No. 13-339

IN THE

Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

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

BRIEF FOR THE PETITIONER

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FEBRUARY 24, 2014

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QUESTION PRESENTED

Did the Fourth Circuit correctly interpret 42 U.S.C. § 9658 to apply to state statutes of repose in addition to state statutes of limitations?

PARTIES TO THE PROCEEDING

The plaintiffs in this case are Respondents Peter Waldburger, Sandra Ratcliffe, Lee Ann Smith, Tom Pinner, IV, a/k/a Bud Pinner, IV, Hans Momkes, Wilma Momkes, Walter Dockins, Jr., Autumn Dockins, William Clark Lisenbee, Dan Murphy, Lori Murphy, Robert Aversano, Daniel L. Murphy, Laura A. Carson, Glen Horecky, Gina Horecky, Renee Richardson, David Bradley, Byron Hovey, Ramona Hovey, Peter Tatum MacQueen, IV, Bethan MacQueen, Patricia Pinner, Tom Pinner, III, a/k/a Buddy Pinner, III, and Madeline Pinner.

The defendant is Petitioner CTS Corporation.

CORPORATE DISCLOSURE STATEMENT

Petitioner CTS Corporation is a publicly held corporation. It does not have any parent corporations. GAMCO Asset Management, Inc., a wholly owned subsidiary of GAMCO Investors, Inc., owns 10% or more of CTS Corporation's stock.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-36a) is reported at 723 F.3d 434. The unreported decision of the United States District Court for the Western District of North Carolina (Pet. App. 37a-39a) is available at 2012 WL 380053. The unreported memorandum and recommendation of the magistrate judge (Pet. App. 40a-47a) is available at 2011 WL 7153937.

JURISDICTION

The Fourth Circuit issued its opinion reversing the district court's final judgment on July 10, 2013. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at issue in this case provides in full:

(a) State statutes of limitations for hazardous substance cases

> (1) Exception to State statutes — 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.

(2) State law generally applicable — Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions 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.

(3) Actions under section 9607 — Nothing in this section shall apply with respect to any cause of action brought under section 9607 of this title.

(b) Definitions — As used in this section—

(1) Subchapter I terms — The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period — The term "applicable limitations period" means 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.

(3) Commencement date — The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general — Except as provided in subparagraph (B), the term "federally required commencement date" means 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.

(B) Special rules — In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

42 U.S.C. § 9658.

STATEMENT

A. Two Distinct Types of Statutes: Statutes of Limitations and Statutes of Repose

At the heart of this case is a fundamental difference between two types of statutes. Statutes of *limitations* establish "a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Black's Law Dictionary* 1546 (9th ed. 2009). These statutes begin to run from a date connected to the *plaintiff*—asking when the plaintiff is injured, or when the plaintiff learned or should have learned of the injury and, perhaps, its cause. Statutes of limitations are procedural, designed to encourage litigants to assert their rights promptly. They are also frequently subject to equitable exceptions (*e.g.*, equitable tolling). *See generally Police & Fire Retirement Sys. v. IndyMac*

MBS, Inc., 721 F.3d 95, 106 (2d Cir. 2013); *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F. 2d 862, 866 (4th Cir. 1989).

Statutes of *repose*, by contrast, bar "any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1546 (9th ed. 2009). Unlike statutes of limitations, statutes of repose are linked to the *defendant* and begin to run from the date of the defendant's allegedly tortious conduct or some other specified event, regardless of whether a cause of action has accrued. *See generally* 54 C.J.S. Limitations of Actions § 7 (2013). Because they are substantive, not procedural, they are not generally subject to the various exceptions associated with statutes of limitations. Instead of encouraging claimants to act promptly, statutes of repose assure potential defendants that liability for any particular action cannot lie after a prescribed period of time.

B. CERCLA § 9658: How It Works

Against this backdrop of two distinct statutes sits CERCLA § 9658, which addresses state-law damages actions for exposure to hazardous substances. 42 U.S.C. § 9658. This unusual provision engrafts a special *federal* commencement date onto the running of *state* statutes of limitations governing *state* causes of action. This federal intrusion into state procedural law applies to any state action for "personal injury, or property damages" that arises from a "hazardous substance, or pollutant or contaminant, released into the environment from a facility." *Id.* § 9658(a)(1). For these qualifying state-law actions, § 9658

preempts certain state commencement dates that would have otherwise applied under the state statutes of limitations, and provides in their place a federal commencement date.

Specifically, the general rule under § 9658 is that "the statute of limitations established under State law shall apply." 42 U.S.C. § 9658(a)(2). However, § 9658(a)(1) carves out an exception to that general rule:

> [I]f 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.

§ 9658(a)(1). In other words, if the state-law "applicable limitations period" starts earlier than the federal commencement date, then the federal commencement date controls.

Significantly, § 9658 incorporates several mutually reinforcing references to the phrase "statutes of limitations." First, the text of § 9658(a)(1) itself applies to "the applicable limitations period for such action (as specified in the State statute of limitations or under common law)." Second, the phrase "applicable limitations period" is separately 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." § 9658(b)(2). And, finally, the phrase "commencement date" is defined as "the date specified in a statute of limitations as the beginning of the applicable limitations period." § 9658(b)(3).

Thus, § 9658(a)(1) by its terms acts only on "statutes of limitations," as opposed to other time limitations.

How it works confirms as much, as the statute's preemptive effect is defined in part by a comparison of relevant "commencement" dates. Specifically, 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." *Id.* And § 9658 defines the "applicable limitations period" that it covers as the "period specified in a statute of limitations during which" the qualifying state claims may be brought. *Id.* § 9658(b)(2).

The "federally required commencement date" 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." § 9658(b)(4)(A). This type of accrual provision for statutes of limitations is generally referred to as a "discovery rule," since it runs from the date of the plaintiff's actual or reasonable discovery of a particular fact. And it is actually an "enhanced discovery rule" because, under § 9658, the relevant facts to be discovered are not just the existence of the plaintiff's injury, but also its cause.

Like North Carolina, most states have statutes of limitations that begin to run when the plaintiff's "bodily harm" or "physical damage" "becomes apparent or ought reasonably to have become apparent to

the" plaintiff. N.C. Gen. Stat. § 1-52(16). Moreover, many states have statutes of limitations that begin to run from the time of injury. So, in place of these triggering events, § 9658 delays the commencement of the state statutes of limitations until "the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A). Accordingly, for such statutes this federal discovery rule is more plaintiff-friendly than the State's own rule, as it does not trigger a state statute of limitations until the plaintiff knows of (or reasonably should have known of) *both* the injury *and* the causal connection between the injury and the alleged hazardous substance at issue.

The statute also codifies "[s]pecial rules" for cases involving "a minor or incompetent plaintiff," which are all equitable exceptions typically found in statutes of limitations, not statutes of repose. § 9658(b)(4)(B). In the case of a minor, the federal commencement date is "the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed." § 9658(b)(4)(B)(i). And, in the case of an incompetent individual, the federal commencement date is the date "on which such individual becomes competent or has had a legal representative appointed." § 9658(b)(4)(B)(ii).

C. The District Court Ruled That § 9658 Preempts Only The Commencement Of Statutes of Limitations

According to the complaint's allegations, over several decades, CTS of Asheville, Inc., operated a plant

in Asheville, North Carolina, that manufactured electronic components. Pet. App. 51a. As part of the manufacturing process, CTS of Asheville used and stored various solvents at the plant. *Id.* In 1983, CTS of Asheville was dissolved, and Petitioner CTS Corporation took over the plant's operations under its Asheville Division. *Id.* at 52a. CTS Corporation operated the plant for two years, and eventually sold the property in 1987. The buyer then sold the unimproved portion of the property to a developer that built houses on the mountainside overlooking the former plant site. Pet. App. 53a-54a. Respondents—a group of individuals that purchased houses on or near the former CTS property—"contend that their land and ground water is contaminated by the toxic chemicals . . . that CTS Corporation left at the Facility when it sold the property." *Id.* at 41a.

