

No.

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IN THE  
*Supreme Court of the United States*

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

*Petitioners,*

v.

SCOTT WILCOX,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

The Servicemembers Civil Relief Act (“SCRA”) tolls “any action or proceeding . . . by or against the servicemember or the servicemember’s heirs, executors, administrators, or assigns” for the “period of a servicemember’s military service.” 50 U.S.C. § 3936(a).

The question presented is whether the SCRA tolls a statute of limitations applicable to a claim brought by a servicemember in a purely representative capacity for another.

**PARTIES TO THE PROCEEDING AND  
RULE 29.6 STATEMENT**

All parties to the case below are named in the caption, except that respondent misidentified petitioner Les Schwab Tire Centers of Portland, Inc. in the proceedings below as Les Schwab Tire Centers of Oregon, Inc.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Toyo Holdings of Americas Inc. is a wholly-owned subsidiary of Toyo Tire Corporation, a publicly-traded corporation in Japan. Petitioner Les Schwab Tire Centers of Portland, Inc., is a privately-held Oregon corporation and has no parent company, and no publicly held company owns 10% or more of its stock.

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## **PETITION FOR A WRIT OF CERTIORARI**

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Petitioners Les Schwab Tire Centers of Portland, Inc. and Toyo Tire Holdings of Americas Inc. respectfully petition for a writ of certiorari to review the judgment of the Oregon Court of Appeals.

### **OPINIONS BELOW**

The order of the Oregon Supreme Court denying petitioners' petition for review (App. 17a) is unreported. The opinion of the Oregon Court of Appeals reversing the circuit court's dismissal of the action (App. 1a–12a) is reported at 428 P.3d 900. The order of the Circuit Court of Multnomah County granting petitioners' motion to dismiss (App. 13a–14a) is unreported.

### **JURISDICTION**

The decision of the Oregon Court of Appeals was issued on August 22, 2018. Petitioners filed a timely petition for review with the Oregon Supreme Court, which was denied on January 17, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a). The state courts have “finally decided” a “federal issue” for which “later review . . . cannot be had.” *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 481 (1975). Moreover, reversal “on the federal issue would be preclusive of any further litigation” and “refusal immediately to review the state court decision might seriously erode federal policy.” *Id.* at 482–83; *see also infra* Part III (discussing finality).

### **STATUTORY PROVISION INVOLVED**

The tolling provision of the SCRA, 50 U.S.C. § 3936(a), provides:

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, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

This and other relevant sections of the SCRA are reproduced in Appendix D to the petition. App. 19a–23a.

## **STATEMENT**

Does the SCRA toll claims brought by a servicemember in a purely representative capacity for another? For nearly a hundred years, the answer has almost uniformly been “no.” The court below departed from this consensus, despite acknowledging in the process that its decision would allow unscrupulous litigants to evade statutes of limitation that plainly should bar untimely claims. The Court should step in now to resolve this square split.

### **A. THE SCRA'S TOLLING PROVISION**

Protecting the legal rights of men and women in the armed forces has long been an important congressional objective. Since at least the Civil War, Congress has recognized that military service can impede servicemembers' “ability to meet obligations and protect their legal interests.” R. Chuck Mason, Cong. Research Serv., *The Servicemembers Civil Relief Act (SCRA): An Explanation* 1 (2014). Thus, “[d]uring the Civil War, Congress enacted an absolute moratorium on civil actions brought against soldiers and sailors.” *Id.*

During World War I, Congress passed the Soldiers' and Sailors' Civil Relief Act of 1918. Pub. L. No. 65-103, 40 Stat. 440 (1918). The Act's stated purposes were "to enable [servicemembers] to devote their entire energy to the military needs of the Nation" and "to prevent prejudice or injury to their civil rights during their term of service" by providing "for the temporary suspension of legal proceedings . . . which may prejudice the civil rights of persons in [military] service during" the war. *Id.* § 100, 40 Stat. at 440.

The 1918 Act did not institute a moratorium to accomplish those purposes, but rather provided an extensive suite of carefully crafted and limited protections. One of those protections was a tolling provision:

That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service.

*Id.* § 205, 40 Stat. at 443. The 1918 Act expired six months after World War I concluded. *See id.* § 603, 40 Stat. at 449.

