FILED
United States Court of Appeals
Tenth Circuit

August 30, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAMANTHA GERSON,

Plaintiff - Appellant,

v.

LOGAN RIVER ACADEMY, d/b/a Maple Rise Academy,

Defendant - Appellee,

and

DOES, 1 through 11,

Defendants.

No. 20-4074

Appeal from the United States District Court
for the District of Utah
(D.C. No. 1:20-CV-00010-DB)

Alan S. Mouritsen (Michael W. Young with him on the briefs), Parsons Behle & Latimer, Salt Lake City, Utah, for Appellant.

Molly M. Loy (Thomas E. Beach with her on the brief), Beach Law Group, LLP, Oxnard, California, for Appellees.

Before **HARTZ**, **BRISCOE**, and **CARSON**, Circuit Judges.

HARTZ, Circuit Judge.

At the age of 15, Plaintiff Samantha Gerson was allegedly sexually abused by an employee (the Perpetrator) at Logan River Academy, a residential treatment facility in Logan, Utah. She filed suit against Logan River a decade later in the United States District Court for the Central District of California (the Central District), from which the case was transferred to the United States District Court for the District of Utah. Logan River moved to dismiss on the ground that the suit was barred by Utah's applicable statute of limitations. Ms. Gerson responded that the suit was timely under California law. The district court applied California's choice-of-law doctrine, determined that Utah's statute of limitations governed, and granted the motion to dismiss. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I. BACKGROUND

Because this case comes to us on review of a dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, we accept as true the well-pleaded allegations in Ms. Gerson's complaint. *See Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021). Although the statute of limitations is an affirmative defense, *see* Fed. R. Civ. P. 8(c)(1), a dismissal on that ground is permissible if "the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements." *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018).

Ms. Gerson was a California resident and high school student in Beverly Hills. On October 15, 2008, Logan River staff members came to her school and transported her to Logan River. Ms. Gerson claims she was taken from California involuntarily and against

her will.[1] While at Logan River, the Perpetrator repeatedly sexually abused Ms. Gerson until April 2009. She continues to suffer physically and emotionally from her ordeal.

In June 2019 Ms. Gerson—then 25—filed suit in the Central District[2] against Logan River and 11 unknown and unnamed individuals and entities, not including the Perpetrator. She pleaded eight causes of action based on allegations that the defendants knew or had reason to know of the Perpetrator's unlawful sexual conduct but covered it up and failed to properly supervise the Perpetrator. Logan River responded by moving to dismiss the complaint or, alternatively, transfer the case to federal court in Utah. The Central District granted the motion to transfer because Ms. Gerson could have brought

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[1] Although the complaint alleges that Logan River staffers "abducted and kidnapped" her from her high school, Aplt. App. at 11, Ms. Gerson has abandoned that characterization on appeal. Instead, both in her appellate briefing and at oral argument, Ms. Gerson repeatedly characterized her removal as involuntary and against her will. *See* Aplt. Br. at 21, 24 (involuntary); *id.* at 1, 3, 5, 21, 23 (against her will). We will have more to say about this particular language later in the opinion.

[2] The federal court had diversity jurisdiction under 28 U.S.C. § 1332. But jurisdiction was not established by the complaint. It recognized that Logan River is organized as a Utah LLC, yet it characterized Logan River as a traditional "corporation incorporated in the State of Utah" for purposes of invoking federal jurisdiction. Aplt. App. 10. This was error. "[A]n LLC, as an unincorporated association, takes the citizenship of all its members." *Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 781 F.3d 1233, 1234 (10th Cir. 2015). And "where an LLC has, as one of its members, another LLC, the citizenship of unincorporated associations must be traced through however many layers of partners or members there may be to determine the citizenship of the LLC." *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010) (internal quotation marks omitted). The error apparently went unnoticed until we sua sponte issued an order directing Logan River to identify the citizenship of each of its members. Logan River's response reported three members: two natural persons of Utah citizenship and one Delaware LLC. Because this response failed to provide any information on the members of the Delaware LLC, we issued a second order seeking that information. Logan River's second response assures us that there is complete diversity among the parties.

her action in Utah and because on balance the convenience of the parties and witnesses, as well as the interest of justice, favored transfer. *See* 28 U.S.C. § 1404(a). Once in Utah, Logan River again moved to dismiss, arguing that Utah law governed and the applicable Utah statute of limitations barred the claims. In response, Ms. Gerson did not dispute that her claims would be barred under Utah law but argued that California law governed and her claims were timely under the applicable California statute of limitations. The district court agreed with Logan River. Applying California choice-of-law principles, it decided that Utah substantive law governed because it was the State whose interests would be more significantly impaired if its law were not applied to this case. It dismissed the complaint as time-barred under Utah law.

II. DISCUSSION

The sole issue on appeal is whether Utah's or California's statute of limitations applies. There is much debate about how to decide which State's substantive law should govern a dispute that has connections with more than one State, with one leading commentator having identified seven approaches in use among the 50 States. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 Am. J. Comp. L. 235, 259 (2020) (*2019 Annual Survey*). A highly influential approach is that adopted by the Restatement (Second) of Conflict of Laws, whose guiding principle for tort claims is to apply the law of the State with the "most significant relationship" to the parties and the occurrence with respect to the issue in question. Restatement (Second) of Conflict of Laws §§ 6, 145 (1971); *see* Gregory E. Smith, *Choice of Law in the United States*, 38 Hastings L.J. 1041, 1044–46 (1987). But

that approach is far from universally accepted. *See* Symeonides, *2019 Annual Survey* at 259 (cataloging each State's choice-of-law approach and identifying 25 States that follow Restatement (Second) of Conflict of Laws for tort claims). Accordingly, our first task is to determine what choice-of-law rules apply to this case.

When exercising diversity jurisdiction under 28 U.S.C. § 1332, a district court ordinarily applies the choice-of-law rules of the State in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Brooks*, 985 F.3d at 1278 n.1. But when, as here, a case lands in a forum by way of transfer under 28 U.S.C. § 1404(a) on a motion by the defendant, the transferee court generally must use the choice-of-law rules that would have prevailed in the transferor court. *See Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964). *But see Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 65–66 (2013) (when transfer is ordered to effectuate a valid contractual forum-selection clause, the choice-of-law rules of the transferee court apply). Because Ms. Gerson initially filed this case in the Central District, we use California's choice-of-law rules to determine which State's law should apply. We review de novo the district court's choice-of-law determination. *See Carolina Cas. Ins. Co. v. Burlington Ins. Co.*, 951 F.3d 1199, 1207 (10th Cir. 2020).

A. California's Choice-of-Law Rules

California has long been recognized as the leading proponent of so-called governmental-interest analysis to resolve conflicts of laws arising from tort claims. *See McCann v. Foster Wheeler LLC*, 225 P.3d 516, 524 (Cal. 2010); *see also* Symeonides, *2019 Annual Survey* at 259 (cataloging California as the only State (along with the

District of Columbia) that presently uses governmental-interest analysis for tort claims). This approach involves three steps. *See McCann*, 225 P.3d at 527. A court must first determine "whether the relevant law of each of the potentially affected jurisdictions" differs with regard to the particular issue before it. *Id.* (internal quotation marks omitted). This requirement is satisfied if the outcome depends on which jurisdiction's law is applied. *See id.* at 527–28; *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 933 (Cal. 2006).

If the laws differ, the court proceeds to step two, which requires it to determine "each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." *McCann*, 225 P.3d at 527 (internal quotation marks omitted). A "true conflict" is said to exist if each jurisdiction has a "real and legitimate interest" in having its law applied. *Id.* at 527, 531–32. A jurisdiction may not have the requisite interest if, for example, it has an "unusual and outmoded statute," *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721, 728 (Cal. 1978), or has "exhibited little concern" about whether its law is applied in the relevant context, *id.*; *see Kearney*, 137 P.3d at 934, or the party that would benefit from application of the jurisdiction's law is not a resident of the jurisdiction, *see Hurtado v. Superior Ct.*, 522 P.2d 666, 668, 670 (Cal. 1974) (no true conflict in wrongful-death suit by Mexican plaintiffs against Californian defendants where Mexico, but not California, imposed a limit on monetary recovery because Mexico's policy was meant to protect its defendant-residents from ruinous liability, not to deny full recovery to its injured plaintiff-residents).

In these situations, there is no true conflict even if the ignored law would produce a different result.

If a true conflict exists, the court proceeds to step three, known as comparative-impairment analysis. *See McCann*, 225 P.3d at 527, 533. This step requires the court to determine which jurisdiction's interests would be "more impaired" if its law were not applied and then apply that jurisdiction's law. *Id.* at 527 (internal quotation marks omitted). The court "carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law." *Id.* (internal quotation marks omitted). The relevant interest is not measured by the strength of the State's belief that its law is normatively superior. The California Supreme Court has emphasized that courts are not to "weigh" the wisdom of each jurisdiction's policies by "determining which conflicting law manifested the 'better' or the 'worthier' social policy on the specific issue." *Id.* at 533 (some internal quotation marks omitted). As that court has explained, "An attempted balancing of conflicting state policies in that sense is difficult to justify in the context of a federal system in which, within constitutional limits, states are empowered to mold their policies as they wish." *Id.* (ellipsis and internal quotation marks omitted). "Instead, the process can accurately be described as a problem of allocating domains of law-making power in multi-state contexts—by determining the appropriate limitations on the reach of state policies." *Id.* at 533–34 (brackets, ellipsis, and internal quotation marks omitted). "Emphasis is placed on the appropriate scope of conflicting state policies rather than on the quality of those policies." *Id.* at 534 (brackets and internal quotation marks omitted).

California courts have recognized that "a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders and in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future." *Id.* (citations and internal quotation marks omitted); *see also Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 557, 562 (9th Cir. 2020) (applying California choice-of-law rules), *cert. denied*, 141 S. Ct. 1735 (2021). That is not to say that California courts blindly apply the law of the jurisdiction where the alleged tortious conduct occurred without regard to the nature of the issue before the court, *see McCann*, 225 P.3d at 534; but it does mean that a foreign jurisdiction has a "presumptive interest" in applying its law to conduct within its territory "absent some other compelling interest to be served by applying California law," *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430, 442 (Cal. Ct. App. 2007); *see also* Michael H. Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 Rutgers U. L. Rev. 167, 241 (2015) (surveying California precedent and concluding that "California judicial decisions since 2000 display a marked turn to territorial principles as the decisive consideration in resolving conflict of laws").

