In the Supreme Court of Ohio

CLAUDIA L. KENNEDY, EXECUTRIX OF THE ESTATE OF DONALD R. GERRES, DECEASED,	:	Case No. 2023-0372
	:	On Appeal from the Portage County Court of Appeals, Eleventh Appellate District
Appellant,	:	
v.	:	
	:	Court of Appeals Case No. 2021-P-0055
WESTERN RESERVE SENIOR CARE, ET AL.,	:	
Appellee.	:	

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANT CLAUDIA L. KENNEDY

DIRK E. RIEMENSCHNEIDER (0055166)
Buckingham, Doolittle & Burroughs LLC
One Cleveland Center – #1700
1375 E. Ninth Street
Cleveland, Ohio 44114
(t) 216-621-5300
(f) 216-621-5440
driemenschneider@bdblaw.com

JUSTIN S. GREENFELDER (0077924)
Buckingham, Doolittle & Burroughs LLC
4277 Munson Street NW
Canton, Ohio 44718
(t) 330-492-8717
(f) 330- 492-9625
jgreenfelder@bdblaw.com

Counsel for Appellees
Satya Acharya, M.D. and
Western Reserve Senior Care

DAVE YOST (0056290)
Attorney General of Ohio

T. ELLIOT GAISER* (0096145)
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor General
NICHOLAS A. CORDOVA (0100969)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
thomas.gaiser@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

MICHAEL D. SHROGE (0072667)
FRANK L. GALLUCCI, III (0072680)
Plevin & Gallucci Co., LPA
55 Public Square, Suite 2222
Cleveland, OH 44113
(t) 216-861-0804
mshroge@pglawyer.com
fgallucci@pglawyer.com

Paul W. Flowers (0046625)
Melissa A. Ghrist (0096882)
Paul W. Flowers Co., LPA
Terminal Tower, Suite 1910
50 Public Square
Cleveland, OH 44113
(t) 216-344-9393
pwf@pwfco.com
mag@pwfco.com

Counsel for Appellant
Claudia Kennedy, Executrix

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Constitutional Provisions

Other

INTRODUCTION

The Constitution "is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed." *Padilla v. Kentucky*, 559 U.S. 356, 388 (2010) (Scalia, J., dissenting). Here, the Eleventh District brought down a sledgehammer on a longstanding Ohio statute because of a limitation that the Constitution no more than *implies*. *See, e.g.*, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000) (Easterbrook, J.). It held that an implied limitation on States' legislative power emanating from Congress's power to "regulate Commerce … among the several States," U.S. Const. art. 1, §8, cl. 3, prevents Ohio from enforcing its tolling statute, R.C. 2305.15(A), against individuals who leave Ohio for business purposes. But this "dormant Commerce Clause" does not prevent the tolling statute's application because the statute was not passed with intent to discriminate against out-of-state businesses. The Eleventh District should have held that the dormant Commerce Clause does not invalidate application of Ohio's tolling statute to preserve Claudia Kennedy's wrongful-death claim against Dr. Sataya Acharya.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. He is interested in defending Ohio's retained, sovereign legislative and executive powers by promoting the

full application of duly enacted Ohio laws and defending them against constitutional challenges. *Cf. Cincinnati v. Fourth Nat'l Realty, L.L.C.*, 163 Ohio St. 3d 409, 2020-Ohio-6802 ¶¶9–10; R.C. 2721.12(A). That interest extends to the Eleventh District's decision that R.C. 2305.15(A), which has existed largely unchanged for generations, is unconstitutional as applied to an individual who caused harm in Ohio and then later left the State for business-related reasons.

STATEMENT OF THE CASE AND FACTS

1. While the question before this Court involves the dormant Commerce Clause, the case follows a winding procedural road. When Donald R. Gerres passed away in 2013, Claudia Kennedy sued Western Reserve Senior Care, Dr. Sataya Acharya, and others on behalf of Gerres's estate, asserting that substandard medical care wrongfully caused Gerres's death. *Kennedy v. W. Res. Senior Care*, 2023-Ohio-264 ¶¶1–2 (11th Dist.) ("App. Op."). She brough suit in 2014, within a year of Gerres's death, but the Defendants sought summary judgment on a theory that the claim was untimely.

