No. 21–27

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Petitioner Arrow Highway Steel, Inc., filed this action in a California court to enforce a state court judgment against Robert Dubin. The record below reveals an unresolved factual dispute about whether Arrow transferred its interest in that judgment before Arrow was dissolved in 1997. If Arrow's ownership of the judgment is uncertain, can Arrow establish Article III standing to enforce that judgment and seek relief in this Court?

2. California has a law that tolls a statute of limitations indefinitely while a defendant is out of state. This Court considered a similar Ohio tolling law in *Bendix Autolite Corp. v. Midwesco Enter-prises, Inc.*, 486 U.S. 888 (1988). There, this Court held that a tolling law may not constitutionally be applied to defendants engaged in interstate commerce in situations where the tolling law would serve no legitimate purpose. Here, Dubin raised a statute of limitations defense while residing outside of California and while engaged in an interstate accounting business. On the facts of this case, did California courts properly apply *Bendix*, properly decline to apply the California tolling law, and therefore properly hold that Arrow's action was barred by the applicable statute of limitations?

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INTRODUCTION

There are jurisdictional, merits, and policy grounds for denying review here—a trifecta of reasons not to grant Arrow's petition for a writ of certiorari.

1. *Jurisdiction*. Arrow comes to this Court unable to demonstrate its Article III standing. Arrow filed this action to enforce a judgment against Dubin, but the record reveals conflicting evidence about whether Arrow has an interest in that judgment. When Arrow was dissolved as a corporate entity more than two decades ago, it filed a certificate with the California Secretary of State attesting that its known assets had been distributed. The judgment Arrow seeks to enforce here predates the dissolution. But more recently, the son of Arrow's principal declared that he does not recall Arrow transferring its interest in the judgment and that he has been unable to find a record of a two-decades-old transfer. Arrow's Article III standing hinges on this factual dispute, which no court has resolved. The Court should not grant certiorari in a posture where its jurisdiction to proceed is uncertain.

2. *Merits*. States may legislate to benefit local interests if they do not unduly burden interstate commerce. *E.g.*, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960) (collecting cases). The Court applied this bedrock principle to statutes of limitations in *Bendix*, 486 U.S. 888. This case presents the same confluence of interests and the same basic fact pattern that the Court considered in *Bendix*, and the California courts faithfully applied

Bendix. Arrow has not asked the Court to overrule *Bendix*, thus this case is ill-suited for review.

Like *Bendix*, this case involves a state law that tolls statutes of limitations indefinitely while defendants are out of state. *Bendix* noted that statutes of limitations "are an integral part of the legal system and are relied upon to protect the liabilities of persons and corporations active in the commercial sphere." *Id.* at 893. The plaintiff in *Bendix* had relied on a tolling law to override the statute of limitations, but the defendant successfully invoked the Commerce Clause to avoid applying the tolling law. *Id.* at 889–90. The tolling law in *Bendix* was a vestige of the bygone era when States protected local plaintiffs who could not sue defendants *at all* unless those defendants could be found and served within state boundaries, a purpose no longer valid in light of modern long-arm statutes enabling service in other states, *see id.* at 893–94. Absent some other justification, the tolling law imposed an unacceptable burden on a defendant engaged in interstate commerce. *Id.* at 894–95.

This case fits *Bendix*'s rule hand-in-glove. Plaintiff Arrow sued Defendant Dubin in a California court. Dubin was engaged in an interstate accounting business. Under the applicable California statute of limitations, Arrow's suit was untimely. To defeat the statute of limitations, Arrow relied on California's tolling law because Dubin lived outside California. But Arrow was able to serve Dubin with the complaint and Dubin answered. The tolling law served no purpose, it merely purported to prevent an interstate businessman from relying on a statute of limitations

defense—the very issue *Bendix* addressed. California courts properly applied *Bendix*, holding it would be unconstitutional to apply California's tolling law on the record here. They granted Dubin summary judgment based on the statute of limitations.

Reviewing this fact-bound application of *Bendix* would serve little purpose. Arrow does not show that lower courts are having difficulty applying *Bendix* in cases involving statutes of limitations. The cases Arrow cites simply show that the results in the lower courts vary depending on whether the defendant was (or was not) engaged in interstate commerce. That is a component of this Court's analysis in *Bendix*, not a conflict supporting certiorari. Arrow is unable to show that the result in this case would have been different in another state or federal court.