Illustrative is *Offshore Rental Co. v. Continental Oil Co.*, in which a California corporation sued a non-California corporation for damages arising from the latter's negligence that caused injury to a key employee of the California corporation. *See* 583 P.2d 721, 723 (Cal. 1978). All relevant events occurred in Louisiana. *See id.* Louisiana

law barred recovery on key-employee claims, *see id.* at 724, reflecting its interest "to protect negligent resident tort-feasors acting within Louisiana's borders from the financial hardships caused by the assessment of excessive legal liability or exaggerated claims," *id.* at 725. California law, however, permitted recovery, reflecting an interest in protecting injured California plaintiffs and thereby protecting California's economy and tax revenues from the effects of such injuries. *See id.* at 724–25. The court held that Louisiana's interests would be the more impaired if its law were not applied, *see id.* at 729, pointing out that the foundation of Louisiana's liability-limiting policy was "the vital interest in promoting freedom of investment and enterprise within Louisiana's borders," *id.* at 728 (emphasis omitted).

Offshore Rental was reaffirmed by the California high court in *McCann v. Foster Wheeler LLC*, which presented choice-of-law issues similar to those in our case. *See* 225 P.3d 516, 535–36 (Cal. 2010). The plaintiff sought recovery for mesothelioma caused by exposure to asbestos while observing the installation of a very large boiler at an oil refinery in Oklahoma. *See id.* at 520. The defendant company had designed, manufactured, and provided advice regarding the installation of the boiler. *See id.* Although the plaintiff had not been a California resident at the time of exposure, he was a resident when he became ill and filed suit. *See id.* at 520–21. The claim was barred by Oklahoma's statute of repose but permitted under California law. *See id.* at 527–29. The court previewed its analysis in the following sentence:

> [A]lthough California has a legitimate interest in affording a remedy to a resident of California whose asbestos-related illness first manifests itself when the individual is a California resident, past California cases indicate

> that it is generally appropriate for a court to accord limited weight to California's interest in providing a remedy for a current California resident when the conduct of the defendant from whom recovery is sought occurred in another state, at a time when the plaintiff was present in (and, in the present situation, a resident of) that other state, and where that other state has its own substantive law, that differs from California law, governing the defendant's potential liability for the conduct that occurred within that state.

Id. at 519.

The court recognized that Oklahoma's law served "the legitimate government objectives of providing a measure of security for building professionals whose liability could otherwise extend indefinitely" and "the legitimate objective of avoiding the difficulties of proof which arise from the passage of time." *Id.* at 529–30 (internal quotation marks omitted). At the same time, California had a general interest in ensuring recovery for its injured residents and a special interest in providing relief for asbestos-related harm, reflected in the California legislature's decision to create a special, extended statute of limitations for such claims. *See id.* at 529, 532; *see also* Cal. Civ. Proc. Code § 340.2. But two factors tilted the scales in favor of applying Oklahoma law. First, the court noted California's "diminished authority over activity that occurs in another state." *McCann*, 225 P.3d at 536. Second, it noted that when someone enters a State, she "expose[s] [herself] to the risks of the territory, and should not expect to subject [the] defendant to a financial hazard that [the law of the State she entered] had not created." *Id.* at 535 (internal quotation marks omitted). The court rejected the plaintiff's argument that his case was different because his injury actually occurred in California—where the repercussions of his exposure to asbestos first manifested themselves. *See id.*

at 537. It explained that this circumstance did "not realistically distinguish the present matter from a case . . . in which a California resident is seriously injured in an automobile accident in another state and returns home to California for extensive medical treatment and long-term care." *Id.* The court recognized that "in such a case the plaintiff's long-term medical expenses are likely to be incurred in California and, if the plaintiff's resources are insufficient, the state ultimately may expend considerable financial resources for his or her care," *id.*; but it noted that "past California choice-of-law decisions . . . have not treated that type of case as one in which a defendant's conduct has caused an injury in California," *id.* It explained that those decisions have recognized "that the State in which the alleged injury-producing conduct occurred (and in which a significant risk of harm to others is posed) generally has the predominant interest in determining the appropriate parameters of liability for conduct undertaken within its borders." *Id.* Thus, the court held that Oklahoma's interests in limiting liability for torts occurring within its territory prevailed over California's interests. *See id.*

As these cases demonstrate, California's choice-of-law rules—particularly comparative-impairment analysis—is rooted in basic notions of federalism. *See id.* at 533. It is well established that "our federal system . . . leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors." *Klaxon*, 313 U.S. at 496. Recognizing this, California courts take a "restrained view" in extending California's authority to impose liability on extraterritorial conduct that is not subject to liability under the laws of the jurisdiction in which such conduct occurred. *McCann,* 225 P.3d at 535. To have courts evaluate and weigh the

wisdom of competing States' laws would, in California's view, violate federalist principles. *See id.* at 533.

B. Application to this Case

1. Step 1: Do the Statutes of Limitations of California and Utah Lead to Different Results?

Both California and Utah have enacted special statutes of limitations for claims of childhood sexual abuse. When Ms. Gerson commenced this suit in 2019, California law gave victims of childhood sexual abuse the right to sue until the later of their 26th birthdays or three years after their discovery of their psychological injuries. *See* Cal. Civ. Proc. Code § 340.1(a) (2019).[3] This limitations period applied to suits brought against

[3] The California statute read in relevant part:

> (a) In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later, for any of the following actions:
>
> > (1) An action against any person for committing an act of childhood sexual abuse.
> >
> > (2) An action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.
> >
> > (3) An action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.

alleged perpetrators or nonperpetrator persons or entities whose actions caused sexual abuse. *See id.* In Utah a special statute of limitations for sexual abuse permitted victims to sue perpetrators "at any time" and to sue nonperpetrators until the later of the victims' 22nd birthdays or four years after their discoveries of their psychological injuries. Utah Code § 78B-2-308(3).[4] The special statute applies only to suits against living persons. *See id.* § 78B-2-308(6); *Savage v. Utah Youth Vill.*, 104 P.3d 1242, 1247–49 (Utah 2004). *Nonliving* entities, such as Logan River, were instead subject to Utah's default four-year limitations period and a tolling provision for claims arising before a plaintiff reaches the age of majority. *See* Utah Code § 78B-2-307(3); *id.* § 78B-2-108.

Cal. Civ. Proc. Code § 340.1 (2019). After Ms. Gerson filed suit, California's statute of limitations was amended to further extend the limitations period to 22 years after a victim attains the age of majority or, if later, five years after delayed discovery of the abuse. *See* 2019 Cal. Legis. Serv. Ch.861 (A.B. 218) (West) (effective January 1, 2020).

[4] The Utah statute reads in relevant part:

> (3)(a) A victim may file a civil action against a perpetrator for intentional or negligent sexual abuse suffered as a child at any time.
>
> (b) A victim may file a civil action against a non-perpetrator for intentional or negligent sexual abuse suffered as a child:
>
> (i) within four years after the individual attains the age of 18 years; or
>
> (ii) if a victim discovers sexual abuse only after attaining the age of 18 years, that individual may bring a civil action for such sexual abuse within four years after discovery of the sexual abuse, whichever period expires later.

Utah Code § 78B-2-308; *see id.* § 78B-2-308(2)(b) (defining *discovery* of sexual abuse).

Thus, Utah law was more favorable to victims than California law with respect to suits against perpetrators of sexual abuse, because Utah set no time limit on such suits. For suits against living persons who were nonperpetrators, the laws of the two States were comparable. Although Utah always allowed suits only until age 22, while California always allowed suits until age 26, Utah had a four-year discovery period while California's discovery period was three years. For suits against nonperpetrators who were not living persons, however, California law was more plaintiff-friendly. California allowed suits until the later of age 26 and the end of a three-year discovery period, whereas Utah allowed suits only until age 22 and recognized no special discovery period.

These differences in the laws of California and Utah illustrate the often-observed reality that crafting statutes of limitations requires balancing important interests of plaintiffs and defendants. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("The length of a limitations period reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." (internal quotation marks omitted)); *McCann*, 225 P.3d at 529 (recognizing that Oklahoma's statute of repose "was intended to balance the interest of injured persons in having a remedy available for such injuries against the interest of [defendants] in being subject to a specified time limit during which they would remain potentially liable for their actions").

Ms. Gerson was 25 when she filed suit. Her claims against Logan River (a nonliving nonperpetrator) therefore would be timely under California law but untimely under Utah law. The two statutes differ in their application to this case.

2. Step 2: Is There a True Conflict?

We think it obvious that California and Utah each has a "real and legitimate interest" in having its statute of limitations applied. *McCann*, 225 P.3d at 531–32. California, recognizing the obstacles in bringing claims of childhood sexual abuse, has provided a generous statute of limitations so that its residents can be compensated for their injuries and lessen the burden on the State for their care. In some respects Utah has an even more generous statute of limitations (for suits against alleged perpetrators); but, as in this case, it has a shorter limitations period for suits against entities that are not living persons. Utah's limitation of liability for businesses (such as Logan River) and other entities reflects the usual reasons for setting time limits on lawsuits—"including preventing unfair litigation such as surprise or ambush claims, fictitious and fraudulent claims, and stale claims" and avoiding injustices "due to the difficulties caused by lost evidence, faded memories and disappearing witnesses." *Davis v. Provo City Corp.*, 193 P.3d 86, 91 (Utah 2008) (internal quotation marks omitted); *see McCann*, 225 P.3d at 530 (setting clear limitations periods serves a State's "vital" economic interest by promoting commercial activity within the State, which in turn can increase "tax and other revenue" and "advance the opportunity of state residents to obtain employment and the products and services offered" (internal quotation marks omitted)).

Ms. Gerson argues that Utah has little interest in having its law applied because, unlike California, it "has 'exhibited little concern'" about "third-party business entities who negligently facilitate [child sexual-]abuse." Aplt. Br. at 21–22 (quoting *Kearney*, 137 P.3d at 927). But this proposition is impossible to reconcile with the fact that the

Utah child-sexual-abuse statute of limitations in effect when Ms. Gerson filed suit had been amended as recently as 2015 (to eliminate any time limit on suits against perpetrators), 2016, and 2018. This was no out-of-date statute whose contemporary application would be a surprise to anyone. Ms. Gerson has provided no evidence that the Utah courts have declined to dismiss untimely sexual-abuse claims against nonliving persons. Her exhibited-little-concern argument amounts to no more than an assertion that a State can show concern on a subject only by expanding liability, not by protecting prospective defendants. That assertion ignores the reality that both plaintiffs and defendants have significant interests in the terms of a statute of limitations, and state policy must balance those interests. *Cf. Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 592 (9th Cir. 2012) ("Maximizing consumer and business welfare, and achieving the correct balance for society, does not inexorably favor greater consumer protection; instead, setting a baseline of corporate liability for consumer harm requires balancing the competing interests.").