The Defendants' theory was that the four-year statute of repose barred Kennedy's claim because she voluntarily dismissed it without prejudice in 2019, and then refiled later in 2019. *Id.* at ¶¶2–4. Citing the statute of repose, Defendants moved for judgment on the pleadings, but Kennedy argued that Ohio's savings statute, R.C. 2305.19, can revive a claim once the four-year statute of repose for medical claims expires. *Id.* at ¶4;

see R.C. 2305.113(C). The trial court denied Defendants' motion, holding that the savings statute applied. *Id.* at ¶4.

Then, this Court held the opposite—that the savings statute does *not* preserve claims beyond the statute of repose's expiration, *id.* at ¶5; *see Wilson v. Durrani*, 164 Ohio St. 3d 419, 2020-Ohio-6827. Thus, Defendants asked the trial court for leave to move for summary judgment, pointing again to the statute of repose, *id.* at ¶7. The trial court eventually granted Defendants' motion for a directed verdict after Kennedy's opening statements. *Id.* at ¶¶8–9.

Kennedy appealed to the Eleventh District, arguing that regardless of the interplay between the statute of repose and the savings statute, another provision saved her claims—that Ohio's tolling statute tolled the statute of repose for her claim against Dr. Acharya. *Id.* at ¶5. This Court has already settled that the tolling statute, "by its plain language," acts as an exception to the statute of repose. *Elliot v. Durani*, 171 Ohio St. 3d 213, 2022-Ohio 4190 ¶1, *reconsideration denied*, 168 Ohio St. 3d 1478, 2022-Ohio-4652. The Eleventh District recognized this precedent, App. Op. ¶35, but affirmed dismissal for another reason entirely: in its view, applying the tolling statute to Dr. Acharya would violate the dormant Commerce Clause, *id.* at ¶¶37–39.

2. Kennedy filed this appeal, and this Court ordered briefing only on Proposition III concerning the Eleventh District's dormant Commerce Clause ruling. *12/28/2023 Case Announcements*, 2023-Ohio-4773. The question is whether the Commerce Clause, U.S.

Const. art. 1, §8, cl. 3, forbids Ohio's tolling statute from tolling the medical-claim statute of repose while a defendant is out of state for legitimate business reasons. *Id.*

3. Ohio's tolling statute, R.C. 2305.15(A), extends a cause of action's life for any length of time that the defendant spends either outside Ohio, or in concealment. As relevant here, it reads:

> 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.

R.C. 2305.15(A). If applicable, that statute preserves Kennedy's wrongful-death claim against Dr. Acharya: the cause of action accrued upon Gerres's October 17, 2013 death, but Dr. Acharya moved to Pennsylvania for a new job in 2014, long before the four-year statute of repose expired, and has remained there since. App. Op. ¶¶36–38.

The Eleventh District agreed that the tolling statute would preserve Kennedy's claim but concluded that applying the statute would be unconstitutional. Its rationale tied to a 1988 U.S. Supreme Court opinion about tolling claims against out-of-state corporations. *Bendix Autolite Corp. v. Midwesco*, 486 U.S. 888 (1988). That case held that applying the tolling statute to an out-of-state corporation would violate the dormant Commerce Clause because the corporation would be forced "to choose between exposure to the general jurisdiction of Ohio courts or … remaining subject to suit in Ohio in perpetuity." *Bendix*, 486 U.S. at 893. Facing general jurisdiction for "all transactions, including those in which it did not have the minimum contacts necessary for supporting

personal jurisdiction," the U.S. Supreme Court held, "is a significant burden" that the tolling statute imposed only on out-of-state corporations. *Id.* That burden far outweighed the statute's local benefit of "protecting its residents from corporations who become liable for [in-State] acts … but later withdraw from the jurisdiction" because Ohio's long-arm statute provides a similar local benefit in most instances. *Id.* at 894.

