dismissed (as occurred on three separate occasions by two different trial judges), and upheld on appeal by the California Court of Appeal. Such result would not depend on whether the parties had ever had sex, extramarital or not.

The California Court of Appeal's reversal of the judgment in Petitioner's favor improperly incorporated into the Commerce Clause an exception that simply does not exist, *e.g.*, whether the parties have an interpersonal

relationship. This application is in direct contravention of *Bendix* and its progeny, and was violative of the both the Commerce Clause, the Supremacy Clause and Equal Protection. Incredibly, Respondent fails to address the myriad cases of this Court, cited at length by Petitioner, in any meaningful way. Instead, Respondent (at 3-23) merely repeats, primarily, California state law cases that self-servingly preserves the tolling statute. The California Court of Appeal made the same error relying on other flawed California State Appellate analyses. Indeed, Respondent (at 23) cites to the California Rules of Court, which of course do not govern United States Supreme Court Petitions for Certiorari, to support her claim that the petition should be denied. Notwithstanding this flaw, which should be deemed fatal by this Court, the issue of whether California and other states with similar tolling statutes that deprive nonresidents of limitations defenses for parties engaged in interstate commerce is deserving of review. This Court should grant the Petition and reverse the decision of the California Court of Appeal.

ARGUMENT

I. RESPONDENT, LIKE THE CALIFORNIA COURT OF APPEAL, SIMPLY RELIES ON CALIFORNIA STATE LAW DECISIONS THAT HAVE UPHELD THE CHALLENGED TOLLING STATUTE AND SHE HAS FAILED TO ADDRESS FEDERAL, BINDING PRECEDENT, CITED BY PETITIONER, THAT AMPLY DEMONSTRATES THAT TOLLING STATUTES SUCH AS CALIFORNIA'S ARE UNCONSTITUTIONAL

Thirty years ago, in *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988), this Court held that

state tolling statutes that treat nonresidents differently than in-state residents by permanently depriving the nonresidents of the state statute of limitations defenses if they do not volunteer to subject themselves to the jurisdiction of the state are unconstitutional because they violate the Commerce Clause, equal protection and due process. Besides providing a mere summary of the case, however, Respondent, not unlike the California Court of Appeal, fails to address the myriad cases of this Court, as well as other cases in other federal circuits cited by Petitioner, that thoroughly explain why California's tolling statute, Code of Civil Procedure Section 351, and other similar state statutes are constitutionally infirm. Indeed, Respondent fails to address or cite to at all the following cases cited by Petitioner, which include the binding precedent of this Court, such as:

> *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 750 (1995) (Ohio Supreme Court refused to properly apply *Bendix* after this Court found that the Ohio tolling statute was unconstitutional, and the failure of the state to do so violated the Supremacy Clause);

> *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1067, fn. 3 (8th Cir. 1992) (North Dakota tolling statute was an unconstitutional burden on interstate commerce);

> *Rademeyer v. Farris*, 284 F.3d 833 (8th Cir. 2002) (Missouri tolling statute, which tolls the statute of limitations when a resident leaves the state, as applied in that case violated the Commerce Clause);

> *Oregon Waste Systems v. Dept. of Env. Quality*, 511 U.S. 93, 99, 101 (1994) (determination of whether a state statute "discriminates against interstate commerce" must evaluate whether "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" and "justifications for discriminatory restrictions on commerce pass the 'strictest scrutiny.'"); and,

> *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997) (state statutes that discriminate against interstate commerce will only survive a constitutional challenge if the state can demonstrate that "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives).

Further, similar to her summary recitation of *Bendix*, Respondent (at 5-8) only offers a cursory discussion of the Ninth Circuit's decision in *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. Cal. 1990), arguing simply that the case is different from the facts at issue here because the parties here were lovers at one time and the parties in *Bendix* and *Abramson* were corporations. Respondent ignores the fact that all of Petitioner's pleadings acknowledge the interstate business purpose of the subject loans. App. G-I. Respondent makes no mention whatsoever of the primacy of the Supremacy Clause, which was addressed in Petitioner's Petition, or why *Bendix* and its progeny control this outcome and should have been properly applied by the California Court of Appeal. Instead, Respondent (at 3-23) relies primarily on California state appellate decisions to

support her Opposition without any meaningful federal analysis. Such dilatory conduct does not take away from the fact that the California appellate court failed in *its* obligation to adhere to this Court's binding precedent. As shown by Petitioner, the California Court of Appeal failed to cite to any federal authority that the alleged existence of an interpersonal relationship forecloses the application of the dormant Commerce Clause for parties engaged in interstate business transactions. California state law which incorrectly suggest that such a requirement exists simply does not control here. As such, the petition should be granted to reinforce to California and all other states that tolling statutes such as California Code of Civil Procedure Section 351 are constitutionally infirm as set forth in *Bendix*, which remains the law of the land.