In February 2011, Respondents filed a one-count complaint against CTS Corporation alleging that it had violated North Carolina's nuisance law. *Id.* at 55a-57a. Respondents sought monetary damages and a judgment requiring CTS Corporation to engage in reclamation of the toxic solvents and remediation of the environment around the former plant site. *Id.* at 57a. CTS Corporation moved to dismiss the complaint on the ground that North Carolina's 10-year statute of repose had eliminated Respondents' nuisance claim long before they brought this suit. *See* N.C. Gen. Stat § 1-52(16) (prohibiting a "cause of action [from] accru[ing] more than 10 years from the last act or omission of the defendant giving rise to het cause of action").

A magistrate judge recommended that the district court grant CTS Corporation's motion to dismiss.

Pet. App. 40a. The magistrate judge initially noted that a 3-year *statute of limitations* governs North Carolina nuisance claims, and begins to run once "'bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant.'" Pet. App. 43a (quoting N.C. Gen. Stat. § 1-52(16)). But also applicable was a 10-year *statute of repose*, which indicates 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." Pet. App. 44a (quoting N.C. Gen. Stat. § 1-52(16)). Because "[t]he last possible act or omission by Defendant CTS Corporation that could give rise to a cause of action occurred in 1987 when it sold the property," the magistrate judge reasoned, Respondents' nuisance claim was "barred by the statute of repose contained in N.C. Gen. Stat. § 1-52(16)." *Id.*

The magistrate judge rejected Respondents' arguments for avoiding this statute of repose. As relevant here, the magistrate judge specifically rejected Respondents' argument that § 9658 engrafts its federally-mandated commencement date not only onto North Carolina's 3-year statute of limitations, but also onto its 10-year statute of repose. Pet. App. 46a. Relying on the Fifth Circuit's decision in *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co.*, 419 F.3d 355, 362-63 (5th Cir. 2005), the magistrate judge reasoned that "[t]he clear language of the statute . . . is limited to a state's statute of limitations," not a state's statute of repose. Pet. App. 46a.

The magistrate judge noted the well-known substantive differences between the two types of statutes. On the one hand, "'[a] statute of repose is a

substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit.'" Pet. App. 47a (quoting *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 446 S.E.2d 603, 605 (N.C. Ct. App. 1994)). On the other, a statute of limitations is a "'procedural device that operates as a defense to limit the remedy available from an existing cause of action.'" *Id.* (quoting *First United*, 882 F.2d at 865).

The district court subsequently adopted the magistrate judge's recommendation and entered final judgment for CTS Corporation. Pet. App. 39a. The court described the "magistrate judge's analysis of CERCLA's preemption of state statutes of limitations, as opposed to statutes of repose" as "accurate and well-reasoned." *Id.* at 38a. And the court found the Ninth Circuit's contrary holding—that CERCLA preempted both statutes of limitation and statutes of repose—to be "flawed." *Id.* (disagreeing with *McDonald v. Sun Oil Co.*, 548 F.3d 774, 778 (9th Cir. 2008)). Section 9658's plain language applies only to state statutes of limitations, the court explained, so the "*McDonald* court created an ambiguity where none existed." *Id.*

D. The Court Of Appeals Read § 9658 To Preempt Statutes Of Repose Because Of CERCLA's Supposed "Remedial Purpose"

A divided panel of the Fourth Circuit reversed. Pet. App. 1a, holding that "the discovery rule articulated in § 9658 . . . preempts North Carolina's ten-year limitation" in N.C. Gen. Stat. § 1-52(16). Pet. App. 2a. The majority began with a summary of how § 9658 came to be. Congress passed CERCLA in 1980 against the backdrop of well-publicized environmental disasters. Pet. App. 2a-3a. The majority

thus described CERCLA as "a remedial statute" designed to abate hazardous waste sites and to shift the costs of cleanup to responsible parties. *Id.* at 3a-4a. The majority also noted that CERCLA reflected a compromise between three separate bills and, as a result, the text of "CERCLA is often criticized for its lack of precision." *Id.* at 3a.

After CERCLA's initial enactment, Congress "established a study group to examine the 'adequacy of existing common law and statutory remedies in providing legal redress for harm . . . caused by the release of hazardous substances into the environment.'" *Id.* at 4a (quoting 42 U.S.C. § 9651(e)(1)). The study group determined that environmental claims frequently have long latency periods that are not suited for statutes of limitations that run from the time of the plaintiff's injury. Pet. App. 4a-5a. The study group recommended to the states that they "'adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause,'" and "'repeal . . . statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring [a] plaintiff's claim before he knows that he has one.'" *Id.* at 5a (quoting Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes-Analysis and Improvement of Legal Remedies pt. 1, at 241 (Comm. Print 1982)). In 1986, the majority opined, Congress intervened by passing § 9658 instead of waiting for the states to amend their state laws. *Id.*

The majority next "review[ed] the concepts of limitations and repose." Pet. App. 9a. It noted that both limit the time that a plaintiff has to bring suit. A

statute of limitations "'bars claims after a specified period . . . based on the date when the claim accrued (*as when the injury occurred or was discovered)*,'" and is designed to discourage plaintiffs from sitting on their rights while evidence is lost. *Id.* at (quoting *Black's Law Dictionary* 1546 (9th ed. 2009) (emphasis added)). A statute of repose, by contrast, "'bar[s] any suit that is brought after a specified time *since the defendant acted* . . . even if this period ends before the plaintiff has suffered a resulting injury'" and before the claim accrues. *Id.* (quoting *Black's Law Dictionary* at 1546 (emphasis added)). A statute of repose's grant of substantive immunity is designed to balance the interests of plaintiffs and defendants by setting a time limit beyond which no liability exists. *Id.* The majority concluded that the 10-year period at issue in this case was a statute of repose under these general definitions, as the North Carolina courts themselves had repeatedly held. *Id.* at 10a-11a.

Only then did the majority turn to the language of § 9658. As the majority candidly acknowledged, the phrase "statute of limitations" appears in the statute "five times," and "[n]oticeably absent is the phrase 'statute of repose.'" Pet. App. 11a-12a. "Thus," the majority conceded, "a simple review of § 9658's language could reasonably lead to a conclusion that its application is limited only to statutes of limitations." *Id.* at 12a.

But the majority did not rest on that simple conclusion. Pet. App. 11a-12a. Instead, the majority concluded that the provision was ambiguous as to whether Congress meant the phrase "statute of limitations" to encompass statutes of repose. *Id.* at 11a. That ambiguity, the majority reasoned, came in part

from the fact that the statute of repose at issue here appears in a section of the North Carolina Code entitled "Limitations, Other than Real Property," so it could be interpreted to fall within § 9658(a) because it was "'specified in the State statute of limitations or under common law.'" Pet. App. 12a. The majority also suggested that the statute of repose could be read to qualify under § 9658(b)'s definition of "applicable limitations period" because it was a "period," "specified in a statute of limitations," "during which a civil action . . . may be brought." *Id.* Finally, because the statute of repose began to run at the time of the defendant's last action, the majority found that its "commencement period" was earlier than the federal commencement date and could be interpreted to trigger that delayed date. *Id.* at 12a-13a.

Self-consciously desiring to avoid the appearance that it was "stretching to find ambiguity in the text," the majority provided two additional rationales to support its view that the phrase "statute of limitations" could include "statute of repose." Pet. App. 13a. It suggested that "a historical analysis reveals that both scholars and courts have often used the terms interchangeably." *Id.* Given this confusion, the majority found it probable that Congress intended for statute of limitations to cover statutes of repose. *Id.* Additionally, the majority opined that there is a "lack of internal consistency" between § 9658's substantive provision (§ 9658(a)(1)) and its definitional provision (§ 9658(b)(2)). *Id.* The substantive provision indicates that it applies to an "applicable limitations period" "as specified in the State statute of limitations or under common law." The definition of "applicable limitations period," by contrast, defines the phrase as "the period specified in a

statute of limitations" without reference to the common law. Pet. App. 13a-14a. The majority thus concluded that § 9658 failed to manifest a plain meaning when state common law (rather than state statutory law) establishes the relevant limitations period. *Id.*

The majority went on to resolve this perceived ambiguity by holding that § 9658 preempts the commencement dates in state statutes of repose. It relied on three factors. First, it cited the study group's recommendations—which were "equally concerned with statutes of repose and limitations, and with their effect of barring plaintiffs' claims before they are aware of them." Pet. App. 14a. Second, it cited CERCLA's "remedial" nature, opting for a "broad interpretation" of "statute of limitations" to further the statute's remedial goals. *Id.* at 15a. Third, it cited the Ninth Circuit's *McDonald* decision, noting that it was "unpersuaded" by the Fifth Circuit's contrary analysis regarding the plain meaning of § 9658's text. *Id.* at 16a.

