No. 20-___

In The
Supreme Court of the United States

ARROW HIGHWAY STEEL, INC.,
Petitioner,
v.
ROBERT DUBIN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the dormant commerce clause may be used to invalidate the application of a state's neutral, non-discriminatory tolling statute to defeat the enforcement of a former resident's stipulated judgment where there is no showing of any burden on or discrimination against interstate commerce.
2. Whether the dormant commerce clause applies to a state statute with no intended or demonstrated effect on interstate commerce.

PARTIES TO THE PROCEEDING

Arrow Highway Steel, Inc., ("Arrow"), Petitioner on review, was the plaintiff-appellant below.

Robert Dubin, Respondent on review, was the defendant-appellee below.

RULE 29.6 STATEMENT

Petitioner Arrow Highway Steel, Inc. has no parent corporation and no publicly held company owns more than 10 percent of its stock.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- *Arrow Highway Steel, Inc. v. Dubin*, Supreme Court of California, No. S265889. Minute order denying review entered Feb. 10, 2021,
- *Arrow Highway Steel, Inc. v. Dubin*, Court of Appeal of the State of California, No. B303289, reported at 56 Cal. App. 5th 876 (2020). Opinion filed October 29, 2020.
- *Arrow Highway Steel, Inc. v. Dubin*, Superior Court of Los Angeles County, California, No. EC068969. Judgment entered Oct. 29, 2019.

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PETITION FOR WRIT OF CERTIORARI

Arrow, Inc., respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS BELOW

The decision in the Los Angeles Superior Court dismissing the case is included in Petitioner's Appendix at 34a-49a. The Court of Appeal's decision affirming the dismissal (Pet. App. 4a-25a) is reported at 56 Cal. App. 5th 876 (2020). The California Supreme Court's order denying review is included at Pet. App. 2a.

JURISDICTION

The California Court of Appeal entered its decision on October 29, 2020. Petitioner timely sought review in the California Supreme Court, which was denied on February 10, 2021. This petition is timely based on Rule 13(1) of this Court and its order extending the time to file petitions for a writ of certiorari by sixty days. The Court has jurisdiction under 28 U.S.C. § 1257(a).

RULE 14.1(E)(IV) STATEMENT

This case involves the constitutionality of Section 351 of California's Code of Civil Procedure and 28 U.S.C. § 2403(b) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, clause 3 of the U.S. Constitution, the "Commerce Clause," provides that "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.

Section 351 of the California Code of Civil Procedure provides:

> If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

Cal. Code Civ. P. § 351.

STATEMENT

Respondent Robert Dubin ("Dubin") embezzled over a million dollars from Petitioner Arrow Highway Steel, Inc. ("Arrow") while serving as its fiduciary in California. He was imprisoned for these crimes. Arrow sued him for his fraudulent conduct and he stipulated to a civil judgment. Without paying any portion of the judgment Dubin subsequently moved to Nevada.

In 2018, Arrow sued Dubin to recover on the judgment. California Code of Civil Procedure Section 351 ("§ 351"), tolls the time to enforce a judgment, and made Arrow's enforcement action timely. Without

this tolling provision Arrow's judgment would have expired. The California courts below held that the statute was unconstitutional as applied to Dubin because enforcing his stipulated judgment would violate the "dormant" commerce clause.

Nothing in §351 has any intended, or even unintended, effect on interstate commerce. It is designed to ensure that California judgments can be enforced when a judgment debtor has left California for any reason, whether temporarily or permanently, and whether the departure has anything to do with commerce.

Despite the absence of any intended or demonstrated impact on interstate commerce, the courts below held that §351 was unconstitutional as applied, based on a "significant" burden on interstate commerce which they found outweighed any of California's interests in the enforcement of its judgments. Pet. App. 17a. The Court of Appeal concluded that a statute "significantly burdens interstate commerce" if it creates a theoretical "incentive" for a person "and his commercial activity – to remain in state rather than out of state." *Id.* Because a California resident might feel disincentivized to leave if she could not avoid the enforcement of valid judgments by operation of the statute of limitations, the court found §351 unconstitutional as applied to Respondent. Based on this analysis the courts below prohibited Petitioner from enforcing the stipulated judgment.

These decisions warrant review for two reasons. First, there is a significant, ongoing conflict among the federal circuits and state courts applying this Court's dormant commerce clause cases to neutral state statutes having no intended or demonstrated

impact on interstate commerce. Some courts have insisted on significant evidence of a burden on interstate commerce or discrimination against out-of-state parties before invalidating such statutes. Other courts, like the courts below, have applied the dormant commerce clause aggressively, without any actual evidence of burden or discrimination, to find such statutes unconstitutional.

