No. 18-1137

IN THE

Supreme Court of the United States

LES SCHWAB TIRE CENTERS OF PORTLAND, INC., ET AL.,

Petitioners,

v.

SCOTT WILCOX,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review an Oregon intermediate court's interlocutory ruling that the Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043, tolls the statute of limitations because, under Oregon law, this wrongful death action is brought for the benefit of respondent.

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STATEMENT OF THE CASE

The petition is based on a fundamental misunderstanding of Oregon law and the decision below. Respondent's wrongful death action is not brought in a "purely representative" capacity. Instead, as a matter of Oregon law, this suit is brought on his own behalf and for his own benefit. Respondent is therefore entitled to tolling under the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. §§ 3901-4043, even on petitioners' view of how that statute should operate. Thus, deciding this case would not resolve any conflict in authority over whether a servicemember who brings a "purely representative" action is entitled to tolling.

In fact, no such conflict even exists—the handful of decisions petitioners identify permit tolling under the SCRA when, as here, state law treats the wrongful death cause of action as for the benefit of the beneficiary, but do not permit tolling when the claim under state law operates to the benefit of the deceased's estate. The petition should be denied.

1. On March 27, 2010, Jenna Wilcox ("Jenna") sustained catastrophic injuries including internal decapitation, a severe brain stem injury, dislocation of her cervical spine, spinal cord transaction, mediastinal hematoma, ruptured spleen, and liver laceration, when a tire sold and manufactured by Petitioners exploded. Or. C.A. App. 5, 25; Pet. App. 3a. Jenna was placed on life support at Western General Hospital in Edinburgh, Scotland. Or. C.A. App. 25-26. On April 1, 2010, Jenna was removed from life support and passed away. Or. C.A. App. 26. Jenna

was 27, and a Captain in the United States Air Force, at the time of her death. *Id*.

Respondent Scott Wilcox ("Scott") received a commission as a Second Lieutenant, into the United States Air Force on July 1, 2005. *Id*. at 24. Scott met Jenna while stationed at the Misawa Air Base in Japan. *Id*. The two were married in Misawa on June 20, 2006. *Id*. They did not have any children.

On March 27, 2010, Scott and Jenna were both active duty servicemembers stationed overseas. *Id*. at 25. Scott and Jenna were on a weekend getaway to the Isle of Lewis. *Id*. They departed from Suffolk, and traveled in Scott's 1998 BMW Z3, a small coupe with little to no trunk space. *Id*. Previously, Scott had bought the car stateside and had it shipped to him. As they drove north through Scotland, Scott noticed that a tire was causing a disruption to the ordinary operation of the vehicle. *Id*. Scott removed the defective tire and affixed the spare. *Id*.; Pet. App. 3a. Scott and Jenna attempted to place the defective tire in the trunk space of the vehicle, but there was insufficient room. Or. C.A. App. 25. Rather than leave the tire along the road side, Jenna held the defective tire on her lap. *Id*.; Pet. App. 3a. Scott and Jenna then began to search for a mechanic to inspect, and possibly repair, the defective tire. Or. C.A. App. 25. As they turned into a service station the defective tire spontaneously burst, killing Jenna. Pet. App. 3a.

Following his wife's untimely death, Scott remained on active duty in the U.S. Air Force until September 30, 2011, when he was honorably discharged from rank of Captain, receiving seven med-

als and ribbons for his service. Pet. App. 3a. On November 1, 2011, Scott was appointed the Personal Representative of the Estate of Jenna Wilcox in Park County, Colorado, where Jenna owned real property. Or. C.A. App. 26.

2. On or about September 17, 2014, Scott commenced suit against petitioners (defendants) by filing a Summons and Complaint in the Multnomah County Clerk's Office, in Oregon, where the tires were purchased. *Id*. at 2-11. The action is against Les Schwab Tire Centers of Oregon, Inc. ("Les Schwab") and Toyo Tire Holdings of America, Inc. ("Toyo"), for products liability related to the wrongful death of Jenna Wilcox. *Id*.