The majority concluded by conceding that its holding may "raise the ire" of "corporations and other entities" that rely on statutes of repose, but explained that it had not turned a "blind eye" to the policies that these statutes vindicate. *Id.* After all, the majority noted, a plaintiff still must meet its burden of proof on the merits, which will prove more difficult as time passes. *Id.* at 17a. And, while the majority's holding effectively eliminated the statute of repose by starting it and the statute of limitations at the exact same time, the 3-year period still applied so "defendants will not necessarily be endlessly subjected to the possibility of litigation." *Id.* Finally, the majority ex-

pressed again that its holding comported with the study group's recommendations. *Id.*

Judge Davis, in a short concurrence, opined that § 9658's "plain language" need not establish an ambiguity if other tools of statutory interpretation proved that an ambiguity existed. Pet. App. 18a.

Judge Thacker, however, dissented. Pet. App. 19a-37a. Beginning with § 9658's plain language, the dissent rejected the majority's argument that the phrase "statute of limitations" was ambiguous in 1986 when Congress adopted § 9658. The dissent recognized the "modern vintage" of the differences between "statutes of limitations" and "statutes of repose." *Id.* at 24a. But this did not help the majority. Historically, statutes of limitations were "considered, along with other statutory time-bars, to provide repose to litigants and were thus, generally, statutes of repose." *Id.* at. 24a. In 1986, therefore, "the only possible ambiguity may have been the meaning of 'statute of repose' and whether that term had fully matured into its modern definition"—no longer including statutes of limitations. Pet. App. 26a. There had, by contrast, never been any ambiguity on the narrower scope of the phrase "statute of limitations"—the phrase actually used by § 9658.

In addition, the dissent noted that the majority's holding made § 9658 unworkable. "Importantly, the commencement date is defined as the *beginning* of the period in which a civil action may be brought." Pet. App. 28a-29a (citing 42 U.S.C. § 9658(b)(2)-(3)). But statutes of repose like North Carolina's do not create a beginning point when a claim may be brought; they create an outer limit *whether or not* the claim could have been brought before that limit

runs. *Id.* As such, "[b]ecause North Carolina's statute of repose does not create the beginning of the applicable limitations period, § 9658 cannot graft neatly—or at all—onto the North Carolina statute of repose so as to preempt its enforcement." *Id.* at 29a.

While recognizing that the court need not look to legislative history because the plain language must control, the dissent also observed that the relevant legislative history supported its "conclusion that Congress was aware that statutes of limitations were a distinct category of time-bar statutes and specifically chose only to preempt those statutes and not other statutory time bars such as statutes of repose." *Id.* Specifically, the study group's report (on which the majority had relied) expressly distinguished between statutes of limitations and statutes of repose, recommending changes to *both* types of statutes. *Id.* at 31a. That the very recommendations underlying § 9658 distinguished these two kinds of statutes illustrates that Congress could not have been confused about their separate meanings. *Id.* at 32a.

The dissent bolstered this interpretation with two canons of statutory interpretation. For one thing, the dissent explained that "the role of legislative compromise" should play a part in § 9658's interpretation. *Id.* The study group recommended a host of procedural reforms to state tort claims, but Congress, through § 9658, adopted only the recommendation concerning statutes of limitations. *Id.* at 34a. By doing so, Congress struck "a balance between harmonizing certain procedural matters in toxic tort cases and allowing states to continue to regulate their own substantive areas of law." *Id.* at 34a-35a. The majority frustrated this compromise (and the legislative in-

tent) by departing from the plain language and expanding the reach of the statute.

For another, this case "arises in the context of federal preemption," so the long-standing presumption against preemption should apply. *Id.* at 35a. "Just as [courts] presume 'Congress does not cavalierly preempt state-law causes of action[,]' [the courts] should also presume that Congress does not cavalierly preempt state substantive rights to be free from those state-law causes of action." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). This general presumption weighed against giving § 9658 an overly broad preemptive effect. *Id.* at 35a-36a.

Since issuing its decision, the Fourth Circuit has stayed its mandate pending this Court's ruling.

SUMMARY OF ARGUMENT

The statute's plain text resolves this case. On its face, § 9658 does one thing and one thing only: it postpones a state-law "commencement date"—that is, a date when, under state law, a suit "may be brought." § 9658(b)(1)-(2). That approach makes perfect sense if § 9658 is read according to its terms to apply only to statutes of limitations, which run from the date when a plaintiff's cause of action accrues. But § 9658 cannot sensibly apply to statutes of repose, which do not have commencement dates within the meaning of § 9658. Instead, statutes of repose run from the date of the defendant's conduct and can expire even if the plaintiff has yet to suffer an actionable injury. *Id.* Because § 9658 only postpones the state "commencement date," it cannot possibly affect statutes of repose.

Confirming as much, § 9658 repeatedly states that it preempts only a singular time period, thereby precluding the possibility of preempting two separate time periods (one for the statute of limitations, the other for the statute of repose). Faced with a choice between reading § 9658 to preempt statutes of limitations *or* statutes of repose, the answer is self-evident. Moreover, there can be preemption under § 9658 only *if* there is a state-law "commencement date" that is *earlier* than the "federally required commencement date." But that necessary triggering event does not occur when a State's statute of repose has *already* run before the plaintiff's action accrues. Once the applicable statute of repose has expired, there can be no state "commencement date" at all, since there can be no date when, under state law, a "civil action . . . may be brought." § 9658(b)(1)-(2).

The meaning of § 9658 only becomes clearer when viewed in the historical and statutory context in which it was enacted. In 1986, dictionaries, treatises, and cases routinely distinguished statutes of limitations and statutes of repose. Reflecting older usage, some cases used the phrase "statutes of repose" as an umbrella term encompassing statutes of limitations. But the converse was not true. That is, the phrase "statutes of limitations" was widely recognized *not* to encompass what we now call statutes of repose. Moreover, tort law had just undergone a major change, whereby relatively permissive "discovery rules" were adopted for statutes of limitations, thereby prompting the enactment of statutes of repose. Given that legislative environment, it would be perverse to assume that Congress used a recognized term of art to encompass a separate legal concept. Moreover, Congress commissioned a study group to

investigate issues related to § 9658, and the resulting report expressly distinguished statutes of limitations and statutes of repose. Indeed, the study group expressly addressed the North Carolina laws at issue in this case, and concluded that the State's "limitations period" was the three-year statute of limitations.

Even if § 9658 were viewed as ambiguous, it *still* should not preempt state statutes of limitations. When preemption provisions like § 9658 can be read either broadly or narrowly, respect for the independent sovereignty of states counsels in favor of the narrower view. Therefore, under federalism principles and the well-settled presumption against preemption, any ambiguity in § 9658 should be construed against broad preemption of state legislation in an area of traditional state concern. Further, federal preemption of state statutes of repose would raise a serious constitutional question. Because statutes of repose demarcate the bounds of *substantive* tort liability, federal preemption of those laws would effectively command states to treat certain conduct as tortious as a matter of state law. To avoid the serious political accountability problems that would result, § 9658 should be read to avoid this question.

The panel majority plainly erred in concluding that § 9658 preempted state statutes of repose. Even though it conceded that "a simple review of § 9658's language could reasonably lead to a conclusion that its application is limited only to statutes of limitations," the majority below rejected that conclusion. Pet. App. 12a. But as the decision below itself acknowledged, its pseudo-textual arguments "seem[ed] to be stretching to find ambiguity in the text." *Id.* at 13a. To overcome this acknowledged

problem, the decision below referenced historical research contained in the footnotes of another court-of-appeals decision. But that evidence actually *supported* the inference that, when § 9658 was enacted, the phrase "statutes of limitations" was not thought to encompass statutes of repose.

