NO. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For over a century, Ohio has maintained a statute, like others in all 50 states, that tolls limitations when the defendant is "out of" or "departs from" the state. Ohio Rev. Code § 2305.15. In *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), the Court held § 2305.15 imposes "impermissible burden on commerce," *id.* at 892, when applied to non-residents. This was because of the unique disability it foisted on non-residents: As they are always "absent from the state," they remain subject to perpetual liability. And the Court concluded that this non-resident burden was not offset by any legitimate benefit to plaintiffs, given the ease of using long-arm statutes to sue non-residents in the post-*International Shoe* world. *Id.* at 889-890.

Yet there is a deep, acknowledged split among U.S. courts over the proper application of such out-of-state tolling statutes to residents who permanently leave the state, and thus *become* non-residents, *after* the events underlying the suit—thereby incurring equally perpetual liability. One circuit and six state supreme courts have held these statutes impose impermissible burdens on interstate commerce when applied in these circumstances, or have interpreted statutes narrowly to avoid that result. The Sixth Circuit, by contrast, held that these statutes impose no cognizable burden on interstate commerce in these circumstances. The question presented is:

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.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

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Petitioner Heriberto Menendez, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1a) is published at 888 F.3d 678. Its order denying rehearing en banc (*id.* 17a) is unpublished. The relevant excerpts from the district court proceedings (*id.* 19a–35a) are unpublished.

JURISDICTION

The Sixth Circuit issued its opinion on May 1, 2018, and denied a timely petition for rehearing en banc on June 1, 2018. Justice Kagan, then Circuit Justice for the United States Court of Appeals for the Sixth Circuit, extended the time to file a petition for writ of certiorari to and including October 29, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the U.S. Constitution provides:

> The Congress shall have Power *** To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. Const. art. I, § 8, cl. 3.

Ohio Rev. Code § 2305.15 provides:

> (A) When a cause of action accrues against a person, if the person is out of the state, has absconded, or conceals self, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.35 of the Revised Code does not begin to run until the person comes into the state or while the person is so absconded or concealed. After the cause of action accrues if the person departs from the state, absconds, or conceals self, the time of the person's absence or concealment shall not be computed as any part of a period within which the action must be brought.

STATEMENT

This case presents a question of great importance about the proper boundary between Congress's power to regulate interstate commerce and the States' power to do the same—namely, whether states exceed their legitimate interstate regulatory authority when they deprive defendant of limitations defenses if they depart the state after the events giving rise to suit, even if those defendants remain amenable to suit under the state's long-arm statute. In these circumstances, such out-of-state tolling statutes serve only as a means of economic capture, penalizing departing residents with perpetual liability for their decision to pursue opportunities elsewhere.

Yet in this case, the Sixth Circuit concluded that § 2305.15 is no different than locals-only benefits that states create for their residents—and that states are free to deny residents if they depart the state. In doing so, the lower court self-consciously moved the boundaries of Court's dormant Commerce Clause jurisprudence, and cemented a long-simmering conflict among the circuits and states that commentators have asked to be resolved. What is more, the Sixth Circuit authorizes § 2305.15's heavy toll on interstate commerce only by refusing to recognize that it is exacting any toll at all, and does so in the teeth of this Court's precedents establishing that toll's burdensome price. Accordingly, this case involves none of the hard questions that sometimes divide the Court over the balancing required in many dormant Commerce Clause cases—no need to discern "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (Scalia, J., concurring). "[W]hen the stone is very heavy and the line very short—then at least we

can be relatively sure of the right answer." *De Niz Robles* v. *Lynch*, 803 F.3d 1165, 1176 (10th Cir. 2015) (Gorsuch, J.). This is one of those cases.

The petition for certiorari should be granted.

A. Background

1. Over a century ago, Ohio first enacted a statutory provision tolling limitations periods when defendants went missing or left Ohio. An Act for the Limitation of Actions, ch. 213, § 2 (1810), *reprinted in* 1 *The Statutes of Ohio and of the Northwestern Territory* 656 (Salmon P. Chase, ed., 1833). The present version of that statute, Ohio Rev. Code § 2305.15, is similar. It tolls limitations if the defendant "has absconded, or conceals [him]self" to avoid the suit. It also contains a catch-all provision making clear that tolling occurs whenever "the person is out of" or "departs from the state"—*regardless* of why, and regardless of whether he could be properly sued and served.

Statutes like § 2305.15 once served a vital purpose under the common-law rule, later converted into constitutional command, that state courts could only exercise jurisdiction over defendants served with process within the state. *Pennoyer* v. *Neff*, 95 U.S. 714, 722 (1877); see also *Burnham* v. *Superior Court of Cal.*, 495 U.S. 604, 616 (1990) (describing the common-law rule). In an era when obtaining jurisdiction over non-resident or physically absent defendants was impossible, these statutes protected plaintiffs by preventing limitations on their claims from expiring before they could effectuate the personal, in-state service *Pennoyer* and the common law demanded. Accordingly, by the 1900s, most states had passed laws tolling limitations on claims against out-of-

state defendants. 2 H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 244, at 1143-47 (Dewitt C. Moore, ed., 4th ed. 1916) (citing statutes).

2. Things changed, however, after *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), which provided that "[d]ue process does not necessarily *require* the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer*." *Burnham*, 495 U.S. at 618 (emphasis in original). Under the "long-arm" jurisdiction *International Shoe* permitted, states no longer had to serve defendants in-state in order to hale them into court. The States responded by passing "long-arm" statutes that authorized suits against non-residents and provided means for serving them, sometimes through substituted service provisions that did not even require personally locating the defendant. See 1 Robert C. Casad, *Jurisdiction in Civil Action*s § 4.01[2][a] (4th ed. 2017). This largely obviated any need for out-of-state tolling laws. And many states, like Ohio, further aided their obsolescence by changing their rules to make filing suit, rather than effectuating service, the event satisfying limitations, thereby releasing the pressure to locate a defendant before limitations expired. *Goolsby* v. *Anderson Concrete Corp.*, 575 N.E.2d 801, 802 (Ohio 1991) (citing Ohio Civ. R. 3(a)).