A little over a year before the United States entered World War II, Congress passed the Soldiers' and Sailors' Civil Relief Act of 1940. Pub. L. 76-861, 54 Stat. 1178 (1940). "The Act of 1940 was a substantial re-enactment of that of 1918." *Boone v. Lightner*, 319 U.S. 561, 565 (1943); *see also* Brooke Tibbs, *Soldiers' and Sailors' Civil Relief Act in 1942*:

*Operation, Need for Clarification, Future Significance*, 27 MARQ. L. REV. 59, 59 (1943).

Since then, Congress has periodically amended the Act. For example, Congress revised the tolling provision to encompass administrative proceedings in addition to actions brought in court, *see* Soldiers' and Sailors' Civil Relief Act Amendments of 1942, Pub. L. 77-732, § 5, 56 Stat. 769, 770 (1942); made the Act permanent, *see* Selective Service Act of 1948, Pub. L. 80-759, § 14, 62 Stat. 604, 623 (1948); expanded the Act's coverage to include National Guard members in certain circumstances, *see* Veterans Benefits Act of 2002, Pub. L. 107-330, § 305, 116 Stat. 2820, 2826–27 (2002); and changed its name to the SCRA, *see* Servicemembers Civil Relief Act, Pub. L. 108-189, § 1, 117 Stat. 2835, 2835 (2003).

The tolling provision currently provides, in its entirety:

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, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

50 U.S.C. § 3936(a). In all respects material to this case, the tolling provision has remained the same since its initial enactment in 1918.<sup>1</sup>

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<sup>1</sup> Because the tolling provision has not changed in a material way, we will refer to all versions of the legislation in which it has appeared as “the SCRA” to avoid confusion.

The stated purposes of the SCRA also remain the same: “to enable [servicemembers] to devote their entire energy to the defense needs of the Nation” and “to provide for the temporary suspension of judicial and administrative proceedings . . . that may adversely affect the civil rights of servicemembers during their military service.” 50 U.S.C. § 3902.

### **B. THE PROCEEDINGS BELOW**

Respondent bought Toyo tires for his BMW Z3 sports car in 2004. In March 2010, respondent and his wife, both members of the United States Air Force, were in the United Kingdom during a period of active-duty leave. On March 27, 2010, respondent and his wife were driving in the BMW when he noticed an issue with one of the tires and replaced it with the spare tire. Respondent’s wife held the tire on her lap in the passenger seat because there was not enough room for it in the trunk or the back of the car. While they were searching for a mechanic, the tire exploded, injuring respondent’s wife. She died from her injuries several days later, on April 1, 2010.

Respondent was discharged from the Air Force on September 30, 2011. Thereafter he was appointed the personal representative of his wife’s estate by a Colorado court. On September 17, 2014, he filed this action against petitioners in Oregon state court as the personal representative of his wife’s estate, alleging that a defect in the tire caused his wife’s death. *See* Or. Rev. Stat. § 30.020(1) (“When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent . . . may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for an injury done by the same act or omission.”).

Petitioners moved to dismiss the complaint under the applicable three-year statute of limitations because the claim accrued when respondent's wife died on April 1, 2010. Or. Rev. Stat. § 30.905(4); *see* 50 U.S.C. § 3911(3) (providing that a servicemember's "period of military service" ends "on the date on which the servicemember . . . dies while in military service"). The Circuit Court granted the motion. App. 14a. Respondent appealed, arguing that his claim was timely because the SCRA tolled the statute of limitations until he was discharged from the Air Force on September 30, 2011.

The Oregon Court of Appeals reversed, holding that the SCRA tolled claims brought by a servicemember acting in a representative capacity for another. The court acknowledged that respondent served "as the personal representative of his wife's estate" and "did not allege any claims of his own." App. 4a n.1. Yet the court maintained that the SCRA "does not distinguish between actions brought by a servicemember in a personal capacity and those brought in a representative capacity." App. 6a; App. 8a (substantially same). The court further reasoned that because respondent would inherit his wife's estate, "applying the SCRA to the action serves the congressionally identified policies" because the lawsuit "would affect his civil rights." App. 8a. According to the court, it was immaterial that respondent's claims were wholly "derivative of the decedent's rights," because the claims were "brought *by him*," and were ultimately "for *his* benefit" as the