We readily conclude that there is a "true conflict" between the California and Utah statutes. To subject a Utah enterprise to litigation on this claim at this late date would clearly be contrary to Utah policy to protect such entities from stale claims. The policies of the two States cannot be reconciled on the issue whether Ms. Gerson's claims can proceed.

3. Step 3: Comparative-Impairment Analysis

We now must determine which State's interests would be "more impaired if its policy were subordinated to the policy of the other state." *McCann*, 225 P.3d at 533

(internal quotation marks omitted). The answer can be found in *McCann*. Addressing issues similar to those of the present case, *McCann* held that a foreign State's interest in setting clear limitations on liability for conduct within its borders that injuriously impacted the plaintiff while also within the State predominated over California's interest—reflected through a special, more generous statute of limitations—in facilitating recovery by its residents for latent injuries (in that case, arising from asbestos) that are often difficult to prosecute within ordinary limitations periods. *See id.* at 537. That same analysis applies here and requires application of Utah's statute of limitations.

This result should not be surprising. The outcome of California's choice-of-law doctrine in this context is far from unique. When parties have different domiciles but the tortious conduct and injury occurred within the tortfeasor's home State, whose law favors the tortfeasor, the great majority of courts apply the law of the State where those events occurred, regardless of the choice-of-law methodology they use. *See* Symeon C. Symeonides, *Choice of Law* 205–08 (2016) (stating that this was the result in 32 of 35 cases); *see* Restatement (Third) of Conflict of Laws § 6.07 ("Loss Allocation: No Shared Domicile—Intrastate Torts") (Am. Law Inst., Council Draft No. 4, Sept. 4, 2020) ("When the relevant parties are domiciled in states whose laws are in material conflict, and conduct and injury occur in a single state, that state's law governs an issue of loss allocation."); *id.* cmt. b ("American courts overwhelmingly apply the law of the state of conduct and injury in these cases, as do many codifications."); *id.* ("[W]hen the conduct and injury occur in one party's domicile and that state's law favors the domiciliary party,

selecting the law of the place of the tort is a reasonable way to resolve the conflict between the two states' policies.").

The two California Supreme Court cases on which Ms. Gerson principally relies do not persuade us to the contrary, because in each the injury occurred in California. The defendant in *Bernhard v. Harrah's Club* was a Nevada tavern that advertised in California to encourage California residents to drive across the state border to drink and gamble. *See* 546 P.2d 719, 720 (Cal. 1976). One night an intoxicated tavern patron drove back into California, crossed into oncoming traffic, and caused a head-on collision. *See id.* The California Supreme Court applied California law, which rendered businesses liable in such circumstances, rather than Nevada law, which did not. *See id.* at 721, 725–26. Essential to the decision was that the injury occurred in California. *See id.* at 724 ("At its *broadest limits* [California's] policy would afford protection to all persons injured *in California* by intoxicated persons who have been sold or furnished alcoholic beverages while intoxicated regardless of where such beverages were sold or furnished." (emphasis added)).[5] *Cable v. Sahara Tahoe Corp.* presented facts similar to those in *Bernhard* except the plaintiff's injury occurred in Nevada. *See* 155 Cal. Rptr. 770, 771–72 (Cal. Ct. App. 1979). The court applied Nevada law, interpreting *Bernhard* as "neither declar[ing] nor justif[ying] any policy purporting to protect California residents

[5] *Bernhard* reserved ruling on whether to actually go as far as the "broadest limits." It said only that it would go so far as to encompass claims against out-of-state taverns like the one in that case, "who regularly and purposely sell intoxicating beverages to California residents in places and under conditions in which it is reasonably certain these residents will return to California and act therein while still in an intoxicated state." 546 P.2d at 725.

injured in Nevada." *Id.* at 778; *see id.* at 777–79. Read together, *Bernhard* and *Cable* reinforce the general principle underlying California's choice-of-law precedent: "a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders" and in ensuring that defendants can rely on limitations on liability set by its law. *McCann*, 225 P.3d at 534 (internal quotation marks omitted).

The other case on which Ms. Gerson relies, *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006), suffers from the same flaw. The California Supreme Court applied California law to a claim that a Georgia call center was recording its conversations with California residents in violation of California—but not Georgia—privacy law. *See id.* at 917–18. Once again, the injury occurred to California residents *in California*—a fact noted in *McCann*. *See McCann*, 225 P.3d at 537 ("[D]efendant's conduct [in *Kearney*], although engaged in within another state, had the direct effect of causing an injury in California.").

In cases arising under our diversity jurisdiction, our duty is "simply to ascertain and apply the state law." *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 665 (10th Cir. 2007) (internal quotation marks omitted). "[W]e must take care not to extend state law beyond its well-marked boundaries in an area that is quintessentially the province of state courts." *CVS Pharmacy, Inc. v. Lavin*, 951 F.3d 50, 58 (1st Cir. 2020) (ellipsis and internal quotation marks omitted).

The Supreme Court of California has made clear that under the circumstances of this case, a foreign State's interest in limiting liability for activity within its borders predominates over California's interest in facilitating recovery for its residents for out-of-

state injuries.[6] Following this precedent, we conclude that Utah's interests would be more impaired if its law were not applied to this case. We emphasize that our task is not to decide which State has adopted the "better" or "worthier" policy, only to determine which State "should be allocated the predominating lawmaking power." *McCann*, 225 P.3d at 534. We accordingly hold that Utah law governs this dispute.

4. Allegations That Do Not Affect Our Analysis

Finally, we dispose of two arguments by Ms. Gerson that attempt to distinguish her case from California precedent on factual grounds. First, she claims that Logan River should be subjected to California law because her claims "stem from out-of-state businesses advertising and soliciting the business of California residents." Aplt. Br. at 20 (internal quotation marks omitted). In district court she submitted a declaration that states, "[Logan River] advertises in California through the internet, brochures, pamphlets and other printed materials about its facility." Aplt. App. at 60.

Ms. Gerson analogizes her case to *Bernhard*, which, as previously discussed, involved an accident *in California* caused by a driver who had become intoxicated at a

[6] We recognize that *McCann* noted, in parentheses, that the injured party had not been a resident of California until years after the conduct in Oklahoma that caused his injury. But nothing in the court's analysis turned on that fact. To our knowledge, no California appellate court has identified any state interest that depends on where the resident lived at the time of the tortious conduct and injury outside of California (except to protect against forum shopping by plaintiffs moving to California, *see McCann*, 225 P.3d at 534); and *Bernhard*, which involved injury to a California resident, set the "broadest limits" of California policy, 546 P.2d at 724, as extending only to injury in California if the tortious conduct occurred outside California, *see Cable*, 155 Cal. Rptr. at 778 ("[*Bernhard*] neither declared nor justified any policy purporting to protect California residents injured in Nevada.").

Nevada tavern that advertised in California. *See* 546 P.2d at 720. We have already distinguished that case on the ground that Ms. Gerson's injury occurred in Utah, thereby taking the claim beyond the "broadest limits" of California policy. *Id.* at 724 ("At its broadest limits [the California policy underlying the imposition of civil liability upon tavern keepers] would afford protection to all persons *injured in California* by intoxicated persons who have been sold or furnished alcoholic beverages while intoxicated regardless of where such beverages were sold or furnished." (emphasis added)). Since advertising was emphasized in the *Bernhard* opinion, we can only infer that the "broadest limits" would not be expanded because of advertising. *See Cable*, 155 Cal. Rptr. at 778 ("[*Bernhard*] neither declared nor justified any policy purporting to protect California residents injured in Nevada.").

Moreover, Ms. Gerson's advertising argument does not succeed even on its own terms. Although she claims that her injuries in Utah "stem from" Logan River's advertising in California, Aplt. Br. at 20, she does not explain the alleged causal connection. In *Bernhard* the tavern had published the advertisements "knowing and expecting" that California residents would respond by using California's highways to travel to and from the Nevada tavern. 546 P.2d at 725 (internal quotation marks omitted). The advertising in *Bernhard* was closely tied to the tortious conduct causing the injury. *See id.* ("Defendant by the course of its chosen commercial practice has put itself at the heart of California's regulatory interest, namely to prevent tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in the intoxicated state."). The advertising encouraged the very conduct (drunk driving) that

ultimately caused injury. Ms. Gerson does not point to any advertising with a comparable connection to the Perpetrator's misconduct in this case. *Cf. Cable*, 155 Cal. Rptr. at 772, 778 (in a case with facts similar to *Bernhard*'s—including an "equally extensive" amount of advertising directed at prospective California *patrons*—advertisements for prospective *employees* in the "Help Wanted" section of a California newspaper had no connection to the underlying drunk-driving injury and were irrelevant for the choice-of-law analysis).

Ms. Gerson's second fact-based argument is that her "presence in Utah was involuntary," and this fact "changes the choice-of-law inquiry." Aplt. Reply Br. at 5. Ms. Gerson does not explain, however, why a lawful removal from California to Utah would affect the choice-of-law analysis. And we decline to consider whether California's choice-of-law rules would produce a different result when the defendant has unlawfully removed a California resident from the State because the record does not adequately support a claim that Logan acted unlawfully in the removal of Ms. Gerson to Utah. As we proceed to explain, even if we consider the unsworn allegations of the complaint, they do not plausibly allege unlawful conduct by Logan in the removal, and the declaration Ms. Gerson submitted in district court in support of her choice-of-law arguments is no more satisfactory.

To be sure, the complaint need not allege all the facts necessary to support the plaintiff's position regarding the proper choice of law (although some of those facts may be necessary to state a cause of action). But if the plaintiff is to rely on the complaint in that regard, the sufficiency of the complaint in alleging the relevant facts should be

subject to the same standard of review applied in determining the sufficiency of the complaint's allegations to establish the elements of the cause of action. That is, the relevant allegations must be plausible. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (internal quotation marks omitted)). "[C]onclusory statements . . . do not suffice." *Id.* Nor does "a legal conclusion couched as a factual allegation." *Id.* (internal quotation marks omitted). Plausibility is a higher threshold than mere conceivability. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "The nature and specificity of the allegations required to state a plausible claim will vary based on context," *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011), and in making such a determination, we must "draw on [our] judicial experience and common sense," *Iqbal*, 556 U.S. at 679.