The applicable Oregon statute of limitations is three years, ORCP § 21 A(9); ORS 030.020(1)(a), and would thus have expired in 2013 absent tolling. Petitioners moved to dismiss the complaint on limitations grounds, and Scott opposed relying on the SCRA, which provides in relevant part that "[t]he 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 [state or federal] court … by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns." 50 U.S.C. § 3936(a). Under that provision, Scott argued, the limitations period did not begin to run until Scott was discharged, and thus did not expire until September 30, 2014.

The trial court granted petitioners' motion to dismiss the Complaint as time barred, and a

judgment was entered in favor of petitioners on April 17, 2015. Pet. App. 13a-14a.

3. Scott timely appealed to the Oregon Court of Appeals. The Oregon Court of Appeals reversed, holding that "the SCRA did toll the statute of limitation for plaintiff's wrongful-death action for the period in which plaintiff was on active duty with the Air Force." Pet. App. 8a.

The court explained that the text of the SCRA "does not distinguish between actions brought by a servicemember in a personal capacity and those brought in a representative capacity." Pet. App. 6a. The "enacted purposes of the SCRA" likewise supported tolling here, because if the SCRA did not apply, the statute of limitations would have begun to run while Scott was still on active duty. *Id.* at 6a, 8a.

The Oregon Court of Appeals also rejected, as a matter of Oregon law, petitioners' argument that the wrongful death claims brought by Scott "must be considered to be the decedent's claims" rather than his. Pet. App. 10a. To the contrary, the "claims that he brought are for *his* benefit" under Oregon law. *Id.* at 11a (emphasis in original). Moreover, "Oregon's wrongful-death statute provides that the three-year limitation period to bring a wrongful-death action begins to run when the decedent, the personal representative, or a person for whose benefit the action may be brought has discovered or reasonably should have discovered the injury that caused the decedent's death." *Id.* Scott falls within the "last two categories of people," and making his "knowledge of the decedent's injuries a basis for the

statute of limitation to begin running reflects the interest that he has in the action and imposes *on [him]* an obligation to bring the action within the three-year limit imposed by the statute." *Id.* (emphasis in original). "In that light," the court explained, "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 to bring his wrongful-death action." *Id.* (emphasis omitted). The Oregon Court of Appeals therefore remanded the case to the trial court for further proceedings.

4. Petitioners then asked Oregon's highest court, the Supreme Court of Oregon, to exercise its authority of discretionary review over that interlocutory ruling. The Supreme Court of Oregon denied review. Pet. App. 17a.

REASONS FOR DENYING THE WRIT

The question presented in the petition is whether the SCRA tolling provision applies to actions brought by returning servicemembers in a "purely representative" capacity. Pet. i. That question is not presented here. In truth, under Oregon law an action for wrongful death is not for the benefit of the estate, but rather the statutory beneficiaries—the "real parties in interest" to the litigation. Scott is the sole heir of the decedent, and thus the statutory beneficiary of this action wrongful death action. He brings this suit, in other words, not in a "purely representative" capacity, but on *his own behalf*. The petition does not present whether the SCRA tolling provision applies in those circumstances, and the answer, obviously, is yes.

In any event, there is no split in authority over whether the SCRA provides tolling for a "purely representative" claim, and this case is not a suitable vehicle to resolve such a hypothetical division in authority in any event. Worse, this Court does not even have jurisdiction to review the decision below, as it is an interlocutory decision of an intermediate state court, and the supposed federal issue has not been finally decided by the Oregon Supreme Court.

The petition should be denied.