The Eleventh District held that *Bendix* controls this case because, as one federal district court noted, "interstate commerce is clearly affected when persons move between states … in search of employment," App. Op. ¶39 (quoting *Lovejoy v. Macek*, 122 Ohio App.3d 558, 562 (11th Dist. 1997) (citing *Tesar v. Hallas*, 738 F. Supp. 240 (N.D. Ohio 1990))), and "there is no dispute that Dr. Acharya moved from Ohio for legitimate business purposes," *id.* Reasoning that the dormant Commerce Clause prohibits any application of state law that affects interstate commerce, the Eleventh District affirmed that the tolling statute could not constitutionally apply to preserve Kennedy's wrongful-death claim against Dr. Acharya. *See id.* at ¶67.

Kennedy's Proposition of Law III challenges that conclusion. It reads, "Regardless of whether a defendant leaves the state for 'legitimate business purposes,' the medical malpractice statute of repose is tolled pursuant to R.C. 2305.15(A)." Jur. Mem. at ii. This Brief now addresses that Proposition.

ARGUMENT

<u>*Amicus Curiae* Ohio Attorney General's Proposition of Law:</u>

> *The dormant Commerce Clause permits Ohio's tolling statute to apply to claims against individuals who leave the State for business purposes.*

The U.S. Constitution's text, U.S. Supreme Court precedent, Sixth Circuit case law, and a prior decision of this Court lead to the conclusion that Ohio may constitutionally apply its tolling statute to claims against individuals who leave Ohio for business purposes. Just last Term, the U.S. Supreme Court focused the dormant Commerce Clause's scope, leaving behind little room to invalidate laws that lack an apparent discriminatory purpose. Likewise, Sixth Circuit precedent has already examined the tolling statute's effect and history and determined that it lacks a discriminatory purpose. More still, this Court independently reached the same conclusion in a case that upheld the tolling statute's application on facts that are functionally indistinguishable from the present case. This Court cannot affirm the Eleventh District without contradicting its own precedent and disregarding the U.S. Supreme Court's guidance on a question of federal law. This Court should thus reverse.

I. The dormant Commerce Clause prohibits State laws that purposefully discriminate against out-of-state competitors.

The U.S. Supreme Court has long inferred that Congress' power to "regulate Commerce … among the several States," U.S. Const. art. I, §8, cl. 3, includes a negative implication that prohibits States from adopting protectionist laws that promote in-state economic interests by discriminating against out-of-state competitors. *Nat'l Pork*

Producers Council v. Ross, 598 U.S. 356, 369, 390–91 (2023) (citing *Gibbons v. Ogden*, 22 U.S. 1 (1824)). In the past, the Supreme Court has applied "what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986). Under tier one, courts presumed that laws that discriminated against interstate commerce were invalid. Under tier two, laws that did not discriminate received forgiving scrutiny under a balancing test. *Am. Express Travel Related Servs. Co. v. Kentucky*, 730 F.3d 628, 633–34 (6th Cir. 2013). The so-called "*Pike* balancing" test asked whether the challenged law's "burdens on interstate commerce … clearly exceed their local benefits." *Garber v. Menendez*, 888 F.3d 839, 843 (6th Cir. 2018) (Sutton, J.) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 144–46 (1970)). Under this longstanding regime, the cases drew "no clear line separating the category of state regulation that is virtually *per se* invalid under [tier one of] the Commerce Clause, and the category subject to the … balancing approach." *Brown-Forman*, 476 U.S. at 579.

Last year, the U.S. Supreme Court significantly simplified the inquiry for dormant Commerce Clause challenges. *See Nat'l Pork Producers*, 598 U.S. 356. It largely removed the difficulty of discerning which of the two categories to apply by reducing the doctrine into a judicial search for discriminatory purpose. The Court trimmed the dormant Commerce Clause back to its original dimensions of an "antidiscrimination principle" that prohibits the enforcement of State "regulatory measures designed to benefit in-state

economic interests by burdening out-of-state competitors." *Id.* at 369 (quotations omitted). This return to basics, the Court reiterated, aligned with the federalism implications of "[p]reventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause"—implications that demand judges exercise "extreme caution" and employ the doctrine "only where the infraction is clear." *Id.* at 390.