3. *Policy*. Both before and since *Bendix* was decided, state legislatures and courts have embarked on pertinent legal reforms. States adopted long-arm statutes to enable service of process on out-of-state defendants. States also deleted or modified tolling statutes (like those here) in recognition of the rights of out-of-state defendants. Granting certiorari could upend those salutary efforts to modernize state law. As States have recognized, *Bendix* shone a light on tolling laws that served no valid purpose and made no sense. This Court should not disturb ongoing efforts by States to amend their laws accordingly.

The Court should deny Arrow's petition.

STATEMENT

Arrow retained Dubin as an accountant to perform bookkeeping and other tasks that required communications with out-of-state lenders and insurers. (Pet. App. 37a–38a.) Arrow and its principals sued Dubin alleging he embezzled company money. (Pet. App. 6a.) In February 1997, Arrow, Dubin, and others stipulated to a judgment requiring Dubin to pay Arrow almost $1 million. (*Id.*; 1 AA 10–13.)

Later that year, in December 1997, Arrow's sole director, Seymour Albert, dissolved the corporation. (1 AA 178; *see* Pet. App. 7a n.3.) The director signed a sworn Certificate of Dissolution that was filed with the California Secretary of State. (1 AA 178.) The certificate attested that

> 2. The corporation has been completely wound up.
> 3. The corporation's known debts and liabilities have been paid.
> 4. The corporation's known assets have been distributed to the persons entitled thereto.

(*Id.*)

The next year, 1998, Dubin moved to Nevada and started a new accounting business serving clients across the nation and around the world. (Pet. App. 6a, 38a.) Dubin has remained in Nevada since then.

More than two decades after stipulating to the judgment, Arrow filed this action in a California court to enforce whatever rights might remain under the judgment against Dubin. (Pet. App. 7a.) Though Dubin was out of state, Arrow was able to serve the complaint and it made no record that doing so was cumbersome. (*See* 2 AA 331 (noting proof of service of summons).) Dubin answered. (1 AA 14–19.)

Dubin later moved for summary judgment on two distinct grounds. (1 AA 27–28.)

First, Dubin noted that Arrow's assets were long ago distributed, meaning that Arrow no longer had an interest in the judgment and thus could not be considered a real party in interest under principles of California law. (1 AA 42.) Dubin also argued, based on the dissolution certificate, that a dissolved corporation that had long ago wound up its affairs should not be permitted to sue. (1 AA 41–42.)

Second, Dubin argued that Arrow's enforcement action was barred by a ten-year statute of limitations in California Civil Procedure Code section 337.5(b). (Pet. App. 41a–42a.) Dubin acknowledged that a different statute ostensibly tolled the ten-year statute indefinitely because he had left California. (*See* 1 AA 33 (quoting Cal. Civ. Proc. Code § 351).) But Dubin argued that applying this form of tolling in his case would violate the Commerce Clause in light of his past and present interstate accounting work. (Pet. App. 42a–43a.)

Arrow opposed summary judgment and disputed Dubin's Commerce Clause analysis as

applied to the facts here. (Pet. App. 45a–47a.) Arrow also responded to Dubin's first ground by producing a declaration from Gary Albert, the son of the director who had dissolved Arrow two decades before. (1 AA 213.) He relied on a lack of knowledge of a transfer of corporate assets to prove the documented transfer did not happen:

> To my knowledge, the judgment in favor of Arrow and against Dubin in *Arrow Highway Steel, et al. v. Robert Dubin*, L.A.S.C. Case No. BC101768, has never transferred or distributed to any person or individual. I have searched all existing corporate records of Arrow, to the extent they exist, and have found no evidence of any such transfer or distribution. Accordingly, it remains in the possession of Arrow.

(1 AA 212–14.)

The trial court acknowledged the parties' dispute about Arrow's ownership of the judgment and denied summary judgment on this state law real-party-in-interest ground. (Pet. App. 39a–41a.) But the trial court granted summary judgment to Dubin on the dormant Commerce Clause ground. (Pet. App. 41a–48a, 51a.)

The California Court of Appeal affirmed the summary judgment for Dubin. The court began by following the analytical framework in this Court's controlling decision in *Bendix*. (Pet. App. 4a–5a, 12a–15a.) Applying *Bendix*, the Court of Appeal concluded

that Dubin was engaged in interstate commerce as an accountant, and that section 351 imposed a "'significant' burden on interstate commerce"—forcing Dubin to choose between returning to California until the limitations period expires and forfeiting his limitations defense by remaining outside California indefinitely—a burden that easily outweighed the "weak" state interest in tolling. (Pet. App. 17a–19a (citation omitted).)

