No. 13-339

In The
Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JOHN J. KORZEN
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
Post Office Box 7206 Reynolda Station
Winston-Salem, North Carolina 27109
336-758-5832
korzenjj@wfu.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Did Congress intend the discovery rule in 42 U.S.C. § 9658 to apply to all less favorable limitations periods in state statutes of limitations, including provisions within state statutes of limitations that can be characterized as statutes of repose?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
CERCLA Discovery Rule	1
North Carolina Statutory Provision At Issue	4
Proceedings Below	5
REASONS FOR DENYING THE PETITION	9
I. There Is No Meaningful Split Among The Circuits	9
II. The Decision Below Is Consistent With This Court's Case Law	15
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES:

Atchison, T. & S.F.R. Co. v. Buell, 480 U.S. 557 (1987) 19

Barnes v. Koppers, Inc., 534 F.3d 357 (5th Cir 2008) 20, 21

BedRoc Ltd., LLC v. United States, 541 U.S. 176 (2004) 17

Bridges v. United States, 346 U.S. 209 (1953).....17

Bryant v. United States, No. 12-15424 (11th Cir. to be argued Jan. 17, 2014).....22

Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355 (5th Cir. 2005).....12, 13, 21

Camreta v. Greene, 131 S. Ct. 2020 (2011) 14

Clark Cnty. v. Sioux Equip. Corp., 753 N.W.2d 406 (S.D. 2008) 12, 13

CTS Corp. v. Mills Gap Road Assocs., No. 1:10-CV-156-GCM, 2013 WL 4499136 (W.D.N.C. Aug. 20, 2013) 22

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).....18

Landis v. Phys. Ins. Co. of Wis., Inc., 628 N.W.2d 893 (Wis. 2001).....19

McDonald v. Sun Oil Co., 548 F.3d 774 (9th Cir. 2008) 9, 10

Moore v. Walter Coke, Inc., No. 2:11-cv-1391, 2012 WL 4731255 (N.D. Ala. Sept. 28, 2012).....14

TABLE OF AUTHORITIES – Continued

Page

Moore v. Winter Haven Hosp., 579 So. 2d 188 (Fla. App. 1991) 18

Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246 (10th Cir. 2013) 10, 11, 18

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 15

Taniguchi v. Kan Pacific Saipan, Ltd., 132 S. Ct. 1997 (2012) 9

U.S. v. Bestfoods, 524 U.S. 51 (1998) 1

United States. v. Kubrick, 444 U.S. 111 (1979) 17

Wallace v. Kato, 549 U.S. 384 (2007) 18

Witherspoon v. Sides Constr. Co., Inc., 362 N.W.2d 35 (Neb. 1985) 18

STATUTES:

21 U.S.C. § 335 19

31 U.S.C. § 3731 19

42 U.S.C. § 9601 ..... 13, 21

42 U.S.C. § 9651 ..... 1, 20

42 U.S.C. § 9658 ..... *passim*

Comprehensive Environmental Response, Compensation and Liability Act ..... *passim*

Federal Employers' Liability Act 20

Financial Institutions Reform, Recovery, and Enforcement Act of 1989 10

TABLE OF AUTHORITIES – Continued

Page

N.C. Gen. Stat. § 1-46.....4, 17

N.C. Gen. Stat. § 1-52.....*passim*

RULES:

Federal Rule of Civil Procedure 12(b)(6) 6

OTHER AUTHORITIES:

18 J. Moore et al., *Moore's Federal Practice*, § 134.02 (3d ed. 2011).....14

AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, PUBLIC HEALTH STATEMENT FOR TRICHLOROETHYLENE (1997) 6

Black's Law Dictionary (5th ed. 1979) 17

H.R. CONF. REP. 99-962, 1986 U.S.C.C.A.N. 3276, 3354 .....4, 21

Injuries and Damages from Hazardous Wastes – Analysis and Improvement of Legal Remedies: A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510) by the "Superfund Section 301(e) Study Group" 2, 3, 18, 20

S. Rep. No. 96-848 (1980) 1

STATEMENT OF THE CASE

The Fourth Circuit addressed the preemptive effect of the discovery rule in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) on a ten-year repose provision within a state statute of limitations. After summarizing the key aspects of the CERCLA discovery rule, the state repose provision at issue, and the proceedings below, Respondents contend that there is no meaningful circuit split on the question presented and that the decision below is consistent with this Court's case law.

