

No. 18-1137

IN THE
Supreme Court of the United States

LES SCHWAB TIRE CENTERS OF PORTLAND, INC., AND
TOYO TIRE HOLDINGS OF AMERICAS INC.,

Petitioners,

v.

SCOTT WILCOX,

Respondent.

**On Petition For A Writ Of Certiorari
To The Court Of Appeals Of The State Of Oregon**

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Respondent concedes that in every other jurisdiction to have considered the issue, a claim brought in a purely representative capacity for another is *not* entitled to tolling under the Servicemembers Civil Relief Act (“SCRA”). Despite respondent’s protestations, the Oregon Court of Appeals clearly held that such claims *are* entitled to tolling. The split is thus square, and there is no barrier to review. The petition for certiorari should be granted.

I. THE SPLIT IS PLAINLY IMPLICATED BY THIS CASE

Respondent does not dispute that it is “long-established” that the SCRA’s tolling provision does not apply to “claims that are brought in a purely representative capacity.” Opp. 19. In fact, respondent makes no attempt to defend the Oregon Court of Appeals’ rationale for its decision, which departs from that consensus. Instead, respondent mischaracterizes the court’s clear holding as mere “dicta.” *See* Opp. 14.

The Oregon Court of Appeals held (incorrectly) that the statutory “language does not distinguish between actions brought by a servicemember in a personal capacity and those brought in a representative capacity.” App. 6a. The court observed that Congress’ stated purpose with the SCRA was “to provide for the temporary suspension of judicial . . . proceedings . . . that *may* adversely affect the civil rights of servicemembers during their military service.” App. 6a (quotation marks omitted). The court continued:

Given those purposes and the broad language of the act, we conclude that the SCRA's text supports plaintiff's construction of the SCRA—*viz.*, that the act tolls the statute of limitation for plaintiff, based on plaintiff's military service, to bring an action in his capacity as the personal representative of his wife's estate.

App. 6a. That is not dictum; it is the holding. *See, e.g., Kiernan v. City of Portland*, 112 P. 402, 408 (Or. 1910) (holding that statement was not dictum where “[t]he points decided . . . were all forcibly presented in the briefs and at oral argument, and the effect of the conclusion reached by this court was that, taking either horn of the dilemma, appellant's position is untenable.”).

Indeed, the court *conceded* that it was creating a split in authority, but justified its holding by claiming that its interpretation was supported by the text and the statutory purposes overall. App. 8a–9a. The court further admitted that, under its “construction of the SCRA” a plaintiff could “circumvent statutes of limitation . . . by appointing as personal representative for a decedent's estate a servicemember who has no connection to the decedent to pursue claims that do not affect the servicemember's rights.” App. 9a.

Respondent nevertheless asserts that this case “fits the substance-over-form rule of *Stutz* [v. *Guardian Cab Corp.*, 74 N.Y.S.2d 818 (N.Y. App. Div. 1947)] and *Halle* [v. *Cavanaugh*, 111 A. 76 (N.H. 1920)], which petitioners notably do not challenge.” Opp. 8 (emphasis removed); *see also* Opp. 14 n.1. As respondent describes it, this “rule” seems to require courts to determine, presumably as a matter of federal common law, whether the estate's representative will himself benefit from the action. *See* Opp. 8–9, 12–14.

Thus, respondent argues that he is entitled to SCRA tolling because he would benefit from recovery in the lawsuit.

Petitioners never articulated any such rule, nor does that rule exist. The consensus among the courts until the decision below was that only claims that, *under the applicable jurisdiction's law*, are individual and personal to the plaintiff are entitled to SCRA tolling based on the plaintiff's military service. *See, e.g., Halle*, 111 A. at 78 (under state law, servicemember had a right "to appear as an individual"). The SCRA provision at issue is a tolling provision; it does not impose a *substantive* overlay on preexisting causes of action. The federal question presented is whether claims considered truly representative under the applicable jurisdiction's law, as opposed to individual and personal, are entitled to SCRA tolling. That question is presented here, because the Oregon Court of Appeals answered the question differently than the other courts that have considered the question and expressly noted that respondent "did not allege any claims of his own." App. 4a n.1.