This conflict is particularly pronounced for statutes tolling time for persons leaving the state, such as the statute below and numerous similar statutes nationwide. Some courts, such as the Sixth Circuit, refuse to strike such a state statute without a showing that tolling the statute of limitations for absent individuals poses a substantial burden on interstate commerce, rather than a hypothetical one. *See Garber v. Menendez,* 888 F.3d 839 (6th Cir. 2018). Other courts, such as the Eighth Circuit and the court below, strike similar statutes without requiring any showing of a substantial burden on interstate commerce. *See Rademeyer v. Farris*, 284 F.3d 833 (8th Cir. 2002). Review is needed to resolve the conflict as to how aggressively the dormant commerce clause is applied, as to tolling statutes such as this one and to statutes generally.

Second, these and other conflicting decisions demonstrate ongoing uncertainty about the scope of the dormant commerce clause in the context of neutral, nondiscriminatory statutes. This case is an example of the harmful effects of this uncertainty and the generally aggressive application of this Court's dormant commerce clause cases in that Arrow will be denied compensation from the fiduciary who has destroyed the corporation with his embezzlement, without any showing of any impact on interstate

commerce caused by the application of §351 in these circumstances.

Review by this Court is necessary to resolve these conflicts and to ensure that aggressive judicial application of the dormant commerce clause does not infringe on legitimate neutral state legislation.

1. Factual Background

Respondent Robert Dubin embezzled over a million dollars from Arrow, a California corporation with its principal place of business in California. Pet. App. 6a.; *see also* Appellants' Appendix 213. Arrow was a small family-owned business. *Id.*; Appellants' Appendix 213. Dubin forged checks from Arrow's bank account, put the stolen funds into his personal accounts, and altered Arrow's books, all in California. Pet. App. 38; Appellant's Appendix 253-54. Dubin was a California resident living in California at the time, and for 26 continuous preceding years, and served as Arrow's CPA in California from 1967 to 1994. Pet. App. 43a, 47a. Arrow was financially devastated and destroyed by the embezzlement, and was dissolved three years later in 1997. Pet. App. 38a, 47a.[1]

Dubin was convicted for this embezzlement in a federal district court, for which he was imprisoned for approximately three years, briefly released on parole in 1998, and then again imprisoned. Pet. App. 6a.

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[1] Arrow ultimately dissolved as a result of Dubin's actions. California expressly allows a corporation to wind up its affairs and that no action abates merely upon dissolution of the corporation, Cal. Corp. Code § 2010, though this and Arrow's standing was not at issue in the decision below given the superior court found standing and the Court of Appeal did not address the matter. Pet. App. 7a n.3.

Arrow filed suit against Dubin for his fraudulent conduct while he was in prison. Dubin stipulated to a civil judgment, in the amount of $937,000, which was entered on February 27, 1997. Pet. App. 35a. Arrow was dissolved the same year the judgment was entered. Pet. App. 38a. The judgment was never appealed, vacated, or set aside. Pet. App. 47a. Arrow, however, has recovered nothing on the judgment to date. *Id.* After stipulating to the judgment and being released from prison in California, Dubin moved to Nevada in 1998. Pet. App. 6a. According to Durbin, upon his release from prison in California all of his firm's books and records disappeared for entirely unknown reasons, and he decided to move to Nevada. Appellants' Appendix 46. He still lives in Nevada. Pet. App. 43a-44a. Apparently, he worked as a bookkeeper in Nevada. Pet. App. 38a.

Arrow filed to enforce the judgment against Dubin on July 3, 2018.[2] By that time, Dubin had been living in Nevada for 19 years. The time by which to enforce a judgment would have expired if Dubin remained in California, but was tolled under California law.[3] California's Civil Code provides that where a cause of action against a California resident has accrued, where, as here, a California resident then "departs from the state, the time of his absence" is not counted against a person with a cause of action against him. Cal. Code Civ. P. §351. Where a motion to enforce an

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[2] California provides creditors two options to enforce a judgment: they may file an action to enforce it, Cal. Enforcement of Judgments Law § 683.05, or renew the judgment. *Id.* §§ 683.110, 683.120. Pet. App. 9a.