CERCLA Discovery Rule

In 1980, Congress enacted CERCLA to counter "the serious environmental and health risks posed by industrial pollution." *U.S. v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA's purpose was to ensure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S. Rep. No. 96-848, at 13 (1980).

At the same time, Congress authorized a Study Group "to determine the adequacy of existing common law and statutory remedies . . . for harm to man and the environment caused by the release of hazardous substances into the environment." 42 U.S.C. § 9651(e)(1). Congress directed the Study Group to evaluate, among other issues, "barriers to recovery posed by existing statutes of limitation." 42 U.S.C. § 9651(e)(3)(F).

The Study Group Report was issued on July 1, 1982. *See* Injuries and Damages from Hazardous Wastes – Analysis and Improvement of Legal Remedies: A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510) by the "Superfund Section 301(e) Study Group" [hereafter *Study Group Report*]. (The full Study Group Report, including its appendices, can be found online at http://babel.hathitrust.org/cgi/pt?id=mdp.39015004856327#view=1up;seq=366.)

The Study Group Report concluded that in hazardous waste litigation, "Commencement of the running of the statute of limitations can be a barrier to recovery under both common law and statutory remedies" because injuries from exposure to certain hazardous wastes "have long latency periods, sometimes 20 years or longer." *Study Group Report*, at 28. The "traditional rule" that an action accrued at the time of the defendant's tortious act or omission "caused great hardship" to plaintiffs with latent injuries because their claims were often time-barred before they discovered they had been injured. *Id.* at 240, Appendix B page B-2.

Accordingly, under the heading "Statutes of Limitation," the Report recommended that "all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the disease and its cause" and stated that the recommendation was "intended also to cover the repeal of the statutes of repose which, in a

number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one." *Id.* at 241. Elsewhere, the Report continued to treat statutes of repose, including the North Carolina ten-year repose provision, as a subcategory of statutes of limitation, including them within summaries of "statutes of limitation" or "limitations statutes." *Id.* at Appendix B, pages B6-B10, B59, B63.

In 1986, Congress amended CERCLA and added 42 U.S.C. § 9658(a)(1), a preemption clause stating that:

> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

42 U.S.C. § 9658(a)(1).

Subsection (b) contains three definitions. "Applicable limitations period" is defined as "the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this

section may be brought." 42 U.S.C. § 9658(b)(2). "Commencement date" is defined as "the date specified in a statute of limitations as the beginning of the applicable limitations period." 42 U.S.C. § 9658(b)(3). Finally, "federally required commencement date" (FRCD) is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4).

The House Conference Report noted that section 9658 was meant to "address the problem identified in the" Study Group Report, namely that "certain State statutes deprive plaintiffs of their day in court." H.R. CONF. REP. 99-962, 1986 U.S.C.C.A.N. 3276, 3354.

North Carolina Statutory Provision At Issue

The ten-year limitations provision Petitioner relies on is the second sentence of two in N.C. Gen. Stat. § 1-52(16). Section 1-52 is found in Chapter 1 (Civil Procedure), Subchapter II (Limitations), and Article 5 (Limitations, General Provisions) of the North Carolina General Statutes. The first section in Article 5 is entitled "Periods Prescribed" and provides, "The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article." N.C. Gen. Stat. § 1-46.

Section 1-52 lists causes of action subject to a three-year limitations period. Then, in subsection

(16), the first sentence provides a discovery rule that causes of action for personal injury or physical damage to property "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant." The second sentence adds the proviso "that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-52(16). Section 1-52 never uses the term "repose."

Proceedings Below

Petitioner CTS Corporation is a successor to CTS of Asheville, Inc. Pet. App. 52a. CTS of Asheville, Inc. was formed on April 16, 1959, and manufactured electronic parts at the Mills Gap Road Electroplating Facility in Buncombe County, North Carolina. Pet. App. 51a. The corporation used various toxic solvents, including trichloroethylene (TCE), cyanide, chromium VI, and lead. *Id.*

CTS of Asheville, Inc. was dissolved on December 29, 1983, and then continued to operate as CTS Corporation, Asheville Division. Pet. App. 52a. Petitioner operated the Mills Gap Road Electroplating Facility until November 1985. Pet. App. 53a. In 1986 or 1987, Petitioner marketed the facility and surrounding land, representing that the site "has been rendered in an environmentally clean condition." *Id.* In June 1987, Petitioner agreed to sell 54 acres of the

industrial site to a general partnership and provide specific warranties that the property was free of environmental contamination. *Id.* The sale was finalized in December 1987. *Id.* at 54a.