Even after straining to find § 9658 ambiguous, the majority below committed a separate error by resting on the statute's supposed "remedial purpose," even though § 9658—like all statutes—in fact reflects a balance of competing interests and purposes. The resulting analysis culminated in a freewheeling policy discussion that overlooked the serious threats to justice that result from litigating stale cases with incomplete facts. In the end, the decision below paid lip service to the reasons for having statutes of repose by blithely noting that, under its holding, "defendants will not *necessarily* be endlessly subjected to the possibility of litigation." *Id.* at 17a (emphasis added).

This Court should enforce the plain meaning of § 9658 by reversing the judgment below.

ARGUMENT

I. CERCLA § 9658 UNAMBIGUOUSLY APPLIES ONLY TO STATUTES OF LIMITATIONS, NOT STATUTES OF REPOSE

As this Court has explained, the "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, consideration of CERCLA's text, context, and structure demonstrates that § 9658 preempts only the commencement of state "statutes of limitations," not statutes of repose.

A. "Statutes of Limitations" Are Fundamentally Different From "Statutes of Repose"

This case is about a fundamental difference between two types of statutes. A *statute of limitations* is "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Black's Law Dictionary* 1546 (9th ed. 2009). By contrast, a *statute of repose* is a "statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury." *Id.* As these definitions make clear, statutes of limitations begin to run from a date connected to the *plaintiff*, such as when the plaintiff is injured, or when the plaintiff learned or should have learned of the injury and, perhaps, its cause. *See id.* Statutes of repose, on the other hand, are typically linked to the *defendant* and begin to run from the date of the defendant's allegedly tortious conduct or some other specified event, regardless of whether a cause of action has accrued. *See generally* 54 C.J.S. Limitations of Actions § 7 (2013).

These two types of time periods differ in their nature and purpose. Statutes of limitations are procedural, in that they are designed to encourage litigants to assert their rights promptly. *See generally IndyMac MBS, Inc.*, 721 F.3d at 106. Under the so-called "traditional rule," a tort statute of limitations begins to run when a claimant is injured. Under a "discovery rule," by contrast, a statute of limitations begins to run when the claimant knew or should have known of either the injury or (for "liberal" discovery

rules) the cause of the injury. Because they determine when individuals can assert their substantive rights, statutes of limitations are procedural in nature and are subject to equitable exceptions, such as equitable tolling. *See generally id*; *First United*, 882 F.2d at 866.

A statute of repose, by contrast, establishes the period of time when a cause of action ceases to exist, regardless of whether the claim has accrued. Because they demarcate the existence of tort liability, statutes of repose are substantive and are not generally subject to equitable exceptions or treated as retroactively applicable. Instead of encouraging claimants to act promptly, statutes of repose assure potential defendants that liability for any particular action cannot lie after a prescribed period of time. To achieve that purpose, statutes of repose run from the time of the defendant's action, thereby ensuring that every individual eventually obtains repose. *See generally Bolick v. American Barmag Corp.*, 293 S.E.2d 415, 420 (N.C. 1982).

B. The Plain Text and Structure of § 9658 Demonstrate That It Applies Only To "Statutes of Limitations"

On its face, § 9658 unambiguously postpones only the state "commencement date" provided by the applicable state statutes of limitations—not the date on which a statute of repose begins to run.

Under § 9658, a "commencement date" is the "beginning of the applicable limitations period," which in turn is "the period . . . during which a civil action . . . may be brought." § 9658(b)(2)-(3). Those terms and definitions make perfect sense in connection with statutes of limitations, since a plaintiff's ability to

bring a suit does indeed commence on the date that the statute of limitations begins to run: the action's accrual *both* starts the statute of limitations *and* allows the plaintiff to commence litigation. Thus, § 9658 does one thing and one thing only: it postpones a state-law "commencement date," as defined in the state statute of limitations.

Because it does nothing more or less than postpone a "commencement date," § 9658 cannot affect state statutes of repose. A statute of repose does not have a "commencement date" within the meaning of § 9658, since it runs from the date when the defendant's action occurs—regardless of whether a cause of action has accrued. A statute of repose does not dictate when to commence suit at the front end, but instead provides a back-end date after which the cause of action expires as a matter of substantive law. To bring suit, the plaintiff must at a minimum have suffered an actionable injury. And, particularly in cases involving latent injuries of the type addressed in § 9658, the defendant's action can take place days, months, or years before the plaintiff suffers an injury and thereby accrues a cause of action that "may be brought." § 9658(b)(2). Because it simply is not true that "a civil action . . . may be brought" when a statute of repose begins to run, *see id.*, the time to bring an action clearly does not commence when a statute of repose begins to run. Thus, the postponement described in § 9658, the definitions set out in § 9658(b)(2)-(3), and even the term "commencement date" would not make sense if they were read to apply to statutes of repose.

Everything about § 9658 confirms this result. For instance, § 9658 is written in such a way that

preemption can occur *if and only if* there is a state "commencement date" that is "earlier" than the federally required commencement date. § 9658(a)(1), (b)(2). In other words, only *if* there is an "earlier" state-law "commencement date" can *any* preemption occur. But even if § 9658's reference to "statutes of limitations" were read to encompass statutes of repose, that necessary triggering event could not possibly occur *after* a State's statute of repose had already run. Once the statute of repose has run, there can no longer be a state "commencement date" at all, since there is no date when, as a matter of state law, a "civil action . . . may be brought." § 9658(b)(2). The only circumstance where § 9658 can possibly apply is when a "civil action . . . may be brought" *before* the state statute of repose has expired. Only in that circumstance will there be "a commencement date which is earlier than the federally required commencement date." § 9658(a)(1). And, in that situation, § 9658 would postpone the state-law "commencement date" defined by the applicable statute of limitations—without having any effect on the state statute of repose.

Furthermore, the plain text of § 9658 repeatedly makes clear that it accomplishes a single substitution: as to each action, only one state-law time period is potentially replaced with a later federal-law time period. The statute provides that, in general, hazardous waste suits are governed by "*the* statute of limitations established under State law." § 9658(a)(2) (emphasis added). Further, "*the* federally required commencement date" controls if "*the* applicable limitations period for such action (as specified in *the* State statute of limitations or under common law)" is "earlier." § 9658(a)(1) (emphases add-

ed). In light of this flurry of definite articles and singular nouns, § 9658(a)(1) clearly preempts only one "applicable limitations period," *id.*, or (equivalently) one "period specified in a statute of limitations," § 9658(b)(2). In other words, § 9658 preempts and replaces a single period of time defined by state law. That indisputable meaning resolves this case, since nobody could seriously contend that the single period of time intended was the state statute of repose (where one exists). Rather, the singular period of time affected was clearly the one named five different times in the statute—namely, the period defined by the state "statute of limitations." § 9658(b)(2).

A contrary view would be irreconcilable with § 9658's repeated use of definite articles and singular nouns. To preempt *both* statutes of limitations *and* statutes of repose, Congress would have had to use language capable of encompassing multiple periods of time: one period defined by the state statute of limitations, and another defined by the state statute of repose. For example, the North Carolina statute of limitations at issue here begins to run once the plaintiff learned or should have learned about an injury, and terminates three years later. *See* N.C. Gen. Stat § 1-52(16). By contrast, the North Carolina statute of repose begins to run upon the defendant's action and terminates ten years later. *See id.* (prohibiting a "cause of action [from] accru[ing] more than 10 years from the last act or omission of the defendant giving rise to the cause of action"). Thus, each of these state laws defines a distinct period of time, with unique beginning points and end points. To encompass both of these time periods, Congress would have had to use plural nouns referring to *periods* of time.