Thus sapped of their original purpose, many of these out-of-state tolling statutes were revised or reinterpreted to make defendants "absent" from the state only when they went missing or lay beyond reach of the state's long-arm statute. See *Kuk* v. *Nalley*, 166 P.3d 47, 50-53 (Alaska 2007) (summarizing several such cases). In eight states, including Ohio, however, these statutes remain on the books unchanged. In some states, this is because their

courts have refused to narrow their statutes through judicial interpretation.[1] In others, it is because neither the courts nor the legislature has yet addressed the issue.[2] Whatever the cause, these statutes survive only as protectionist restraints on interstate commerce.

3. So held the Court in *Bendix Autolite Corp.* v. *Midwesco Enterprises*, 486 U.S. at 889-891, which decided that Ohio Rev. Stat. § 2305.15—the same statute at issue in this case—imposed unconstitutional burdens on interstate commerce when applied to claims brought in an Ohio lawsuit against an Illinois corporation about the delivery and installation of a boiler system at the plaintiff's Ohio facility.

The Court held that "statutes of limitations" have an intrinsic, "obvious" connection to commerce—as an "integral part of the legal system relied upon to protect the liabilities of persons and corporations active in the commercial sphere." 486 U.S. at 891. Thus, states might exceed their powers if they denied these "ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce," triggering scrutiny under the dormant Commerce Clause. *Ibid.* "[T]he state law" must then "be reviewed *** to determine whether the denial is discriminatory on its face," and therefore per se invalid, *United Haulers Ass'n, Inc.* v. *Oneida-*

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[1] *Seeley* v. *Expert, Inc.*, 269 N.E.2d 121, 125-126, 128 (Ohio 1971); *Olseth* v. *Larson*, 158 P.3d 532, 535-39 (Utah 2007); *Dew* v. *Appleberry*, 591 P.2d 509, 511-513 (Cal. 1979); *Knappenberger* v. *Davis-Stanton*, 351 P.3d 54, 60 (Or. Ct. App. 2015).

[2] Ky. Rev. Stat. § 413.190; La. Rev. Stat. § 9:5802; Mo. Rev. Stat. § 516.200; N.D. Rev. Stat. § 28-01-32.

Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338-339 (2007), or "an impermissible burden on commerce" under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 144-146 (1970).

The Court indicated that § 2305.15 *might* be invalidated as facially discriminatory "without extended inquiry," 486 U.S. at 891, because of the ugly Hobson's choice it put to non-resident corporations—and only foreign corporations. They could *become* Ohio residents, by appointing agents for service of process (thereby, in the Court's view, consenting to "general jurisdiction" in the state's courts).[3] *Id.* at 889, 892-893. Or they could suffer "forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity." *Id.* at 893.

The Court declined to take that route, however, instead deciding that § 2305.15 could not even survive more deferential *Pike* review, under circumstances that suggested few applications of out-of-state tolling statutes would ever survive such review. The Court deemed the Hobson's choice that § 2305.15 posed for non-resident corporations to be a "significant burden," and a "substantial restraint[]" on interstate commerce. 486 U.S. at 891, 893. The Court also questioned whether, after *International Shoe*, the statute still had any legitimate benefit for plaintiffs. The Court determined that "the ability to

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[3] In reaching the conclusion that a non-resident corporation's appointment of an in-state agent for service of process might subject the corporation to general jurisdiction, the Court did not consider its precedent that such appointments do not necessarily constitute consent to general jurisdiction. *Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

execute service of process on foreign corporations" might be "an important factor to consider in assessing the local interest" in tolling, and noted that "serving foreign corporate defendants may be more arduous than domestic corporations," but found these concerns absent where the "Ohio long-arm statute would have permitted service" on the company "throughout the period of limitations." *Id.* at 894. *Bendix*'s rule seemed clear: If the nonresident defendant can be located and long-arm service is available, § 2305.15's out-of-state tolling provision is not.

Yet decades later, the Sixth Circuit would muddy the waters considerably.

B. Factual background

In 2010, Dr. Heriberto Menendez treated fifteen-year-old Marshall Garber for fever, constipation, and back pain. Pet. App. 29a. Three days later, Garber went to the emergency room, where he related these same routine symptoms, but also complained of difficulty moving his legs and feet. *Id.* 30a. These new neurological symptoms led emergency physicians to discover that Garber had a spinal epidural abscess—a rare accumulation of pus in the epidural space that mechanically compresses the spinal cord—which eventually cost Garber the use of his lower extremities. *Ibid.* Garber pleaded no facts to suggest he was having difficulty moving his legs and feet when Menendez treated him. Yet he still blamed Menendez for his injuries, claiming that the three-day delay in diagnosis was the cause of his injuries. *Ibid.*

In April of 2014, Dr. Menendez retired from the practice of medicine and moved permanently to Florida. Pet. App. 29a. There is no allegation that Menendez abscond-

ed or made any efforts to conceal himself. Indeed, nothing suggests Menendez had any notice of a potential suit from Garber when he left Ohio.

Because Garber was a minor at the time of his injuries, Pet. App. 20a, Ohio law tolled the state's 1-year limitations period for medical malpractice claims, Ohio Rev. Code § 2305.113, until he turned 18, *id.* § 2305.16. Garber claimed no difficulty in locating Menendez. Nor did he suggest that Menendez was ever beyond reach of Ohio's long-arm statute when he left the state. Garber nonetheless had trouble initiating suit. Garber's first suit was timely, but it was still fatally defective because Garber failed to substantiate his medical negligence claims with the affidavit from a medical expert required under Ohio Civil Rule 10(D)(2). Pet. App. 2a. It took two more attempts, over a period of 3 years, for Garber to properly file suit and serve Dr. Menendez. Pet. App. *Id.* 2a-3a.

Menendez removed the lawsuit to federal court and filed a motion to dismiss, arguing that Garber's claims fell outside Ohio's 1-year statute of limitations for medical negligence claims. Pet. App. 3a. Garber maintained that, because Ohio's medical-malpractice limitations statute, § 2305.13, is one of those tolled by Ohio Rev. Code § 2305.15, his claims were saved—permanently tolled after Menendez left the state. Pet. App. 3a. Menendez countered that applying § 2305.15 to toll claims against him would be unconstitutional under *Bendix*. *Ibid.*

The district court agreed with Menendez and dismissed the case. Pet. App. 19a. It noted that § 2305.15 gave individuals like Menendez "an even more draconian choice to make" than it gave to the corporation in *Bendix*, "because there is no mechanism by which an individ-

ual could register with the state for service of process." *Id.* 24a (internal quotation omitted). The only way a departing resident can end § 2305.15's perpetual liability is to turn around and return to Ohio. The district court held that this burden on departing residents—one "even greater than in *Bendix*," Pet. App. 25a—burdened interstate commerce because Petitioner's "decision to permanently leave Ohio for Florida" itself "implicated the Commerce Clause" under this Court's precedent, "'whether the transportation is commercial in nature'" or not. *Ibid.* (quoting *Edwards* v. *California*, 314 U.S. 160 n.1 (1941)).