Respondents are individuals who live either on or near the property formerly owned by Petitioner. *Id.* On November 23, 2009, the United States Environmental Protection Agency (EPA) advised Respondents David Bradley and Renee Richardson that their well water contained startlingly high levels of TCE and was not fit for human consumption. *Id.* at 55a-56a. TCE is a manmade, persistent, and highly mobile solvent. *See, e.g.*, J.A. 174 ["J.A." refers to the Joint Appendix filed in the Fourth Circuit, which is available via PACER.] Concentrations of TCE above .005/mg/L can lead to liver damage, kidney damage, changed heart rhythms, and cancer. AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, PUBLIC HEALTH STATEMENT FOR TRICHLOROETHYLENE, at 3 (1997).

The other Respondents live in the vicinity of the Richardson and Bradley residence, and they likewise have been and continue to be exposed to toxins left behind by Respondents via contact from air, land, and water. Pet. App. 56a.

On February 22, 2011, less than two years after the EPA notification, Respondents sued Petitioner for nuisance. J.A. 15. Petitioner moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that N.C. Gen. Stat. § 1-52(16) barred the Complaint. J.A. 37, 41-42. Respondents contended that their action

was timely based in part on 42 U.S.C. § 9658. J.A. 118-19, 258-62. The district court granted Petitioner's motion to dismiss in a two-page opinion concluding that CERCLA does not apply to state statutes of repose. Pet. App. 37a-39a.

The Fourth Circuit reversed the district court and held "that the discovery rule articulated in § 9658 . . . preempts North Carolina's ten-year limitation." Pet. App. 2a. The court noted that a "simple review" of section 9658's language could lead to the conclusion that the section applies only to statutes of limitation because it uses the phrase "statutes of limitation" five times and does not use "statutes of repose." Pet. App. 12a. The court then concluded that section 9658 can also be read to preempt the ten-year limitation provision in N.C. Gen. Stat. § 1-52(16), applying the plain language of subsection (a)(1) and the definitions in subsection (b). Pet. App. 12a-13a.

The discovery rule in section 9658(a)(1) can be read to apply to section 1-52(16)'s ten-year limitations provision, because it is an "applicable limitations period" that is "specified in the State statute of limitations" and provides "a commencement date which is earlier than the federally required commencement date." Pet. App. 12a. It is an "applicable limitations period" because it is a "period" "during which a civil action . . . may be brought." *Id.* It is "specified in the State statute of limitations" because it is located within state statutes of limitations. *Id.* Finally, the ten-year limitation period provides a "commencement date" that "is earlier than the federally

required commencement date" because it begins with the defendant's last act, not when the plaintiff discovers the harm. *Id.* at 12a-13a.

The court further reasoned that the use and meaning of the terms "statute of limitations" and "statute of repose" had developed considerably over the years and that historically the terms had often been used interchangeably. *Id.* at 13a.

Because the text of section 9658 could be read as either including statutes of repose or excluding them, the court then looked to other indicia of congressional intent. *Id.* at 14a. The court reasoned that Congress adopted section 9658 to address the problem identified in the Study Group Report, which was "equally concerned with statutes of repose and limitations, and with their effect of barring plaintiffs' claims before they are aware of them." *Id.* The court also reasoned that CERCLA is remedial, section 9658 resulted from Congress's specific concern with ensuring adequate remedies, and section 9658 furthers the Act's remedial goals by preempting state limitations periods that would bar causes of action for latent harms. *Id.* at 14a-16a.

The court concluded that interpreting section 9658 to exclude North Carolina's ten-year statute of repose would "obliterate legitimate causes of action before they exist. . . . precisely the barrier that Congress intended § 9658 to address." *Id.* at 15a. Such a

reading would thwart Congress's goal of removing barriers to relief from hazardous substances. *Id.*

REASONS FOR DENYING THE PETITION

I. There Is No Meaningful Split Among The Circuits.

Statutory terms should be construed based on their meaning when the statute was enacted. *See, e.g.*, *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012). Like the Fourth Circuit below, the only other circuit to construe "statute of limitations" in section 9658 as of when the section was enacted agrees that the section does not plainly exempt statutes of repose. *See McDonald v. Sun Oil Co.*, 548 F.3d 774 (9th Cir. 2008).