The very operation of "the federally required commencement date" further confirms that § 9658 preempts only a single period of time. The federally required commencement date is defined by an accrual provision that is typically referred to as a "discovery rule." In particular, the federally required commencement date is generally the date on which the plaintiff discovered or reasonably should have discovered the cause of her injury or damages. *See* § 9658(b)(4). This provision operates sensibly when read, according to its terms, to preempt only statutes of limitations. Under the so-called "traditional" rule, statutes of limitations run from the date of the plaintiff's injury, and even many discovery rules run from the date when the plaintiff learned or should have learned of the injury. Those relatively stringent statutes of limitations will have commencement dates "earlier" than the federal commencement date defined in § 9658, which begins to run only when the plaintiff learns the *cause* of the injury. Under § 9658, those early commencement dates are postponed until the federally required commencement date. Indeed, early state-law commencement dates can be postponed even longer under the "[s]pecial rules," § 9658(b)(4)(B), which codify the sort of equitable exceptions long associated with statutes of limitations (and not with statutes of repose).

By contrast, an interpretation of § 9658 that somehow preempted statutes of repose—a textually incoherent result, for the reasons explained above—would clash with the detailed text of § 9658(a)(1). If the state "commencement date" were the date on which the statute of repose begins to run, then it would *always* be earlier than the date of the federal commencement date. By definition, *every* statute of

repose begins to run as soon as the defendant's action occurs, so it will always be "earlier"—or, in extraordinary cases, simultaneous with—the date when the plaintiff learns or should have learned the cause of the injury. The comparison of commencement dates that is carefully described in § 9658(a)(1) would thus have no purpose in connection with statutes of repose. A Congress that had wanted to postpone the date when statutes of repose began to run would not have done so by carefully specifying a detailed procedure that is sensible only in connection with statutes of limitations.

In sum, the text of § 9658 has a plain and straightforward meaning: state statutes of limitations that are more stringent than the federal discovery rule are supplanted by that rule. That meaning should control. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (A legislature's "authoritative statement is the statutory text, not the legislative history."); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

C. When Congress Enacted § 9658, The Term "Statute of Limitations" Was Not Understood To Encompass Statutes Of Repose

The "cardinal rule of statutory construction" is that plain statutory terms should carry their plain meanings, *Molzof v. United States*, 502 U.S. 301, 307 (1992), and that rule entails adherence to the recognized meanings of legal terms of art. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). "In the absence of contrary indication, [the Court] as-

sume[s] that when a statute uses . . . a term [of art], Congress intended it to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). That principle supplies an independent basis to resolve this case in favor of Petitioner. At the time Congress enacted § 9658 in 1986, the phrase "statute of limitations" was a recognized term of art that did not encompass statutes of repose.

1. *Dictionaries*. Contemporaneous dictionaries recognized that statutes of limitations did not encompass what we today would term statutes of repose. *See FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (exploring the meaning of a legal term of art by consulting "[t]he latest edition of *Black's Law Dictionary* available when Congress enacted" the relevant provision).

In 1986, the most recent edition of *Black's Law Dictionary* was the 1979 Fifth Edition, and it defined "statute of limitations" in relevant part as a law "declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time *after the right accrued*." *Black's Law Dictionary* 835 (5th ed. 1979) (emphasis added). That definition—which predated § 9658 by seven years—accords with contemporary usage: a statute of limitation begins to run from some point "after the right [to sue] accrued." *Id.* A statute of repose, by contrast, begins to run from the time of the defendant's action, regardless of whether the plaintiff's right to sue has already accrued—or ever will. *See also The Law Dictionary* 202, 309 (6th ed. 1986) (Gilmer, ed.) (distinguishing statutes of limitations and statutes of repose).

To be sure, the 1979 *Black's Law Dictionary* also said that "[s]tatutes of limitations are statutes of repose," *id.*, but that statement simply reflected an older usage of "statute of repose" as an umbrella term for all types of time periods. In the mid-twentieth century, the term "statutes of repose" was sometimes understood—including by this Court—to be a relatively broad term, in that it encompassed what we would today call statutes of limitations as well as statutes of repose (and potentially other time limits as well). *See, e.g.*, *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (referring to a statute of limitations as a statute of repose). For reasons explained below, the 1970s and 1980s saw the phrase "statutes of repose" come to assume its current, narrower meaning, such that it no longer encompasses statutes of limitations. But as the Fifth Edition of *Black's Law* demonstrates, by 1979 the term "statute of limitations"—the term that is actually in § 9658—had already come to have a narrower meaning that excluded what we would today call statutes of repose.

2. *Commentaries*. During the 1980s, prominent treatises and commentaries regularly distinguished between statutes of limitations and statutes of repose. As one leading treatise put it: "Unlike an ordinary statute of limitations, which begins running upon accrual of the claim, [the] period contained in a statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." 54 C.J.S. Limitations of Actions § 4, at 20-21 (1987). That discussion—published just one year after § 9658's enactment—succinctly but definitively contrasted the two terms in precisely the way recognized by contemporary usage. Other prominent secondary materials

are to much the same effect. *See* Restatement (Second) of Torts 899 cmt. g (1979) (discussing adoption of "special 'statutes of repose'"). The fact that the meaning of these terms was rapidly crystallizing in the years leading up to § 9658's enactment was no coincidence, as explained below.

3. *Historical Context*. The distinction between statutes of limitations and statutes of repose had special salience at the time of § 9658's enactment due to nationwide trends in state legislation.

Beginning in the 1960s, states increasingly replaced the traditional statute of limitations rule—that is, that the period begins to run from the date of the injury—with more flexible discovery rules. This trend was soon accompanied by a compensatory move toward adoption of statutes of repose, in order to protect persons from being perpetually liable for all their past actions, no matter how remote in time. *See, e.g.*, *Wenke v. Gehl Co.*, 682 N.W.2d 405, 423 (Wis. 2004) ("As the courts began to modify statutory limitations by applying the 'discovery rule,' legislatures responded by enacting absolute statutes of repose.") (quoting *Reynolds v. Porter*, 760 P.2d 816, 819-20 (Okla. 1988)); *id.* ("Early treatise writers and judges considered time bars created by statutes of limitations, escheat and adverse possession as periods of repose." (internal quotation marks omitted)); Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 587 (1981). As one leading treatise put it in 1984, the "widening acceptance of the discovery rule" prompted "the great majority of states" to place "an outer time limit on negligence and related claims in certain contexts." W. Prosser & W. Keeton, *The Law*

of Torts, § 30, at 167 (5th ed. 1984). "Such statutes of 'repose,'" the authors continued, "generally supplement or override the discovery accrual rule." *Id.*; *see also* Restatement (Second) of Torts 899 cmt. g (1979) (explaining that, "[i]n recent years special 'statutes of repose' have been adopted in some states").

The interaction of these two legislative trends—one in favor of discovery rules and the other in favor of statutes of repose—explains why courts and commentators increasingly distinguished between the terms "statutes of limitations" and "statutes of repose" in the years leading up to the enactment of § 9658. Indeed, it would be no exaggeration to say that the distinction between statutes of limitations and statutes of repose was a basic feature of policy and legal debates on tort law during the 1980s.

Confirming as much, congressional proceedings increasingly included express reference to the distinction between statutes of limitations and statutes of repose. For example, during a 1979 hearing on the Uniform Product Liability Act, a Senator asked, "would you clarify for me the distinction between a 'statute of limitation' and a 'statute of repose'?" The answer tracked the modern usage, distinguishing between "procedural" statutes of limitations and "substantive" statutes of repose. *See* Uniform Product Liability Act: Hearing Before the Subcomm. on General Oversight and Minority Enterprise of the H. Comm. on Small Business, 96th Cong. 49 (1979) (colloquy between Sen. John J. LaFalce, Chairman, Subcomm. On Gen. Oversight and Minority Enterprise, and Victor E. Schwartz, Chairman, Task Force on Product Liability and Accident Compensation, Dep't of Commerce). Other statements even more closely contem-

poraneous with the 1986 enactment of § 9658 reflect awareness of the newly emerging terminological distinction between statutes of limitations and statutes of repose. *See, e.g.*, 132 Cong. Rec. 24876 (Sept. 19, 1986) (statement of Sen. Metzenbaum); 132 Cong. Rec. 9672 (May 6, 1986) (statement of Sen. Kassebaum); 125 Cong. Rec. 28678 (Oct. 17. 1979) (statement of Rep. Sensenbrenner).