The California Supreme Court later denied review. (Pet. App. 2a.) Arrow now seeks certiorari.

REASONS FOR DENYING THE PETITION

I. Arrow cannot demonstrate Article III standing.

A. A state court plaintiff seeking certiorari must show an Article III injury that is independent of the contested state court decision.

"Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.' For there to be a case or controversy under Article III, the plaintiff must have a "'personal stake"' in the case—in other words, standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citation omitted).

The requirement of a "personal stake" obligates a plaintiff to identify a unique "injury," meaning "an

invasion of a legally protected interest which is [ ] concrete and particularized." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). At the initial stage of a case, it is necessary for a plaintiff only to "allege a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). But a plaintiff cannot rest on allegations indefinitely. A plaintiff must ultimately prove his personal stake "with the manner and degree of evidence required at the successive stages of the litigation"—including conclusive proof accepted by the factfinder "at the final stage," if the "facts [are] controverted." *Lujan*, 504 U.S. at 561.

Federal district courts routinely apply these principles in evaluating whether a plaintiff has pleaded and proven an injury establishing standing. But applying these principles is not the job of district judges alone. This Court has an equivalent obligation to confirm the Article III standing of a petitioner invoking this Court's jurisdiction. *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019); *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) ("[Article III] standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'") (quoting *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997)).

This Court usually encounters disputes about Article III standing in cases initiated in federal courts. But that is not the only context in which these disputes arise. A party to state court litigation who seeks this Court's review must also establish Article III standing, whether or not the state courts required

that showing. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617–18 (1989).

In a case coming to this Court from a state court, the standing inquiry differs depending on the petitioner's status. A state court *defendant* petitioning for certiorari may point to the adverse state court decision itself as the "direct injury" establishing Article III standing. *Id.* at 618 ("[A]s a result of the state-court judgment, the case has taken on such definite shape that [defendants] are under a defined and specific legal obligation, one which causes them direct injury."). Not so for state court *plaintiffs* petitioning for certiorari. They must identify an Article III injury independent of the state court decision denying the relief they sought. *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 432–35 (1952); *see ASARCO*, 490 U.S. at 623 n.2 (distinguishing *Doremus* on this basis); *id.* at 634 (Rehnquist, C.J., concurring and dissenting) ("The Court now says that although the *Doremus* case is good law for plaintiffs who lack standing but lost in the state court on the merits of their federal claim, it is not good law for such plaintiffs who prevailed on the merits of their federal question in the state courts.").

Careful adherence to these principles ensures that federal courts avoid resolving "hypothetical or abstract disputes." *TransUnion*, 141 S. Ct. at 2203. After all, "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

B. Arrow's purported injury is the impairment of its right to enforce a judgment. But Arrow cannot conclusively establish an interest in that judgment.

Here, Arrow sued Dubin in a California court, asserting rights under a February 1997 judgment in which Arrow was a judgment creditor and Dubin was a judgment debtor. (Pet. App. 34a–35a.) But the record reveals an unresolved factual dispute about whether Arrow retains any interest in that judgment today. On one hand, contemporaneous corporate records show that all assets—which would include the judgment here—had been distributed to others in the course of winding up the company. (1 AA 178.) It may be that the company sold the right to collect the judgment to a third party, or the company assets were divvied up in a way that accounted for the value of the uncollected judgment, but the details are lost in the mists of time. On the other hand, someone who had no involvement in the company at the time, but today has access to some of the old records (the son of the company's director), cannot find a record of how, exactly, the company disposed of its asset. (1 AA 213–14.)

These competing accounts are difficult to reconcile without concluding that the director's son's declaration has no evidentiary value. After all, he was able to say only, "[t]o my knowledge," that Arrow's interest was not transferred. (1 AA 213.)

Wherever the truth lies, at the very least, there is an unresolved factual dispute. The trial court

acknowledged the dispute (Pet. App. 40a–41a), but could not resolve it at the summary judgment stage. A factfinder was needed to decide the point. *See Lujan*, 504 U.S. at 561 (requiring the elements of standing, "if controverted," to be "'supported adequately by the evidence adduced at trial'" (citation omitted)). Yet there is no prospect of convening a trial to resolve this dispute now. The California courts have completed their work on this case. And this Court does not resolve such factual disputes. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view . . . .").