To be sure, when the Court announced its holding in *National Pork Producers*, it acknowledged that its past cases had "left the courtroom door open to challenges premised on even nondiscriminatory burdens," and that the Court in "a small number of cases" "invalidated state laws" that were "genuinely nondiscriminatory" under the *Pike* balancing approach. *Id.* at 377. But the Court signaled such precedents are also genuine outliers. As the Court explained, "*Pike* has traditionally served as another way to test for purposeful discrimination against out-of-state economic interests," and any expansion beyond its traditional sphere would impermissibly "authoriz[e] judges to strike down duly enacted state laws … based on nothing more than their own assessment of the relevant law's 'costs' and 'benefits.'" *Id.* at 379–80 (quotations omitted). As *National Pork Producers* explained, the dormant Commerce Clause simply prohibits state legislatures from engaging in "economic protectionism" through "purposeful discrimination against out-of-state economic interests." *Id.* at 369, 371; *see also id.* at 370–72. The dormant Commerce Clause, that is, enforces an "antidiscrimination principle." *Id.* at 369.

II. Ohio's tolling statute has no discriminatory purpose.

Precedent and history rebut any suggestion that Ohio's tolling statute has a discriminatory purpose.

As a matter of precedent, this Court held that Ohio's tolling statute is facially valid and evinces no intent to discriminate against interstate commerce. *See Johnson v. Rhodes*, 89 Ohio St. 3d 540 (2000). Were it otherwise, this Court could not have held that the statute constitutionally applies to "individual[s who] temporarily leave the state of Ohio for non-business reasons." *Id.* at 541, 543. If the tolling statute purposefully discriminated against out-of-state businesses, this Court would have had to hold it invalid in all applications. *See, e.g.*, *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018). The Sixth Circuit agreed years later that Ohio's tolling statute is nondiscriminatory. It held that the statute constitutionally applied against a doctor who left Ohio for retirement in Florida. *Garber*, 888 F.3d at 841, 847. Ohio's statute, now-Chief Judge Sutton noted, "clears" the antidiscrimination "hurdle[]" because it "bears none of the hallmarks of facial discrimination," such as "draw[ing] distinctions based on residency." *Id.* at 843.

The statute's history confirms that no discriminatory purpose lurks beneath its neutral text. Ohio enacted the tolling statute in the days before long-arm statutes to ensure that injured Ohioans could seek redress in Ohio courts when those who injured them left the State. *Id.* at 841–43. Once Ohio adopted a long-arm statute, though, the General Assembly and this Court stood by the tolling statute's original text, rather than

amending or interpreting it to apply only to defendants beyond the long-arm statute's reach. *E.g.*, *Wetzel v. Weyant*, 41 Ohio St. 2d 135 (1975).

Ohio's history tracks that of other States, showing that there is nothing nefarious about this common practice. So far as the Attorney General is aware, California and Oregon courts read their laws as tolling the statute of limitations for out-of-state defendants who are reachable by a long-arm statute. *See, e.g.*, *Dew v. Appleberry*, 591 P.2d 509, 511–13 (Cal. 1979); *Knappenberger v. Davis-Stanton*, 351 P.3d 54, 60 (Or. Ct. App. 2015). Several other States' courts did the same until their legislatures voluntarily narrowed their tolling provisions, *e.g.*, *Duke Univ. v. Chestnut*, 221 S.E.2d 895, 898 (N.C. Ct. App. 1976); *Beckmire v. Ristokrat Clay Prods. Co.*, 343 N.E.2d 530, 534 (Ill. Ct. App. 1976); *Olseth v. Larson*, 158 P.3d 532, 535–36, 539 (Utah 2007); N.C. Gen. Stat. §1-21; 735 Ill. Comp. Stat. 5/13-208; Utah Code Ann. §78B-2-104. Thus, as a matter of text and history, Ohio's tolling statute is wholly unrelated to any protectionist purpose.