heir to his wife’s estate. App. 11a (emphases in original).<sup>2</sup>

The court “acknowledge[d] that [its] construction of the SCRA might encourage some people to attempt to circumvent statutes of limitation under circumstances that would not serve the policies that Congress enacted the SCRA to serve.” App. 9a. The court further recognized that “anyone can be appointed personal representative of an estate” under Colorado law, not just an heir. App. 7a (citing Colo. Rev. Stat. § 15-12-601). Nevertheless, it disagreed with the other courts that have “reject[ed] a construction of the SCRA that would toll statutes of limitation in actions brought by servicemembers acting as personal representatives of estates.” *Id.* (citing *McCoy v. Atl. Coast Line R.R. Co.*, 47 S.E.2d 532 (N.C. 1948)).

Petitioners’ petition for review was denied by the Oregon Supreme Court on January 17, 2019.

### **REASONS FOR GRANTING THE PETITION**

Whether the SCRA tolls claims brought by a servicemember in a purely representative capacity for another now depends on the jurisdiction in which the suit is filed. Tolling is unavailable under these circumstances in North Carolina, Arkansas, New Hampshire, New York, the Fourth Circuit, and two federal district courts. The court below departed from

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<sup>2</sup> The court characterized petitioners’ demonstration that respondent’s claims belong to his wife’s estate as an “alternative argument.” App. 9a. But that showing is, in truth, part and parcel of the argument that the SCRA does not toll statutes of limitation for claims brought by a former servicemember in a purely *representative* capacity, as opposed to “any claims of his own.” App. 4a n.1.



this consensus; servicemembers suing in Oregon may take advantage of the SCRA's tolling provision even though the claims they bring belong to another. This case presents an excellent vehicle to resolve this recognized split and to head off the gamesmanship that will result from allowing tolling in these circumstances.

### **I. FEDERAL AND STATE COURTS ARE SPLIT ON THE QUESTION PRESENTED**

As the court below acknowledged, lower courts are squarely in conflict regarding the applicability of the SCRA's tolling provision to claims brought by servicemembers in a purely representative capacity.

The vast majority of courts have held that the SCRA does *not* toll claims brought by a servicemember in a purely representative capacity, because such claims are not personal to the servicemember and often could just as easily have been brought by someone else.

In *McCoy*, the plaintiff, who had served in the Pacific during World War II, sued as administrator of his father's estate "to recover for the injury and death" of his father as a result of the defendant's negligence. 47 S.E.2d at 533. The North Carolina Supreme Court concluded that the SCRA did not apply because the plaintiff brought the suit "as a representative of the estate in an official capacity." *Id.* at 535. The court explained:

It seems to us that it was not the intention of the [SCRA] to hold up administration [of a decedent's estate] until one of many eligible persons might administer [the estate]; or, if such a person has administered and brought suit in his official capacity, that it should be regarded as a suit

brought by the sailor or soldier designated in the [SCRA] in his individual right, merely because of his interest in a contingent recovery of damages in a suit brought in behalf of decedent's estate, however it might be if the distribution, in case of recovery, was in dispute.

*Id.* That is, the SCRA does not toll claims brought by a former servicemember where he sues in his purely *representative* capacity, but does toll any *personal* claims the servicemember may have.

In *Lopez v. Waldrum Estate*, 460 S.W.2d 61 (Ark. 1970), the plaintiff was serving in Vietnam when his wife and daughter were injured in a car crash. The Arkansas Supreme Court held “that the statute of limitations was not tolled as to recovery of damages to which the wife and child were entitled, each in her own right.” *Id.* at 65. “Where there were competent persons by whom an action was or could have been brought as easily as it could have been by the person in military service,” the court explained, “it has been held that the [SCRA] does not apply, particularly when the suit is brought in a representative capacity.” *Id.* at 64. In contrast, tolling *did* apply “to those elements of damage for which [the plaintiff], as husband and father, was entitled to recover in his own right,” such as loss of consortium and “medical expenses incurred.” *Id.* at 65. “Neither the wife nor any person other than [the plaintiff] could have sued for these elements of damage which are personal to him.” *Id.*