We recognized in *Gee v. Pacheco* that certain claims arise in "unique environment[s]" and accordingly require a plaintiff to "recite[] facts that might well be unnecessary in other contexts" in order to cross the threshold from conceivable to plausible. 627 F.3d 1178, 1185 (10th Cir. 2010). *Gee* involved various constitutional challenges to a prisoner's treatment by prison guards. *See id.* at 1182. For example, the prisoner alleged that guards had "assaulted" him during internal prison transfers, but he failed to provide any details about this conduct. *Id.* at 1182, 1192–93. In light of the "prison context" from which the complaint arose, *id.* at 1193, we said that the prisoner needed more than the bare word *assault* to allege a plausible claim because there are

many legitimate and lawful penological reasons why prison guards may use physical force that, in other contexts, would be unlawful assaults, *see id.* at 1187–88, 1192–93.

In most respects there are hardly two segments of the population more different than prisoners and children. *See Ingraham v. Wright*, 430 U.S. 651, 669 (1977) (observing that "the prisoner and the schoolchild stand in wholly different circumstances" when refusing to apply Eighth Amendment to school use of corporal punishment). Yet *Gee* is instructive in this case. Children, like prisoners, live in a unique environment, which can inform what is required to elevate a claim past the plausibility threshold. As the Supreme Court has recognized, "[J]uveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. *They are assumed to be subject to the control of their parents*, and if parental control falters, the State must play its part as *parens patriae*." *Schall v. Martin*, 467 U.S. 253, 265 (1984) (emphasis added) (citations omitted). "Parents can and must make" many decisions on behalf of their children, even their adolescent children. *Parham v. J. R.*, 442 U.S. 584, 603 (1979). To that end, both the Supreme Court and California courts have recognized that parents possess the right to direct their children's education. *See Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925); *Jonathan L. v. Superior Ct.*, 81 Cal. Rptr. 3d 571, 592 (Cal. Ct. App. 2008); *cf. Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2053 (2021) (Alito, J., concurring) ("In our society, parents . . . have the primary authority and duty to raise, educate, and form the character of their children.").

In light of Ms. Gerson's adolescence at the time of her transfer to Logan River, she would need to establish that someone without legal authority over her caused her to go there. (Indeed, she would need to show that Logan acted culpably in the removal.) Even if she could correctly claim that her removal from California was "against her will," that bare assertion would fail to show any unlawfulness. "The fact that a child may balk at . . . or complain about" a parental decision "does not diminish the parents' authority to decide what is best for the child." *Parham*, 442 U.S. at 604. A State's authority over a child present in the State is not diminished simply because a parent with custody placed her in the State against her wishes.

It is particularly appropriate to impose on Ms. Gerson the burden of establishing the facts regarding her removal to Utah because the relevant facts are likely within her purview—that is, there is no reason to believe that Ms. Gerson needs the discovery process to learn whether she was unlawfully removed from California in 2008, with Logan at least sharing in any culpability. *Cf. Gee*, 627 F.3d at 1185 ("[P]risoners ordinarily know what has happened to them."). Yet her complaint provides virtually no information on this point. In fact, what information we can glean strongly indicates that her parents *did* know she was attending Logan River. The complaint says that Ms. Gerson's mother sent her a gift while at Logan River. It also alleges that Logan River was negligent by, among other things, "failing to tell or concealing from Plaintiff, *Plaintiff's parents, guardians*, or law enforcement officials" that the Perpetrator was sexually abusing minors and "by holding out the Perpetrator to the Plaintiff *and her parents or guardians* as being in good standing and trustworthy." Aplt. App. at 17

(emphasis added). And the complaint contradicts the notion that Logan River engaged in anything resembling a "kidnapping" when it alleges that Ms. Gerson's "care, welfare, and/or physical custody *were temporarily entrusted to*" Logan River and that Logan River "*voluntarily accepted* the entrusted care of" Ms. Gerson. *Id*. (emphasis added).

The insufficiency of the allegations of the complaint is not, of course, dispositive. Ms. Gerson could have supplemented those allegations with additional evidence that would support her contention that the law of California should govern. In fact, she did submit a declaration for that purpose. But like the complaint it provided no plausible allegation of an unlawful removal, certainly not any allegation implicating Logan as culpable. The declaration characterized, without elaboration, her removal from her high school as a "kidnapping." Aplt. App. at 60. But that does not help Ms. Gerson. In part, her kidnapping allegation is a legal conclusion, and assertions of law do not bind the court. *See, e.g., Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1244 (10th Cir. 2010) (rejecting affidavit stating "in the affiant's opinion, the legal conclusion the court should reach"). And in part the allegation must be rejected as conclusory because the supporting factual allegations (which appear only in the unverified complaint) omit (clearly for tactical purposes) facts that are essential for drawing the conclusion. *See, e.g., Potts v. Davis Cnty.*, 551 F.3d 1188, 1194–95 (10th Cir. 2009) (rejecting the statement by a former law-enforcement officer that he was constructively discharged when his department refused to provide him with backup because there was "no evidence in the record other than a single conclusory sentence in [his] affidavit that suggests this occurred"); *see also* 10A Charles Alan Wright et al., Federal Practice and Procedure §

2726.1 at 467 (4th ed. 2016) ("[C]ourts have found that if the affidavit itself presents incredible assertions contradicted by otherwise objective evidence, it is insufficient to prevent summary judgment from being entered."). Certainly if implausible claims in a complaint cannot prevent dismissal of the claim, *see Iqbal*, 556 U.S. at 678, a sworn statement to the same effect cannot carry the day.

At oral argument Ms. Gerson's counsel made no attempt to explain how her removal was involuntary, despite extensive questioning from the panel, except to say that the allegation of involuntariness was made from the perspective of a 15-year-old. In sum, we do not think it plausible, in the absence of further specific allegations, that anything like the "kidnapping" described in Ms. Gerson's complaint, followed by her lengthy stay at Logan River, could have happened without the consent of a parent or state authorities.[7]

[7] Ms. Gerson repeatedly cites as persuasive authority the unpublished decision from the Central District in *Norwood v. Children & Youth Services Inc.*, which involved similar allegations: a plaintiff alleged that as a teenager he had been "kidnapped . . . from his grandmother's home in Agoura, California in the middle of the night" and transported to a residential treatment school in Utah where he suffered sexual abuse from school employees. No. CV 10-7944 GAF (MANx), 2011 WL 13130697, at *1 (C.D. Cal. Apr. 25, 2011) (internal quotation marks omitted). Faced with the same choice-of-law issue regarding statutes of limitations as we face here, the court applied California law after deciding that California's interest in ensuring recovery would be more impaired than Utah's interest in limiting liability. *Id.* at *8–9. That decision certainly supports Ms. Gerson's position, but we do not find it persuasive. To begin with, the court appeared to rely, at least partially, on the "kidnapping" allegation in the complaint even though the complaint also said that the plaintiff had been "entrusted to [the school's] care by Plaintiff's parents." Complaint at 9, *Norwood v. Children & Youth Services Inc.*, No. CV 10-7944 GAF (MANx) (C.D. Cal. Apr. 25, 2011), ECF No. 1. Moreover, the district court's opinion overlooks or misinterprets California precedent. First, although the court acknowledged that the plaintiff "initially" suffered his injury in Utah, it discounted this key fact "because the effects of sexual abuse can be expected to last well into the future" and "[t]hese ongoing injuries are suffered in California." *Norwood*, 2011 WL 13130697, at *8 n.2. But the injuries caused by asbestos to the plaintiff in *McCann* had not

Because Ms. Gerson has failed to make an adequate showing that her removal from California was unlawful, or that Logan was culpable in the illegality, we decline to address how that hypothetical possibility might alter our comparative-impairment analysis.

III. THE DISSENT

The dissent relies on several connections between Logan River and California: (1) Ms. Gerson's domicile was California when she was assaulted in Utah; (2) Logan River advertised in California (although the record says nothing about the content of the advertising or its extent, and there is absolutely no reason to believe that the advertising in any way encouraged the tortious conduct (sexual assault) alleged in this case—unlike the advertising in *Bernhard* that encouraged the interstate drunken driving that injured the plaintiff in that case); (3) Logan River was licensed as an educational institution by the

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manifested themselves until he moved to California, yet the California Supreme Court declined to treat the case "as one in which a defendant's conduct has caused an injury in California." 225 P.3d at 537. Second, the court relied on the fact that the defendant "ha[d] chosen to do business with Californians" by soliciting business and advertising in California, going so far as to say that "[b]y accepting California children, the Utah Defendant has subjected itself to California's longer limitations period for purposes of those children's potential claims." *Norwood*, 2011 WL 13130697, at *8. But this approach would support application of California law to any tort claim against any public accommodation in another State that advertises in California. More importantly, it finds no support in California authority and contradicts declarations by California appellate courts that California law does not apply to tortious conduct that occurs and injures a California resident in another State. *See McCann*, 225 P.3d at 536–37; *Bernhard*, 546 P.2d at 724 ("*At its broadest limits* [the California policy underlying the imposition of civil liability upon tavern keepers] would afford protection to all persons *injured in California* by intoxicated persons who have been sold or furnished alcoholic beverages while intoxicated regardless of where such beverages were sold or furnished." (emphasis added)); *Cable*, 155 Cal. Rptr. at 778 ("[*Bernhard*] neither declared nor justified any policy purporting to protect California residents injured in Nevada.").

State of California (although this fact is never mentioned in the Argument sections of Ms. Gerson's briefs on appeal); and (4) Logan River removed Ms. Gerson from her California school to Utah (although there was nothing improper about the removal, and the removal was independent of the later alleged sexual assaults by a Logan River employee).

These connections with California would certainly be relevant in determining whether Logan River had sufficient connections to California that it would be consistent with due process for Logan River to be haled into a California court to answer for the alleged tortious conduct. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). But that has never been disputed. The quite different question here is whether these connections require that California substantive law govern resolution of Ms. Gerson's claim. And, applying California choice-of-law principles, the answer to that question is clearly no.