In *McDonald*, the plaintiff learned that its property was contaminated with mercury more than twenty years after the seller had represented that no mercury remained there. The Ninth Circuit held that Oregon's ten-year statute of repose did not extinguish the plaintiff's negligence claim. *Id.* at 779. The court first determined that the term "statute of limitation" was "ambiguous regarding whether it included statutes of repose" when the statute was enacted in 1986. *Id.* at 781. As of 1986, courts often used the terms "statute of limitations" and "statute of repose" interchangeably. *Id.* Because the statute was ambiguous, the court examined CERCLA's legislative purpose to interpret its meaning. *Id.*

After reviewing CERCLA's legislative purpose, the Ninth Circuit held that CERCLA preempted Oregon's statute of repose. *Id.* at 782-83. The court reasoned that "Congress's primary concern in enacting § 9658 was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of it – precisely the type of circumstance involved in this case." *Id.* at 783. The court noted that "[t]his predicament can be caused by either statutes of limitation or statutes of repose, and is probably most likely to occur where statutes of repose operate." *Id.* The court held that based on the ambiguity of the phrase "statute of limitations" itself when section 9658 was enacted and the evidence of Congressional intent, it was apparent that Congress intended section 9658 to include statutes of repose. *Id.*

The Fourth Circuit's decision below and the Ninth Circuit's *McDonald* decision are entirely consistent with other circuits that have interpreted the term "statute of limitations" as of the 1980s. The Tenth Circuit, for example, recently cited both of these decisions with approval in construing the term "statute of limitations" in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. *See Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1258 (10th Cir. 2013). The Tenth Circuit determined that "'statute of limitations' did not have a consistent, clearly distinct meaning in 1989." *Id.* at 1258. The Tenth Circuit cited other circuit court discussions of the terms

"statute of limitations" and "statute of repose," observing that:

> Courts have noted the historically ambiguous and overlapping use of these terms. *E.g., FHFA v. UBS Am. Inc.,* 712 F.3d 136, 140, 142-43 & n.3 (2d Cir. 2013) ("[C]ourts . . . have long used the term 'statute of limitations' to refer also to statutes of repose." (referring, inter alia, to *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 210 (1976))); *Fields v. Legacy Health Sys.,* 413 F.3d 943, 952 n.7 (9th Cir. 2005) ("[T]he distinction between statutes of limitations and statutes of repose is often blurred."); *Alexander v. Beech Aircraft Corp.,* 952 F.2d 1215, 1218, n.2 (10th Cir. 1991) ("Although the statute is titled as a 'Statute of limitations,' we refer to it as a statute of repose. . . . Both types of statutes are often referred to as statutes of limitations."); *Anixter v. Home-Stake Prod. Co.,* 939 F.2d 1420, 1434 n.17 (10th Cir. 1991), *vacated on other grounds by Dennler v. Trippet,* 503 U.S. 978 (1992) ("Although the two concepts differ," the terms statute of limitations and statute of repose "have become interchangeable.").

Id. at 1259 n.14. Then, after thoroughly examining the meaning of "statute of limitations," the Tenth Circuit concluded that "[t]he majority of the case law treats repose periods as a subcategory of statute of limitations." *Id.* at 1266.

In sum, there is broad agreement that the term "statute of limitations" did not plainly exclude statutes of repose as of the mid to late 1980s and that repose periods have usually been treated as subcategories of statutes of limitations.

The two appellate decisions relied on by Petitioner do not support review. *See Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355 (5th Cir. 2005); *Clark Cnty. v. Sioux Equip. Corp.*, 753 N.W.2d 406 (S.D. 2008). In *Burlington Northern*, a case arising from a storage tank rupture, neither party briefed the question presented here. (The appellate briefs are available on Westlaw at 2004 WL 3591804, 2005 WL 3186188, and 2005 WL 3186187.) The district court had agreed with the appellant that the "federally required commencement date" of section 9658 applied but disagreed as to the limitations period that followed the commencement date. On appeal, the appellee never argued that section 9658 preempted only statutes of limitation. The parties instead disputed whether section 9658 could apply when no CERCLA claims were or could have been asserted, and they argued over various state law questions such as retroactive application of an amendment to the statute of repose. Because the Fifth Circuit reached its decision on the question presented here with no adversarial briefing or argument, *Burlington Northern* provides a weak basis for review.