The Fourth Circuit, in *Kerstetter v. United States*, 57 F.3d 362 (4th Cir. 1995), reached the same conclusion. The plaintiffs “sought recovery, on behalf of their minor child Elizabeth for the personal injuries she sustained as a result of alleged medical negligence

by government doctors, and, in their individual capacities, for the recovery of medical expenses.” *Id.* at 363. The SCRA tolled the statute of limitations for the father’s “claim for medical expenses,” because he had served in the Navy and his “claim was independent of his daughter’s personal injury claims.” *Id.* at 367, 369. But the SCRA did not toll “the claims [the plaintiffs] brought on behalf of Elizabeth.” *Id.* at 366 (citing *Miller v. United States*, 803 F. Supp. 1120, 1131 n.4 (E.D. Va. 1992)).<sup>3</sup>

*Beck v. United States*, No. 86 C 10134, 1987 WL 17154 (N.D. Ill. Sept. 14, 1987), is in accord. A former member of the Navy and his minor daughter brought claims to recover damages related to the daughter’s brain damage, which allegedly was caused by a vaccine she received as a newborn. The daughter “argu[ed] that since she is unable, as a minor and incompetent, to file a claim for damages, she had to rely on her father,” and that she thus was entitled to tolling under the SCRA. *Id.* at \*2. The court rejected that argument, because the daughter “never served in the military” and “there is no reason why any other person, or a duly appointed guardian, could not have represented [her].” *Id.* In contrast, the court allowed the father’s claim for “his injuries in having to maintain the medical, hospital, and vocational care for” his daughter, because that claim was “personal” to him and, therefore, triggered SCRA tolling. *Id.* at \*3.

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<sup>3</sup> *Miller* held that “[a]ctions brought by servicemen on behalf of minors are not tolled by the [SCRA] when the minor was entitled to recover in his own right when there was no reason why a non-military representative could not have brought the minor’s claim.” 803 F. Supp. at 1131 n.4.

In *Phillips v. Generations Family Health Center*, No. 3:11-CV-1752-VLB, 2015 WL 4527008 (D. Conn. July 27, 2005), *aff'd*, 657 F. App'x 56 (2d Cir. 2016), the plaintiff sought to recover for the death of his sister, who died after a team of doctors failed to diagnose her colon cancer. The decedent's son was on active duty in the United States Navy. *Id.* at \*2. The plaintiff, who was eventually appointed administrator of his sister's estate, "argue[d] that the SCRA applies to the time when [decedent's son] was the executor of the estate." *Id.* at \*3, 13. The court rejected that argument, because "the claims belonged to [the sister's] estate and were not personal to [her son], as is demonstrated by the fact that the action was ultimately filed by [the plaintiff]." *Id.* at \*14.

A few courts have held that the SCRA tolled the statute of limitations where the servicemember sued under the title of executor or administrator, because in reality the claim was *personal* to the servicemember. In reaching this conclusion, these courts also held that the SCRA does *not* toll claims brought in a purely representative capacity for another.

In *Halle v. Cavanaugh*, 111 A. 76 (N.H. 1920), the plaintiff brought a tort claim to recover for injuries she suffered. She then died, and her husband was drafted into the armed forces. *Id.* at 77. After nobody appeared to prosecute her suit, the court "granted the defendant's motion to abate the action." *Id.* The New Hampshire Supreme Court agreed that the SCRA did not toll the limitations period with respect to the plaintiff's claim, because "the rights so sought to be enforced are primarily hers, and not those of her husband or of one who was in the military service." *Id.* It thus was "immaterial" that "the person

appointed representative of the deceased . . . was at one time in the military service.” *Id.*

However, under New Hampshire law, “any person interested in an estate may bring an action which the executor declines to prosecute”; despite “[t]he fact that his proceeding might have to be in the name of the executor,” the plaintiff’s husband in fact would be proceeding “individually,” which would trigger the SCRA’s tolling provision. *Id.* at 77–78. *Halle* thus conforms to *McCoy* and the other cases discussed above because the court distinguished between personal and purely representative claims. “The husband, as an individual” could proceed, but “the executor in his official capacity” could not. *Id.* at 78; *see also* Tibbs, *supra*, at 66 & n.70 (citing *Halle* when explaining “that the benefits of the [SCRA] have been held not [to] extend to a soldier acting in a representative capacity”).