C. The decision below

A panel of the Sixth Circuit Court of Appeals reversed. Pet. App. 2a. The panel recognized *Bendix*'s holding that § 2305.15 cannot be constitutionally applied to non-residents. *Id.* 14a-15a. Yet the panel held that same statute could be constitutionally applied to Menendez because he only became a non-resident *after* the events giving rise to the lawsuit, even if he was a non-resident when he was sued. The panel emphasized that Menendez treated Garber "in Ohio," while "Dr. Menendez lived in Ohio." *Id.* 15a.

1. To the panel, this quirk of circumstance made the case categorically different from *Bendix*, because *Bendix* involved an "an out-of-state company," and—at least in the panel's view—concerned a "traditional interstate business transaction." Pet. App. 15a. That, to the panel, meant that Menendez was an Ohio resident during the "medical/business" transaction at the core of the case. *Ibid.* Menendez was not "out-of-state" at that time, it concluded, so that application of § 2305.15 to him involved

no "favoritism toward in-state firms over out-of-state ones." *Ibid.* And because Menendez treated Garber in Ohio, the panel concluded that § 2305 imposed no "cost on [any] traditional interstate business transaction," and imposed no "cognizable burden on any interstate market." Pet. App. 12a. The panel thus concluded the case was not "governed by the dormant Commerce Clause" at all. *Id.* 12a. And because the panel dismissed *Bendix*'s relevance, it ignored *Bendix*'s result, under which the fact that Menendez was always amenable to service under Ohio's long-arm statute would have been fatal to tolling under § 2305.15's out-of-state tolling provision. 496 U.S. at 894.

2. The panel rejected Menendez's argument that the statute's burden on his right to relocate had sufficient connection to interstate commerce to trigger Commerce Clause scrutiny, and parted ways with the Court's precedent in doing so. The panel concluded that such concerns about whether the law "discourage[d] Ohio residents from moving" or deprived "other States of the commercial benefits that new residents might bring," Pet. App. 10a, ought to be relegated to protection under the non-economic "right to travel" recognized in *Saenz* v. *Roe*, 526 U.S. 489, 500–01 (1999), and did not weigh in the dormant Commerce Clause calculus, *id.* 13a. This despite its acknowledgment of precedent like *Edwards* v. *California* in which the connection between interstate commerce and interstate travel was established.

The panel instead concluded that if Ohio's tolling rules favored residents, that favoritism was merely akin to "[p]olicy incentives that entice residents to stay in a State"—like an "in-state tuition break," or local preference in "licensing fees," which "residents put in jeopardy

if they move." Pet. App. 10, 11a, 16a. Applying this Court's decision in *McBurney* v. *Young*, 569 U.S. 221 (2013), which upheld the constitutionality of one such residents'-only benefit, a local preference in access to "Virginia public records," the panel concluded that forcing departing residents to surrender such local preferences at the border imposed no cognizable burdens on interstate commerce. Pet. App. 11a.

The panel likewise criticized Menendez for providing no "evidence" demonstrating § 2305.15's burdens on departing residents—although *Bendix* contained no requirement that he produce such evidence. Pet. App. 12a. The panel then hypothesized that burden to be a small one, by focusing on the shortness of Ohio's statute of limitations for medical malpractice, and speculating that "it is fair to wonder how many Ohio Doctors" would have altered their retirement plans based on the tolling rule. *Ibid.* It therefore dismissed Petitioner's concerns as merely "hypothetical." *Ibid.*

3. On the benefits side of the *Pike* equation, the panel concluded that § 2305.15 remained useful for Ohio plaintiffs even after *International Shoe* obviated its original purpose, claiming it retained utility for a plaintiff faced with a defendant who "'remains potentially difficult to locate' and 'may not be so easy to find and serve'" after departing the state. Pet. Appx. 16a (quoting *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 410 (1982)). The panel found this "enough of a local benefit to survive *Pike* review on this record," *ibid*, despite the fact that Garber alleged no difficulty locating or serving Menendez, and in spite of *Bendix*'s direct admonition that such concerns are generally "insufficient to withstand Commerce Clause scrutiny." 486 U.S. at 894.

4. The panel also rejected the argument that § 2305.15 was facially discriminatory against interstate commerce. Despite *Bendix*'s plain lesson that the statute *did* have discriminatory effects against non-residents (including recent non-residents), and despite recognizing that the Ohio tolling statute would "affect out-of-state residents more than in-state ones," Pet. App. 9a, the panel concluded that the statute did not "explicitly discriminate[] against interstate commerce," because the law was even-handed in its distribution of discriminatory burdens. *Id.* 8a. The panel noted that the statute imposed indefinite tolling "for [any] defendant outside of the State regardless of whether he once resided in Ohio or not." *Id.* 9a. The panel also concluded that the law had no "disguis[ed] *** protectionist effect" because it did not "operate like an embargo on interstate commerce," *ibid*, once again failing to recognize that mere burdens on interstate commerce, no less than complete embargos, can trigger dormant Commerce Clause scrutiny.

5. These departures from this Court's precedent were no accident. The panel made clear its belief that the law had changed since *Bendix*, or ought to change. The panel took pains to note that "the Court has not invalidated a law under *Pike* balancing in three decades"—since *Bendix* itself. Pet. App. 13a. And it stated that "[t]he meaning of the Commerce Clause" too has "not stood still." *Id.* 6a. The panel pointed to technological and legal changes that had, in its view, blurred the lines between the matters reserved to "the National Government" and those for "the States." *Id.* 7a. And it claimed this "overlapping authority over interstate commerce" removed the "imperative" for judicial doctrine to keep each "in their separate spheres." *Ibid.*

6. Menendez sought en banc rehearing. He criticized the panel for ignoring this Court's "century-old understanding" of the connection between interstate travel and interstate commerce. Rehr'g Pet. 9. And he pointed out that the panel decision created conflicts with other circuits and state courts of last resort, creating a particular inequity for *him* a result of those conflicts. *Id.* 14. Menendez noted that the panel's decision departed from the Ohio Supreme Court's resolution of "the same question for the same statute," *Id.* 3, 14 (citing *Johnson* v. *Rhodes*, 733 N.E.2d 1132 (Ohio 2000)), thereby penalizing Menendez for his decision to remove the case to federal court. *Id.* at 15-16.