III. The tolling statute's challenged application places no prohibited burden on interstate commerce.

Although the tolling statute's text and history reveal no discriminatory purpose, the dormant Commerce Clause would still override the statute if Defendants could show that its "practical effects" impose a burden on interstate commerce that is so "clearly excessive in relation to the putative local benefits" as to evidence a hidden discriminatory purpose. *Nat'l Pork Producers*, 598 U.S. at 377 (quoting *Pike*, 397 U.S. at 142). But to trigger a *Pike* inquiry, a challenger must show more than just any "practical effect" on interstate

commerce. *Id.* at 374. That is because "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior" that affects commerce, and *Pike* ordinarily "serve[s] as [just] another way to test for purposeful discrimination against out-of-state economic interests." *Id.* at 374, 380. Thus, burdens that could not reasonably disguise a protectionist purpose are generally not cognizable under the dormant Commerce Clause. *Garber*, 888 F.3d at 844 (citing *McBurney v. Young*, 569 U.S. 221, 235–36 (2013)).

Pike's inquiry is narrow because the alternative would unleash a "freewheeling power" for "judges to strike down duly enacted state laws … based on nothing more than their own assessment of the relevant law's 'costs' and 'benefits,'" *Nat'l Pork Producers*, 598 U.S. at 380. Here, the tolling statute's application affects interstate commerce in such an unimportant and evenhanded a manner that it cannot be credibly described as "clearly excessive," nor as animated by protectionism. Thus, evenhanded application of the dormant Commerce Clause requires this Court to uphold the tolling statute's application without pursuing a *Pike* inquiry. That is true for two reasons. One, the tolling statute's interstate effects are too incidental to trigger *Pike*. Two, the tolling statute's burdens—if any—fall equally in-state as out-of-state.

A. The tolling statute's application affects interstate commerce too slightly and incidentally to run afoul of the dormant Commerce Clause.

The challenged application of Ohio's tolling statute affects interstate commerce, if at all, only slightly and contingently. Consider the effects identified in the decision that the Eleventh District made the centerpiece of its analysis, *Tesar v. Hallas*, 738 F.Supp. 240

(N.D. Ohio 1990). *Tesar* offered three effects on interstate commerce. First, tolling might increase out-of-state employers' recruiting costs because Ohio-resident recruits subject to live tort claims might demand indemnification from prospective employers for any money judgment that would have been barred had the recruit remained longer in Ohio. *Id.* at 242. Second, a former employer might be perpetually liable to indemnify the tortfeasor who loses a potential limitations/repose defense by moving outside Ohio. *Id.* Third, Ohio-resident tortfeasor-recruits might refuse to move altogether, forcing out-of-state employers to incur costs in wooing other candidates. *Id.*

These effects on interstate commerce are too speculative and attenuated to trigger dormant Commerce Clause scrutiny because they are of the type that unavoidably accompany a wide range of state laws that raise no dormant Commerce Clause concerns. *See Nat'l Pork Producers*, 598 U.S. at 374. For example, income taxes, estate taxes, in-state tuition, license fees, minimum-wage laws and other "[p]olicy incentives" can all "entice residents to stay in a State." *Garber*, 888 F.3d at 846, 844. But these resident-only benefits "do not impose a cognizable burden on any interstate market under the dormant Commerce Clause" because they are "a healthy byproduct of the laboratories of democracy in our federalism-based system of government, not a sign of unconstitutional protectionism." *Id*. Ohio's statutory scheme that offers residents repose from liability fits this pattern. It is just another example of a state policy that incidentally and marginally

influences residents to remain residents. Any knock-on effects of its enticement for residents to stay are not cognizable burdens on interstate commerce.

B. The tolling statute's application to individuals also comports with the dormant Commerce Clause because it does not favor Ohio economic interests over out-of-state competitors.

