

05-0653

**In the
Supreme Court of Texas**

GILBERT KERLIN, INDIVIDUALLY; GILBERT KERLIN, TRUSTEE;
WINDWARD OIL & GAS CORP.; AND PI CORP.,
Petitioners,

v.

CONCEPCION SAUCEDA, ET AL.,
Respondents.

On Petition for Review from the
Thirteenth Court of Appeals at Corpus Christi

**BRIEF OF *AMICUS CURIAE* THE STATE OF TEXAS
IN SUPPORT OF REHEARING**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Court’s decision in this case effectively repeals section 16.063 of the Texas Civil Practice and Remedies Code—a result beyond the judiciary’s province. By interpreting section 16.063 to be inapplicable when a person has sufficient contacts with Texas to afford personal jurisdiction, the Court has ensured that section 16.063 will never apply to anyone. That reading contravenes the statutory-construction canons that the Legislature is never presumed to do a useless act and that courts should not construe statutes in a manner that renders provisions meaningless.

The Court can avoid this result by modifying its holding to preserve an important application of section 16.063. The Court presumably reasoned that tolling the limitations period is unnecessary so long as a putative defendant is subject to personal jurisdiction in Texas courts. But as numerous other courts have recognized, States have an interest in tolling limitations periods against defendants who, although subject to personal jurisdiction in the State's courts, cannot be found for service of process because their whereabouts are unknown or they are purposefully evading service. To protect Texas citizens in these circumstances, the Court should at least hold that a defendant is present in Texas for section 16.063's purposes not merely by being subject to personal jurisdiction, but by also being amenable to service of process.

STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

The State previously submitted an *amicus curiae* brief in this cause to defend section 16.063 of the Texas Civil Practice and Remedies Code against Kerlin's as-applied constitutional attack. Although the Court did not reach the constitutional issue, its decision sweeps even more broadly because its interpretation of section 16.063 strips the statute of *any* application. Just as the State has an interest in defending its statutes against constitutional attack, so too does it have an interest in opposing interpretations of its statutes that render them nullities.

1. No fee has been or will be paid for the preparation of this brief.

ARGUMENT

I. THE COURT’S INTERPRETATION OF SECTION 16.063 IMPROPERLY RENDERS THE STATUTE USELESS AND MEANINGLESS.

Section 16.063 of the Texas Civil Practice and Remedies Code provides: “The absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person’s absence.” As the State previously explained, although section 16.063 facially appears to toll limitations against residents and nonresidents alike, it generally does not apply to nonresidents. State Amicus Br. 12 (citing *Wise v. Anderson*, 163 Tex. 608, 611, 359 S.W.2d 876, 879 (1962); *Jackson v. Speer*, 974 F.2d 676, 678-79 (5th Cir. 1992)). As an exception to this general rule, section 16.063 applies to a nonresident who is physically present in Texas when the “obligation forming the basis of the suit arises or comes into existence” but then leaves the State. *Stone v. Phillips*, 142 Tex. 216, 220, 176 S.W.2d 932, 934 (1944); *see also* State Amicus Br. 13-14.²

Section 16.063 thus applies to two categories of persons: (1) Texas residents; and (2) nonresidents who incur obligations while physically present in Texas. *See Wise*, 163 Tex. at 611, 359 S.W.2d at 879; *Stone*, 142 Tex. at 221, 176 S.W.2d at 934. The statute tolls limitations periods for claims against these persons while they are absent from the State. TEX. CIV. PRAC. & REM. CODE § 16.063.

2. These qualifications on section 16.063’s applicability to nonresidents were incorporated into the statute through the doctrine of legislative acceptance. State Amicus Br. 12-14.

But the Court has now held that a nonresident is not “absen[t] from the State” under section 16.063 if his “contacts with the state are sufficient to afford personal jurisdiction under the general longarm statute.” *Kerlin v. Saucedo*, No. 05-0653, 2008 WL 3991036, at *7 (Tex. Aug. 29, 2008). And if being subject to personal jurisdiction in Texas courts establishes a nonresident’s continuous presence in Texas, there is no reason why presence would be defined any differently for Texas residents under the same statute. *See Int’l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 723 (5th Cir. 2004) (“Texas courts must interpret statutory terms consistently.”).