What is missing from the dissent (and the arguments of Ms. Gerson) is an identification of interests of the State of California that distinguish this case from California precedents that apply the law of the defendant's domicile when the tortious conduct and injury occur in that State and that State's law is more favorable to the defendant than California law. The California Supreme Court has recognized the interest of California in the welfare of those who reside there, because of both the benefit to the resident and the benefit to the State of having taxpaying residents rather than residents dependent on the State. *See McCann*, 225 P.3d at 532–33. But those interests of California have consistently been outweighed (under principles of federalism) by the interests of another State in facilitating local economic activity by protecting against

liability an enterprise conducting its affairs within that other State when the tortious conduct and injury occur in that other State. This was true in *Offshore Rental*, where the plaintiff was domiciled in California at all material times, *see* 583 P.2d at 723, and in *McCann*, where the plaintiff was domiciled in California when his injury manifested itself (thereby triggering California's interest in his welfare and the State's finances), *see* 225 P.3d at 537.

The language relied on by the dissent arises largely in the context of lawsuits in which the plaintiff was injured in California. In that circumstance (unlike the case before us) the analysis can become more nuanced. For example, in *Kearney*, where the violation of California privacy law (forbidding the nonconsensual recording of a telephone conversation by a party to the conversation) occurred in a telephone conversation between a California resident and an agent of a business in Georgia, the California Supreme Court pointed out that Georgia's interest in protecting local business from liability was greatly diminished because the Georgia agent could easily avoid recording calls with California residents. *See* 137 P.3d at 936. And in *Bernhard* the tortious conduct—serving alcohol to an inebriated driver—took place in Nevada, but the driver caused an accident in California. *See* 546 P.2d at 720. In balancing the interests of Nevada and California, the California Supreme Court thought it important that the Nevada tavern had encouraged interstate drunk driving by advertising to Californians the pleasures of driving to Nevada to drink. *See id.* at 725. But, as repeatedly noted above, the opinion made clear that it would not extend its holding in that case to injuries (accidents) occurring outside California. When the facts were essentially identical except

that the motor-vehicle accident occurred in Nevada, the California Court of Appeals in *Cable* applied Nevada law, stating that *Bernhard* "neither declared nor justified any policy purporting to protect California residents injured in Nevada." 155 Cal. Rptr. at 778; *see McCann*, 225 P.3d at 534 (citing *Cable* with approval). The dissent cannot explain away this (completely correct) reading of *Bernhard* by a California appellate court.

Thus, the first two connections relied on by the dissent (Ms. Gerson's California domicile and Logan River's advertising in California) are clearly not enough in themselves to justify applying California law in this case. Nothing in the California precedents suggests that California's interest in protecting its residents should prevail over another State's interest in protecting from liability a business operating in that other State when the resident is injured in the other State by tortious conduct in the other State by that business, even when the business advertises in California.

As for the third connection—Logan River's being licensed in California—we need not address it because it was not relied on by Ms. Gerson in her appellate briefs. But it is certainly not material. For example, the defendant in *Offshore Rental* did business in California, *see* 583 P.2d at 723, but that fact was ignored by the California Supreme Court in its analysis. Moreover, consideration of whether the defendant does business (or is licensed) in California would be contrary to the fundamental approach of California choice-of-law doctrine, which is to "allocate[e] domains of law-making power in multi-state contexts—by determining the appropriate limitations on the reach of state policies." *McCann*, 225 P.3d at 533–34 (brackets, ellipsis, and internal quotation marks omitted).

Implicit in California's governmental-interest approach is that if every State adopted that approach, the substantive law applied to litigation would be the same regardless of the forum State. Given how many enterprises do business in multiple states, this desired uniformity could not be achieved if a forum State imposed its substantive law whenever one of its residents was injured in another State by a business licensed in the forum State. And nowhere does Ms. Gerson attempt to explain an alleged causal connection between Logan River's licensing in California and the assaults she suffered in Utah (in stark contrast to the clear causal connection between the advertising and the injury in *Bernhard*, *see* 546 P.2d at 725).

There remains the dissent's fourth connection—Logan River's removal of Ms. Gerson from her California school. As the dissent acknowledges, however, Ms. Gerson's complaint does not adequately allege that her removal was unlawful. *See* Dissent at 15 n.3. We must assume that a lawful guardian (presumably one or both parents) voluntarily approved the removal and transfer to Logan River. Why does California have a greater interest in what happens to Ms. Gerson at Logan River when Logan River personnel transported her to the school than if a parent had handled that task? Would it matter if the parent needed to use force to get her in the car and keep her there?

The dissent appears to think that if an out-of-state business solicits and welcomes clients or customers from California, it should be subject to California law. But that gets things backwards. The California Supreme Court takes a when-in-Rome perspective. Applying Louisiana law in *Offshore Rental*, the court explained: "By entering Louisiana, plaintiff exposed itself to the risks of the territory, and should not expect to subject

defendant to a financial hazard that Louisiana law had not created." 583 P.2d at 728 (brackets and internal quotation marks omitted); *accord McCann*, 225 P.3d at 535 (quoting this sentence with approval).

The dissent's analysis would wreak havoc in an area of law where the California Supreme Court has set some clear markers.[8]

IV. CONCLUSION

Ms. Gerson concedes that her complaint is untimely under Utah law. We accordingly **AFFIRM** the district court's dismissal of the complaint.

[8] The dissent also suggests that we certify this choice-of-law question to the California Supreme Court. But as the dissent acknowledges, Ms. Gerson never sought certification in district court, and "we generally will not certify questions to a state supreme court when the requesting party seeks certification only after having received an adverse decision from the district court." *Pacheco v. Shelter Mut. Ins. Co.*, 583 F.3d 735, 738 (10th Cir. 2009) (brackets and internal quotation marks omitted). Perhaps more importantly, "we are not convinced the issue is so novel that its resolution requires further guidance from the [California] Supreme Court." *Id.*

20–4074, *Samantha Gerson v. Logan River Academy*
BRISCOE, Circuit Judge, Dissenting

I respectfully dissent. I would apply California's statute in this case. When applying California's choice-of-law analysis, we are to accommodate the conflicting statutes of limitations of California and Utah to attain the underlying purpose of each State's statute: California has an interest in allowing victims of childhood sexual assault a long period in which to bring claims against third parties; and Utah has similarly extended statutes of limitations for childhood sexual assault cases but it also has an interest in protecting Utah businesses from defending against stale and "surprise" claims arising under another State's laws. We are to select the law of the State whose interests would be "more impaired" if its laws were not applied. *Washington Mut. Bank, FA v. Superior Ct.*, 15 P.3d 1071, 1081 (Cal. 2001). In this analysis, we are to "carefully evaluate[] and compare[] the nature and strength of the interest of each jurisdiction in the application of its own law . . . ." *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 527 (Cal. 2010). In the end, we are to determine the appropriate limitations on the reach of each State's policies. *Id.* at 533–34.

Ms. Gerson alleges in her complaint that agents of defendant Logan River Academy ("Logan River") came to Ms. Gerson's school in California and transported her across state lines to Utah, where she suffered sexual abuse while attending Logan River. Prior to these events, Logan River had advertised its services in California and also registered with the California Department of Education as a sanctioned, out-of-state, non-public, non-sectarian school. When Logan River solicits business by advertising in

California seeking students to attend, and also registers as an out-of-state, non-public, non-sectarian school with the California Department of Education, it should come as no "surprise" to Logan River that California laws applicable to minors would apply to tortious acts committed against California minors while attending Logan River. Op. at 15 (citing *Davis v. Provo City Corp.*, 193 P.3d 86, 91 (Utah 2008)). California's interests would be more impaired than Utah's interests if California law was not applied. Accordingly, I conclude that the district court erred in its choice-of-law analysis and that California law, and not Utah law, should apply to Ms. Gerson's claims.

I

I agree with the majority's recitation of the facts of this case. Op. at 2–3. However, because Logan River's exact intrusions into California inform the choice-of-law analysis, I briefly summarize the alleged manner in which Ms. Gerson, a California resident, was transported by Logan River from California to Utah. On October 15, 2008, when Ms. Gerson was 14 years old, two staff members from Logan River Academy arrived at her high school in California and told her they were transporting her to a residential treatment facility in Utah. Aplt. App. at 12. The Logan River employees explained that "This can go the easy way, or the hard way. If you choose the hard way, we will have to handcuff you and that will be embarrassing when we walk out." *Id.* The Logan River staff members brought Ms. Gerson to a car outside her high school and locked her in the back seat. *Id.* "The staff members then told Plaintiff she was going to Logan River in Utah . . . ." *Id.* The Logan River employees drove to Los Angeles International Airport, and the three boarded a flight to Utah. *Id.* After landing in Utah, the staff members

transported Ms. Gerson to Logan River. According to the complaint, Logan River "voluntarily accepted the entrusted care" of Gerson, a California minor. *Id.* at 17. Ms. Gerson's complaint alleges that once she arrived in Utah, Logan River employees sexually abused her and that Logan River Academy "knew or should have known that the abuse was happening" and that Logan River Academy is therefore liable for her injuries. *Id.* at 9. In addition to Logan River's physical intrusion into California, Ms. Gerson also averred that Logan River "advertises in California through the internet, brochures, pamphlets, and other printed materials about its facility." *Id.* at 60. Ms. Gerson also provided the district court with documentation showing that Logan River was registered with the California Department of Education as an out-of-state, non-public, non-sectarian high school. *Id.* at 61–74.

II

I agree with the majority's assessment that California's choice-of-law rules should determine which State's substantive law should apply.[1] Op. at 5. Several decades ago, California courts abandoned the traditional *lex loci delicti* approach, which automatically applies the law of the State where the injury occurred. *See, e.g.*, *Reich v. Purcell*, 432 P.2d 727, 730 (Cal. 1967) ("We conclude that the law of the place of the wrong is not necessarily the applicable law for all tort actions brought in the courts of this state."). In place of the old rule, California uses governmental-interest analysis to resolve

[1] I also suggest in Section III of this dissent that the California Supreme Court is a superior body to make that determination.

choice-of-law disputes in tort cases. *McCann*, 225 P.3d at 527. This is a three-step analysis:

> First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state and then ultimately applies the law of the state whose interest would be more impaired if its law were not applied.

Id. (quoting *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006) (internal quotations and citation omitted).