*Stutz v. Guardian Cab Corp.*, 74 N.Y.S.2d 818 (N.Y. App. Div. 1947), is similar. The plaintiff’s mother was hit by a taxi and died from her injuries. *Id.* at 820. The plaintiff, who served in World War II, sued as administrator of his mother’s estate to recover for her death. *Id.* Under New York law, a wrongful death claim was “[e]ssentially . . . a suit for injury to the property rights of the beneficiaries named in the statute.” *Id.* at 821. The court explained that “[t]he fact that the action has been brought in the plaintiff’s name in a representative role” was merely “a matter of form.” *Id.* at 822. Because in this case the “administrator su[ed] on his own behalf individually,” the SCRA tolled the limitations period. *Id.* at 823. On the other hand, tolling did *not* apply to the claim “for conscious pain and suffering,” because the “rights

sought to be enforced” were “primarily those of the decedent.” *Id.* at 824.

On the other side of the ledger, petitioners are aware of only one other court that has held, like the Oregon Court of Appeals, that the SCRA tolls claims brought by a servicemember in a purely representative capacity. In *Mitchell v. Phillips*, 58 Pa. D & C.2d 314 (1972), a child was injured while ice skating. His father “was overseas in the military service at the time” and later sued the defendants as his son’s guardian. *Id.* at 315. The court rejected defendants’ argument “that because the minor plaintiff could have selected another guardian, presumably not in the military service, the [SCRA] should not be invoked” to toll the statute of limitations. *Id.* at 317.<sup>4</sup>

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

The plain text of the SCRA’s tolling provision is clear that it does not extend to claims brought by a servicemember in a purely representative capacity for another. The statute provides:

*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.*

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<sup>4</sup> Another case stated in dicta that, “[a]s an illustration, Congress could not have intended . . . that an extension of time . . . should be denied if a soldier, as next of kin, had a statutory right to recover for the negligence of someone in causing a death.” *Clark v. Mechs.’ Nat’l Bank*, 282 F. 589, 591 (8th Cir. 1922).

50 U.S.C. § 3936(a) (emphases added). The Oregon Court of Appeals’ interpretation ignores the last clause of the statute. 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. *See Ebert v. Poston*, 266 U.S. 548, 554 (1925) (“[The SCRA] deals with a single subject and does so comprehensively, systematically, and in detail.”). The period of *respondent’s wife’s* military service thus would toll the statute of limitations while she was in military service. But because her service ended at the same time that her claim accrued (her death), the SCRA did not toll the limitations period in this instance. *See* 50 U.S.C. § 3911(3); Or. Rev. Stat. § 30.905(3).

That respondent was also a servicemember and remained in active service for a period of time after his wife’s death is irrelevant because he “did not allege any claims of his own.” App. 4a n.1. Respondent, as representative of his wife’s estate, brought claims that “depend[ed] on whether the decedent could have maintained an action against defendants for her injuries had she survived.” App. 11a. Indeed, anyone could have been appointed as representative of her estate. App. 6a–7a (citing Colo. Rev. Stat. § 15-12-601); *see also, e.g., Lopez*, 460 S.W.2d at 64 (“Where there were competent persons by whom an action was or could have been brought as easily as it could have been by the person in military service, it has been held that the [SCRA] does not apply, particularly when the suit is brought in a representative capacity.”). With few exceptions, it has been “clear” for decades “that the extension of the statutory period has no application to a case where the real party to the action is not a soldier or sailor but the soldier or sailor, as

executor or administrator of the estate of the real plaintiff or defendant, is prosecuting or defending the action.” Comment, *Soldiers and Sailors—Civil Relief Act of 1940—Application to Decedents’ Estates, Secured Obligations, Installment Contracts, Insurance, Taxes, and Assessments*, 42 MICH. L. REV. 480, 487 (1943); *see also* Tibbs, *supra*, at 66; *Ebert*, 266 U.S. at 554 (“[The SCRA] is so carefully drawn as to leave little room for conjecture.”).