A. There Is No Lower Court Conflict

Petitioners argue that the Oregon Court of Appeals created a conflict in authority and diverged from a century-old "consensus" by ruling that the SCRA tolls suits brought by a servicemember in a "purely representative capacity." Pet. 2. But there is no such conflict. The cases cited in the petition instead fall neatly into three categories: (1) wrongful death suits, like this one, and similar actions treated by the relevant state law as being for the benefit of *beneficiaries* like the servicemember himself, (2) wrongful death suits, *unlike* this one, in which state law treats the suit as being for the benefit of the *estate*, *not* the servicemember, and (3) personal injury suits brought by a servicemember in a representative capacity for another. Courts uniformly apply tolling in the first category of cases, but not in the second and third.

1. *Stutz v. Guardian Cab Corp.*, 74 N.Y.S.2d 818 (N.Y. App. Div. 1947), illustrates those rules. There, a former servicemember brought both a wrongful

death claim under New York law and a personal injury claim for injuries to his deceased mother.

The court determined that SCRA tolling applied to the wrongful death claim, which the servicemember brought in his capacity as the administrator of his mother's estate. The court explained that, under New York law, "[w]hile the right to maintain such action is conferred upon the legal representative alone, *it exists solely for the benefit of the decedent's surviving spouse and next of kin*." *Id.* at 821 (emphasis added). As a result, "[t]he fact that the action has been brought in the plaintiff's name in a representative role proceeds from the requirements of the [New York wrongful death] statute and is simply a matter of form serving the purposes of orderly procedure in settling the affairs of the decedent's estate." *Id.* at 822. Put otherwise, "the plaintiff himself in his individual capacity is the real party in interest on the cause of action for wrongful death." *Id.* The court reasoned that the argument for not applying the SCRA to "the plaintiff as administrator suing on his own behalf individually as the real party in interest on the cause of action for wrongful death is too legalistic in view of the policy of liberal construction of such statutes in favor of those who have been obliged to drop their own affairs in order to take up the burdens of the nation." *Id.* at 823.

The court applied "a different rule" to the cause of action for personal injuries to the deceased. *Id.* at 824. That claim truly "belonged to the decedent herself"—among other things, the "proceeds of any recovery in such action constitute an asset of the es-

tate." *Id.* The court accordingly reasoned there was "no warrant for extending the benefit of [the SCRA] to the deceased civilian or her estate as such." *Id.*

The New Hampshire Supreme Court's decision in *Halle v. Cavanaugh*, 111 A. 76 (N.H. 1920), is in accord with *Stutz*. That decision held that SCRA tolling did not apply to the extent the servicemember plaintiff sought to recover on a claim that belonged under state law to the estate, *id.* at 77, but that such tolling did apply to a claim in which state law gave him an "individual" right to sue as a person interested in the estate, *id.* at 77-78 ("The right to be vindicated is one in which he is interested and which he can assert if the executor declines to do so.").

As detailed further below, *see infra* at 12-15, this case fits the substance-over-form rule of *Stutz* and *Halle*, which petitioners notably *do not challenge*. Pet. 11-13. Scott was required as a formal matter to commence this wrongful death action in a representative capacity, but the Supreme Court of Oregon has squarely held that "a wrongful death action is not brought on behalf of the [decedent], but on behalf of the beneficiaries," and thus "any recovery goes to those beneficiaries, not to the [decedent's] estate." *Behurst v. Crown Cork & Seal USA, Inc.*, 203 P.3d 207, 212 (Or. 2009). Scott, not the estate, is the "real part[y] in interest." *Christensen v. Epley*, 601 P.2d 1216, 1219 (Or. 1979); *see also Horwell v. Oregon Episcopal Sch.*, 787 P.2d 502, 503-04 (Or. Ct. App. 1990); Pet. App. 11a (explaining that the claims at issue "are for *his* benefit"). As in *Stutz* and *Halle*, although Scott filed suit as the personal representa-

tive of a decedent's estate, he was in substance asserting his own rights.