As the majority observes, Op. at 12–16, the first two steps are straightforward in this case. At the first step of the analysis, California and Utah law each apply a different statute of limitations to claims against third parties alleging negligent sexual abuse. Both States have enacted special statutes of limitations for tort claims relating to the sexual abuse of children. *See* Cal. Civ. Proc. Code § 340.1 (2019); Utah Code § 78B-2-308 (2018). Under California's statute, Ms. Gerson's claims were timely because her complaint was filed prior to her 26th birthday. Under Utah's statute, however, Ms. Gerson's claims are untimely because her complaint was not filed before her 22nd birthday.

The second step requires us to ask whether California and Utah both have a "real and legitimate interest" in having its statute of limitation applied to this case. *McCann*,

225 P.3d at 531–32. As the majority concludes, both States have a clear interest in having their statute of limitations applied. California has an interest in allowing victims of childhood sexual assault a longer period to bring claims against third parties, while Utah has an interest in protecting Utah businesses from defending against stale claims. Therefore a "true conflict" between Utah and California law exists, and I proceed to the third step of the analysis.

In the third step, a court "carefully evaluate[s] and compare[s] the nature and strength of the interest of each jurisdiction . . . to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *McCann*, 225 P.3d at 533 (internal quotations omitted). Courts should not "weigh the conflicting governmental interests" to determine which is better or more worthy, but instead should "determin[e] the appropriate limitations on the reach of state policies . . . ." *Id.* at 533–34 (brackets and internal quotations omitted). The California Supreme Court has explained that "[a]n attempted balancing of conflicting state policies in that sense is difficult to justify in the context of a federal system in which, within constitutional limits, states are empowered to mold their policies as they wish." *Id.* at 533 (ellipsis and internal quotations omitted). "[T]he comparative impairment process can more accurately be described as an accommodation of conflicting state policies attempting, to the extent practicable, to achieve the maximum attainment of underlying purpose by all governmental entities." *Kearney*, 137 P.3d at 934 (brackets and internal quotations omitted). Given this tall order, the California Supreme Court has recently explained that "the governmental interest test is far from a mechanical or rote application

of various factors." *Chen v. L.A. Truck Centers, LLC*, 444 P.3d 727, 732 (Cal. 2019). Accordingly, I briefly summarize relevant caselaw from California courts before applying this test to Ms. Gerson's complaint.

A

In *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976), the California Supreme Court applied California law to tortious conduct that occurred in Nevada. In *Bernhard*, the California Supreme Court concluded that California law, and not Nevada law, should apply to a suit alleging that a Nevada tavern owner had negligently served alcohol to an intoxicated patron. This intoxicated person, now a drunk driver, collided head-on with the *Bernhard* plaintiff in California, near the state's border with Nevada. Both the plaintiff and the drunk driver were California residents, and prior to the accident the drunk driver had spent the evening at defendant's bar in Nevada. The plaintiff sued the defendant under a California law holding tavern keepers liable for the injuries caused when the tavern keeper negligently sells alcoholic beverages to an intoxicated patron who subsequently drives drunk and injures a third party. *Id.* at 720–21. Under California law, therefore, the suit would be allowed to go forward, but if Nevada law applied, the suit would fail. *Id.*

The *Bernhard* court found that California and Nevada law conflicted and that both States had an interest in applying their own law. *Id.* at 722–23. Turning to the third step of governmental-interest analysis, the court explained that, where a true conflict exists, "the 'comparative impairment' approach . . . seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state."

Id. at 723. Seeking to "reexamine the California policy underlying the imposition of civil liability upon tavern keepers," the court reasoned that "[a]t its broadest limits this policy would afford protections to all persons injured in California by intoxicated persons who have been sold or furnished alcoholic beverages while intoxicated regardless of where such beverages were sold or furnished." *Id.* at 724.[2] But the court found that it did not need to examine whether the policy should be extended this far, because the instant case involved a defendant who advertised in California, actively sought business from California residents, and "by the course of its chosen commercial practice, has put itself at the heart of California's regulatory interest." *Id.* at 725.

The *Bernhard* court noted additional factors suggesting that California law should extend to tortious conduct that occurred in Nevada. *Id.* First, "the act of selling alcoholic beverages to obviously intoxicated persons is already proscribed in Nevada" as a criminal (but not civil) offense, so the court reasoned that the application of California's civil

[2] The majority relies heavily on this "broadest limits" language, repeating it with added emphasis throughout the Opinion. Op. at 18, 20 n.6, 21, 27 n.7. The majority appears to read *Bernhard* as announcing a rule that California's legitimate policy goals could never extend to injuries sustained beyond that State's borders. Op. at 21 ("We have already distinguished [*Bernhard*] on the ground that Ms. Gerson's injury occurred in Utah, thereby taking the claim beyond the 'broadest limits' of California policy."). But the majority imbues this dicta with more significance than it can bear. The *Bernhard* court explained that its ruling did not describe the outer bounds of California's policy interests, because the defendant advertised to California patrons, and therefore "has put itself at the heart of California's regulatory interest." *Bernhard*, 546 P.3d at 725. Indeed, the *Bernhard* court expressly said that they "need not, and accordingly do not here determine the outer limits to which California's policy should be extended" because of the defendant's deliberate solicitation of Californians. More on this distinction to follow, but Ms. Gerson's complaint alleged that Logan River did much more than merely advertise its services in California.

liability law "would not impose an entirely new duty" on tavern keepers. *Id.* Second, the court noted that its decision did not apply to all Nevada tavern keepers, but rather only "those tavern keepers who actively solicit California business." *Id.*

In its discussion of *Bernhard*, the majority describes the "injury" as occurring in California rather than Nevada, and concludes that *Bernhard* and *Cable* together support the conclusion that the place of the "injury" determines which State's law should apply. Op. at 18–19 (citing *Cable v. Sahara Tahoe Corp.*, 155 Cal. Rptr. 770, 778–79 (Cal. Ct. App. 1979)). However, as the majority later recognizes, the tortious conduct giving rise to the *Bernhard* plaintiff's action against the tavern owner occurred in Nevada. Op. at 20–21. Contrary to the majority's statements, the facts in *Bernhard* and the related competing state interests support the application of California's statute here as they did in *Bernhard*, i.e., in both cases, a California resident is harmed by tortious conduct in another State after the defendant targeted Californians through its business dealings.

In a second relevant case, *Offshore Rental*, the California Supreme Court held that Louisiana law, and not California law, applied to a California resident injured on a business trip to Louisiana. *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721 (Cal. 1978). Plaintiff's suit seeking recovery for injuries to a key employee was permitted under California law, but barred under Louisiana law. Defendant was a Delaware corporation that did business in California, Louisiana, and other states. *Id.* at 723. The *Offshore Rental* court considered the place of injury, explaining that "although the law of the place of the wrong is not necessarily the applicable law for all tort actions, the situs of the injury remains a relevant consideration." *Id.* at 728 (internal citations omitted). The

court further considered that the relevant "California statute has historically been of minimal importance in the fabric of California law," while noting that "Louisiana courts have recently interpreted their analogous Louisiana statute narrowly . . . ." *Id.* at 729. Concluding that Louisiana therefore had the "stronger, more current interest," the court determined that Louisiana's interests would be more impaired if its law did not apply, and held that Louisiana law applied. *Id.*

The *Kearney* decision is also instructive. The *Kearney* court held that California privacy law governed phone calls made to California residents by an out-of-state business. 137 P.3d 914. The *Kearney* plaintiffs were California residents who had accounts with defendant, a Georgia-based brokerage firm. *Id.* at 917. Unknown to plaintiffs, defendant recorded various calls made to and by the plaintiffs concerning their accounts. *Id.* Under Georgia law, which requires only the consent of one party to being recorded, defendant's conduct was lawful. *Id.* But under California's privacy law, which requires consent of all parties to a recording, defendant's conduct was unlawful.

The *Kearney* court proceeded through the governmental-interest analysis, concluding that the two laws differed and that they presented a true conflict because California had a legitimate interest in protecting the privacy of its residents while Georgia had a legitimate interest in "establishing the general ground rules under which persons in Georgia may act." *Id.* at 933.

Proceeding to the third step, the *Kearney* court considered the impairment of each State's interest, and concluded that California law should apply. The court determined that California had a substantial interest in having its privacy laws applied to protect its

citizens. First, the court explained that "the objective of protecting individuals in California from the secret recording of confidential communications" was "one of the principal purposes underlying" California's privacy law. *Id.* at 934. Second, the court noted that California's legislature had continued to expand privacy protections in recent years, suggesting that the State had a "strong and continuing interest in the full and vigorous application" of its privacy laws. *Id.* at 935. Third, citing *Bernhard*, the court explained that "the failure to apply California law in the present context would seriously undermine the objective and purpose of the statute." *Id*. Finally, the court observed that "unequal application of the law very well might place [California] companies at a competitive disadvantage with their out-of-state counterparts" if California-based companies had to observe California's privacy laws when calling California residents, but out-of-state companies did not. *Id.*

Turning to Georgia's interests, the *Kearney* court found that Georgia's interests would not be seriously undermined by having Georgia-based companies follow California law when calling California residents. The court observed that California's law was more protective than Georgia's, such that application of California law "would not violate any privacy interest protected by Georgia law." *Id.* at 936. Further, the court reasoned that Georgia companies would not be severely burdened by the application of California law, because it would be feasible for Georgia businesses to tell when they were calling a California phone number and obtain consent from the California resident before recording. *Id*. The court therefore held that California law should apply to calls made from Georgia to California residents. *Id*. at 937.

The majority also discusses *McCann*, which I agree is an instructive case. The *McCann* court clarified that the mere fact that the plaintiff was a California resident at the time the suit was initiated was insufficient grounds to apply California law. *McCann*, 225 P.3d 516. In *McCann*, the court concluded that under governmental-interest analysis, Oklahoma's statute of repose, and not California's more lenient statute of limitations, should apply to a lawsuit stemming from asbestos exposure the plaintiff suffered in Oklahoma. *Id.* The plaintiff in *McCann* was a former construction worker who had lived in Oklahoma in the 1960s. While living in Oklahoma, plaintiff was exposed to asbestos while working on a steam generator manufactured by the defendant. *Id*. at 520–21. The defendant corporation was incorporated and headquartered in New York but shipped its steam generator to Oklahoma. *Id*. Plaintiff later moved from Oklahoma to Minnesota, then Illinois, and finally moved to California in 1975. In 2005, the plaintiff developed mesothelioma and filed suit in California. *Id.*

The plaintiff in *McCann* argued that California's statute of limitations should apply and that his claim was therefore timely. Defendant argued that Oklahoma's ten-year statute of repose should apply and bar the suit. Proceeding through the first two steps of governmental-interest analysis, the *McCann* court concluded that California and Oklahoma law differed and that the case presented a true conflict. Turning to the third step, the *McCann* court sided with the defendant, holding "that a failure to apply Oklahoma law would significantly impair Oklahoma's interest." *Id.* at 534. In reaching this conclusion, the court emphasized several operative facts.