The Court denied rehearing. Pet. App. 17a.

REASONS FOR GRANTING THE WRIT

The traditional criteria of certworthiness are all present here. There is an acknowledged and fully developed split on the question presented, one recognized by commentators and appellate courts alike, but that has only now percolated into a full-blown division among circuit courts and state high courts as the result of this case. This question is right now leading to different outcomes in similar cases across jurisdictional lines. This case is a compelling one for resolving the split, as it presents an opportunity to create a clear body of law for the constitutional application of all out-of-state tolling rules, under circumstances where the current confused state of the law has created real unfairness for Menendez. The question is also of obvious national importance. It embraces the tolling laws of at least 11 different states, and the erroneous rule applied below will have serious adverse effects on the businesses and individuals whose conduct is

likely to be hindered, and opportunities stifled, by the protectionist impulses keeping these laws on the books.

A. This case cements an acknowledged, widespread conflict among the circuit courts and state courts of last resort.

The Sixth Circuit's decision widens and cements an acknowledged rift among the federal and state courts, and is opposed by a lopsided majority. The Eighth Circuit, along with the state supreme courts of Missouri, Nebraska, and Ohio, have all held that out-of-state tolling statutes like § 2305.15 cannot be constitutionally applied to residents who permanently depart the state after the events giving rise to suit, but remain amenable to long-arm jurisdiction. The high courts of three other states (Alaska, Texas, and South Carolina) have employed narrowing constructions to avoid these *Bendix* problems.

1. Courts holding that application of out-of-state tolling statutes to departing residents is unconstitutional.

a. The only circuit court outside the Sixth to directly confront the question presented is the Eighth, in *Rademeyer* v. *Farris*, 284 F.3d 833 (2002). There the Eighth Circuit applied *Bendix* to hold Missouri's out-of-state tolling statute, Mo. Rev. Stat. § 506.200, was unconstitutional when applied to claims brought against a man who moved from Missouri to Florida after buying out his company's minority shareholder and selling the company to someone else. *Id.* at 836, 838. Drawing upon circuit precedent, the court determined that the statute forced upon departing residents the same impermissibly draconian choice it put to other non-residents: "'[C]hoose between being physically present in the state for the limita-

tions period or forfeiting the limitations defense.'" *Id.* at 838-839 (quoting *Bottineau Farmers Elevator* v. *Woodward-Clyde Consultants*, 963 F.2d 1064, 1074 (8th Cir. 1992)). It then held that the burden on these recently minted "non-residents" was not outweighed by "the state's interest in aiding its residents' efforts to litigate" against them, when "long-arm service of process was available," *id.* at 839.

b. Three state supreme courts have reached similar results. In one, the Missouri Supreme Court directly invoked *Rademeyer* to invalidate the same Missouri statute that was at issue in that case. *State ex rel Bloomquist* v. *Schneider*, 244 S.W.3d 139, 142, 144 (2008) (en banc*), abrogated on other grounds*, *State ex rel Norfolk S. Ry. Co.* v. *Dolan*, 512 S.W.3d 41 (Mo. 2017). And it did so under factual circumstances nearly identical to *this* case, concerning the timeliness of medical-malpractice claims raised against a doctor who moved from Missouri to Kansas. *Id.* at 140-141. The Eighth Circuit also directly confronted, and rejected, many of the arguments the Sixth Circuit found persuasive in this case. The court dismissed the notion that accidents of timing over a defendant's departure ought to control *Bendix*'s operation. It determined instead that regardless of *when* the doctor became a non-resident, Missouri's out-of-state tolling statute based tolling "solely on" his "out-of-state residence," and thus applied to him when he *was* a non-resident. *Id.* at 142-143. Thus, the tolling statute "'impos[es] a greater burden on out-of-state [defendants] than it does on [resident defendants].'" *Ibid.* (quoting *Bendix*, 486 U.S. at 894) (alteration in original).

The Missouri Supreme Court likewise dismissed the idea that *Bendix* contained some silent requirement that

the transaction underlying the suit must involve a "traditional interstate business transaction," Pet. App. 15a, to trigger Commerce Clause scrutiny, as based on a "cabined interpretation of interstate commerce" that the "Supreme Court has long since rejected." 244 S.W.3d at 143. Drawing upon this Court's decision in *Hoke* v. *United States*, 227 U.S. 308, 320 (1913), the court concluded that "'Commerce among the states *** consists of intercourse and traffic between their citizens,'" meaning that Missouri's out-of-state tolling provision "falls afoul of the Commerce Clause" by "discourag[ing] and burden[ing]" residents' "ability to move from state to state." *Id.* at 142-43 & n.4 (quoting *Hoke*, 227 U.S. at 320).

Finally, the Missouri Supreme Court rejected the assertion that out-of-state tolling statutes serve some legitimate purpose merely because it may be "harder to locate and serve an out-of-state resident than it is one who is in Missouri." *Id.* at 143. The court deemed this too little benefit to justify tolling when, under Missouri's rules (which mirror Ohio's), "one need not obtain service in order to toll the statute of limitations. It is tolled by the filing of suit." *Ibid.* (citing *Ostermueller* v. *Potter*, 868 S.W.2d 110, 111 (Mo. 1993) (en banc)).

c. The Nebraska Supreme Court followed suit in *First Tennessee Bank National Association* v. *Newham*, 859 N.W.2d 569, 574 (2015), invalidating California's out-of-state tolling statute, Cal. Civ. Proc. Code § 351, when applied to a departing resident. The case concerned an active-duty servicemember who made a promissory note to refinance a mortgage on his home in California. *Id.* at 572. After the refinance, he left California, and active duty, and made a series of moves to Nebraska, North Dakota, Kansas, and Minnesota, after which was sued for non-

payment of the note. *Ibid.* The court joined *Bloomquist* in concluding that "a former resident of California" who permanently left the state is a "nonresident of California" for purposes of determining whether the statute uniquely burdened non-residents. *Id.* at 572, 574, 575. It also joined *Bloomquist* in deciding that § 351 implicated interstate commerce concerns by "penaliz[ing] people who move out of state," thus imposing "'restraints on their movements across state lines.'" *Id.* at 575 (quoting *Heritage Mkt'g Servs., Inc.* v. *Chrustawka*, 73 Cal. Rptr.3d 126, 132 (Ct. App. 2008)).