II. RESPONDENT, NOT UNLIKE THE CALIFORNIA COURT OF APPEAL, COMPLETELY FAILS TO SUBSTANTIVELY ADDRESS ANY OF THE COMMERCE CLAUSE ARGUMENTS MADE BY PETITIONER

Petitioner argued that the Commerce Clause is not limited to only three distinct categories and cited myriad cases of this Court to demonstrate this point, none of which were even addressed by Respondent in her Opposition. *See* Respondent's Table of Authorities (at v-vii), in which none of the cases cited by Petitioner were addressed by Respondent, *e.g., W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Furst & Thomas v. Brewster*, 282 U.S. 493 (1931); *Taylor v. United States*, 136 S. Ct. 2074 (2016); *Heart of Atlanta Motel v. United States*, 379 U.S. 241; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985);

South Dakota v. Wayfair, Inc., 201 L. Ed. 2d 403 (2018); *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910); *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). Also, the California Court of Appeal also failed to address this binding, authority and at best superficially cited a few federal cases before following erroneous California precedent that the dormant Commerce Clause does not apply to individuals engaged in interstate commerce, but only to traditional business entities. Instead of using common sense, as the trial court did, the California Court of Appeal should have recognized that Respondent's belated claim that she loaned nearly a million dollars to Petitioner because of her sexual relationship was preposterous on its face and irrelevant as a matter of federal law. Merely repeating that the California Court of Appeal correctly decided the issue, without any such analysis by Respondent, demonstrates that she and the California Court of Appeal misunderstand the primacy of this Court's binding precedent.

Other states with tolling statutes similar to the California tolling statute are in defiance of the clear mandate of this Court's *Bendix* pronouncement in violation of the Supremacy Clause. Such bold affronts by these states to this Court's authority can no longer stand and this case is a perfect vehicle to make clear the expanse and limitations of the Commerce Clause and the supremacy of this Court upon wayward states who continue seek to undermine this Court's clear mandates.

Review is also practically important for non resident individuals who conduct business with California residents. Individuals such as Petitioner from other states who conduct business, negotiate or transact with California

residents, even where the subject of the business is outside of California, will be subject to a lawsuit at the whim of the California resident in California state court in perpetuity, as here, if this Court does not intervene. Given that California is one of the largest economies in the world, California's refusal to adhere to well-established federal precedent will continue to discriminate against non residents and burden interstate commerce. Such conduct flies in the face of the very judicial underpinnings for the existence of a statute of limitations defense. As this Court so aptly held nearly 75 years ago in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944):

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

This essential policy, rooted in notions of fundamental fairness and justice has not changed. Yet, here, the California Court of Appeal, in protecting the state tolling statute in clear disregard of *Bendix*, *Reynoldsville Casket Co.* and its progeny, has turned this Court's reasoning on its head. It cannot be forgotten that this is a case that concerns loans that were allegedly made by Respondent

to Petitioner between July 9, 1999, and continuing through April 2, 2002. App. G-I. This is between 19 (nineteen) and 16 (sixteen) years ago. Locating witnesses, banking, and other financial records will, with all due respect to the California Court of Appeal, render the trial that it insists should occur, a farce and a travesty of justice of the highest order. An in-state California resident would not have to endure such a trial because he, she or it would be given the benefit of the statute of limitations defense without question and at the outset of the case. Petitioner, a New Jersey resident sought the same right and was denied this fundamental right by the Court of Appeal. Neither Petitioner nor any other non-California resident who has the misfortune of conducting business with a resident Californian should be deprived of a fundamental statute of limitations defense in such a way. The Commerce Clause seeks to protect all citizens from state action that favors its own citizens at the expense of those who reside outside the state's borders. The California Court of Appeal has made clear its willingness to refuse to protect the rights of non-citizens. This Court should intervene, grant the Petition, and apply this Court's binding and supreme precedent as concerns California's constitutionally infirm tolling statute.

III. CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, this Court should reverse the decision of the California Court of Appeal and grant review.

Respectfully Submitted,

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September 12, 2018