This unresolved factual dispute forecloses Arrow from establishing its standing to sue under Article III. Arrow seeks to invoke this Court's jurisdiction, so it bears the burden of proving an Article III injury. But Arrow cannot satisfy that burden because it is (at best) unknown whether Arrow has any remaining interest in the unpaid judgment that is its claimed injury.

California has not adopted this Court's Article III jurisprudence, so the courts below did not consider Arrow's Article III standing. The trial court did rule that Arrow had "legal capacity as a dissolved corporation to bring this action." (Pet. App. 39a–41a.) But that inquiry focused on a corporation's state law right "to wind up its affairs and to prosecute actions to collect obligations." (Pet. App. 40a.) The Article III inquiry here is different. In any event, "standing in federal court is a question of federal law, not state law," and "the fact that a State thinks a private party should have standing to seek relief . . . cannot override

our settled law to the contrary." *Hollingsworth*, 570 U.S. at 715.

The fact that the procedural posture of this case makes this Court's review inappropriate should be no cause for concern. First, Arrow had a full and fair opportunity to be heard in the California courts, which adjudicated the tolling issue presented here in thoughtful decisions. California courts are properly entrusted with the responsibility "to render binding judicial decisions that rest on their own interpretations of federal law." *ASARCO*, 490 U.S. at 617; *see* U.S. Const. art. VI, cl. 2. Second, it is a fluke that, on the unusual facts of this case, Arrow is unable to establish Article III standing. There is no feature of California's tolling law that disables plaintiffs from seeking review by this Court generally. The tolling law applies to all civil actions, not merely actions to enforce judgments, increasing the opportunities for review. In the overwhelming majority of cases, a plaintiff's injury in fact will not be in doubt. Thus, there is "no reason to fear that our dismissal of the present appeal would lead to a legal landscape in which we would no longer have the opportunity to review many important decisions on questions of federal law." *ASARCO*, 490 U.S. at 636–37 (Rehnquist, C.J., and Scalia, J., concurring and dissenting).

II. The Court's decision in *Bendix* controls and does not require elaboration.

A. *Bendix* held it could be unconstitutional to apply tolling laws absent a valid purpose.

A generation ago, this Court held in *Bendix* that a state statute that tolls a statute of limitations while a defendant is out of state might (depending on the facts) impermissibly burden interstate commerce, making it unconstitutional to apply the tolling statute against that defendant. 486 U.S. at 891–95. *Bendix* involved an Illinois company that sold and installed a boiler system at an Ohio factory. The Ohio company sued the Illinois company in Ohio six years after a four-year statute of limitations had been triggered, claiming the suit was timely because an Ohio statute tolled the limitations period while the Illinois company was "out of the state." *Id.* at 889–90 & n.1. The district court "dismissed the action, finding that the Ohio tolling statute constituted an impermissible burden on interstate commerce." *Id.* at 890–91.

This Court affirmed. The Illinois company was plainly involved in interstate commerce, and this Court concluded that the Ohio tolling statute imposed a "significant" burden on interstate commerce. *Id.* at 889–90, 891–92. Because a statute of limitations defense is "an integral part of the legal system," States "may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain." *Id.* at 893. The Ohio tolling statute forced the Illinois company to "subject itself to the general jurisdiction

of the Ohio courts"—encompassing "any suit," whether connected to Ohio or not—simply "[t]o gain the protection of the limitations period" that otherwise applied. *Id.* at 892.

In contrast to that "significant" burden on a defendant engaged in interstate commerce, the State's interest in tolling was minimal to non-existent. *See id.* at 894–95. This Court rejected the notion that a tolling statute protects State residents from defendants who incur liability "within the State but later withdraw from the jurisdiction"; those residents may rely on long-arm statutes to serve and sue defendants "throughout the period of limitations." *Id.* at 894; *accord Garber v. Menendez*, 888 F.3d 839, 841–42 (6th Cir. 2018) (explaining that, once "the Due Process Clause no longer required in-state personal service on defendants for a state court to exercise personal jurisdiction over them[,] . . . every State enacted a long-arm statute that allowed claimants to file lawsuits against out-of-state defendants . . . . [Thus,] the most salient justification for tolling the statute of limitations against out-of-state defendants no longer existed." (citations omitted)).