The *McCann* court observed that the conduct underlying the injury "occurred in Oklahoma in 1957, at a time when plaintiff was present in Oklahoma and was an Oklahoma resident." *Id.* The court explained that while California had rejected the rule that automatically applied the law of the jurisdiction in which tortious conduct occurred, California's caselaw "nonetheless continue[s] to recognize that a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders." *Id.* (internal quotations omitted). Regarding statutes of limitations and repose, the *McCann* court ruled that a jurisdiction has an interest "in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability . . . will be available . . . ." *Id.*

The court reasoned that it would be unfair to allow California law to displace Oklahoma law "solely upon the circumstance that *after* defendant engaged in the allegedly tortious conduct in Oklahoma, plaintiff happened to move" to California. *Id.* (emphasis in original). Oklahoma's interest in providing a reliable rule regarding liability would be severely undermined if that rule could be circumvented when someone moved to a different State after suffering injury in Oklahoma. *Id.* at 535. California's choice-of-law decisions "generally hold that when the law of the other state limits or denies liability for the conduct engaged in by the defendant in its territory, that state's interest is predominant . . . ." *Id.* at 536. The *McCann* court distinguished *Kearney* (discussed above) on the basis that there "the defendant, while outside of California, participated in an *interstate* telephone call with a California resident who was *in California* and, where the defendant, in violation of California privacy law, recorded

. . . the words that were spoken by the California resident *in California*." *Id.* at 537 (emphasis in original).

B

As the above cases demonstrate, California courts take a fact-intensive approach to resolve choice-of-law conflicts. With these cases in mind, I apply them to Ms. Gerson's complaint. To the majority, this case is entirely analogous to *McCann*, and *McCann*'s analysis requires the application of Utah law. Op. at 16–17 ("The answer can be found in *McCann*. Addressing issues similar to those of the present case, *McCann* held that a foreign State's interest in setting clear limitations on liability for conduct within its borders that injuriously impacted the plaintiff while also within the State predominated over California's interest . . . ."). But does *McCann* really provide the answer to Ms. Gerson's very different case? The plaintiff in *McCann* was an Oklahoma resident at the time he was injured in Oklahoma. 225 P.3d at 520. In contrast, Ms. Gerson was a California resident before, during, and after her injury in Utah. *McCann* did not involve allegations that the out-of-state defendant had advertised in California or otherwise targeted the State with relevant commercial activities. Ms. Gerson, on the other hand, has alleged that Logan River had several voluntary and deliberate contacts with the State of California *prior* to the injuries Ms. Gerson sustained and that these contacts were related to Ms. Gerson's injuries. The *McCann* court explained that, were California law to apply, that decision "would rest solely upon the circumstance that *after* defendant engaged in the allegedly tortious conduct in Oklahoma, plaintiff happened to move to a jurisdiction whose law provides more favorable treatment to plaintiff than that available under

Oklahoma law." *Id.* at 534 (emphasis in original). However, application of California law here should come as no surprise to Logan River given its deliberate actions within the State of California. California's involvement in this case, as well as Ms. Gerson's California residence, remained constant throughout.

In sum, *McCann* involved a plaintiff who voluntarily moved to California *after* suffering injury out of state and sought to apply California law to his injury. The *McCann* court found this chronology of events to be determinative. The court refused to subordinate Oklahoma's interests in the application of its laws as resting "solely upon the circumstance that *after* the defendant engaged in the allegedly tortious conduct in Oklahoma, the plaintiff happened to move to a jurisdiction whose law provides more favorable treatment to plaintiff than that available under Oklahoma law." *Id.* at 534. This case, however, involves a Utah corporation who advertised its school to California residents, registered its school with the California Department of Education, and voluntarily sent its agents into California to transport the plaintiff, a California resident, out of state *before* causing her injury out of state. The connection to California was fortuitous in *McCann*, but known and deliberate here. Because *McCann* involved a completely different set of factual circumstances, any general rule one could divine from *McCann* on out-of-state injuries does little to answer the question before us.

The key facts in this case are Logan River's deliberate dealings with California, particularly its solicitation of California residents and physical intrusion into California to retrieve Ms. Gerson, a California resident. But strangely the majority ignores this fact altogether, asserting that "Ms. Gerson does not explain, however, why a lawful removal

from California to Utah would affect the choice-of-law analysis." Op. at 22. Ms. Gerson's briefing counters that assertion. Indeed, Ms. Gerson's briefing is replete with explanations as to why Logan River's cross-border conduct changes the outcome of the governmental-interest analysis. For example, Ms. Gerson's brief explained that California would not be able to effectuate its policy of protecting minors if out-of-state defendants could "advertise in California, physically travel to California, and forcibly transport California minors to Utah" as an end-run on California's longer statute of limitations. Aplt. Br. at 25. Ms. Gerson continued to explain that "Logan River's conduct in California—forcibly removing Ms. Gerson from her high school and transporting her to Utah—exposed her to the risk of sexual assault" in Utah. *Id.*[3] Elsewhere, Ms. Gerson argues that she "did not voluntarily submit to Utah's laws, but was instead taken from California to Utah [by the defendant] against her will." *Id.* at 21 (citing Aplt. App. at 10–14). When discussing Utah's interests, Ms. Gerson argued that the State's interests in regulating in-state business conduct and regulating tortious conduct within its borders

[3] Ms. Gerson's briefing also emphasized that Ms. Gerson was involuntarily transported to Utah. *See, e.g.*, Aplt. Br. at 24–25. The majority goes to great lengths to explain why Ms. Gerson's complaint failed to plausibly plead facts sufficient to conclude that she was unlawfully removed from California. Op. at 22–27. To be sure, if Ms. Gerson had been unlawfully kidnapped from California to Utah by Logan River, this would be a different case. And I agree with the majority that her pleadings are insufficient to establish that her transport was unlawful. But the majority's emphasis on this scenario is misplaced. The operative facts are that Logan River advertised in California, solicited business from California, and, through its agents, voluntarily crossed California's borders to transport a minor child back across state lines. Her briefing argues repeatedly that Logan River's intrusion into California changes the choice-of-law analysis, regardless of whether Ms. Gerson's transport to Utah was unlawful or only involuntary and forceful.

"lose their vitality, however" where the defendant Utah business "physically reached into California to transport a minor to Utah against her will." *Id.* at 23. There is another example near the end of Ms. Gerson's brief, noting that "where the defendant had purposefully conducted business with California residents, California law applied." From this, Ms. Gerson reasoned that because "the academy's contact with California was purposeful. . . declining to apply California law would more significantly impair California's interests than the other way around." Aplt. Br. at 28 (ellipsis, quotations, and citations omitted). Additional arguments explaining why Logan River's physical presence in California might affect the governmental-interest analysis can be found in Ms. Gerson's briefing before the district court and her reply brief before this court. *See, e.g.*, Aplt. Reply Br. at 9 (explaining that because "agents of Logan River physically entered California to transport Ms. Gerson to Utah," Logan River had voluntarily subjected itself to California's policy goal of preventing sexual abuse of its minor children); Aplt. App. at 153 (explaining that "California presumably has an interest in the enforcement of its statute" because "employees of Logan River Academy, under direct orders of Defendant, kidnapped Plaintiff from her high school in Beverly Hills, California").

With these circumstances in mind, I turn to the task of comparing which State's interests would be more impaired by the application of the other State's law. I conclude that California has a greater interest in having its law applied in Ms. Gerson's case. I agree generally with the majority's assessment of the relevant interests. Op. at 15–16. California's expanded statute of limitations for child sexual abuse claims against third parties reflects the State's broader goal of permitting victims of abuse a greater chance of

recovery against negligent third parties. California courts have explained that "[t]he overall goal of section 340.1 is to allow victims of childhood sexual abuse a longer time period in which [to] bring suit against their abusers." *McVeigh v. Doe 1*, 42 Cal. Rptr. 3d 91, 94 (Cal. Ct. App. 2006). The California legislature has expanded this statute of limitations "numerous times since its enactment in 1986, to enlarge the period for filing claims," and the extended statute of limitations now includes "actions not just against molesters, but against 'any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse . . . .'" *Id.* at 94–95 (quoting Cal. Civ. Proc. Code § 340.1). Utah, of course, has a substantial interest in this case as well. Utah's shorter statute of limitations for claims against third parties reflects the potential for unfair litigation should a longer statute of limitations apply, and a desire to protect business entities by "preventing unfair litigation such as surprise or ambush claims, fictitious and fraudulent claims, and stale claims" and avoiding injustice "due to the difficulties caused by lost evidence, faded memories and disappearing witnesses." *Davis*, 193 P.3d at 91 (internal citations omitted).

