

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

REPLY IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI

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INTRODUCTION

Respondent's Article III argument that an unresolved factual dispute about Petitioner's injury precludes this Court from asserting jurisdiction misstates the record and the law. The trial court found Arrow had an interest in the judgment that Respondent has not paid. This satisfies Article III. Moreover, a purported dispute as to whether a party is injured does not require a trial before Petitioner may challenge the Court of Appeal's constitutional ruling in this Court.

Nor does Respondent address the divisions in the case law since this Court's decisions in *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988) and *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). There is great uncertainty in federal and state courts about the application of this Court's dormant Commerce Clause jurisprudence to neutral state statutes justifying review in this case.

Review would not interfere with any legislative reform efforts in the States. In fact, eliminating the uncertainty about the application of the dormant Commerce Clause to neutral state statutes would restore a freedom of legislative action fully consistent with basic federalism principles.

Fundamentally, Respondent has used the dormant Commerce Clause as an escape hatch to avoid paying for his criminal embezzlement that destroyed a company to which he owed fiduciary duties. Nothing in any California law has ever affected his ability to engage in interstate commerce. Indeed, he claims to have done so without any hindrance for twenty years since he left California. The only impact the California tolling statute will have is to enable

Petitioner to make Respondent pay for his crimes. The dormant Commerce Clause should not provide an immunity to Respondent in these circumstances. The Court should grant the petition to resolve ongoing conflicts in federal and state courts about the application of the dormant Commerce Clause to non-discriminatory statutes.

ARGUMENT

I. RESPONDENT'S ARTICLE III STANDING ARGUMENT MISSTATES THE RECORD.

Respondent argues that there is no Article III standing because he disputes that Arrow still has an interest in the judgment, and thus a cognizable injury. Opp. 7-12. The trial court record refutes that claim. It also confirms Petitioner sufficiently established an injury, i.e. that Respondent has not paid Petitioner the judgment he owes it.

Initially, Respondent mischaracterizes the facts. Respondent notes that Arrow dissolved the corporation in 1997, which involved filling out *pro forma* Certificate of Dissolution recitations, one of which is that the corporation's known assets were distributed to the entitled parties. Opp. 4, 10. Respondent contends that in filling this out, the director considered the uncollected Arrow judgment to be an asset to which another was entitled and thus was indicating that it transferred the judgment. However, there is no evidence any such transfer occurred.

Arrow introduced testimony that Arrow's Vice President searched through Arrow's records and confirmed that there is no record of any transfer of the

judgment. AA 213.¹ The trial court held that the judgment was still an Arrow asset at this stage of the proceeding. Pet. App. 41a.

Respondent's claim that there can be no Article III standing until his claimed factual dispute is resolved at trial is erroneous. Opp. 10-12. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) stands for the unremarkable proposition that standing must be met "with the manner and degree of evidence required at [those] stages of the litigation." *Id.* at 561. In other words, at the summary judgment stage, a disputed fact as to standing, like any other disputed fact, permits jurisdiction and allows the case to progress to trial where it will be definitively answered. *Id.* (holding that "*at the final stage*," disputed facts must be resolved at trial) (emphasis added). Thus, the Court should only refuse to hear a case for lack of standing at summary judgment where "the movant shows that there is no genuine issue as to any material fact" viewing the facts "in the light most favorable" to the party contending jurisdiction exists. *E.g. Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014).

Respondent's contention that a jury could rule for him at trial on this issue does not affect Arrow's standing in this Court to challenge the Court of Appeal's decision. At a minimum, Respondent concedes that the facts relating to Arrow's continuing possession of the judgment are disputed and thus could not have been definitively determined at summary judgment. Opp. 11. As *Lujan* holds, that is

¹ Respondent argues that Gary Albert, the declarant, was merely the "son of the company's director," and omit the fact that he is the Vice President of the company. *E.g.* Opp. 6, 10.

sufficient for Article III jurisdiction at this stage of the litigation. 504 U.S. at 561.

II. THE COURT SHOULD GRANT THE PETITION TO CLARIFY THE SCOPE AND APPLICATION OF THE DORMANT COMMERCE CLAUSE TO NEUTRAL STATUTES.

A. The Court's Decision in *Bendix* Does not Control Here.

Respondent argues that *Bendix* controls this case and thus the Court should deny review. Opp. 13-15.

First, *Bendix* concerned a substantially more significant burden on interstate commerce. *Bendix* held a tolling statute unconstitutional based on finding a significant burden on interstate commerce in that case, and is the last time this Court struck a non-discriminatory statute under the dormant Commerce Clause. At the time *Bendix* was decided, Ohio, and nearly every state allowed tolling of claims against out-of-state corporations. In order to benefit from Ohio's statutes of limitation, corporations had to designate an agent for service of process in the state, which at the time appeared to permit general jurisdiction over them.