4. *Judicial Decisions*. Unsurprisingly, the years leading up to § 9658's enactment in 1986 also saw many courts self-consciously explaining why they were using the term "statutes of repose" more narrowly, in order to distinguish between the two fundamentally different types of time periods. *See Bolick*, 293 S.E.2d at 417-18 ("Although the term 'statute of repose' has traditionally been used to encompass statutes of limitation, in recent years it has been used to distinguish ordinary statutes of limitation from those that begin 'to run at a time unrelated to the traditional accrual of the cause of action.'" (citation omitted)); *J.H. Westerman Co. v. Fireman's Fund Ins. Co.*, 499 A.2d 116, 119 (D.C. 1985) ("A statute of repose differs from an ordinary statute of limitations in that the specified time period begins to run not from the date on which a right of action accrues, but from another ascertainable date."); *James Ferrera & Sons, Inc. v. Samuels*, 486 N.E.2d 58, 60 (Mass. App. Ct. 1985) ("There is a marked difference between a statute of limitations and a statute of repose."); *Univ. Eng'g Corp. v. Perez*, 451 So.2d 463, 465 (Fla. 1984) (per curiam) ("A statute of repose should be distinguished from a statute of limitations."); *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1985) ("As a statute of repose is not a statute of limitations[,] it

need not be pleaded affirmatively."). While some courts may have written imprecisely in cases where the nature of time limits was not at issue, the mid-1980s saw a remarkably widespread judicial consensus emerge: "statutes of limitations" were a distinctive type of time rule that was fundamentally separate from statutes of repose.

5. *Study Group Report*. Of course, legislative history cannot trump plain statutory text. *E.g.*, *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1266 (2011) ("We will not . . . allo[w] ambiguous legislative history to muddy clear statutory language."). Here, however, the context in which § 9658 was enacted only confirms that Congress was well aware of the terminological distinction between statutes of limitations and statutes of repose.

When CERCLA was first enacted in 1980 (without what is now § 9658), Congress commissioned a study group of experts to research existing tort remedies for hazardous waste (the "study group"). CERCLA, Pub. L. No. 96-510, § 301(e)(1), 94 Stat. 2767 (1980). The study group produced a detailed report and recommendations, and those documents repeatedly distinguished between statutes of limitations and statutes of repose. *See* Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies (Comm. Print 1982). For example, the study group recommended that the States *modify* their statutes of limitations by adopting discovery rules, but that they voluntarily *repeal* many of their statutes of repose. *See id.* at 241 (recommending "repeal of *the* statutes of repose which, *in a number of states* have" unjustifiably barred claims (emphases

added)). And in observing that certain "statutes of repose" can "have the same effect as some statutes of limitations," the study group sharply distinguished between the two terms. *Id.* Thus, the study group and its report make clear that Congress was aware of the terminological difference between statutes of limitations and statutes of repose. And, in § 9658, Congress chose to address only statutes of limitations.

Making this point even clearer, the study group specifically addressed the very North Carolina timing rules at issue in this case. While noting that North Carolina had adopted a statute of repose precluding substantive liability for conduct more than ten years old, the study group specifically and repeatedly referred to the three-year discovery rule as the State's "limitations period." *See* Appendix B-9 (noting that the "period of limitations in North Carolina is three years"); Appendix B-63 (listing "3" in the column for "Limitations period"). Furthermore, the study group indicated that, because North Carolina had adopted a discovery rule, the "statute of limitations will not bar a private cause of action arising from latent personal injuries." Appendix B-10.

In sum, both the plain text and the historical context of § 9658 demonstrate that the provision pertains only to state statutes of limitations—not state statutes of repose.

II. EVEN IF § 9658 WERE AMBIGUOUS, IT STILL SHOULD APPLY ONLY TO STATUTES OF LIMITATIONS

Assuming *arguendo* that § 9658 could be read to preempt state statutes of repose, *but see supra* Part I, that reading would still be precluded by sev-

eral independent and mutually reinforcing principles of statutory interpretation.

A. Under Principles Of Federalism And The Presumption Against Preemption, Any Ambiguity In § 9658 Should Be Resolved Against Preempting Statutes Of Repose

Even if § 9658 were ambiguous, any uncertainty should be resolved based on principles of federalism and the well-settled "presumption against preemption." *See, e.g.*, *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

"The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). For that reason, this Court has long presumed that "Congress does not cavalierly pre-empt state-law causes of action." *Medtronic*, 518 U.S. at 485; *see also Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002) (explaining that a clear statement rule applies "when Congress intends to pre-empt the historic powers of the States"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001) ("[W]e 'work on the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress'" (citation and alterations omitted)). Thus, adherence to the presumption against preemption "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic*, 518 U.S. at 485.

Under the presumption—which this Court has affirmed and reaffirmed—"when the text of a pre-

emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)); *see also Medtronic*, 518 U.S. at 485 (likewise applying the presumption against preemption when construing an express preemption provision). In sum, it is now blackletter law that this Court will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230).

Here, there can be no serious question that, at the very least, § 9658 can plausibly be read, according to its terms, to apply only to statutes of limitations and not statutes of repose. Further, § 9658 impinges on state tort law—which is, clearly, "a field which the States have traditionally occupied." *Rice*, 331 U.S. at 230. Indeed, § 9658 is even more of an incursion on state sovereignty than many other federal statutes to which the presumption has been applied: not only does § 9658 nullify a traditional state legislative decision, but it does so by *compelling* the State to impose substantive tort liability where the State does not wish to do so. Therefore, under well-settled principles of federalism and the equally settled presumption against preemption, any conceivable ambiguity in § 9658 would only demonstrate the need to resolve this case in favor of Petitioner and against the preemption of statutes of repose. *See also infra* p. 50 (discussing legislative history demonstrating, without recourse to any presumption, that Congress did in

fact adopt § 9658 to minimize its intrusion on state prerogatives).

In short, the presumption against preemption makes this an easy case, even if (contrary to the statute's text) § 9658 were viewed as ambiguous.

B. Under The Avoidance Canon, Any Ambiguity In § 9658 Must Be Resolved Against Preempting Statutes of Repose

A second interpretive principle—the canon of constitutional avoidance—supplies an independent ground for resolving any ambiguity in § 9658 against preempting statutes of repose.

The canon of constitutional avoidance "allows courts to *avoid* the decision of constitutional questions" through statutory interpretation. *Clark v. Martinez*, 543 U.S. 371, 381 (2005). This Court has often applied avoidance principles by adopting clear statement rules. When one interpretation of a federal statute would "upset the usual constitutional balance of federal and state powers," then "[i]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (internal quotation marks omitted).

Here, § 9658 would raise serious constitutional doubts if it were construed to force states to impose substantive tort liability as a matter of state law. As noted above, statutes of repose—unlike statutes of limitations—demarcate the bounds of *substantive* tort liability under state law. *See Bolick*, 293 S.E.2d at 420 (holding that a particular North Carolina statute of repose was substantive); *id.* ("Other states have similarly construed statutes of repose to be substantive provisions and not merely procedural modi-

fications of a remedy." (collecting citations)). Thus, if § 9658 preempted statutes of repose, it would be akin to a federal law *compelling* state legislatures to enact tort causes of action in the first instance. Yet, under basic principles of federalism, the Federal Government generally has no Article I authority to compel state legislation or decree the content of state law, particularly with regard to areas of traditional state regulation such as tort law. *See* U.S. Const. art. I § 8, cl. 18; *New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)); *cf. Stewart v. Kahn*, 11 Wall. 493 (1871) (discussing congressional power over state-court actions in rebellious States pursuant to the War Power Clause). Thus, reading § 9658 to preempt statutes of limitations would raise serious questions regarding unconstitutional commandeering of state law.

To be sure, there is one difference between direct federal commandeering of state law and a statute that preempts state statutes of repose. While there is no practical way for a State to evade an order *to enact* legislation, a federal order *preempting* state statutes of repose could in theory be averted by state legislation entirely eliminating the underlying state-law causes of action. But that difference—the existence of a coerced choice—does not make federal preemption of statutes of repose any more constitutional. In *New York v. United States*, the Federal Government forced states to choose between unconstitutional options: either take title to certain radioactive waste, or enact the federally prescribed regulatory scheme.