2. The petition also identifies cases in which courts have denied tolling for wrongful death actions brought in states that—unlike New York and Oregon—treat the estate as the real party in interest. For example, the court in *Phillips v. Generations Family Health Center*, No. 3:11-CV-1752-VLB, 2015 WL 4527008 (D. Conn. July 27, 2005), declined to apply SCRA tolling to an action brought under Connecticut's wrongful death statute. The court explained that under Connecticut's "wrongful death statute, the statutory right of action belongs, in effect, to the decedent, and to the decedent alone," and therefore concluded that "the cause of action belongs to the estate of the decedent." *Id.* at *13 (quoting *Sanderson v. Steve Snyder Enters., Inc.*, 491 A.2d 389, 397 (Conn. 1985)). Indeed, the *Phillips* court explicitly acknowledged *Stutz* and distinguished that case on the basis that under Connecticut law, unlike New York law, the beneficiary is not the real party in interest. *Id.*; *see id.* at *14 ("In this case, the claims belonged to [the] estate and were not personal to [the servicemember], as is demonstrated by the fact that the action was ultimately filed by [someone other than the servicemember].").

Petitioners also cite *McCoy v. Atl. Coast Line R.R.*, 47 S.E.2d 532 (N.C. 1948), which similarly declined to apply SCRA tolling to an action under North Carolina's wrongful death statute. Mirroring *Phillips*, that court explained that North Carolina courts "have distinctly held that the administrator bringing his action under [that state's wrongful

death statute] brings it as representative of the estate in an official capacity" and has no right as a "potential distributee . . . to bring the action." *Id.* at 535. That is, the suit was as a matter of state law brought "in behalf of decedent's estate" and any recovery would go to the estate, not directly to beneficiaries. *Id.* at 534-35. And again as in *Phillips*, the court recognized, citing *Halle*, that if the representative "action in reality, though not in form, is an action brought by" a servicemember, a different rule would apply and the SCRA *would* require tolling because "the purpose of the statute could only be served by looking through the form to the substance." *Id.* at 535.

Both of those courts also noted that as a practical matter there was no reason someone other than the servicemember could not have brought the suit on behalf of the decedent's estate. *Id.* (plaintiff was "one of many eligible persons" who could have administered the estate); *Phillips*, 2015 WL 4257008 at *14 (noting that the suit *actually was* brought by someone other than the servicemember).

3. The third category of cases cited in the petition involve purely representative actions by a servicemember raising a personal injury claim on behalf of another, typically a minor. In this category of cases, as in wrongful death actions where the estate is treated by state law as the real party in interest, the servicemember was not the real party in interest, but instead was acting as a representative of someone else's substantive claim.

In *Lopez v. Waldrum Estate*, 460 S.W.2d 61 (Ark. 1970), a husband brought personal injury claims (not

wrongful death claims) arising out of a car accident on behalf of his wife and daughter. The court explained that SCRA tolling would not apply as to the wife's claim, because she was "the real party in interest in an action on her behalf for her personal injuries, as the recovery is her separate property and not that of her husband." *Id.* at 64. "No logical reason appears why she could not or did not bring timely suit in her own name." *Id.* The cause of action on behalf of the plaintiff's daughter was likewise "that of the child, not that of the father," and again there was "no reason why" the action "could not have been brought by the minor's mother" or someone else. *Id.*

Similarly, in *Kerstetter v. United States*, 57 F.3d 362 (4th Cir. 1995), the court held that the SCRA would not toll personal injury claims brought by a father on behalf of his daughter because the father was not the real party in interest. It was in fact undisputed that the SCRA did not apply "to the claims [plaintiffs] brought on behalf of [their daughter]." *Id.* at 366. Again, *Kerstetter* holds only that the SCRA does not toll personal injury claims of an individual brought by a servicemember as representative, when that servicemember possesses no right or interest in the claim.

Finally, in *Beck v. United States*, No. 86 C 10134, 1987 WL 17154 (N.D. Ill. Sept. 14, 1987), the court held that the SCRA did not serve to toll personal injury claims of a child brought on her behalf by her servicemember parents. The court reasoned that the parents were not the real parties in interest, and that the claim instead was hers. *Id.* at *2.