Forced corporate exposure to indefinite liability in other states, or all-encompassing jurisdiction for a corporation in unanticipated locations, the court indicated, would impermissibly burden interstate commerce. *Bendix*, 486 U.S. at 894-95. In contrast, there is no remotely comparable burden on interstate commerce created by the California statute's application to individuals here. Unlike the statute at issue in *Bendix*, the California statute does not

require corporations or anyone else to submit to jurisdiction over any claims.

Moreover, this Court's cases make clear that application of the dormant Commerce Clause to non-discriminatory statutes should be highly circumscribed. For example, there must be genuine empirical demonstration of a significant burden on interstate commerce before invalidating neutral statutes. *Am. Trucking Assns v. Mich. PSC*, 545 U.S. 429, 436 (2005) (rejecting argument that a party need not "empirically demonstrate the existence of a burdensome" effect on interstate commerce). Parties cannot rely, as Respondent did here, on simplistic or theoretical views about burdens on interstate commerce to warrant invalidating nondiscriminatory statutes. *See S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092, 2094 (2018) (noting courts should apply "a sensitive, case-by-case analysis" and disavow arbitrary or formalistic distinctions). And, where a court lacks the ability to easily gauge factual or policy matters related to purported burdens on interstate commerce, striking a non-discriminatory statute for an undue burden would be impermissible. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353-56 (2008).

This case is an ideal opportunity to clarify that the dormant Commerce Clause cannot be used to invalidate neutral state statutes based on hypothetical claims of a burden on interstate commerce. Speculative claims about theoretical impacts on interstate commerce do not warrant invalidating neutral statutes when there are no empirical or obvious burdens on interstate commerce.

B. Review is Necessary to Clarify the Application and Scope of the Dormant Commerce Clause to Tolling Statutes Like § 351 and Statutes Generally.

There is significant conflict as to when a neutral statute like the tolling statute at issue here may be invalidated under the dormant Commerce Clause. Pet. 9-14. Respondent cannot explain away the post-*Bendix* conflicts. Opp. 15-21.

First, Respondent argues that *Garber v. Menendez*, 888 F.3d 839 (6th Cir. 2018) upheld tolling as constitutional only because the court concluded the defendant did not participate in interstate commerce Opp. 17-18. However, *Garber* found that non-speculative evidence of a significant burden was required. 888 F.3d. at 845. *Garber* held, for example that incentives that entice individual residents to stay in a state, like tolling laws, do not violate the dormant Commerce Clause. *Id.* at 846.

The *Garber* decision was not predicated on the idea that the defendant never affected interstate commerce before or after arriving in Florida, indeed the decision was based the understanding that he did. The decision was based on the finding that tolling for departing residents did not amount to a demonstrated burden significant enough to violate the dormant Commerce Clause. *Id.* at 844-45. The courts below, and Eighth Circuit in *Rademeyer v. Farris*, 284 F.3d 833 (8th Cir. 2002) held the same burden does warrant invalidating neutral statutes under the dormant Commerce Clause.

The split between *Garber* and this case, and *Rademeyer v. Farris*, 284 F.3d 833 (8th Cir. 2002) is clear. The Court of Appeal below correctly

acknowledged the conflict between the opinions. Pet. App. 20-23a.

The other state cases Petitioner cited also reflect this conflict. Pet. 12. Respondent argues that in those state cases, the constitutionality of tolling statutes hinged on whether the person who left a state engaged in relevant interstate commerce. Opp. 19. But even that is a significant conflict in applying the dormant Commerce Clause. *Bendix* has also engendered unmanageable, inconsistent standards for when individuals leaving a state are engaged in interstate commerce such that tolling amounts to a significant burden on interstate commerce and is unconstitutional. *See, e.g., Kuk v. Naley*, 166 P.3d 47, 54 & n. 40 (Alaska 2007). Holding that states' tolling statutes are constitutional outside of the narrow application to corporations in *Bendix* would end this patchwork of unpredictable applications.

Respondent also claims four cases that Petitioner cites are irrelevant because they did not involve tolling. Opp. 19-20. Confusion about the showing of an interstate commercial burden needed to invalidate statutes extends beyond the tolling context, as the cases indicate. Pet. 13-14.

Lastly, as addressed in Section II(A), *supra*, the Court need not overrule *Bendix* or the dormant Commerce Clause to clarify its limitations and to resolve the conflict below.

III. REVISITING *BENDIX* WOULD HAVE NO ILL EFFECTS ON STATE LEGISLATURES.

Respondent contends that revisiting and providing clarity on the operation of the dormant Commerce Clause after *Bendix* would interfere with legislative reform efforts. Opp. 21-23. Actually, providing clarity on the application of the dormant Commerce Clause would assist state legislatures.

The post-*Bendix* conflicts have created uncertainty about the freedom of state legislatures to enact or maintain tolling statutes like the statute at issue here to protect their residents. In addition to providing clarity and resolving these post-*Bendix* conflicts, this Court should correct the intrusive application of the dormant Commerce Clause to limit states' ability to enact and enforce non-discriminatory statutes to advance the interests of their residents.

CONCLUSION

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

Respectfully submitted,

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