[3] If the creditor decides to file to enforce a judgment, this must occur within 10 years of the entry of final judgment unless the time is tolled. Cal. Code Civ. P. § 337.5(b).

unpaid judgment is timely under California law, then the plaintiff is automatically entitled to judgment "as a matter of right." *E.g. Green v.* Zissis, 5 Cal. App. 4th 1219, 1223 (1992). The California statute has nothing to do with commerce, interstate or otherwise. The statute is intended to protect judgment creditors and prevent judgment debtors from avoiding a judgment by moving from California.

2. The Decisions Below.

Respondent moved for summary judgment on the basis that tolling in these circumstances would be unconstitutional under the dormant commerce clause, as it would extend the time to enforce the stipulated judgment. He offered no facts or evidence whatsoever in support of any purported burden on commerce from applying §351 to persons like him. *E.g.* Pet. App. 37a-39a.

The Los Angeles Superior Court held that courts may strike statutes that do not discriminate against out of state residents or interests if the court believes there was nonetheless a theoretical burden on interstate commerce, which was not "counterbalanced by state interests. . . ." Pet. App. 44a. The court found that this was the case "as applied to Dubin." *Id.* The court discounted any state interests protecting California judgment holders and their ability to collect valid judgments in circumstances like this. Pet. App. 44a-45a.

The Court of Appeal affirmed on similar grounds. The Court of Appeal agreed that California's statute is not discriminatory. Pet. App. 16a-17a. The statute's text does not treat local residents and interests more favorably than out-of-state ones. Pet. App. 16a. The statute's history shows there was no

intention to do so, and the statute does not have any notable practical discriminatory effect. *Id*. It applies regardless of the reason the debtor leaves the state or whether the departure is permanent or temporary.

However, the Court of Appeal found the statute was unconstitutional as applied to Dubin if a court believed there were burdens on interstate commerce and they were clearly excessive to the local benefits. Pet. App. 14a-15a. The court found that tolling the enforcement of a stipulated judgment against Dubin burdens interstate commerce. The Court believed the burden was heavy because a statute "significantly burdens interstate commerce" if it creates an "incentive" for a person "and his commercial activity – to remain in state rather than out of state." Pet. App. 17a. The court held that this was true for persons like Dubin, though it would be true of virtually any judgment debtor who moves from the state. Pet. App. 18a.

Petitioner sought review by the California Supreme Court. The California Supreme Court denied review. Pet. App. 2a. Justice Cuéllar stated that the Court should have granted the petition. *Id*.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG FEDERAL CIRCUITS AND STATE COURTS CONCERNING THE APPLICATION OF THE DORMANT COMMERCE CLAUSE TO TOLLING STATUTES LIKE SECTION 351, AND STATUTES GENERALLY.

The opinion below, that a neutral, non-discriminatory statute significantly burdens interstate commerce and may be stricken if the statute offers a theoretical "incentive" for a person "and his commercial activity – to remain in state rather than out of state," reflects a deep, ongoing conflict among circuits and state courts concerning tolling statutes, and the application of the dormant commerce clause generally. Pet. App. 17a. This Court should grant certiorari to resolve these conflicts.

A court may strike neutral statutes under the "dormant" Commerce Clause only if it finds a burden on interstate commerce that "is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and at minimum the burden is significant. *See* § II(B), *infra*. State laws will and should ordinarily survive such an analysis. *See, e.g.*, *Dep't of Revenue of Ky. v. Davis*, 553 U.S 328, 338 (2008) (collecting cases). Indeed, the dormant commerce clause "does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority" in its own laws. *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (citation omitted); *see also, e.g.*, *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) ("[N]ot every

exercise of local power is invalid merely because it affects in some way the flow of commerce between the States.") Indeed, much legislation could be said to affect interstate commerce in some way. Nonetheless, some federal and state courts have read this Court's jurisprudence to require aggressive application of the dormant commerce clause to non-discriminatory statutes.

This Court's last case striking such a statute, from which the Court of Appeal drew its analysis, was *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988). However, *Bendix* involved a much more significant burden on interstate commerce than this case. The Ohio statute at issue in *Bendix* exposed corporations operating throughout the country to indefinite liability and no tolling of any claims in Ohio, and by extension in states like it, or required the corporation to submit to general jurisdiction in Ohio for any claim against it. *Bendix* reflects its extreme facts. It did not overturn or modify *Pike*'s holding that neutral non-discriminatory statutes may only be stricken under the dormant commerce clause in very limited circumstances.