B. The decision below applied *Bendix* in materially similar circumstances.

Here, the California courts confronted a fact pattern similar to *Bendix* and faithfully applied this Court's decision. The California Court of Appeal held that Dubin was involved in interstate commerce, both while working for Arrow long ago, and "currently, in his interstate and international accounting, bookkeeping and tax practice." (Pet. App. 16a.) That

court also held that, "[l]ike the state tolling law at issue in *Bendix*, section 351 places a 'significant' burden on interstate commerce" by forcing defendants to choose between avoiding California and raising a limitations defense. (Pet. App. 17a (citation omitted).) Section 351 coerces out-of-state defendants and their commercial activities "to remain in state rather than out of state." (Pet. App. 17a.) "And like the putative state interest underlying the Ohio tolling law in *Bendix*, the putative state interest advanced by section 351 is weak." (Pet. App. 18a.) Just "[l]ike the law at issue in *Bendix*, the advent of long-arm statutes" renders "section 351's original function [ ] largely a quaint relic of the bygone era." (*Id.*)

The decision below hews so closely to *Bendix*—factually and legally—that this Court could not reverse the decision below without overruling *Bendix*. Yet Arrow has stopped short of asking for *Bendix* to be overruled. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 n.5 (2020) ("Before overruling precedent, the Court usually requires that a party ask for overruling . . . ."). And there is no reason here to grant certiorari to affirm, since *Bendix* already provides the rule of decision in such cases. This case is simply unsuitable for this Court's review.

C. The decision below is consistent with other lower courts' decisions.

Arrow asserts that this case implicates an "ongoing conflict" between federal and state decisions applying *Bendix* to "neutral state statutes having no intended or demonstrated impact on interstate

commerce." (Pet. 3–4.) This assertion is mistaken in two fundamental respects.

First, the conflict Arrow articulates does not embrace this case because section 351 *has* a "demonstrated impact on interstate commerce." This case is a good example. Dubin introduced evidence that he worked at accounting firms representing clients (including Arrow) that required him to communicate with insurers and banks in multiple states. (1 AA 44–45.) When Dubin started his own California accounting practice, he continued to represent Arrow and "many clients who were out of state." (1 AA 45.) The judgment Arrow seeks to enforce here was based on claims arising from that accounting work. (*See* 1 AA 57, 61–62, 64–69.) When Arrow later filed this action, Dubin had moved to Nevada to start a new accounting practice "represent[ing] clients all over the United States" and in foreign countries. (1 AA 46–47; *see* 1 AA 117–32 (list of non-Nevada clientele).) These facts—none of which Arrow disputed below (1 AA 247–51)—undermine Arrow's contention that section 351 has no impact on interstate commerce, or does so only in a "theoretical" way. (Pet. 7, 9.) The impact of the statute of limitations on an interstate business like Dubin's accounting practice is not different from the impact on the Illinois company in *Bendix*. As Arrow ultimately concedes, "much legislation could be said to affect interstate commerce in some way." (Pet. 10.)

Second, the conflict claimed by Arrow is illusory. It's true that some courts have accepted constitutional challenges, while other courts have rejected them. But the difference in results amounts

to whether each particular defendant was, or was not, engaged in interstate commerce. In this case, for example, a California court refused to apply section 351 because interstate commerce was implicated (Pet. App. 15a–16a), while other California courts apply section 351 when interstate commerce is not argued or implicated, *e.g.*, *Green v. Zissis*, 7 Cal. Rptr. 2d 406 (Ct. App. 1992); *Kohan v. Cohan*, 251 Cal. Rptr. 570, 576 (Ct. App. 1988) ("[The] acts giving rise to the causes of action herein occurred in Iran while defendants were residents of that country . . . ."). It should be no surprise (and it is no reason to grant certiorari) that constitutional challenges have succeeded when defendants *are* engaged in interstate commerce, while constitutional challenges have failed when defendants are *not* engaged in interstate commerce.