d. The Supreme Court of Ohio also resolved a dormant Commerce Clause challenge to Ohio Rev. Stat. § 2305.15—the same statute at issue here—in a manner directly contrary to the Sixth. *Johnson* v. *Rhodes*, 733 N.E.2d 1132 (2000). There the Court held that § 2305.15 could *only* be permissibly applied to individuals "who temporarily leave the state of Ohio for non-business reasons," not those who permanently leave the state. *Id.* at 1134. That carve-out for temporary, non-business travel makes sense. Tolling during temporary travel does not necessarily impose "impermissible" burdens on the interstate travel, because temporary travelers are not faced with the "same unpalatable choice" of remaining a resident "or be[ing] subject to suit in perpetuity." *Dan Clark Family P'ship* v. *Miramontes*, 122 Cal Rptr.3d 517, 528 (Cal. App. 2011)). But the clear implication from *Johnson* is that tolling limitations against permanently departing residents *would* impose impermissible burdens.

2. Courts that interpret out-of-state tolling statutes narrowly to avoid constitutionality problems.

a. Finally, in a trio of cases arising out of car accidents, several state supreme courts interpreted their out-of-state tolling statutes narrowly to avoid *Bendix* questions that would result if they were applied to departing residents. *In Kuk* v. *Nalley*, 166 P.3d 47, 55 (2007), the Alaska Supreme Court declined to apply Alaska Statutes § 09.10.130 to a defendant who left Alaska for a prolonged period "from November 2003 to June 2004," for "health and surgery reasons," 166 P.3d at 49-50. The court interpreted the tolling statute narrowly so that defendants would not be considered "absent" when they were "at all times amenable to service of process," thereby confining the statute to circumstances where it provided some legitimate benefit. *id.* at 55. The court recognized that this reading of the statute departed from both its "plain language," *id.* at 51, and its pre-*International Shoe* reason for being, *id.* at 55. But it determined this reaching interpretation to be preferable to the "uncertainty" surrounding the issue of whether, and to what extent, *Bendix* would render the statute unconstitutional in those circumstances. *Id.* at 53-54.

b. The South Carolina and Texas supreme courts engaged in similarly atextual interpretations of their out-of-state tolling statutes in cases involving departing residents to avoid *Bendix* concerns. *Blyth* v. *Marcus*, 517 S.E.2d 433, 435 (S.C. 1999) (reaffirming precedent interpreting S.C. Code § 15-3-30 to provide that a defendant is not absent when "amenable to personal service" and subject to the "personal jurisdiction of our courts," because anything else might render the statute "unconstitution-

al"); *Ashley* v. *Hawkins*, 293 S.W.3d 175, 178-179 (Tex. 2009) (interpreting Tex. Civ. Prac. & Rem. Code § 16.063 to provide that a defendant was not "absent" from the state when substituted service was available through the state's long-arm statute). And the Texas Supreme Court overruled its own previous precedent in doing so. *Ashley*, 293 S.W.3d at 179 n.4 (overruling *Vaughn* v. *Deitz*, 430 S.W.2d 487 (Tex. 1968) in large part because "*Deitz*'s continuing application may pose constitutional problems" under *Bendix*.).

Each of these courts have demonstrated a recognition that application of out-of-state tolling statutes to departing residents poses constitutional problems. And the rule-bending leaps they take to avoid those constitutional concerns—ignoring their plain terms and the historical imperative for applying the statutes in line with those plain terms—reveal exactly how serious these courts deem those concerns to be.

3. The absence of authority supporting the Sixth Circuit.

By contrast, no other court of similar stature has reached the same result as the Sixth Circuit in this case. None has deemed statutes of limitations to be the mere locals-only benefits that the Sixth Circuit deems them to be. And none holds that application of out-of-state tolling statutes to departing residents has no cognizable interstate commerce impact. Indeed, the only circuit court to employ *even part* of the Sixth Circuit's reasoning is the Ninth Circuit in *Abramson* v. *Brownstein*, 897 F.2d 389 (1990). That case involved a different factual circumstance than this case: application of Cal. Civ. Proc. Code § 351 to a non-resident, not a departing resident. But the court joined the Sixth Circuit in holding, without analy-

sis, that the requisite connection to "interstate commerce" could be satisfied because the transaction at the core of the case was interstate: a sales transaction between two Californians and a Massachusetts resident. *Id.* at 392.

An Oregon intermediate appellate court adopted *Abramson*, but converted its holding from one *option* for establishing a triggering interstate-commerce connection into a *requirement* for doing so. *Knappenberger* v. *Davis-Stanton*, 351 P.3d 54, 56 (Ct. App. 2015). *Knappenberger* held that application of an out-of-state tolling provision to a departing resident only triggers dormant Commerce Clause scrutiny when "the complaint was based on conduct that *itself* involved an activity of interstate commerce." *Id.* at 56. The Oregon court found this threshold condition was not met when "the underlying claim" did not "involve an interstate commerce transaction," *id.* at 64—the case involved a dispute between an attorney and client over unpaid legal fees incurred while the lawyer lived in Oregon.