The Court of Appeal below itself acknowledged that its broader reading took one side in the conflict, and that its opinion was incompatible with the Sixth Circuit's decision in *Garber v. Menendez,* 888 F.3d 839 (6th Cir. 2018), *cert denied* 138 S. Ct. 1261 (2019). In contrast, *Garber* permitted tolling under a similar statute and rejected a dormant commerce clause challenge. The *Garber* court rejected the argument that the statute is unconstitutional because it "discourages Ohio residents from moving by adding a cost to relocating and by depriving other States of the

commercial benefits that new residents might bring." *Id.* at 844. *Garber* held, more in keeping with *Pike*, that there must be some evidence of a significant burden on interstate commerce to support a dormant commerce clause challenge to neutral statutes. *Id.* at 845. The defendant offered none, and it was not obvious why the possibility of being subjected to tolling for torts when he was a resident in Ohio would preclude a doctor from leaving the state to retire or have a significant effect on commerce there. *Id.*

Garber also reveals another problem with decision below. "Many state benefits stop when a resident leaves a State. . . . *All* of these policy choices . . . provide benefits to residents that the residents put in jeopardy if they move. In truth, States discourage residents from leaving whenever they provide residents with policies they like." *Id.* at 844. If courts adopted the Court of Appeal's view that an incentive for residents to stay inherently creates a significant burden on interstate commerce, and one which requires weighing and nullifying state interests, then, as *Garber* found, "we would have to travel down the path of saying that all state policy benefits reserved for residents need to satisfy *Pike* balancing because all in-state benefits potentially affect commerce by potentially affecting where people choose to live." *Id.* 846.

The Eighth Circuit, on the other hand, dispensed with the *Garber* analysis. In *Rademeyer v. Farris*, 284 F.3d 833 (8th Cir. 2002), the plaintiff sued a defendant residing in the state for breach of fiduciary duty concerning the fraudulent and misleading sale of shares of a company. *See id.* at 836. After committing the fraud the defendant moved away to Florida. *Id.* at 838. The plaintiff challenged the lower court's holding

that Missouri's tolling statute was unconstitutional. *Id.* Underscoring the state interest, in *Rademeyer*, the State of Missouri intervened to defend the application of its tolling statute. The Eighth Circuit, without extensive analysis, concluded that the burden was excessive, and struck Missouri's statute as unconstitutional. *Garber* and *Rademeyer* are in direct and irreconcilable conflict.

In addition to the conflict in the Circuits, there is a conflict in state appellate court decisions applying this Court's dormant commerce clause jurisprudence.

Some state appellate courts have upheld tolling statutes once a resident moved out of the state after a cause of action accrued. For example, Ohio's Court of Appeal adopted the reasoning in *Garber*, and found that a similar statute was valid as applied to a defendant who left and found a job in another state. *See Dewine v. State Farm Ins. Co.*, 163 N.E.3d 614, 623-26 (Ohio Ct. App. 2020).

Other state courts have adopted reasoning similar to the Court of Appeal's here and invalidated such statutes. *See First Tenn. Bank Nat'l Ass'n v. Newham*, 859 N.W.2d 569, 574 (2015); *State ex rel Bloomquist v. Schneider*, 244 S.W.3d 139, 142, 144 (Mo. 2008) (en banc), *abrogated on other grounds, State ex rel Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41 (Mo. 2017). The Alaska Supreme Court's view has been that under *Bendix* a state may not, under any circumstances, constitutionally toll statutes of limitation where a person has left a state, provided that during the time they "engaged in interstate commerce," without indicating what "engag[ing] in interstate commerce" means. *Kuk v. Nalley*, 166 P.3d 47, 54 (Alaska 2007).

Opinions such as those below and *Rademeyer*, that a neutral, non-discriminatory statute poses a significant burden on interstate commerce and may be stricken if it offers an "incentive" for a person "and his commercial activity – to remain in state rather than out of state," reveal conflicts among federal and state courts and conflicts with this Court's cases. Pet. App. 17a. The conflict is significant with respect to tolling statutes.