Considering these competing interests and the facts of this case, I agree with the *Norwood* court that "declining to apply California law here would more significantly impair California's interest than would declining to apply Utah law." *Norwood v. Children & Youth Services, Inc.*, No. CV 10-7944 GAF (MANx), 2011 WL 13130697, at *8 (C.D. Cal. Apr. 25, 2011). Logan River made a commercial decision (indeed, several of them) to seek business from Californians in general and to retrieve Ms. Gerson from

California in particular.[4] As with the defendants in *Kearney* and *Bernhard*, therefore, Logan River voluntarily chose to do business with Californians and within the State of California. The causal link between California business dealings and harm suffered by a Californian is even more pronounced here than in *Bernhard*. In *Bernhard*, the defendant's general advertising in California was sufficient to create a foreseeable effect in California and bring the defendant's action within the heart of California's interest in protecting its own drivers against drunk drivers. *Bernhard*, 546 P.2d at 725–26. But here, Ms. Gerson has alleged not just that Logan River advertises its services in California and is registered with the California Department of Education as a sanctioned, out-of-state, non-public, non-sectarian school, but that its agents actually entered the State of California and transported her out of state, where its negligence caused her sexual abuse. California's

[4] Although I believe the fact that Logan River's employees entered California to retrieve Ms. Gerson is key, Ms. Gerson has alleged further ties between Logan River and California that also contribute to the choice-of-law analysis. For example, Ms. Gerson provided evidence in an appendix to her briefing that Logan River is registered as a high school with the California Department of Education, Aplt. App. at 186–87, and that Logan River's own website holds the school out as "a Certified Non-Public School by the [California Department of Education] which allows for the placement and funding of California students by school districts." *Id.* at 185. Much as the defendant tavern keeper's advertising to Californians created a foreseeable risk of harm to Californians (and justified application of California law to a Nevada defendant), so too does Logan River's advertising in California (and affiliation with the State of California) create a foreseeable risk of harm to Californians. *See Bernhard*, 546 P.2d at 725 ("It seems clear that California cannot reasonably effectuate its policy if it does not extend its regulation to include out-of-state tavern keepers such as defendant who regularly and purposely sell intoxicating beverages to California residents . . . ."). Ms. Gerson mentions Logan River's registration with the California Department of Education in her opening brief. Aplt. Br. at 11–12 ("The California Department of Education recognizes Logan River as a sanctioned, out-of-state, non-public, non-sectarian school."). Ms. Gerson argued in her opening brief that this connection "heightened" California's interests in this case. *Id.* at 20.

expanded statute of limitations against third parties responsible for such acts evinces a clear policy interest that survivors of sexual abuse as children be allowed to recover against those third parties in an expanded time frame. If any third party could evade the reach of this statute of limitations merely by transporting a minor across state lines and then facilitating sexual abuse, California's policy goals would be severely undermined.

Utah's interest, on the other hand, would not be significantly impaired. I agree with the majority that Utah's policy here is "to protect such entities from stale claims." Op. at 16. Application of California law here would subject Logan River to a claim which Utah law deems stale, but it would not expose Logan River to a duty unrecognized under Utah law. *See* Utah Code § 78B-2-308(3)(b) (allowing that a "victim may file a civil action against a non-perpetrator for intentional or negligent sexual abuse suffered as a child"). But Logan River chose to operate interstate by its business model (advertising in California, registering with the California Department of Education as a sanctioned out-of-state school, and physically entering California to retrieve a minor California resident).[5] Applying California law would impair Utah's policy interests only in unusual cases, such as this, where a Utah defendant crossed state lines to transport a minor out of state. The majority asks "[w]hy does California have a greater interest . . . when Logan River personnel transported her to the school than if a parent had handled that task," Op.

[5] The *McCann* court recognized a jurisdiction's "predominant interest" in setting the statute of limitations for businesses "operating within its territory." 225 P.3d at 534. But here, Logan River operated beyond Utah through its advertising in California, registration as a school in California, and then recruiting Ms. Gerson in California and transporting her back to Utah. Utah's predominant interest in protecting Utah businesses, therefore, is greatly diminished by Logan River's own interstate conduct.

at 32, but the point instead is that Utah's interest is diminished by Logan River's out-of-state activities. As with *Bernhard*, therefore, this case does not reach the "broadest limits" of California's policy interests by protecting all California residents from out-of-state torts, but instead applies only to a narrow subset of Utah defendants who deliberately target and enter other States followed closely by the alleged tortious conduct. The majority is correct that in *Cable*, the California Court of Appeals stated that *Bernhard* "neither declared nor justified any policy purporting to protect California residents injured in Nevada." 155 Cal. Rptr. at 778. This makes sense considering that *Bernhard* did not involve a California resident injured in Nevada, and the *Bernhard* court would have had no reason to declare or justify a policy that did not fit the facts of the case. But the *Cable* court also read *Bernhard* as "justify[ing] the extraterritorial effect of [California's] policy which was announced by showing that the injurious situation (drunk driving in California) was generated by the extensive advertising and other solicitation of business in California by the Nevada defendant." *Id.* An extraterritorial effect of California's policy is even more justified here, where Ms. Gerson's "injurious situation" was generated by Logan River's advertising in California, registration with the California Department of Education, and physical entry into California to transport Ms. Gerson to Logan River's facility.

The majority declares that "[t]he California Supreme Court takes a when-in-Rome perspective," Op. at 32, and that California's choice-of-law analysis becomes "more nuanced" only in those cases where the plaintiff was injured in California. *Id.* at 30. But these statements contradict the choice-of-law analysis in the cases cited by the majority,

which uniformly consider the totality of the factual circumstances before deciding which State's law should apply. For example, the *Cable* court did not mechanically conclude that the place of injury dictated the applicable law. *Cable v. Sahara Tahoe Corp.*, 155 Cal. Rptr. 770, 778–79 (Cal. Ct. App. 1979). Instead, the *Cable* court considered (1) the plaintiff's various ties to Nevada, (2) the lack of connection between the defendant's commercial activities in California and the plaintiff's injury, and (3) the fact that California had recently repealed the law at issue before concluding that Nevada law should apply. *Id.* The *McCann* court similarly considered all of the relevant facts before concluding that Oklahoma law should apply and refusing to apply California law when McCann moved to California *after* his exposure to asbestos in Oklahoma. *McCann*, 225 P.3d at 534–36. In contrast, the majority analyzes Logan River's various connections to California in isolation from one another. Op. at 31 (contending that Ms. Gerson's California domicile and Logan River's advertising in California "are clearly not enough in themselves to justify applying California law in this case"). But the California Supreme Court takes a holistic approach to choice-of-law disputes, and the sum of Logan River's California dealings require application of California law to this case. After doing business in California, soliciting business from California residents, and entering California in pursuit of its business interests, Logan River should not expect to be relieved of a financial hazard created by California's more permissive statute of limitations—after all, "when in Rome."

Our role in this analysis is not to "weigh" the wisdom of each jurisdiction's policies by "determining which conflicting law manifested the better or the worthier

social policy on the specific issue." *McCann* 223 P.3d at 533 (internal quotations omitted). It is not our place, therefore, to decide that Utah's stance against stale claims against its businesses is somehow morally superior to California's policy decision to allow victims of childhood sexual assault to recover against third parties. Instead, we are to "allocat[e] domains of law-making power in multi-state contexts—by determining the appropriate limitations on the reach of state policies." *Id.* at 533–34 (brackets, ellipsis, and internal quotations omitted). And here, it makes little sense to allow a Utah defendant to evade California law where the Utah defendant voluntarily and deliberately targets California residents generally through its advertising and registration as an out-of-state school with the California Department of Education and then specifically targets a California minor and transports her across state lines. I would hold that California, and not Utah, law should apply to Ms. Gerson's complaint, and that her complaint was therefore timely filed.

The majority cites several secondary sources to justify application of Utah law to Ms. Gerson's case, announcing that its determination is in line with what other state courts (with different choice-of-law regimes) would reach. *See, e.g.*, Op. at 17 (explaining that "[w]hen parties have different domiciles but the tortious conduct and injury occurred within the tortfeasor's home State, whose law favors the tortfeasor, the great majority of courts apply the law of the State where those events occurred, regardless of the choice-of-law methodology they use." (citing Symeon C. Symeonides, *Choice of Law* 205–08 (2016)). But the court's task in this case "is not to reach its own judgment regarding the substance of the common law" but instead "to predict what the

state supreme court would do." *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 665–66 (10th Cir. 2007). Our goal is to reach the outcome that California courts would reach, not to apply the view contained in secondary restatements of law. And as the majority concedes, California courts are an outlier in their choice-of-law methodology. Op. at 5–6 (noting that California and the District of Columbia are the only jurisdictions that use governmental-interest analysis for tort claims). It is not surprising, then, that California courts would reach a decision that differs from other state courts that rely on very different choice-of-law regimes.

III

Notwithstanding my conclusion that California law should apply, I believe that certification of this question to the California Supreme Court is also appropriate. Ms. Gerson requested certification in her opening brief. Aplt. Br. at 28–29. Although our precedent requires that "we apply judgment and restraint before certifying" a question to a state supreme court, we will ask a state supreme court to weigh in "where the question before us (1) may be determinative of the case at hand and (2) is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance." *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007). Certification of questions to state supreme courts "give[s] meaning and respect to the federal character of our judicial system, recognizing that the judicial policy of a state should be decided when possible by state, not federal, courts." *Id.*

Both *Pino* conditions are met in this case. First, the California choice-of-law question at issue in this appeal is outcome determinative. Ms. Gerson's complaint is

untimely (and must be dismissed) if Utah law applies, but is timely if California law applies. Second, the factual circumstances of Ms. Gerson's case (and attendant legal analysis) is "sufficiently novel" to warrant certification to the California Supreme Court. As discussed above, Ms. Gerson's case is factually dissimilar from other "out-of-state injury" cases, such as *McCann*, *Offshore Rental*, and *Cable*, and the decisions of the California Supreme Court suggest that these factual differences warrant a different outcome in the choice-of-law analysis. To be sure, "[w]hen we see a reasonably clear and principled course [laid out in state supreme court decisions], we will seek to follow it ourselves," *Pino*, 507 F.3d at 1236, but there is no such clear course in Ms. Gerson's case. The differing outcomes proposed by the majority and the dissent after analysis and application of the same California cases is strong evidence that Ms. Gerson's case is not clear cut and that certification is a more prudent approach than the outright dismissal of Ms. Gerson's complaint.

Although Ms. Gerson sought certification in her appellate briefing, the record does not show that she asked the district court to certify this choice-of-law question to the California Supreme Court. "We generally will not certify questions to a state supreme court when the requesting party seeks certification only after having received an adverse decision from the district court," but our caselaw does not impose a categorical ban on certification in such cases. *In re Midpoint Dev., L.L.C.*, 466 F.3d 1201, 1207 (10th Cir. 2006) (internal quotations omitted). Given the panel's disagreement after attempting to parse and harmonize the cited California cases and applying them to a factual scenario very different from any the California Supreme Court has thus far addressed, it would be

more prudent to have the California Supreme Court interpret its cases than for us to attempt to apply its unique government-interest analysis to predict the outcome here. Our precedent "recognize[s] the importance of allowing [state supreme courts] to decide questions of state law and policy, and thus define state law." *State Farm Mut. Auto. Ins. Co. v. Fisher*, 609 F.3d 1051, 1058–59 (10th Cir. 2010). Accordingly, I would certify this question to the California Supreme Court rather than reach an outcome that California courts would not.

IV

For these reasons, I conclude that California law, and not Utah law, should apply to Ms. Gerson's complaint. Accordingly, her complaint was timely filed, and I would reverse the district court's order dismissing her claim. In the alternative, I suggest certification of the question to the California Supreme Court.