New York, 505 U.S. at 174-76. Because each of those options entailed unconstitutional commandeering, the choice between them was likewise unconstitutional. *See id.* Here, the decision below would have § 9658 force States to *either* extend substantive tort liability to a greater extent than the State itself desired, *or* enact state legislation eliminating the relevant category of substantive tort liability altogether. Because the Federal Government lacks authority to commandeer states to make either of those choices, it likewise lacks authority to compel states to choose between them.

The constitutional problem with reading § 9658 to preempt statutes of repose has important consequences for political accountability. *See New York*, 505 U.S. at 168 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."). When the Federal Government uses its preemptive authority to negate state laws, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* But accountability is thwarted when the Federal Government twists state legislation toward federal ends. As this Court has explained, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169; *cf. Printz v. United States*, 521 U.S. 898, 930 (1997). If § 9658 preempted statutes of repose, individuals would be deemed liable as a matter of *state* tort law, not because the State or its people had au-

thorized that liability, but because liability had been covertly decreed by the *federal* legislation.

This case is thus different from many other situations involving federal legislation and preemption of state law. As already noted, the constitutional difficulties potentially connected to § 9658 do not arise when Congress uses its preemption authority to *negate* state substantive law. *See New York*, 505 U.S. at 168. Indeed, federal negation of state substantive law is the inevitable implication of the Supremacy Clause. *See* U.S. Const. art. VI. And because CERCLA does not create a private federal cause of action for the kinds of claims subject to § 9658, this Court's interpretation of § 9658 cannot implicate Congress's separate authority to legislate federal-law claims, or proper procedures for the resolution of those claims. *See New York*, 505 U.S. at 178; *Testa v. Katt*, 330 U.S. 386 (1947).

Finally, the constitutional problem in this case is even more severe than the one posed by federal laws that affect state-court procedural rules that can be asserted as defenses, such as statutes of limitations. *See Jinks v. Richland Cnty.*, 538 U.S. 456, 464-65 (2004) (citing Congressional Authority to Require State Courts to Use Certain Procedures in Products Liability Cases, 13 Op. Off. Legal Counsel 372, 373-74 (1989)); The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary, 105th Cong., 1st Sess. (1997) (statement of Laurence H. Tribe, Harvard Law School) ("For Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims . . . would raise serious questions under the Tenth Amendment and principles of federalism.").

Unlike the foregoing measures, a federal law that preempted state statutes of repose would blur the boundaries between state and federal law. As this Court has explained, the Federal Government would exceed its authority if it enacted a law "seeking to control or influence the manner in which States regulate private parties." *Reno v. Condon*, 528 U.S. 141, 150 (2000) (quoting *South Carolina v. Baker*, 485 U.S. 505 (1988) (alterations omitted)); *see New York*, 505 U.S. at 161. Of course, state courts must follow federal-law instructions, since that is the "sort of federal 'direction' of state judges [that] is mandated by the text of the Supremacy Clause." *Id.* at 178-79. But if § 9658 were read to preempt statutes of repose, it would actually dictate the substantive content of state tort law, and so would force the States to do federal work. Tort liability would have to be found—as a matter of *state* law—even where the State had decreed that no liability should exist.

This Court's practice of avoiding constitutional questions thus counsels in favor of Petitioner's reading, even if § 9658 were viewed as ambiguous.

III. THE DECISION BELOW RESTED ON LEGAL ERROR AND MUST BE REVERSED

The decision below committed several clear legal errors, both in finding § 9658 to be ambiguous and in resolving that supposed ambiguity in favor of preempting state statutes of repose.

A. The Decision Below Erred By Finding Ambiguity In § 9658

1. The decision below began on the right track. It started by acknowledging the fundamental distinction between statutes of limitations and statutes of repose. *See* Pet. App. 9a-10a (citing *Black's Law Dic-*

tionary 1546 (9th ed. 2009); *First United*, 882 F.2d at 866). It then correctly recognized that N.C. Gen. Stat § 1-52(16) is a statute of repose. *See* Pet. App. 10a. And the decision below also candidly acknowledged that the phrase "'statute of limitations' appears in the statute five times," while "[n]oticeably absent is the phrase 'statute of repose.'" *Id.* at 11a-12a. "Thus," the court conceded, "a simple review of § 9658's language could reasonably lead to a conclusion that its application is limited only to statutes of limitations." *Id.* at 12a.

2. Nonetheless, the decision below ultimately found ambiguity: "we reckon § 9658's text capable of at least two interpretations, preventing it from being straightforwardly categorized as 'plain and unambiguous.'" Pet App. 13a. The Fourth Circuit then listed three reasons for its ambiguity finding. *See id.* at 12a-13a. None withstands scrutiny.

The "[f]irst" purported reason for ambiguity has to do with the location of the North Carolina statute of repose within the North Carolina statute books. Pet. App. 12a. As the Fourth Circuit noted, the North Carolina statute of repose is "located with the statutes of limitations periods in a section titled, 'Limitations, Other than Real Property.'" *Id.* (citing N.C. Gen. Stat. § 1-52). "As such," the Fourth Circuit concluded, the statute of repose is "a limitations period 'specified in the State statute of limitations or under common law.'" *Id.* (quoting § 9658(a)(1)). But even the decision below does not claim that North Carolina has attached a "statute of limitations" label to its statute of repose. In any event, North Carolina courts are clear—and every federal judge to review this case below has agreed—that this case involves a

statute of repose. *See* Pet. App. 10a, 19a, 38a, 44a; *Wilson v. McLeod Oil Co.*, 398 S.E.2d 586, 597 (N.C. 1990) (finding claims to be barred "by the statute of *repose* found in § 1-52(16)" (emphasis added)); *Neblett v. Hanover Inspection Serv., Inc.*, No. COA06-1676, 2007 WL 2701349, at *4 (N.C. Ct. App. Sept. 18, 2007) (same).

The Fourth Circuit's "[s]econd" supposed reason for ambiguity consists of a conclusory statement regarding the meaning of § 9658(b)(2). Pet. App. 12a. In its entirety, this second argument reads as follows: the North Carolina statute of repose "is (1) a 'period' (2) 'specified in a statute of limitations,' (3) 'during which a civil action . . . may be brought'; thus, it comports with the definition of 'applicable limitations period.'" *Id.* (quoting § 9658(b)(2)). This assertion is wrong in several respects. While N.C. Gen. Stat § 1-52(16) could be viewed as defining a "period," that period is specified in what the decision below itself recognized to be a statute of repose. Therefore, the period in question is *not* "specified in a statute of limitations." § 9658(b)(2).

In addition, the decision below erred by positing that a statute of repose defines a period "during which a civil action . . . may be brought." § 9658(b)(2). As explained above, *see supra* Section I.B, it simply is not true that "a civil action . . . may be brought" when a statute of repose begins to run. § 9658(b)(2). To bring a tort suit, the plaintiff must (at a minimum) have suffered an injury, but that typically does not occur when a statute of repose begins to run. Because the time to bring a civil action does not commence until the running of a statute of limitations, the statutory definitions—as well as the term

"commencement date"—do not make sense if read to encompass statutes of repose. Thus, the decision below erred by asserting—without any explanation—that its interpretation "comports with the definition of 'applicable limitations period.'" Pet. App. 12a (quoting § 9658(b)(2)).

"Finally," the decision below added a third reason for finding ambiguity in § 9658, but that point is equally misguided. Pet. App. 12a. According to the majority, the "commencement date" for North Carolina's statute of repose "is earlier than the federally required commencement date." Pet. App. 12a-13a (citing § 9658(a)(1)). Again, however, *see supra*, the term "commencement date" is an odd way to refer to the date on which a statute of repose begins to run, since that is not the date when a civil suit can or will "commence" or when "a civil action . . . may be brought." § 9658(b)(2). And because statutes of repose will *always* begin to run "earlier" than the federally required commencement date (which constitutes a permissive discovery rule), the only conceivable reason to compare the state "commencement date" with the "federally required commencement date" is to see whether the State has adopted a *statute of limitations* akin to, or even more permissive than, the federally required commencement date. And, unsurprisingly, § 9658 says just that, referring repeatedly to the "statute of limitations."