The Oregon court was not persuaded that "creating a 'disincentive[] to travel across state lines'" was sufficient to trigger scrutiny under the dormant Commerce Clause. *Id.* at 65 (internal quotation omitted). It concluded that such impacts on travel "may very well implicate" some constitutional rights, such as the right to travel, but disagreed with the argument that "moving across state lines—in and of itself—constitutes 'engaging' in interstate commerce for purposes of invoking the dormant Commerce Clause." *Ibid.* The court expressly acknowledged that this was a departure from cases like

Bloomquist, which "arrive at the contrary conclusion." *Id.* at 64-65.[4]

* * *

The Sixth Circuit's opinion thus cements and widens a long-brewing conflict. That conflict had been recognized both by lower courts, *Knappenberger*, *supra*, and commentators. Walter W. Heiser, *Can the Tolling of Statutes of Limitations Based on the Defendant's Absence from the State Ever Be Consistent with the Commerce Clause?*, 76 Mo. L. Rev. 385, 404-408 (2010). And even before this case, commentators urged that it be resolved. *Heiser* 414-415. But until this case, that conflict had largely been confined to the lower courts. Now the conflict has percolated up to a division between circuit courts and state supreme courts. And it is fully-developed into country-wide spread, directly encompassing the laws of six states. The issues have arisen in dozens of appellate cases since *Bendix* was decided, and the view in the courts that have decided the issue has remained unchanged. The petitioner in this case even sought rehearing on this very question, but the Sixth Circuit nonetheless denied review. Nothing will be gained from further percolation. And there is no question that the issue is dispositive. Ohio residents are subject to bur-

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[4] The lower courts of California are divided on this question. Compare *Dan Clark*, 122 Cal Rptr.3d at 524 (applying *Abramson* and holding that interstate commerce connection existed where conduct underlying the plaintiffs' claims was an interstate transaction), with *Heritage Marketing*, 73 Cal.Rptr.3d at 131 (following *Bloomquist*'s rule that the impact of an out-of-state tolling statute on a departing resident's right to travel is sufficient).

dens that inhibit their ability to pursue opportunities in other states that Missourians, Alaskans, Texans, and Nebraskans do not suffer, based solely on the constitutional standards applied to nearly identical statutes. Indeed, the standards for Ohioans vary based on whether they are in federal or state court. The time is right to grant certiorari and resolve these conflicts.

B. The decision below is wrong.

Certiorari is also warranted because the decision below is incorrect. The Sixth Circuit's stance that out-of-state tolling statutes like § 2505.13 place no cognizable burden on interstate commerce when applied to departing residents is fundamentally incompatible with *Bendix*.

1. Menendez faces the same burdens under § 2305.15 as did the non-resident corporation in *Bendix*. He suffers the same loss of a limitations defense, the same potential for perpetual liability, and similar unpalatable options for ending it. Indeed, because Menendez is an individual, his options for stopping tolling under § 2305.15 are worse than for *Bendix*'s corporation, because he lacks the option of appointing an agent for service of process to end the statute's tolling penalty. The only way for him to end that penalty is to move back to Ohio. This is not a burden that Ohio residents ever experience.

2. Yet even if Ohio's tolling statute imposed only slight burdens on Menendez's relocation options, those burdens are nonetheless intolerable, given that *Bendix* fatally undermines any notion that these statutes may permissibly be applied to non-residents who are amenable to long-arm service. The panel claims that the statute may still be of use to plaintiffs who experience difficulty locating a defendant after his departure, citing thirty-year old

precedent from the Equal Protection context, *G.D. Searle & Co.* v. *Cohn*, 445 U.S. 404, 410 (1982). Pet. App. 16a. But any notion that the commercial burdens of out-of-state tolling provisions ought to be routinely tolerated for mere *International Shoe*-era convenience (rather than their *Pennoyer*-era necessity) was rejected in *Bendix* itself. There, the Court flatly rejected that argument, and reliance on *G.D. Searle*, as generally "insufficient to withstand Commerce Clause scrutiny." 486 U.S. at 894.

Things only go downhill from there. Any suggestion that § 2305.15's burdens are needed to ease plaintiffs' troubles in locating hard-to-find defendants is belied by the fact that § 2305.15's other provisions, which toll limitations whenever a defendant "abscond[s]" or is conceal[ed]" already do that. And they do it in an evenhanded manner that does not uniquely burden interstate commerce. Moreover, in a time when a simple internet search can locate virtually anyone on the planet, there is little reason to believe locating an out-of-state defendant is any harder than finding an in-state one. Extending time *only* for residents that move between states, rather than, say, residents that move between cities, is completely arbitrary. Retaining out-of-state tolling statutes as mere time-saving measures for plaintiffs also makes little sense in states like Ohio where limitations and service are decoupled. There, the action satisfying limitations is the filing of the lawsuit—not effectuating service. *Goolsby*, 575 N.E.2d at 802. There is thus no need—in Ohio, at least—to extend limitations simply to give plaintiffs room to overcome service difficulties.

These days, if Ohio's tolling statute has any surviving purpose when applied to departing residents, it is to prevent resident talent and resident dollars from leaving the

state. But such protectionist motives doom the statute's application here. Accordingly, while past and present members of the Court have worried about the sometimes difficult "subjective judgments" or weighing of competing factors required in the *Pike* calculus, this is not one of those cases. *De Niz Robles*, 803 F.3d at 1175–76 (Gorsuch, J.); *Bendix*, 486 U.S. at 888, 897 (Scalia, J., concurring). The proper balancing is clear, as it was already done in *Bendix*, and it leads inexorably to one result: § 2305.15 cannot be constitutionally applied in this case.

3. The Sixth Circuit's reasons for dismissing these unique burdens are untenable. The lower court claims to see no unequal imposition of burdens between state residents and those "out-of-state" only because it focuses on an irrelevant distraction about the timing of Menendez's departure relative to the "transaction" involved in his treatment of Garber. Pet. App. 15a. Nothing about that transaction triggered § 2305.15's tolling rule, and thus the risk of tolling was not a "cost" imposed on Menendez's treatment of Garber. *Ibid.*

The statute's actual triggering point occurred only after he crossed state lines during his permanent move from Ohio to Florida. That is when § 2305.15's tolling effect kicked in, that is when Menendez was exposed to permanent liability, and that is what exposed him to a unique burden not experienced by residents, triggering scrutiny under the dormant Commerce Clause. Accordingly, the Sixth Circuit's focus on timing, and the gossamer thin distinction it seeks to impose between *non*-residents and *departing* residents, does nothing but pull focus from the true burdens imposed on departing residents under the statute.

The lower court's obsession with the timing of Menendez's departure is not only unsustainable as theory, it is unmanageable in practice. Imagine movers had taken Menendez's belongings to Florida while he stayed behind to treat Garber. Would he have been a nonresident then? Or say, as in *Newham*, 859 N.W.2d at 572, Menendez had refinanced a house in Ohio, and then defaulted on the loan only after he left. Did he depart before the "transaction"? During? After? And why exactly should the answers to these questions matter? The operation of the dormant Commerce Clause, and the potential for perpetual liability, should not turn on such imponderables.