Moreover, the Fifth Circuit acknowledged in *Burlington Northern* that the case did "not involve the delayed discovery for which § 9658 was intended

to address." 419 F.3d at 364-65. The claimant immediately knew it had been injured when the storage tank ruptured, well before the applicable products liability statute of repose expired. *Id.* at 358-59. The Fifth Circuit also failed to address whether the term "statute of limitations" was ambiguous when section 9658 was adopted and failed to discuss section 9658(b)(2)'s definition of "applicable limitations period" as "the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought."

In *Clark County*, an action for property damage against an oil tank installer, the South Dakota Supreme Court heavily relied on what was then "the highest federal court to consider this issue," *Burlington Northern*. 753 N.W.2d at 414. While the court followed *Burlington Northern* and held that section 9658 did not preempt a state statute of repose, 753 N.W.2d at 415-17, it might well decide the issue differently now, with two other federal circuits having construed CERCLA in the meantime to preempt statutes of repose. In addition, the court failed to analyze the meaning of "statute of limitations" as of 1986 and failed to address the definitions within section 9658 of "applicable limitations period" and "commencement date." The court actually did not even need to reach the issue because CERCLA does not apply to claims involving petroleum. *See* 42 U.S.C. § 9601(14). Besides *Clark County*, no other appellate decision has followed *Burlington Northern*.

That Alabama district courts have reached contrary conclusions on whether section 9658 preempts that state's common law rule of repose also does not support review. A federal district court decision "is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (quoting 18 J. Moore et al., *Moore's Federal Practice*, § 134.02[1][d], p. 134-26 (3d ed. 2011)). In any event, the most recent Alabama decision holds that section 9658 preempts Alabama's rule of repose, with reasoning entirely consistent with the decision below. *See Moore v. Walter Coke, Inc.*, No. 2:11-cv-1391, 2012 WL 4731255, at **8-13 (N.D. Ala. Sept. 28, 2012) (opinion by Chief Judge Sharon Lovelace Blackburn).

In the twenty-seven years since section 9658 was enacted, only three federal courts of appeals have addressed the issue presented, all since 2005. The question presented arises infrequently. There must be a claim for personal injury or property damage arising from exposure to a covered hazardous substance, pollutant, or contaminant that was released from a facility, and there must be a state statute of repose that ran before the plaintiff filed suit. The recency of the decisions suggests that, to the extent that the issue may be important, it is only beginning to percolate in the lower courts, and the Court can consider the question if a genuine and serious conflict develops.

II. The Decision Below Is Consistent With This Court's Case Law.

The Fourth Circuit's conclusion that section 9658 does not plainly exclude statutes of repose provisions, analysis of the phrase "statute of limitations" as of the time when section 9658 was enacted, and consideration of legislative purpose are all consistent with this Court's case law.

First, the Fourth Circuit correctly concluded that the plain meaning of section 9658 can be read to include the statute of repose provision at issue, using the language itself, the specific context, and the broader statutory context. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The Fourth Circuit properly analyzed the text of section 9658 itself, including the preemption provision in subsection (a)(1) and all three definitions in subsection (b). The court first accurately summarized (a)(1) as preempting a state limitations period if it (1) is an "applicable limitations period" that is "specified in the State statute of limitations or under common law" and (2) "provides a commencement date which is earlier than the federally required commencement date." Pet. App. 12a.

The court next noted that the statute of repose provision at issue is "specified in the State statute of limitations or under common law" because it is located in the state statutory section on "Limitations, Other than Real Property." *Id.* Indeed, the statute of repose provision is just one of many limitations

provisions in that Article and the Subchapter on "Limitations."

The court then noted that the ten-year limitations provision in subsection 1-52(16) fits the definition of "applicable limitations period" because it is a period specified in a statute of limitations "during which a civil action . . . may be brought." *Id.* The court's reading of "applicable limitations period" to include subsection 1-52(16) makes perfect sense. The first sentence of subsection 1-52(16) states that actions "shall not accrue" until harm is discovered, while the second sentence – the one at issue – provides "that no cause of action shall accrue more than 10 years from the last act or omission of the defendant." Read as a whole, subsection 1-52(16) defines the period "during which a civil action . . . may be brought," with the ten-year provision at issue limiting that period.