4. The petition identifies only a single case that deviates from the rule that makes the availability of SCRA tolling turn on whether the servicemember plaintiff is the real party in interest, and it is an unpublished 1972 case from a Court of Common Pleas in Pennsylvania. *See Mitchell v. Phillips*, 58 Pa. D. & C.2d 314 (1972). That case permitted tolling of a personal injury claim brought by a servicemember father on behalf of his daughter as guardian ad litem, even though the daughter was the real party in interest and someone other than the father could have served as the guardian ad litem. *Id.* at 317. Not surprisingly given its lack of precedential force, no case has ever cited *Mitchell* for that proposition. Indeed, the only case that has ever cited *Mitchell* for any purpose is *Beck*, which cited *Mitchell* to reject its conclusion.

B. This Case Is An Exceptionally Poor Vehicle For Consideration Of The Question Presented Because It Does Not Even Implicate The Purported Conflict

Even if there were a meaningful conflict over whether a servicemember should receive tolling under the SCRA when he brings a "purely representative" claim, this case does not implicate that conflict and would provide this Court no occasion to resolve it. As already explained, as with the New York statute addressed in *Stutz*, claims under the Oregon wrongful death statute are brought for the benefit of the beneficiary. The statute says as much: wrongful death claims are brought "for the benefit of the decedent's surviving spouse" or other heirs, *not* for the benefit of the estate. ORS 030.020(1). As the Court

of Appeals observed, the statute even makes the three-year statute of limitations run from the date "a person for whose benefit the action may be brought" is or should be aware of the harm, which further confirms Scott's personal interest in the cause of action. *Id.*; *see* Pet. App. 11a.

Indeed, Oregon courts have consistently held that the wrongful death cause of action belongs to the statutory beneficiaries, not the estate. The Supreme Court of Oregon's holding in *Behurst* bears repeating: "a wrongful death action is not brought on behalf of the [decedent], but on behalf of the beneficiaries [and] any recovery goes to those beneficiaries, not to the [decedent's] estate." *Behurst*, 203 P.3d at 212. The cause of action exists "for the benefit of the spouse and children of the decedent," and *not* "for the benefit of the estate," meaning the beneficiaries are "the 'real parties in interest' . . . for the recovery of the 'value of the life lost to them.'" *Christensen*, 601 P.2d at 1219. Put otherwise, "the personal representative, when bringing an action for the wrongful death of [the] decedent, acts solely for the benefit of the persons entitled to share in its proceeds." *Graves v. Tulleners*, 134 P.3d 990, 998 (Or. Ct. App. 2006) (citing *Hughes v. White*, 609 P.2d 365, 367 (Or. 1980)).

It is, therefore, clear that this case does not involve a suit by a servicemember in a "purely representative" capacity for another. Instead, Scott is the real party in interest under Oregon law, as the Court of Appeals correctly determined. Pet. App. 11a.

The actual question posed by the petition is not whether the SCRA provides tolling when a service-

member brings a "purely representative" action, but whether the Oregon Court of Appeals was correct to rule as a matter of Oregon law that this suit was brought "for [Scott's] benefit." Pet. App. 11a.[1] Indeed, unlike personal injury claims, which exist in common law and are for the benefit of the person who suffered the injury, wrongful death claims are entirely statutory creations. The right to recover for wrongful death has been codified in every state. Louis R. Frumer & Melvin I. Friedman, 10-45 Personal Injury—Actions, Defenses, Damages § 45.02 (Matthew Bender & Co., Inc. 2013). The beneficiary of a wrongful death statute is thus a question of state statutory law, and the relevant state's answer to that question will determine whether the SCRA's tolling provision will apply to a wrongful death action brought by a returning serviceman, based on the uniform understanding of the SCRA described above.