The conflict is further significant for the application of the dormant commerce clause generally. Courts should not aggressively strike nondiscriminatory statutes based on the court's view that the state's statute is unimportant when there is no demonstrated substantial burden on interstate commerce, as this Court has suggested. Accordingly, some federal circuits, including the Ninth, require evidence of a genuinely substantial burden on interstate commerce to strike down state statutes. *See, e.g.*, *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) ("A critical requirement for proving a violation of the dormant Commerce Clause is that there must be a *substantial burden on interstate commerce.*"); *id.* at 1156 (holding that in the absence of such a burden "we need not determine" the purported benefits of a statute); *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 731 F.3d 843, 847 (9th Cir. 2013) (similar); *Pharm. Research & Mfrs. of Am. v. Cnty. of Alameda*, 768 F.3d 1037, 1044-45 (9th Cir. 2014) (rejecting dormant commerce clause challenge because the plaintiff had not provided evidence of a substantial burden on interstate commerce). Other federal circuits, such as the Eighth Circuit, treat the dormant commerce clause differently, and like the court below, permit striking statutes without evidence

of a substantial burden. *See R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 736 (8th Cir. 2002) (striking statute notwithstanding there was "little evidence in the record" of a purported burden on interstate commerce, given the court concluded the importance of Missouri's statute importance was "de minimis"). Outside the context of tolling, the extent to which striking a statute under the dormant commerce clause requires a substantial burden on interstate commerce varies circuit by circuit, and even case by case.

The Court should grant review to resolve these conflicts, and conclude that basic principles of federalism establish that tolling and other statutes with no intended or demonstrated impact on interstate commerce fall within the authority of state legislatures to resolve.

II. THE ISSUE IS ONE OF NATIONAL IMPORTANCE REQUIRING THE COURT'S INTERVENTION.

A. The Case Raises a Significant Issue Which Will Recur Throughout the Country, Causing Substantial Uncertainty.

Nearly every state has some tolling statutes related to a defendant's absence from the state. These statutes perform important purposes.[4] There is

[4] California itself has long held the tolling statute reflects a state interest, to "alleviate[] any hardship that would result by compelling plaintiff to pursue a defendant out of state," even if service outside the state would be legal. *Dew v. Appleberry*, 23 Cal. 3d 630, 637 (1979). The interest is a reasonable one; and indeed, California's Supreme Court upheld the same tolling statute as applied to a California resident who left the state. *Id.* A state's residents may travel and move, even for short periods

ongoing confusion as to how, if at all after *Bendix*, the dormant commerce clause relates to tolling for individuals who leave the state, and whether such statutes are ever constitutional. The courts below, based on their reading of *Bendix*, applied what amounts to a categorical ban on the application of such statutes, at least where a person's absence purportedly facilitates interstate commerce.

In the decades since *Bendix*, there has been a patchwork of state responses by judicial or legislative actions. For example, North Dakota found it necessary to revise its tolling statute, previously similar to California's statute, because of *Bendix*. The concern appears to have been that the commerce clause rendered unconstitutional any tolling by a state against its residents if they could be legally subject to service – even if the plaintiff faced difficulties or impossibilities in effective service. The new statute provides that there could be no tolling if the state had "jurisdiction over a person during the person's absence." N.D. Cent. Code Ann. § 28-01-32 (West).

Other state courts have employed limitations of their statutes in atextual, and somewhat tortured analyses of their statutes to avoid running afoul of *Bendix*. For example, in *Kuk*, the Alaska Supreme Court rejected tolling under Alaska's similar tolling statute as applied to an Alaska resident temporarily outside Alaska for several months for health reasons, defeating the plaintiff's claim. *Kuk*, 166 P.3d at 49-50, 54-55. The court held that Alaska's statute tolling claims against residents out of state could not apply,

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of time. This often affects service and makes this more difficult, even if they theoretically may be served.

since service on the defendant could have occurred. *Id.* at 54-55. It recognized that the interpretation clearly departed from the statute's "plain language." *Id*. at 53. The Court also explained its view of *Bendix*, that wherever a person was absent for purposes of "interstate commerce," a state may never, under any circumstances "constitutionally stop the running of a period of limitations" regardless of the reason, for any time, and regardless of the matter tolled. *Id.* It underscored that there was also "considerable uncertainty" concerning how *Bendix* was applied. *Id.* at 54. Indeed, there is uncertainty as to what "interstate commerce" even means in this context. *Id.*

In light of this confusion, several other states have, by judicial decision or preemptive legislation, modified tolling statutes in varying ways. Others have not. Whether states may toll time to file against residents who subsequently leave the state, and when, requires guidance.

B. This Court Should Make Clear that Courts Should Not Strike Non-Discriminatory Statutes That Create No Significant Burdens on Interstate Commerce.

Contrary to the decision below and federal and state court decisions like it, the dormant commerce clause should not be used to invalidate neutral, non-discriminatory state statutes without an actual and demonstrated significant burden on interstate commerce.