Even if other courts had applied a federal substance-over-form rule, the Oregon Court of Appeals has created a split by squarely holding that the SCRA allows tolling of representative claims. The court conceded that someone could use its interpretation of the statute to evade a statute of limitations "by appointing as personal representative for a decedent's estate a servicemember who has no connection to the decedent to pursue *claims that do not affect the servicemember's rights*." App. 9a (emphasis added). Indeed, in this case, "*anyone*" could

have been appointed the representative of respondent's wife's estate. App. 7a (emphasis added).¹

Respondent further argues that his claim is actually an entirely individual, personal one under Oregon law, which would mean that the question presented is not implicated here. Opp. 12–13. As respondent was forced to concede in a footnote, however, *see* Opp. 14 n.1, the Oregon Court of Appeals expressly stated that respondent “did not allege any claims of his own,” App. 4a n.1. The court did not, as respondent suggests, hold “that the wrongful death cause of action belongs to the statutory beneficiaries, not the estate.” Opp. 12–13. Rather, the court reasoned (incorrectly) that allowing tolling under the SCRA for claims brought by personal representatives furthered the SCRA’s purposes. The court stated that, because (a) respondent actually brought the claim, (b) he would benefit from the claim, and (c) the statute of limitation can be triggered based on his knowledge, “it would be particularly incongruous, and inconsistent with the policies identified in the SCRA, for us to hold that the SCRA did *not* toll the limitation period for plaintiff.” App. 11a.²

¹ Respondent states that he “is the only person who realistically could bring this claim,” Opp. 18, because he professes to be “the only heir to his wife’s estate” and is “the only surviving eye witness to the events leading to his wife’s death,” Opp. 20. Even if that is all true, that does not demonstrate that he is the only person who could have brought the claim, and the Oregon Court of Appeals expressly stated the opposite. *See* App. 7a.

² The statute of limitations applicable for a wrongful death claim predicated on a product defect theory is Or. Rev. Stat. § 30.905(3)–(4), not the statute of limitations in Or. Rev. Stat. § 30.020(1). *Kambury v. DaimlerChrysler Corp.*, 50 P.3d 1163, 1166 (Or. 2002). For purposes of this petition, however, the differences are immaterial.

Regardless of the precise wording of the Oregon Court of Appeals' decision, respondent is wrong that the claims he has brought are entirely individual and personal to him under Oregon law. *Contra* Opp. 8–9, 13–14. The Oregon Wrongful Death Act does not create “an independent right” for the estate’s personal representative or the decedent’s beneficiaries. *Kilminster v. Day Mgmt. Corp.*, 919 P.2d 474, 479 (Or. 1996). The case upon which respondent primarily relies makes this plain: The fact that the decedent’s beneficiaries can receive recovery through a wrongful death action “do[es] not alter our previous conclusion [in *Kilminster*] regarding the nature of the underlying claim in a wrongful death action. It is the *worker’s* claim that the personal representative vindicates.” *Behurst v. Crown Cork & Seal USA, Inc.*, 203 P.3d 207, 213 (Or. 2009).

II. THE DECISION BELOW IS WRONG AND WILL LEAD TO INEQUITABLE RESULTS

Respondent, like the Oregon Court of Appeals, ignores the last clause of the statute:

The period of a servicemember’s military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court . . . by or against the servicemember or the servicemember’s heirs, executors, administrators, or assigns.

50 U.S.C. § 3936(a) (emphases added). As the petition explained, the SCRA contemplates the very situation presented in this case: the *administrator* of the servicemember’s estate, who also happens to be her *heir*, brought a claim on her behalf. In that circumstance, it is the decedent’s period of military

service that is relevant for purposes of SCRA tolling, not the period of military service (if any) of the administrator. *See* Pet. 13–15.

Indeed, respondent himself concedes that it is “long-established” that claims “brought [by a servicemember] in a purely representative capacity” do not enjoy tolling under the SCRA. Opp. 19. That traditional distinction fits the text of the statute, is supported by Congress’ stated policies, and avoids the risks of gamesmanship and forum-shopping a contrary interpretation would introduce. *See* Pet. 13–17.