To the extent petitioners point to language in the opinion below suggesting that the Oregon Court of Appeals would reach the same conclusion in a "purely representative" suit, such statements are dicta that will not bind future Oregon litigants and courts. Most important, however, the fact that Oregon law

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[1] The petition emphasizes, strewn of context, the Oregon Court of Appeals' observation that Scott "alleged only wrongful-death claims under Oregon law and did not allege any claims of his own." Pet. App. 4a n.1. That statement is technically correct, but as the court later explained, and is indisputably the case under the Oregon authorities cited in the text, in substance the claims *are* Scott's because they are brought "for *his* benefit." Pet. App. 11a (emphasis in original). That is the very nature of the substance-over-form rule articulated in *Stutz*, which petitioners embrace. *See supra* at 6-8.

makes clear that this is not a purely representative suit, but rather one seeking the vindication of Scott's own rights for his own benefit, means that this case is an unsuitable vehicle to resolve whether in some other case a "purely representative" suit should likewise receive the benefit of SCRA tolling.

C. This Court Lacks Jurisdiction To Review This Interlocutory Ruling Of An Intermediate State Court

The petition is also a poor vehicle because this Court lacks jurisdiction to review the decision below.

Petitioners seek to invoke this Court's jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a treaty or statute of the United States is drawn in question." 28 U.S.C. § 1257(a); *see, e.g.*, *United States v. MacDonald*, 435 U.S. 850, 853-54 (1978). This Court lacks jurisdiction because no "final judgment" has been rendered below.

As petitioners acknowledge, they seek review of an interlocutory state court ruling, not a final judgment. Pet. 17. Specifically, the Oregon Court of Appeals' decision denies petitioners' motion to dismiss and remands for further proceedings, and an order denying a motion to dismiss is not a final ruling. *See, e.g.*, *Green v. Lilly Enters., Inc.*, 544 P.2d 169, 169-70 (Or. 1975).

Petitioners invoke the third and fourth exceptions to the rule against review of interlocutory orders set out in *Cox Broadcasting Corp. v. Cohn*, 420

U.S. 469 (1975). *See* Pet. 17-18. Neither exception applies.

The third exception applies when the federal issue "has been finally decided" and "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broad.*, 420 U.S. at 481. That exception applies only when "the governing state law would not permit [the party] to present his federal claims for review" if he were to lose on the merits. *Id.* The prototypical example is where the petitioner is a State in a criminal case seeking interlocutory review of a dispositive issue, and the governing state law precludes the State from appealing if the defendant prevails at trial. *Id.*

This case obviously does not fall within that paradigm, but petitioners argue that the third exception applies anyway since they will not be able to present the federal claim for review in later proceedings because the "applicability of the SCRA's tolling provision has been adjudicated and is now law of the case." Pet. 17. Not so. The Oregon Court of Appeals has decided the tolling issue, but the Supreme Court of Oregon has not; it may do so following a final judgment in the case. And the Supreme Court of Oregon would plainly not accord "law of the case" deference to the earlier ruling of the Oregon Court of Appeals. Oregon law is clear that the "law of the case" principle applies only when the court "fully consider[s]" an issue. *Fox v. Collins*, 241 P.3d 762, 767 (Or. Ct. App. 2010). The Oregon Supreme Court's denial of review is not a full consideration of the issue.

Indeed, respondent is not aware of any decision in Oregon (or any state) in which a State's *highest court* concludes it is bound by "law of the case" because of an earlier decision by *a lower appellate court*. Petitioners certainly cite no such case. Petitioners' only law of the case authority is an Oregon Court of Appeals decision deciding not to apply the law of the case rule to its own earlier decision. *Van Osdol v. Knappton Corp.*, 755 P.2d 744, 745-46 (Or. Ct. App. 1988).

The fourth exception likewise does not afford this Court jurisdiction. That exception applies when "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox Broad.,* 420 U.S. at 482-83. This exception fails for at least two reasons.

First, the question of whether the SCRA tolls Scott's claim has not been "finally decided in the state courts." The Supreme Court of Oregon has not ruled on the issue; it merely declined to review the question. Pet. App. 17a. As just explained, the Supreme Court of Oregon could decide to review this question in a later iteration of this case.