The statute here, like comparable statutes from other states, has nothing to do with interstate commerce and does not burden it by purpose or application. In interpreting *Pike* and *Bendix* to permit

striking a statute in such circumstances, the court below, and others like it, have expanded the reach of the dormant commerce clause beyond its constitutional purpose.

In *Pike* the burden on interstate commerce – legally requiring a corporation to conduct its operations in Arizona, rather than California, at a cost of $200,000 to it – was not only significant but "virtually per se illegal." *Pike*, 397 U.S. at 145. The burden in *Bendix* was, for reasons addressed above, "significant." *Bendix*, 486 U.S. at 891. While these decisions struck statutes under the dormant commerce clause, this Court emphasized the narrow role the dormant commerce clause should play in evaluating neutral, non-discriminatory statutes. Burdens on interstate commerce cannot "clearly exce[ed]" any possible state interest when there are no apparent or significant burdens. *Pike*, 397 U.S. at 142. In such circumstances, courts should not engage in hypothetical balancing of interests to strike a statute.

The judiciary's ability to strike neutral, non-discriminatory legislation under the dormant commerce clause is and should be exceptionally limited. Indeed, as Justice Scalia noted, even where a neutral statute arguably does significantly burden interstate commerce, *Pike* and *Bendix* should never be extended or apply beyond their identical facts given the many problems the doctrine poses in striking such statutes. *See Davis*, 553 U.S. at 359-60 (Scalia, J., concurring); *Bendix*, 486 U.S. at 897-98 (Scalia, J., concurring in judgment); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part). As Justice Scalia frankly observed, "once one gets beyond facial discrimination our negative Commerce

Clause jurisprudence becomes (and long has been) a quagmire." *W. Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (internal quotation marks omitted); *see also, e.g.*, *Kuk v. Nalley*, 166 P.3d at 54 (noting "considerable uncertainty" after the court's *Bendix* decision).

Other justices have suggested that *Pike* and *Bendix* should be overruled entirely, and should never permit striking a non-discriminatory statute. *See, e.g.*, *Davis*, 553 U.S. at 361 (Thomas, J., concurring in judgment) (finding there to be no basis for the dormant commerce clause at all, let alone with respect to neutral, evenhanded statutes); *McBurney v. Young*, 569 U.S. 221, 237 (2013) (Thomas, J., concurring) ("I continue to adhere to my view that 'the negative Commerce clause has no basis in the text of the Constitution, makes little sense, and has provided virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute."); *United Haulers Ass'n,* 550 U.S. at 349 (Thomas, J., concurring) (similar); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,* 520 U.S. 564, 610–11 (1997) (Thomas, J., Rehnquist J., and Scalia, J., dissenting) (similar); *see also South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101 (2018) (Gorsuch, J., concurring) (noting the negative commerce clause itself is dubious, but the extent to which it is justified is "for another day.").

Petitioner respectfully urges this Court to re-examine this doctrine and its application since *Pike* and *Bendix* in this case. The Court should, at a minimum, take this case to hold that such statutes may be stricken under the dormant commerce clause – if at all – only where there is a substantial, demonstrated burden on interstate commerce.

III. THE CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED.

The issues raised in this Petition underscore why the case is an excellent vehicle for resolving these federal circuit and state conflicts. The case is a clear example both of the extremes to which *Bendix* has been distorted for tolling statutes, and of a court striking a statute without any evidence of a substantial burden. Upholding California's statute as applied to Respondent or persons like him creates no significant burden on interstate commerce. The case represents an ideal vehicle through which to clarify that courts may not so aggressively strike such statutes, or any, under the dormant commerce clause. There is also no question that the case proceeds and results in judgment for Petitioner if the tolling statute is not stricken.[5]

Further percolation is also not productive here. Confusion surrounding *Bendix* and whether tolling statutes for out of state defendants may ever be constitutional has persisted for decades. This confusion has resulted in a patchwork of approaches, leaving individuals throughout the country with substantial uncertainty as to whether or when, and to what extent tolling statutes actually apply. The question of when – if ever – courts should strike non-discriminatory statutes under the dormant commerce clause has also received little recent guidance from

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[5] *E.g. Green v.* Zissis, 5 Cal. App. 4th 1219, 1223 (1992) (holding that where a motion to enforce an unpaid judgment is timely under California law, then the plaintiff is automatically entitled to judgment "as a matter of right.")

the Court, resulting in uncertainty as to when state laws generally may or may not be stricken as well.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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