A state law that does not discriminate against out-of-state businesses does not trigger dormant Commerce Clause scrutiny because that scrutiny enforces only an "antidiscrimination principle" that "prohibits the enforcement of state laws driven by economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Pork Producers*, 598 U.S. at 369 (quotation omitted). And as noted above at 8, 10–11, the *Pike* inquiry, properly understood, only "serves to smoke out a hidden protectionism." *Id.* at 379 (quotation omitted). Given that landscape, the tolling statute's application to individuals triggers no dormant Commerce Clause scrutiny for the additional reason that its speculative effects on interstate commerce fall on in-state and out-of-state businesses alike. That is, the alleged burden on interstate commerce is nondiscriminatory.

Any burden on commerce that Ohio's tolling statute imposes is shared equally by Ohio and non-Ohio economic interests. Take, for example, recruitment costs. Ohio is home to many employers with multi-state operations who will sometimes want to recruit qualified Ohio residents for jobs that would require the applicant to move to another state. Those Ohio employers—just like non-Ohio employers—face the hypothetical

recruiting costs of needing to offer indemnification to Ohio tortfeasor-recruits to convince the Ohioan to move out of state.

Any concern that the tolling statute could subject former employers to perpetual liability would apply equally to in-state and out-of-state businesses. An Ohio tortfeasor who later moves out of state was as likely employed by an Ohio business as by a non-Ohio business. *Cf. e.g., State ex rel. Sawicki v. Lucas Cty. Ct. of Common Pleas*, 126 Ohio St. 3d 198, 2010-Ohio-3299 ¶¶2–3, 28 (subjecting Ohio employer to liability for acts of Ohio physician); *Clark v. Southview Hosp. & Fam. Health Ctr.*, 68 Ohio St. 3d 435 (1994) (same). Because the potential interstate-commerce effect of the tolling statute's application to individuals leaving the State for business reasons falls on in-state and out-of-state businesses alike, it is not cognizable under the dormant Commerce Clause.

IV. Even if the tolling statute's challenged application implicated the dormant Commerce Clause, it would survive a *Pike* inquiry because its burden on interstate commerce is not "clearly excessive" compared to its local benefits.

While this Court should reject the dormant Commerce Clause challenge without performing a *Pike* inquiry for all the reasons discussed above, the exercise shows that the interstate-commerce effect of applying the tolling statute to individuals does not clearly outweigh its benefits for Ohioans and others.

On the benefit side, recall that the tolling statute allows persons injured in Ohio (wherever they reside) to recover in Ohio courts against individuals who leave the State. The statute benefits those injured persons by giving them more time to locate and serve

defendants reachable by long-arm service outside the State who might be hard to find. *See Garber*, 888 F.3d at 846–47.

On the burden side, tolling the statute of limitations or repose so that it runs longer for individuals outside the State for business reasons might dampen commerce. But for that dampening to be anything more than speculation, all of the following must be true: (1) An employer offers employment out-of-state to an Ohioan who (2) has committed a tort (3) in Ohio (4) within the limitations (and before any applicable repose) period and (5) knows and cares enough about applicable laws either (a) to demand indemnification or compensation or (b) for tolling to be a but-for cause of the recruit's refusal to take the job. *If (a)*, the tort *victim* would then have to (6) decide to sue after all and (7) win a money judgment against the recruit while (8) the employer is still under a contractual indemnity obligation. *If (b)*, there would be no harm unless the employer spends more money than it otherwise would have on recruiting because of one declined job offer.

Putting aside that no evidence suggests either possibility has ever occurred and the employer whose interstate commerce would be harmed is just as likely to be an Ohio company as not, the remote chance that the tolling statute *might* cause an out-of-state business to incur a cost does not clearly outweigh the statute's benefit of giving injured parties opportunities for redress that would not otherwise exist. *Cf. Garber*, 888 F.3d at 846–47. Since the balance does not lean heavily to the interstate-burden side, the statute's

application to the kind of case presented here poses no constitutional problem even if it merits a *Pike* inquiry.

V. The Eleventh District erred in holding that the dormant Commerce Clause overrides the tolling statute's application to individuals who leave the State for business reasons.