4. The Sixth Circuit's conclusion that a tolling statute must impose a "cost" on a "traditional interstate business transaction" to trigger Commerce Clause scrutiny, or *Bendix*'s balancing, is also wrong. Pet. App. 15a.

It is impossible to find such a condition from *Bendix*, and the notion is at odds with *Bendix's* underlying facts. The transaction at issue in *Bendix* was not of the "traditional interstate" variety—any more than the transaction in this case. In *Bendix*, the defendant was an Illinois corporation. But the dispute itself was over the delivery and installation of a boiler that took place entirely within Ohio. 486 U.S. at 889-891. Here, the dispute is over Menendez's treatment of Garber in Ohio, but Garber now resides in Maryland. Pet. App. 28a,29a. The cases are mirror images of one another.

Further, nothing in this Court's other dormant Commerce Clause cases suggests that Congress's field-clearing power is limited only to interstate transactions. It governs interstate *commerce*. And ever since *Gibbons* v. *Ogden* established the core of Congress's Commerce

authority to encompass "traffic" and "intercourse," 9 U.S. (Wheat.) 1, 64, 89-90 (1824), it has been understood that interstate travel falls within Congress's regulatory powers. The Court has held that power encompasses the interstate "movement of persons as well as of property," *Hoke* v. *United States*, 227 U.S. 308, 320 (1912), whether "commercial in character," *Edwards*, 314 U.S. at 173 n.1, "intended to earn a profit," or not, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison, Me.*, 520 U.S. 564, 565 (1997). And that power incorporates the authority to regulate movement of a person, or that person's movement of others—because "a person may move or be moved in interstate commerce." *Hoke*, 227 U.S. at 283. It also makes no difference whether the positive aspect of that power is at issue, empowering Congress to keep the channels of interstate travel open, *Caminetti* v. *United States*, 242 U.S. 470, 484, 490 (1917), or the negative aspect, defining a zone of protection around interstate travel on which the States may not intrude. See *Edwards*, 314 U.S. at 171-173 (invalidating a state law prohibiting the transport of indigent persons into California). So long as it "includes movement of persons through more States than one," it is a matter that belongs exclusively to Congress. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256-257 (1964).

The panel mentions only one of these cases—*Edwards*—and the grounds the panel offers to distinguish it are unpersuasive. The lower court relied on the fact that *Edwards* involved a "complete ban on travel," while § 2305.15 is not so absolute. Pet. App. 14a. But "burdens" on commerce are just as impermissible as complete bans, so long as they interfere with the "natural functioning" of the interstate market. *McBurney*, 569

U.S. at 235. More importantly, this distinction cannot explain away the conception of interstate commerce that *Edwards* represents—a conception that is irreconcilable with the panel's position.

Moreover, the rationale underlying the panel's decision—that burdens on travel are essentially noneconomical, and therefore less deserving of protection than pure interstate transactions—is also silly. Restricting residents' right to leave the state, and relocate to another state, has a multifaceted commercial impact, sapping both the traveler and other states of economic benefits they might have otherwise enjoyed absent the restriction. The panel thus provides no reason to believe the century-old understanding of the activities protected under the Commerce Clause prohibits state interference with a resident's right to leave the state with any less force than it bars interference with a non-resident's right to conduct business within it.

5. The panel's disregard of Supreme Court authority from *Bendix* to *Edwards* is unsurprising because the panel is forthright about the fact that it is *not* attempting to fit its decision within established Commerce Clause boundaries. It is instead calling for those boundaries to be redrawn. Expressing frustration with the difficulty of "*Pike* balancing," Pet. App. 13a, and evoking the breadth of Congress's modern power to regulate commerce, which frequently "overlap[s]" the states' power over the same, *id.* 7a, the panel calls for a radical retreat for dormant Commerce Clause jurisprudence, such that the job of "polic[ing] and correct[ing] discrimination against multi-state commerce" would fall entirely to Congress, *ibid.*

The panel seems to see movement in this direction in cases like *McBurney* v. *Young*, 569 U.S. 221 (2013), suggesting that *McBurney* inverts dormant Commerce Clause jurisprudence to redefine many ostensible *burdens* on non-residents as mere *benefits* for in-state residents. But nothing in *McBurney* supports that overreaching interpretation, and the case otherwise marks no such retreat from established dormant Commerce Clause jurisprudence, which is why the opinion garnered unanimous support from the Court's members. Certainly, nowhere in *McBurney* or anywhere else has the Supreme Court backed off the foundational principle that the states, as members of a single union, are not permitted to engage in open commercial warfare with one another—and the field of "interstate commerce," broadly understood, is one on which they are prohibited from doing battle. While time may have augmented Congress's powers to regulate commerce, that is no reason to allow the states to renege on that basic bargain with one another.

The idea embraced by the panel that limitations defenses are mere locals-only benefits that States can give or take at their pleasure, Pet. App. 10a, 12a, also flouts *Bendix*. *Bendix* establishes that limitations defenses are more than state incentives for residents. They are instead part of the fabric of a state's commerce—"an integral part of the legal system," and an integral component of the "commercial sphere"—that all market participants fall within: residents, non-residents, and departing residents alike. *Bendix*, 486 U.S. at 894. *Bendix* likewise establishes that states cannot remove these defenses on a whim or withhold them from non-residents on unequal terms. Rather, they are constitutionally protected rights

that "the State may not withdraw on conditions repugnant to the Commerce Clause." *Id.* at 893. Taking these defenses away is therefore an interference "'with the natural functioning of the interstate market'" and an impermissible "burden" imposed on that interstate market. Pet. App. 11a (quoting *McBurney*, 569 U.S. at 235).

The panel departs from *Bendix* yet again in demanding that Dr. Menendez produce "evidence" (Pet. App. 12a) that he has suffered a cognizable interstate commercial burden. *Bendix* required no such evidence, and no evidence should be required now, because *Bendix* has settled that question by holding that stripping non-residents of limitations protections, and subjecting them to indefinite liability, *does* impose "significant" burdens and cognizable effects on interstate commerce. 486 U.S. at 891. That burden is the same whether one starts as a non-resident, or becomes a non-resident after the events giving rise to suit. And these are not "hypothetical." Pet. App. 12a-13a. They have already been recognized in *Bendix* to be very real.