Unable or unwilling to address petitioners’ statutory interpretation argument head-on, respondent argues that “any . . . exception” from tolling should be “limited to . . . claims that are brought in a purely representative capacity,” which he says would mean that his claim qualifies for tolling. Opp. 19. But as described above, his claim is *not* individual and personal under Oregon law. To the extent respondent is instead suggesting that the courts should fashion federal common law to define unique contours of representative and personal claims for purposes of SCRA tolling, that invitation should be declined. Those policy-oriented questions are best left to the legislatures that created the causes of action in the first place.

Similarly, respondent argues that “tolling should at least apply where the cause of action, though brought in a representative capacity, could not realistically be brought by anyone other than the servicemember.” Opp. 20. But the courts that have considered this factor were referring to the fact that someone else *could have* brought (or, in one case, did bring) the claim, not a factual question regarding

whether it is “realistic[]” that someone else *likely would* bring the claim. See *Phillips v. Generations Family Health Ctr.*, No. 3:11-CV-1752-VLB, 2015 WL 4527008, at *14 (D. Conn. July 27, 2005), *aff’d*, 657 F. App’x 56 (2d Cir. 2016); *Miller v. United States*, 803 F. Supp. 1120, 1131 n.4 (E.D. Va. 1992); *Lopez v. Waldrum Estate*, 460 S.W.2d 61, 64 (Ark. 1970).

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THE QUESTION PRESENTED

Despite respondent’s attempt to muddy the waters, this petition presents a clean vehicle to address the split in lower court authority created by the Oregon Court of Appeals’ decision. That opinion began with and rested on its interpretation of the SCRA, and the court expressly recognized that its decision created a conflict. See App. 6a–9a.

There is no jurisdictional bar to this Court’s review, because the fourth *Cox Broadcasting* exception applies here. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 476–85 (1975) (discussing exceptions to finality requirement of 28 U.S.C. § 1257). This exception applies where (a) “the federal issue has been finally decided,” (b) petitioners “might prevail on the merits on nonfederal grounds,” (c) “reversal of the state court on the federal issue would be preclusive of any further litigation,” and (d) “refusal immediately to review the state court decision might seriously erode federal policy.” *Id.* at 482–83.

Petitioners meet each of those factors. First, the federal issue has been finally decided. The Oregon Court of Appeals decided the federal issue, petitioners filed a petition for review with the Oregon Supreme Court, and that court “considered the petition for review and order[ed] that it be denied.” App. 17a.

Petitioners will be “preclude[d] . . . from revisiting” the issue because it was “fully considered by an appellate court in the same proceeding,” *Hayes Oyster Co. v. Dulcich*, 110 P.3d 615, 622 (Or. Ct. App. 2005), and the Oregon Supreme Court denied review, see *Friendship Auto Sales, Inc. v. Bank of Willamette Valley*, 716 P.2d 715, 717 n.2 (Or. 1986) (“The Court of Appeals affirmed. The defendant did not petition for review. The [issue] is now a part of the law of this case.”). Petitioners might prevail on the merits on nonfederal grounds (i.e., that the tire was not defective), and reversal of the Oregon Court of Appeals would end the litigation.

That leaves just the final factor: immediate review is necessary here because the decision of the Oregon Court of Appeals might seriously erode the SCRA’s carefully tailored tolling provision. Contrary to respondent’s suggestion, it is not the balance of the equities in this particular case that control, but rather the federal policy as a whole. See *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (state court decision refusing to compel arbitration eroded federal policy favoring arbitration). In *Southland*, the Court explained that for the Court “to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate.” *Id.* at 7–8. “Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.” *Id.* at 7. A very similar situation is present here: to delay review of the Oregon Court of Appeals’ decision would upset the careful balance represented by the SCRA’s tolling provision and “lead to prolonged litigation” when Congress did not intend to abrogate the statute of limitations. Review is needed now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 17, 2019