Second, permitting this suit to proceed to trial would not "seriously erode federal policy." *Cox Broad.*, 420 U.S. at 483. Petitioners assert that the federal policy implicated is "the carefully targeted applicability of the SCRA's tolling provision." Pet.

18. But as an initial matter, there is no significant federal policy implicated here at all—what controls is *Oregon*'s policy of designating the decedent's heir rather than her estate as the beneficiary of a wrongful death action. And in any event, petitioners make no argument that anything about allowing *this* suit to proceed will actually erode federal policy, such that this Court must grant review now, rather than after a final judgment. For example, petitioners do not, and could not, assert that *this case* involves the type of "gamesmanship" and exploitation of the SCRA's tolling rule that is plausibly a type of "abuse[] that Congress was careful to avoid." Pet. 16. Scott Wilcox, a servicemember who was honorably discharged after petitioners' product killed his wife, is the only person who realistically could bring this claim. Even if petitioners' distorted reading of the SCRA and the state law principles at issue were correct, permitting this suit to proceed to a final resolution will not endanger any federal policy.

D. The Oregon Court of Appeals' Ruling Is Correct

The Court of Appeals, moreover, was entirely correct that the SCRA requires tolling for the period of Scott's service on the facts of this case. That is so for several reasons.

First, the text of the statute plainly requires tolling in this case. The statute provides that the period of "a servicemember's" service is excluded from the limitations period for "the bringing of any action or proceeding" "by or against the servicemember or the servicemember's heirs, executors, administrators, or

assigns." Scott is a "servicemember." The action is brought "by" him. He is therefore entitled to tolling.

Petitioners' contrary textual argument proceeds on the bizarre (and perverse) assumption that Scott's deceased wife is the only "servicemember" at issue. *See* Pet. 14. But she is not. There is therefore no reason to consider only her service time, rather than Scott's, in considering the applicability of the SCRA.

Second, to the extent there should be an atextual exception to the types of claims brought by servicemembers that can receive tolling under the SCRA, any such exception should be limited to the long-established exception for claims that are brought in a purely representative capacity. Here, as discussed and as is clear under Oregon law, Scott is the "real part[y] in interest" in this wrongful death action. *Christensen*, 601 P.2d at 1219; *Behurst*, 203 P.3d at 212. Even if he is required by state law to file as a formal matter as the representative of another, denying Scott the benefit of tolling where he is suing as "the real party in interest [would be] too legalistic in view of the policy of liberal construction of such statutes in favor of those who have been obliged to drop their own affairs in order to take up the burdens of the nation." *Stutz*, 74 N.Y.S.2d at 823. When Scott asserted a cause of action for his wife's wrongful death, he did so nominally as the personal representative of his wife's estate, but substantively in the interest of his own civil rights and "for *his* benefit." Pet. App. 11a (emphasis in original). There is no plausible reason why SCRA tolling would not apply in these circumstances.

Third, tolling should at the least apply where the cause of action, though brought in a representative capacity, could not realistically be brought by anyone other than the servicemember. Here, Scott is the only heir to his wife's estate, and the sole statutory beneficiary of this wrongful death action. Or. C.A. App. 6, 24. He is also clearly an indispensable party to the action as the only surviving eye witness to the events leading to his wife's death. Thus, while it may be hypothetically true that someone else could have been appointed the personal representative of Jenna's estate and brought this suit, Pet. App. 7a, as a practical matter, only Scott had the incentive and ability to come forward to prosecute this action. Denying him tolling would therefore mean that the statute of limitations began to run while Scott was still in active military service, and would squarely frustrate the SCRA's purpose of enabling servicemembers "to devote their entire energy to the defense needs of the Nation" during their period of service. 50 U.S.C. § 3902.

Particularly given this Court's holding that the SCRA is "always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation," the Oregon Court of Appeals' ruling is correct. *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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