Under this new definition, the only persons to whom section 16.063 applies will never be “absen[t] from the State”—and thus the statute’s tolling effect will never be triggered. It is beyond dispute that Texas residents are subject to personal jurisdiction in Texas courts. *See, e.g., Hemingway v. Robertson*, 778 S.W.2d 199, 202 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding); *McGee v. McGee*, 651 S.W.2d 891, 892 (Tex. App.—El Paso 1983, no writ). And nonresidents who enter Texas and incur obligations—by, for example, entering into a contract or committing a tort here—will necessarily satisfy the minimum-contacts test and be subject to personal jurisdiction in Texas. *See* TEX. CIV. PRAC. & REM. CODE § 17.042 (defining acts constituting business in Texas under the long-arm statute); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574-76 (Tex. 2007) (explaining requirements of minimum-contacts test). Because these are the only types of persons subject to section 16.063, and these persons will always be “present” in Texas under the Court’s new

interpretation of section 16.063, there is no longer any circumstance under which the statute will apply.

This result impermissibly contravenes two established canons of statutory construction. First, “the legislature is never presumed to do a useless act.” *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981); accord *Webb County Appraisal Dist. v. New Laredo Hotel, Inc.*, 792 S.W.2d 952, 954 (Tex. 1990). Second, “[t]he Court must not interpret [a] statute in a manner that renders any part of the statute meaningless.” *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, No. 04-0575, 2008 WL 3991190, at *15 (Tex. Aug. 29, 2008); see also TEX. GOV’T CODE § 311.021(2) (“[I]t is presumed that . . . the entire statute is intended to be effective.”). The Court’s new interpretation of section 16.063 renders the statute both useless and meaningless because it will no longer apply to the only persons within its scope. This interpretation should be reconsidered.

II. THE COURT SHOULD REVISE ITS OPINION TO HOLD THAT A PERSON IS “PRESENT” IN TEXAS UNDER SECTION 16.063 IF HE IS BOTH SUBJECT TO PERSONAL JURISDICTION IN TEXAS COURTS AND AMENABLE TO SERVICE OF PROCESS.

The Court can avoid this interpretive problem, and preserve an important function of section 16.063 in the process, by revising its opinion to hold that a person is “present” under the statute if he is both subject to personal jurisdiction in Texas courts *and* amenable to service.

Although the Court’s opinion does not explicitly say so, presumably its reading of section 16.063 was motivated by the reasoning that tolling the limitations period is unnecessary so long as a putative defendant is subject to personal jurisdiction in Texas

courts. But merely being subject to personal jurisdiction in the abstract does not obviate the need for tolling in all circumstances.

Tolling still serves an important purpose when the defendant is not amenable to service of process. As the Alaska Supreme Court has explained regarding an analogous provision: “The essence of the difficulty sought to be remedied by the suspensory statute is not mere personal absence of the defendant, but *such unavailability as will defeat the power of a plaintiff to effectuate commencement of his action.*” *Byrne v. Ogle*, 488 P.2d 716, 718 (Alaska 1971) (emphasis added). If the defendant has sufficient contacts with a State to be subject to personal jurisdiction, but his whereabouts are unknown, the plaintiff will not be able to effect service of process so that the court can exercise its jurisdiction.

For this reason, many States have interpreted tolling statutes similar to section 16.063 to mean that a defendant is deemed “present” in the State for tolling purposes when he is both subject to personal jurisdiction in the State’s courts *and* amenable to service of process. *E.g.*, *Selby v. Karman*, 521 P.2d 609, 611 (Ariz. 1974) (holding that “the terms ‘without the state’ and ‘absence’ as used in [Arizona’s tolling statute] mean out of the state in the sense that service of process in any of the methods authorized by rule or statute cannot be made upon the defendant to secure personal jurisdiction by the trial court”); *Lipe v. Javelin Tire Co.*, 536 P.2d 291, 294 (Idaho 1975) (holding that tolling statute does not apply to foreign corporations “during any period of time in which the corporation is subject to the jurisdiction of the courts of this state and may be personally served without the boundaries of this state under the long arm statute”); *Frazier v. Castellani*, 342 N.W.2d 623, 626 (Mich. Ct. App.