Arrow's primary authority is the Sixth Circuit's decision in *Garber*, 888 F.3d 839. (Pet. 10–11.) There, an Ohio resident sued an Ohio doctor for malpractice arising from treatments in Ohio. *Garber*, 888 F.3d at 840, 846. By the time the suit was filed (belatedly), the defendant doctor had retired to Florida. *Id.* The Sixth Circuit rejected the doctor's constitutional challenge to the Ohio tolling statute that made the belated lawsuit timely. *Id.* at 840. Purely intrastate medical treatments did not affect interstate commerce. Nor did the migration of a retiree. As the court explained, the doctor's decision to start obtaining state benefits in Florida while stopping them in Ohio did not affect interstate commerce. *Id.* at 844–45. The Sixth Circuit therefore distinguished *Bendix* as a case that *did* involve interstate

commerce. *Id.* at 846 ("*Bendix* offers the most support for the doctor's position because it involves the same Ohio law—as applied to an out-of-state company. . . . But the tolling statute does not impose a cost on a traditional interstate business transaction in the same way in today's case."). The Sixth Circuit also pointed out that the lawsuit had been dismissed on the pleadings—before the doctor could marshal evidence showing an impact on interstate commerce. *Id.* at 845.

Garber creates no conflict worthy of this Court's attention. The California court below thought *Garber* was misguided in its evaluation of the tolling statute's burden on interstate commerce, but that is idle criticism because the doctor in *Garber* lost for the separate reason that he was not engaged in interstate commerce, a rationale that is consistent with the decision below and with *Bendix* itself.

Arrow also points to *Rademeyer v. Farris*, 284 F.3d 833 (8th Cir. 2002). (Pet. 11–12.) Defendant Farris was (belatedly) sued in tort by minority shareholders of a medical technology company after he bought out their interest in the company, then flipped the company to a buyer for a higher price. The Eighth Circuit accepted Farris's constitutional challenge, and refused to apply a Missouri tolling statute, because Farris had departed Missouri for Florida after the events at issue. The new buyer was a publicly traded company with operations in Florida, *Rademeyer v. Farris*, 145 F. Supp. 2d 1096, 1100–01 (E.D. Mo. 2001), so the tort claims affected interstate commerce.

Arrow argues that "*Garber* and *Rademeyer* are in direct and irreconcilable conflict." (Pet. 12.) But in fact the decisions are consistent based on the presence (or absence) of facts showing an impact on interstate commerce. That same principle explains the other authorities from which Arrow attempts to divine a conflict. The defendant in *Dewine v. State Farm Inc. Co.* lost his constitutional challenge because he moved out of state for love, not money. 163 N.E.3d 614, 615 (Ohio Ct. App. 2020) ("Bryan left Ohio and moved to Nevada because a woman he was dating lived there."). But the defendant in *First Tenn. Bank Nat'l Ass'n v. Newham* won his constitutional challenge because he moved out of state for work. 859 N.W.2d 569, 576 (Neb. 2015) ("[T]he district court received ample evidence that Newham held numerous positions of employment in multiple states after his relocation from California. Thus, we are not persuaded that Newham's relocation from California did not affect interstate commerce."); *see Kuk v. Nalley*, 166 P.3d 47, 48–49 (Alaska 2007) (accepting defendant's constitutional challenge where she traveled out of state to seek medical treatment). Arrow's other case is *State ex rel. Bloomquist v. Schneider*, 244 S.W.3d 139 (Mo. 2008) (Pet. 12), but the Missouri Supreme Court has directed that *Bloomquist* "should no longer be followed," *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 52–53 & n.11 (Mo. 2017).

Arrow also cites four decisions having nothing to do with statutes of limitations. (Pet. 13–14.) These decisions do not contribute to the analysis here because the relationship between the challenged laws in those cases and interstate commerce was of a

different order. Only one of them even cited *Bendix* (and in a footnote at that). *See Pharm. Rsch. & Mfrs. of Am. v. County of Alameda*, 768 F.3d 1037, 1040 (9th Cir. 2014) (considering a challenge to an ordinance requiring certain prescription drug manufacturers to finance a program for collecting and disposing of unwanted drugs made by other manufacturers); *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 731 F.3d 843, 844 (9th Cir. 2013) (considering a challenge to state health regulations restricting hospitals without on-site cardiac surgical facilities from performing certain nonsurgical procedures unless they obtain a certificate demonstrating "sufficient need in the region"); *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1145 (9th Cir. 2012) (considering a challenge to "statutes and regulations prohibit[ing] licensed opticians from offering prescription eyewear at the same location in which eye examinations are provided and from advertising that eyewear and eye examinations are available in the same location"); *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 733 (8th Cir. 2002) (considering a challenge to a statute requiring retail sellers of propane to maintain a minimum storage capacity within the state).