The court then concluded that the ten-year provision at issue provides a "commencement date" that is "earlier than the federally required commencement date" because the ten-year period runs from when the defendant commits its last act, while under section 9658 the limitations period begins when a plaintiff has knowledge of harm. *Id.* at 12a-13a. The court's commonsense conclusion that the provision at issue provides an earlier "commencement date" than section 9658 is consistent with other provisions in the North Carolina statutes. The first section in the Article in which section 1-52 is located is in fact entitled "Periods Prescribed" and states, "The periods

prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article." N.C. Gen. Stat. § 1-46.

Second, in concluding that the term "statute of limitations" did not exclude statute of repose provisions, the Fourth Circuit complied with the fundamental rule that a statute's terms should be given the meaning they had when the text was adopted. *See, e.g.*, *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004). The Fourth Circuit correctly concluded that "statute of limitations" and "statute of repose" were used interchangeably as of 1986, when section 9658 was enacted.

This Court had used the terms "statute of limitation" and "statute of repose" interchangeably before 1986. *See, e.g., United States. v. Kubrick*, 444 U.S. 111, 117 (1979) (describing statutes of limitation as statutes of repose); *Bridges v. United States*, 346 U.S. 209, 230-31 (1953) ("Of course, statutes of limitation are statutes of repose.").

Furthermore, the *Black's Law Dictionary* definition for "statute of limitation" included the statement that "Statutes of limitation are statutes of repose" and ended by noting, "Also sometimes referred to as 'statutes of repose.'" *Black's Law Dictionary* 835 (5th ed. 1979). Not only did the definition for "statute of limitation" conflate the two terms, *Black's* definition for "Repose statutes" stated simply, and fully, "See Limitation (*Statute of limitation*)." *Id.* at 1169.

Since section 9658 was enacted, this Court and others have continued to use the terms interchangeably. *See Wallace v. Kato*, 549 U.S. 384, 391, 395 (2007) (using "statute of repose" and "statute of limitations" interchangeably); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 352, 355 (1991) (stating question presented was "which statute of limitations is applicable" where one of the three choices was a statute of repose); *Nat'l Credit Union Admin. Bd.*, 727 F.3d at 1266 (concluding that "[t]he majority of the case law treats repose periods as a subcategory of statute of limitations"); *Moore v. Winter Haven Hosp.*, 579 So. 2d 188, 190 (Fla. App. 1991) (explaining that "a statute of repose is a form of a statute of limitations and the terms are often used interchangeably," and holding that "'statute of repose' is subsumed in the general term 'statute of limitations'" in statutory provision at issue because, to hold otherwise, would "frustrate the legislative intent" of the provision); *Witherspoon v. Sides Constr. Co., Inc.,* 362 N.W.2d 35, 41 (Neb. 1985) ("A statute of repose is a type of a statute of limitations.").

The Study Group Report also used the terms interchangeably and treated statutes of repose as a subcategory of statutes of limitation, repeatedly including provisions that can be characterized as statutes of repose within the category of "statutes of limitation" or "limitations statutes." *Study Group Report*, at 240-41, and Appendix B pages B6-B10, B59, B63.

The absence of the term "statute of repose" in section 9658 is understandable when other statutes

are considered. A search of the United States Code reveals that Congress never uses the term "statute of repose," although it indisputably enacts statutes of repose. *See, e.g.*, 31 U.S.C. § 3731(b)(2) (creating three-year statute of limitation and ten-year statute of repose under "false claims procedure"); 21 U.S.C. § 335(b)(3)(B) (creating six-year statute of limitations and ten-year statute of repose under "Limitation on Actions"). The North Carolina ten-year limitation at issue never uses the term "repose." *See* N.C. Gen. Stat. § 1-52(16).

There is no reason in hindsight to expect Congress to have used the term "repose" in section 9658, when Congress and state legislatures such as North Carolina's were not using it themselves. *See, e.g.*, *Landis v. Phys. Ins. Co. of Wis., Inc.*, 628 N.W.2d 893, 896, 907 (Wis. 2001) (holding that phrase "[a]ny applicable statute of limitations" was ambiguous as to whether it included statutes of repose and noting that "The term 'statute of repose' is largely a judicial label for a particular type of limitation on actions" and "It is apparent that the phrase 'statute of repose' is judicial terminology and is not featured in legislative lingo.").

Third, after determining that section 9658 can be read as including statutes of repose, the Fourth Circuit properly considered Congress's remedial purpose in enacting CERCLA and section 9658's legislative history. Construing CERCLA as a broad remedial statute is consistent with this Court's interpretations of other remedial statutes. *See, e.g.*, *Atchison, T. &*

S.F.R. Co. v. Buell, 480 U.S. 557, 562 (1987) (stating that the Federal Employers' Liability Act is a "broad remedial statute" that must be given a liberal construction).