1983) (“The mere fact of a defendant’s absence from the state will not suspend the limitation period when the defendant is amenable to process and subject to the jurisdiction of the court.”); *Blyth v. Marcus*, 517 S.E.2d 433, 435 (S.C. 1999) (noting that South Carolina’s tolling statute “does not toll the statute of limitations when the nonresident defendant is amenable to personal service and the defendant can be brought within the personal jurisdiction of our courts”).³

By contrast, the Court’s interpretation of section 16.063 fails to protect Texas citizens when defendants are not amenable to service. Under the Court’s reading, tolling does not apply so long as the defendant has “contacts with the state . . . sufficient to afford personal jurisdiction,” *Kerlin*, 2008 WL 3991036, at *7—even when the defendant cannot be served because his whereabouts are unknown or because he is purposefully thwarting or evading service. The availability of substituted service on the Secretary of State does not resolve this problem because the plaintiff must still provide a correct address for the defendant so that the Secretary can notify the defendant. TEX. CIV. PRAC. & REM. CODE § 17.045. If the plaintiff, through no fault of his own, cannot provide the defendant’s correct address to the

3. See also, e.g., *Byrne*, 488 P.2d at 718 (declining “[t]o apply the tolling statute to a situation where the defendant is at all times amenable to service”); *Friday v. Newman*, 183 So. 2d 25, 27 (Fla. Dist. Ct. App. 1966) (holding that “the absence of a defendant from the state tolls the running of the statute of limitations except if service of process could be made on the defendant”); *Bray v. Bayles*, 618 P.2d 807, 810 (Kan. 1980) (holding that “absence from the state, as contemplated by [the tolling statute], means beyond the reach of process from the Kansas courts”); *Sullivan v. Trustmark Nat’l Bank*, 653 So. 2d 930, 931 (Miss. 1995) (holding that, for tolling to apply, “the defendant must have left the state and not be amenable to service under a long-arm statute or other means, because for example, his whereabouts are unknown”); *State ex rel. McGhee v. Dist. Court of Sixteenth Judicial Dist.*, 508 P.2d 130, 132 (Mont. 1973) (“By being subject to the jurisdiction or respondent court and capable of being served during the entire time, the statute of limitations was not tolled.”); *Benally v. Pigman*, 429 P.2d 648, 651 (N.M. 1967) (holding that “the tolling statute should not be applied if a defendant could be served with process, either actual or substituted”); *Lund v. Hall*, 938 P.2d 285, 290 (Utah 1997) (holding that “limitations will not be tolled when a defendant is out of state, as long as he is still amenable to service of process in the state”).

Secretary, the substituted service will be invalid and any judgment obtained will be void. *Royal Surplus Lines Ins. Co. v. Samaria Baptist Church*, 840 S.W.2d 382, 383 (Tex. 1992) (per curiam); *World Distributions, Inc. v. Knox*, 968 S.W.2d 474, 477 (Tex. App.—El Paso 1998, no pet.); *Comm’n of Contracts of Gen. Exec. Comm. of Petro. Workers Union of Republic of Mex. v. Arriba, Ltd.*, 882 S.W.2d 576, 585 (Tex. App.—Houston [1st Dist.] 1994, no writ).

Accordingly, the Court should revise its decision to hold that a defendant is present in Texas under section 16.063 only when he has sufficient contacts with Texas to be subject to personal jurisdiction here *and* he is actually amenable to service of process. By preserving a potential application of section 16.063, this reading would not violate construction canons barring interpretations that render statutes useless or meaningless. Moreover, this reading would bring Texas in line with States that have interpreted similar tolling statutes.⁴

PRAYER

The Court should revise its decision to hold that a defendant is present in Texas under section 16.063 of the Texas Civil Practice and Remedies Code only when he has sufficient contacts with Texas to be subject to personal jurisdiction here *and* he is actually amenable

4. This interpretation also would not raise the constitutional problems cited by the concurring Justices, *Kerlin*, 2008 WL 3991036, at *8 (Brister, J., concurring). See *Blyth*, 517 S.E.2d at 435 (rejecting constitutional challenge to South Carolina’s tolling statute because statute had been judicially limited to apply only when the defendant is not amenable to personal service); *Vice v. David Window Co.*, No. 1:05CV258-LG-RHW, 2007 WL 1668637, at *2 (S.D. Miss. June 6, 2007) (finding that Mississippi’s tolling statute “does not violate the Commerce Clause since the statute only tolls the statute of limitations when the defendant is not amenable to service of process because his whereabouts are unknown”); see also *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 898 (1988) (Scalia, J., concurring) (observing that “[a] tolling statute that operated only against persons beyond the reach of Ohio’s long-arm statute, or against all persons that could not be found for mail service” would not violate the dormant Commerce Clause). Indeed, the Fifth Circuit has just upheld an as-applied constitutional challenge to section 16.063 in part because the statute has not yet been judicially narrowed in this manner. *Cadles of Grassy Meadows II, L.L.C. v. Goldner*, No. 07-10711, 2008 WL 4113960, at *5 & nn.16-17 (5th Cir. Sept. 8, 2008).

to service of process. Because there is no evidence in this case that Kerlin was unavailable for service, the judgment need not be altered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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