The Eleventh District misapplied precedent and offered none of its own reasoning to conclude that "the tolling statute cannot be constitutionally applied to" "Dr. Acharya [because she] moved from Ohio for legitimate business purposes." App. Op. ¶39. This Court, in properly distinguishing the sole U.S. Supreme Court case the Eleventh District's decision rests on, has already offered reasoning that commands the opposite conclusion.

A. The Eleventh District misapplied precedent.

The Eleventh District supported its holding only with a block quote from an earlier Eleventh District case that, in turn, relied on a Northern District of Ohio case that "extended [the U.S. Supreme Court's 1988 *Bendix* decision] to a case where an Ohio resident moved out of the state for employment purposes." *Id.* (quoting *Lovejoy v. Macek*, 122 Ohio App.3d 558, 562 (11th Dist. 1997) (citing *Tesar v. Hallas*, 738 F.Supp. 240 (N.D. Ohio 1990))). It all rests on *Bendix*, an inadequate foundation because, as this Court held in *Johnson v. Rhodes*, "*Bendix* was limited to the facts of the case," 89 Ohio St. 3d at 542, and its reasoning carries no farther. *Tesar* incorrectly extended it, but that federal district court ruling does not bind this Court. *State v. Burnett*, 2001-Ohio-1581, 93 Ohio St. 3d 419, 424; *see also Johnson v. Williams*, 568 U.S. 289, 305 (2013). Therefore, the proper starting

point for the Eleventh District was this Court's decision in *Johnson* that "*Bendix* was limited to the facts of the case." 89 Ohio St. 3d at 542. That was the proper ending point, too, because *Bendix* says nothing about this case.

In *Bendix*, the U.S. Supreme Court invoked the Commerce Clause to hold that applying Ohio's tolling statute to out-of-state corporations that had not consented to general jurisdiction in Ohio would unconstitutionally force them to choose "between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense … ." 486 U.S. at 893. Further, the statute's application subjected "foreign and domestic corporations to inconsistent regulations" because only Ohio corporations gained repose in Ohio courts without having to consent to general jurisdiction outside their home state. *Id.* at 894. Ohio could not "force[] out-of-state companies … to face liability indefinitely as a cost of doing business across state lines." *Garber*, 888 F.3d at 846. That holding reflects that the U.S. Supreme Court has always regarded expansions of general jurisdiction for corporations as constitutionally suspect, but has also struggled to settle that suspicion within any particular constitutional provision. *See Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 150 (2023) (Alito, J., concurring in part). *Bendix* shows that in 1988, the Commerce Clause shoe fit closely enough. *Id.*

Yet these concerns about coercing out-of-state corporations' submission to general jurisdiction do not arise when applying the tolling statute to individuals who leave Ohio for business reasons. In these situations, the only Commerce Clause question is whether

the speculative harms of increased recruiting costs and indemnity risk for in-state and out-of-state employers show a protectionist purpose behind the tolling statute. As the Sixth Circuit put it when rejecting an argument for extending *Bendix*, "the tolling statute does not impose a cost on a traditional interstate business transaction in the same way" when applied to individuals. *Garber*, 888 F.3d at 846. This Court also had no trouble recognizing that in *Johnson*. 89 Ohio St. 3d at 540–42.

In fact, this Court's *Johnson* decision, which the Eleventh District did not cite, App. Op., all but decided that *Bendix* cannot extend to this context. There, this Court held that Ohio's tolling statute constitutionally applied to a defendant who took a 10-day vacation in Kentucky. *Id.* at 540–42. Although the decision carefully stated that the case involved only individuals "absent from the state of Ohio for non-business reasons," *id.* at 541, its holding really controls this case because it involved *greater* burdens on interstate commerce than this case and those burdens actually disfavor out-of-state economic interests.

The application upheld in *Johnson* burdens interstate commerce by making Ohio vacation destinations more attractive than out-of-state competitors to tortfeasors because the statute of limitations (or repose) runs if the tortfeasor chooses to spend a weekend visiting the Professional Football Hall of Fame in Canton, but not if the tortfeasor opts instead for the races at Churchill Downs in Louisville. But according to this Court, that effect amounted to neither intentional protectionism, nor a burden on interstate

commerce so clearly excessive that it justified attribution of a protectionist purpose. *Id.* at 541–43. And the Sixth Circuit agreed. *Garber*, 888 F.3d at 843. But the argument is more plausible and far more direct than the argument from the inferential, evenly spread interstate-commerce burdens imagined here. So this Court cannot affirm the Eleventh District without departing from its prior precedent and the Sixth Circuit's good company.