Should evidence be necessary, the very fact that Menendez might be exposed to civil liability in perpetuity should prove more than sufficient to illustrate that § 2305.15's burdens would weigh heavily on anyone thinking about leaving the state. Studies confirm that litigation risks powerfully shape businesses' decision-making.[5] The potential for making those litigation risks

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[5] Catherine Tucker, *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity* 2 (MIT Sloan Sch. of Mgmt., Working Paper No. 5095-14, 2014); Colleen Chien, *Startups and Patent Trolls*, 17 Stan. Tech. L. Rev. 461, 461-62 (2014); see also Robin Feldman, *Patent Demands and Startup Companies: The View*

permanent would likely prove an equally powerful motivator. These powerful decision-shaping incentives could prove especially powerful for doctors, or any professional, given the effect they are likely to have on long-tail malpractice exposure. Malpractice premiums will likely rise, and will have to be paid out over a longer period, when departing professionals and their estates might face decades of legal exposure after their retirement. That should be more than enough to demonstrate the significance of the burden imposed by § 2305.15.

6. Finally, the panel's decision is also incorrect in ignoring the fact that § 2305.15 discriminates against departing Ohio residents—and therefore against non-residents—on its face. The same features that make § 2305.15's out-of-state tolling provision unfairly burdensome to departing Ohio residents also provide ample reason to invalidate it as facially discriminatory. Indeed, the Court in *Bendix* has already indicated that the statute *could* have been considered discriminatory because of its preference for residents over non-residents—although the Court did not go so far as to invalidate the law on that basis. The law subjects residents who leave Ohio to the same discriminatory treatment as other non-residents. The fact that the law casts a wide net of disadvantage, and is evenhanded among the various groups being discriminated against (non-residents and departing residents alike), does nothing to undermine the fact that discrimination is occurring within the statute—because

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from the Venture Capital Community 49 (UC Hastings Research Paper No. 75, 2013).

both non-residents and those who *become* non-residents are treated categorically worse than residents.

The burden that § 2305.15 imposes on departing residents is also not merely "incidental" to some other legitimate purpose. It is virtually *all* that the provision does any more. Accordingly, if there has been any weakening of the standards for *Pike* balancing, as the panel seems suggest, that is still not grounds to uphold the law.

C. The Question Presented is important.

Certiorari is also warranted because the question presented in this case is a recurring one of national significance. Limitations issues and tolling statutes are ubiquitous in litigation, and the dozens of published legal opinions on these tolling statutes' permissible application to travelers, movers and non-residents stand as a testament to the importance of these issues.

The controversy on these issues also encompasses a wide geographic scope. Eight states have laws like Ohio's that toll limitations regardless of whether the defendant is amenable to long-arm jurisdiction. *See supra* at 6. This case will directly impact the laws in all eight. Three *other* states have engaged in narrowing constructions to avoid confronting the precise constitutional issue in this case, This case is vitally important to these states too. The controversy at issue here thus impacts more than 20 percent of the States. That has obvious importance.

The erroneous legal rule applied below is also important to correct because of its potential adverse impacts on individuals and businesses. Permitting statutes like Ohio's to toll limitations for claims against departing residents economically penalizes businesses with indefi-

nite liability if they decide to move out of state, and holds residents considering such a move "hostage until the applicable limitations period expires," *Tesar* v. *Hallas*, 738 F. Supp. at 242, especially if they identify a liability-producing event immediately before a potential move.

These adverse effects are not limited to the would-be traveler. Any time tolling considerations dissuade a business from relocating, that deprives other states and out-of-state businesses of economic benefits they would have otherwise enjoyed. And it can also adversely affect "[t]he ability of business to recruit out-of-state personnel" if their "potential employees must forfeit statute of limitations protection" to relocate for a new job. *Tesar*, 738 F. Supp. at 242.

The penalty imposed on temporary travelers is almost equally significant, especially for those who habitually travel between states for work—such as salesmen, pilots, and truckers. That penalty would powerfully shape the decision-making of many businesspeople who are considering opportunities in other states, especially for those that, by their nature, habitually face suit, or identify a potential event of liability that occurs shortly before a planned departure.

There is thus room to question whether allowing statutes like Ohio's to toll limitations even against temporary travelers. Limiting these statutes' application to temporary travelers is certainly better at accommodating business interests than the Sixth Circuit's absolutist, commerce-ignoring approach. But policing the various distinctions involved, between "temporary" travel and permanent relocation, and "business" versus "personal" travel, will often be difficult to do. Things can get especially tricky for those who mix pleasure with their busi-

ness travel travel—like many truckers and pilots. That uncertainty will make it difficult for businesses to analyze their legal exposure, and will lead to unfairness when similar businesses are treated differently. Only plenary review by the Court can properly wipe the slate clean, and lead to the imposition of a single set of clear standards that minimize the adverse consequences for businesses from these outdated statutes.

D. This case provides a compelling vehicle to decide these issues.

This case presents an ideal vehicle to consider the question presented. This case lies at the intersection of several different strands in dormant Commerce Clause law. It incorporates a number of themes about interstate commerce itself, including the connection between interstate travel and interstate commerce. And because it encompasses rules that define differences between temporary travel and permanent relocation, it offers an opportunity to craft a coherent set of rules that will be applicable in all potential applications of these statutes. As the Sixth Circuit's approach is the most draconian of the bunch, it will thus serve as an attractive platform upon which the Court might wipe the slate clean and start afresh.

And because the Sixth Circuit's decision improperly applied *McBurney*'s holding on the constitutionality of locals-only benefits, it presents an opportunity to ensure that *McBurney*'s holding remains within its proper boundaries, and does not actually creep into this Court's other dormant Commerce Clause cases in the ways the Sixth Circuit suggests it does.

This case is also provides an attractive factual vehicle to consider this important question. Dr. Menendez's story perfectly captures the harshness and arbitrariness of the Sixth Circuit's rule, because he made no attempt to evade service. Garber's previous failures were the result of his inability to find someone willing to opine that Menendez's behavior was below the standard of care and his own dilatoriness. Yet Menendez is now subjected to liability in perpetuity, over treatment of a patient that ended almost a decade ago, based solely on his decision to retire from the practice of medicine and relocate his residence.

Dr. Menendez is also caught within the crosshairs of the intra-circuit conflict that did not exist until this panel's decision. Through a change in the law that could not have been foreseen, Menendez is subject to a new standard. The resulting inequity perfectly demonstrates why the standards must be realigned. And that provides an even more compelling reason for the Court to do so.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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