Construing section 9658 as a broad remedial statute is especially appropriate given the section's history. Congress directed the Study Group "to determine the adequacy of existing common law and statutory *remedies*" and to evaluate "barriers to recovery posed by existing statutes of limitation." 42 U.S.C. §§ 9651(e)(1) (emphasis added), (e)(3)(F). The Study Group then thoroughly analyzed the existing statutes of limitation in all the states. Under the heading "Statutes of Limitations," the Study Group then recommended that states adopt a rule that claims accrue on discovery of latent harm and its cause and stated that the recommendation was also intended to repeal statutes of repose. *Study Group Report*, at 240-41.

The Fifth Circuit, in an opinion by then-Chief Judge Edith Jones, stated that the legislative history of section 9658 is "unusually helpful" because the House Conference Report explained that the section was drafted in response to the Study Group Report. *Barnes v. Koppers, Inc.*, 534 F.3d 357, 365 (5th Cir 2008). Relying on the Study Group Report, the Fifth Circuit held that the section 9658 discovery rule applies "where the conditions for CERCLA cleanup are satisfied," that is, when the plaintiff's evidence meets CERCLA's definitions of a "release" of "hazardous

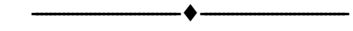
substances" into the "environment" from a defendant's "facility." *Id.* at 365.

Here, applying the Fifth Circuit's test from *Barnes*, the section 9658 discovery rule would apply because the allegations in Plaintiff's Complaint satisfy all the relevant statutory definitions in CERCLA for a "release" of "hazardous substances" into the "environment" from Petitioner's "facility." *Compare* Pet. App. 51a-56a ((Complaint ¶¶ 8, 34-36 (hazardous substances), 9, 29 (facility), 29-31 (environment), 30-31 (release)), *with* CERCLA definitions in 42 U.S.C. §§ 9601(8) ("environment"), (9) ("facility"), (14) ("hazardous substance"), (22) ("release"). Though *Barnes* did not address a statute of repose, its reasoning would apply section 9658 on these facts and further calls into question the earlier Fifth Circuit decision in *Burlington Northern* that Petitioner depends on for a circuit split.

The legislative history is indeed "unusually helpful" as *Barnes* states, for the House Conference Report noted that section 9658 was meant to "address the problem identified in the" Study Group Report, which is that "certain State statutes deprive plaintiffs of their day in court." H.R. CONF. REP. 99-962, 1986 U.S.C.C.A.N. 3276, 3354. The narrow "simple reading" advanced by Petitioner, however, as the decision below recognized, would deprive plaintiffs in states with statutes of limitation containing repose provisions of their day in court.

Finally, this case is not a perfect vehicle for this Court. This case is only one part of a long-running dispute about how to clean up the mess left behind by Petitioner. The EPA previously entered into a consent order regarding the site with Petitioner and the subsequent landowner, J.A. 190-221, and the North Carolina Department of Environment and Natural Resources has also made certain demands of Petitioner. Petitioner sued the subsequent landowner over the costs of responding to the agencies, and that lawsuit is ongoing. *See CTS Corp. v. Mills Gap Road Assocs.*, No. 1:10-CV-156-GCM, 2013 WL 4499136 (W.D.N.C. Aug. 20, 2013) (granting defendant's amended motion for partial summary judgment).

Coincidentally, the Eleventh Circuit will soon hear argument on the exact same issue Petitioner has raised – indeed, involving the exact same ten-year limitations period in N.C. Gen. Stat. § 1-52(16). *See Bryant v. United States*, No. 12-15424 (11th Cir. to be argued Jan. 17, 2014). *Bryant* involves numerous United States Marines and family members who developed leukemia and other cancers more than ten years after being exposed, at Camp Lejeune in North Carolina, to the worst public water contamination in United States history. If the Eleventh Circuit were to hold that section 9658 does not preempt the ten-year limitations period in N.C. Gen. Stat. § 1-52(16), a meaningful circuit split would then exist. But for now, the Court should continue to allow the interpretation of section 9658 to percolate in the lower courts.



CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN J. KORZEN
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
Post Office Box 7206 Reynolda Station
Winston-Salem, North Carolina 27109
336-758-5832

Counsel for Respondents

November 2013