The Oregon Court of Appeals further stated that “applying the SCRA to the action serves the congressionally identified policies.” App. 8a. The court noted this Court’s dicta in *Boone* that the SCRA should “be liberally construed to protect” servicemembers. App. 6a (quoting *Boone*, 319 U.S. at 575). But *Boone* also explained that Congress carefully crafted the SCRA to “‘prevent any person from taking undue advantage’ of its provisions,” 319 U.S. at 569 (quoting S. Rep. 76-2109, at 2 (1940)), and cautioned that courts should “see that the immunities of the [SCRA] are not put to [ ] unworthy use,” *id.* at 575. Moreover, the Court has recently made it clear that a statute should not be read more broadly or more narrowly in order to better effectuate its “remedial purpose.” *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). “We thus have no license to give the [statute] anything but a *fair* reading.” *Id.* (emphasis added). So too here. *See Ebert*, 266 U.S. at 553 (“The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the Legislature therein expressed.”).

Regardless, the purposes of the statute in fact confirm the text’s clear meaning. Congress enacted the SCRA “to enable [servicemembers] to devote their entire energy to the defense needs of the Nation,” and



“to provide for the temporary suspension of judicial . . . proceedings . . . that may adversely affect the civil rights of servicemembers during their military service.” 50 U.S.C. § 3902. Where, as here, others could act as an estate’s representative, there is no reason that a servicemember’s attention would need to be diverted if the statute of limitations is not tolled. And, contrary to the rationale of the court below, tolling is not necessary because a case brought by a servicemember in his purely representative capacity does not involve his “civil rights”—rather, the claim asserted is derivative of his deceased wife’s rights. App. 8a.

The Oregon court’s interpretation will incentivize gamesmanship. The tolling provision does not give courts discretion to consider whether tolling would be just or equitable; rather, “[t]he statutory command in [§ 3936] is unambiguous, unequivocal, and unlimited.” *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993). If the text is extended to cover claims brought in a purely representative capacity, it will invite abuses that Congress was careful to avoid. The Oregon Court of Appeals itself “acknowledge[d] that [its] construction of the SCRA might encourage some people to attempt to circumvent statutes of limitation under circumstances that would not serve the policies that Congress enacted the SCRA to serve.” App. 9a. Indeed, the logic of the court’s decision is not cabined to cases involving a claim brought in a representative capacity; the court’s rule applies just as easily to assigned claims. So, for example, payday lenders could assign claims to servicemembers to increase recovery of exorbitant interest, and an unscrupulous party could assign a dubious claim to a servicemember to extend the statute of limitations and coerce a settlement from the other side. The decision below

similarly will encourage forum shopping to take advantage of the artificially extended statute of limitations in Oregon and in any state that may follow its lead. The Court should step in now to correct the error below to prevent such abuse of the SCRA.

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

This petition presents a clean vehicle to address the split in lower court authority over whether the SCRA tolls claims brought by servicemembers in a purely representative capacity. The Oregon Court of Appeals' decision rested on its interpretation of the SCRA, and the court acknowledged that its decision created a conflict. *See* App. 7a–8a.

The case's interlocutory posture is no hindrance. As this Court has repeatedly recognized, a decision may constitute a "final judgment" under 28 U.S.C. § 1257(a) even where the state court has remanded for further proceedings. *Cox Broad.*, 420 U.S. at 476–85 (describing four exceptions to requirement of finality). The third and fourth *Cox Broadcasting* exceptions apply here. The third exception applies because the federal issue "has been finally decided" and "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. The applicability of the SCRA's tolling provision has been adjudicated and is now law of the case. *See, e.g., Van Osdol v. Knappton Corp.*, 755 P.2d 744, 745 (Or. App. 1988) ("The law of the case principle precludes relitigation or reconsideration of a point of law decided on appeal at an earlier stage of the same case."). The fourth exception also applies because (a) "the federal issue has been finally decided," (b) petitioners "might prevail on the merits on nonfederal grounds," such as by winning on their argument that the tire was not

defective, (c) “reversal of the state court on the federal issue would be preclusive of any further litigation,” because the statute of limitations bars the claims, and (d) “refusal immediately to review the state court decision might seriously erode federal policy,” namely the carefully targeted applicability of the SCRA’s tolling provision. *Cox Broad.*, 420 U.S. at 482–83. The case is ripe for review.

### CONCLUSION

The petition for a writ of certiorari should be granted.

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