Finally, in places, Arrow's petition can be read to criticize the very idea of dormant Commerce Clause analysis and to call on the Court "to re-examine this doctrine." (*E.g.*, Pet. 18.) But the Court recently devoted an entire section of an opinion to rejecting that invitation. In *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, the Court traced the doctrine's "roots" to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1

(1824); noted it was "firmly established" by "the latter half of the 19th century"; and explained that the Framers would "find surprising" a scheme without it. 139 S. Ct. 2449, 2459–60 (2019). The Court should not plow this ground yet again, just a few Terms later.

For all of these reasons, the decisions of lower federal and state courts do not conflict, let alone in ways that require this Court's attention. Each of these decisions can be harmonized with *Bendix*.

D. Revisiting *Bendix* could disrupt efforts of State legislatures and courts to modernize their laws.

Bendix demolishes any justification for tolling statutes like section 351. At one time, tolling statutes preserved the claims of local plaintiffs who could not sue out-of-state defendants at all. *Garber*, 888 F.3d at 841 (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)). "[A] State could not exercise personal jurisdiction over a defendant unless the plaintiff served the defendant with process within the State, where it could exercise physical control over him." *Id.* (citing *Burnham v. Superior Court*, 495 U.S. 604, 616 (1990)). But that concern is long gone. Under the modern approach to personal jurisdiction, out-of-state defendants may be served with process by in-state plaintiffs. *Id.* at 841–42. As the *Bendix* majority explained, "it is conceded by all parties that the Ohio long-arm statute would have permitted service on [the Illinois company] throughout the period of limitations." *Bendix*, 486 U.S. at 894. Justice Scalia emphasized the impact of this legal sea change: "the [tolling] statute discriminates against interstate commerce by

applying a disadvantageous rule against nonresidents for no valid state purpose that requires such a rule." *Bendix*, 486 U.S. at 898 (Scalia, J., concurring).

This Court is not alone in appreciating that developments in the law of personal jurisdiction should impact tolling statutes. Both before and after *Bendix*, many States have reached the same conclusion. *E.g.*, *Kuk*, 166 P.3d at 51 ("[T]he premise of the tolling statute is that a defendant's personal absence from the jurisdiction makes service on the defendant either impossible or difficult and this makes commencement or maintenance of a suit against the defendant likewise impossible or difficult. This premise was once valid. But the shift in personal jurisdiction jurisprudence effectuated by *International Shoe Co. v. Washington* and its progeny have made the premise of the statute no longer valid in most cases.").

Because there is "no longer" any "salient justification" for tolling statutes of limitations against non-residents (and all the more so after *Bendix*), legislatures have amended their tolling statutes to apply only if a defendant cannot be reached by their long-arm statutes. *See Garber*, 888 F.3d at 842 (citing Illinois, North Carolina, New York, and Utah laws). In other States, courts have construed existing tolling laws "to have the same effect." *Id.* (citing state supreme court decisions from Alaska, Massachusetts, and South Carolina); *see Shin v. McLaughlin*, 967 P.2d 1059, 1064 (Haw. 1998) (citing similar cases from Kansas, New Mexico, and Oklahoma).

California has achieved largely the same result in a different way. The State acquiesced in a post-*Bendix* decision finding it unconstitutional to apply the tolling statute. *Abramson v. Brownstein*, 897 F.2d 389, 392 n.3, 393 (9th Cir. 1990) (refusing to apply section 351 based on *Bendix*) ("The State of California declined our invitation to intervene and file a brief in this action."). And the California Supreme Court declined to review the decision here that refused to apply the tolling statute. (Pet. App. 2a.) Thus, section 351 *may not be applied* to defendants engaged in interstate commerce (like Dubin), but *may be applied* to defendants not engaged in interstate commerce. *See Pratali v. Gates*, 5 Cal. Rptr. 2d 733, 740–41 (Ct. App. 1992).

These developments show that—one way or another—States are incorporating into their own *state* law the vital underlying principles this Court acknowledged in *Bendix*. Granting certiorari here could disrupt or stall that process. And the disruption would not be valuable: State reform efforts render nearly academic Arrow's proposed re-examination of when and how *Bendix*'s *federal* constitutional rule applies. This likely explains why the federal constitutional issue flagged by Arrow is so seldom litigated today—evolving *state* law covers the task.

CONCLUSION

This Court should deny Arrow's petition for a writ of certiorari.

Respectfully submitted,

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