B. The Eleventh District identified no discriminatory effect on interstate commerce.

Even if *Johnson* technically leaves open a possibility that the dormant Commerce Clause might prohibit tolling against individuals leaving Ohio for business purposes, the Eleventh District's rote invocation of *Tesar* offers no reason to conclude that it does. The Eleventh District needed to identify a burden on interstate commerce that "would disclose purposeful discrimination against out-of-state businesses." *Nat'l Pork Producers*, 598 U.S. at 379. But *Tesar*, remember, relied on the recruiting-costs and indemnification-risk arguments whose speculative, nondiscriminatory effects are discussed above at 12. It found that those costs violated the Commerce Clause's negative aspect only because it applied the wrong standard.

Tesar mistakenly assumed that any application of a state law that a judge finds "unreasonable" violates the dormant Commerce Clause so long as that application has an effect on an out-of-state business's interstate commerce. *See* 738 F. Supp. 240, 241–43. It opined that "it seems plainly 'unreasonable' for persons who have committed acts they know might be considered tortious to be held hostage until the applicable limitations

period expires" and found license to strike the "unreasonable" law down under the Commerce Clause because it affects "the movement of persons" "between states" which affects "interstate commerce." 738 F.Supp. at 242.

Of course, that is not how the doctrine works because "in our interconnected national marketplace" where "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior," the *Tesar* approach translates to the very "freewheeling" power that the Supreme Court abjured, for judges to invalidate state laws "based on nothing more than their own assessment of the relevant law's 'costs' and 'benefits.'" *Nat'l Pork Producers*, 598 U.S. at 374, 380. The dormant Commerce Clause, in the *Tesar* court's hands, becomes as potent a weapon as substantive due process, equally devoid of "guideposts for responsible decisionmaking," *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992); *see also Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring) (criticizing doctrine that "affords far too much discretion to judges in resolving the dispute before them"), but more offensive to federalism in that it only kills state laws.

* * *

Because the Eleventh District identified no burden on interstate commerce besides those posited in *Tesar*, it too failed to justify its use of the Commerce Clause to strike down state law. The dormant Commerce Clause today prohibits States from enforcing intentionally protectionist laws. Under that correct understanding, and according to this

Court's reasoning in *Johnson*, not to mention the Sixth Circuit's reasoning in *Garber*, the tolling statute constitutionally applies to individuals who leave Ohio for business purposes, including Dr. Acharya.

CONCLUSION

For the foregoing reasons, the Court should reverse the Eleventh District's decision.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s T. Elliot Gaiser
T. ELLIOT GAISER* (0096145)
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor General
NICHOLAS A. CORDOVA (0100969)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
thomas.gaiser@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellant was served this 20th day of February, 2024, by e-mail on the following:

Dirk E. Riemenschneider
Buckingham, Doolittle & Burroughs
One Cleveland Center – #1700
1375 E. Ninth Street
Cleveland, Ohio 44114
driemenschneider@bdblaw.com

Justin S. Greenfelder
Buckingham, Doolittle & Burroughs
4277 Munson Street NW
Canton, Ohio 44718
jgreenfelder@bdblaw.com

Michael D. Shroge
Frank L. Gallucci, Iii
Plevin & Gallucci Co., LPA
55 Public Square, Suite 2222
Cleveland, OH 44113
mshroge@pglawyer.com
fgallucci@pglawyer.com

Paul W. Flowers
Melissa A. Ghrist
Paul W. Flowers Co., LPA
Terminal Tower, Suite 1910
50 Public Square
Cleveland, OH 44113
pwf@pwfco.com
mag@pwfco.com

/s T. Elliot Gaiser
T. Elliot Gaiser
Solicitor General