Apart from the individual errors in the reasoning of the decision below, it is noteworthy that none of the Fourth Circuit's reasons even attempts to explain why it would make sense, given § 9658's text, to preempt statutes of repose. Instead, the decision purported to find ambiguity by looking for isolated

words and snippets of language that could conceivably include statutes of repose. That is not how statutory interpretation is normally carried out. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2004 (2012) (explaining that plain meaning corresponds to the usual meaning of words, not conceivable meanings).

3. Remarkably, the decision below actually conceded that it "seem[ed] to be stretching to find ambiguity in the text." Pet. App. 13a. Having thus admitted that its three stated reasons for finding ambiguity were unpersuasive, the decision below appended two more to the end of its analysis—*after* it had already concluded that § 9658 was ambiguous. *See id.*

The first of these additional reasons is that "a historical analysis" contained in two footnotes of another judicial decision supposedly "reveals that both scholars and courts have often used the terms [statutes of limitations and statutes of repose] interchangeably." Pet. App. 13a (citing *McDonald*, 548 F.3d at 781 & n.3-4). But that is not so. As the dissenting opinion below correctly explained, *see* Pet. App. 24a (Thacker, J., dissenting), courts had historically viewed "statute of repose" as a catch-all phrase covering different types of time bars, including statutes of limitations. *See, e.g.*, *Kubrick*, 444 U.S. at 117 (referring to a statute of limitations as a kind of statute of repose); *United States v. Oregon Lumber Co.*, 260 U.S. 290, 299-300 (1922) (same); *see also Bolick*, 293 S.E.2d at 417 (noting that "the term 'statute of repose' has traditionally been used to encompass statutes of limitation"). But even if the phrase "statute of repose" could be interpreted to cover statutes of limitations,

that would not justify the Fourth Circuit's converse holding that the phrase "statute of limitations" could be interpreted to cover statutes of repose. After all, only the term "statute of limitations" appears in § 9658.

The remaining sources referenced in the decision below overwhelmingly *reinforce* the terminological distinction between statutes of limitations and statutes of repose. Again, the decision below primarily relies on cases collected by the Ninth Circuit in *McDonald* (*see* 548 F.3d at 781 n.3), but almost all of those materials draw a terminological distinction between statutes of limitations and statutes of repose. *See Chamberlain v. Schmutz Mfg. Co.*, 532 F. Supp. 588, 590 (D. Kan. 1982) ("Statutes of repose differ from statutes of limitation . . . ."); *Bauld v. J.A. Jones Constr. Co.*, 357 So.2d 401, 402 (Fla. 1978); *Tindol v. Boston Hous. Auth.*, 396 Mass. 515, 517 (1986); *James Ferrera*, 486 N.E.2d at 60-61; *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 672 (Utah 1985); *see also City of Dover v. Int'l Tel. & Tel. Corp.*, 514 A.2d 1086, 1089 (Del. 1986) (drawing the distinction for modern purposes, but not when construing the meaning of the earlier-enacted state constitution); *Bolick*, 293 S.E.2d at 417; *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 612-13 (7th Cir. 1975) (Stevens, J.) ("[T]he absolute bar creates a true statute of repose after sufficient time has elapsed"). The other cited decisions simply adopt the older usage of "statute of repose" as an umbrella term. *McDonald* also purported to rely on a 1980 article, but that essay discussed historical uses of the relevant terms before explaining and largely *adopting* the now-standard usage. *See* McGovern, *supra*, 30 Am. U. L. Rev. at 581-87. Thus, the "analysis" referenced in the deci-

sion below only reconfirms that, by 1986, the phrase "statute of limitations" was understood to exclude statutes of repose.

The decision below offered one last reason, and it was perhaps the most baffling of all. According to the Fourth Circuit, § 9658(a)(1) "manifests a lack of internal consistency," because § 9658(a)(1) provides that the "applicable limitations period" is "specified in the State statute of limitations or under common law," whereas "the definition of 'applicable limitations period' and 'commencement date' make no reference to common law." Pet. App. 13a (quoting § 9658(a)(1), (b)(2)-(3)). Apart from the fact that there is no inconsistency in acknowledging common-law statutes of limitations in one part of § 9658 but not another, the decision below did not even attempt to explain how this purported inconsistency had *any* bearing on the question presented. *Even if* the decision below were correct that § 9658 were somehow ambiguous in the event of "a limitations period [that] is established only under common law," Pet. App. 13a, that alleged ambiguity would shed no light whatsoever on whether § 9658 should or should not preempt statutes of repose. In advancing this facially irrelevant argument, the Fourth Circuit appears to have been striving to buttress its earlier observation that "CERCLA is often criticized for its lack of precision." Pet. App. 3a. Once again, the decision below "seem[ed] to be"—in its own words—"stretching to find ambiguity in the text." *Id.* at 13a.

B. The Decision Below Erred By Construing § 9658 In Light Of CERCLA'S Supposed "Remedial" Purpose

Having erroneously found § 9658 to be ambiguous, the decision below compounded its error by improperly resolving the statute's supposed ambiguity based on the court's own perception of CERCLA's general purposes.

1. The decision below interpreted § 9658 to preempt statutes of repose because—in the court's view—doing so would further CERCLA's "remedial" purpose. Pet. App. 14a-15a. The Fourth Circuit's primary evidence that CERCLA exhibited this purpose came from a law review article pointedly entitled: *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far? See* Pet. App. 14a (citing Blake A. Watson, 20 Harv. Envtl. L. Rev. 199, 286 (1996)). As even that article noted, the remedial-purpose principle often leads courts to error, including in connection with "provisions of CERCLA that"—like § 9658—"are the product of compromise." *Id.* at 301; *see infra* pp. 50-51 (discussing Congress's choice to enact § 9658 instead of legislating a federal cause of action). The decision below also pointed to certain legislative history—even though that evidence, if reliable at all, purported to show only that *one* goal of § 9658 was to "address" (not even to adopt) some of the recommendation and points raised in the study group report. *See* Pet. App. 14a (citing H.R. Conf. Rep. No. 99-962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354).

Having found this supposed "remedial purpose," the decision below said that it would "reject" a read-

ing of § 9658 that would leave statutes of repose intact, even though that interpretation "may seem to be textually sound under one possible reading of the statute." Pet. App. 15a. In the view of the decision below, that "textually sound" result was unappealing because it "offers too narrow an approach and one that thwarts Congress's unmistakable goal of removing barriers to relief from toxic wreckage." *Id.* at15a. This reasoning is flat wrong.

As this Court has repeatedly explained, "no law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (quoting *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality opinion)). Thus, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam); *see also In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987) (Easterbrook, J.) ("Finding the meaning of a statute is more like calculating a vector (with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone)."). The very idea of a "remedial" statute—a law that pursues compensatory objectives above all else—is therefore more theoretical than real.[1]

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[1] Historically, the "remedial-statute rule" was not an interpretive principle in its own right, but instead "was

In CERCLA itself, Congress clearly did *not* seek to remove all state procedural barriers to relief in hazardous waste cases. In fact, Congress specifically chose *not* to enact a new federal cause of action—a basic step normally associated with supposedly "remedial" legislation—based in part on concerns about excessive federal intrusion into state prerogatives. *See, e.g.*, 131 Cong. Rec. 35,647 (Dec. 10, 1985) (statement of Rep. Glickman) (specifically objecting to an amendment that would have created a federal cause of action because it "override[s] substantive standards of the States"). Thus, there is no need in this case to *presume* that Congress sought to minimize federal preemption of state law. *See supra* Section II.A. (discussing the presumption against preemption). Instead, the legislative history *demonstrates* that the Congress that enacted § 9658 sought to minimize its intrusion into a traditional state domain. When a federal law "strikes a balance" between competing interests, this Court will not "construe [the measure] 'liberally' to serve its ostensibly 'remedial' purpose." *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008). That reluctance is especially warranted here, since it would blatantly defy a legislative compromise if § 9658 were read to "overrid[e] substantive standards of the States" by preempting statutes of repose. 131 Cong. Rec. 35,647 (statement of Rep. Glickman).

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just an antidote to the unreasonable rule that statutes in derogation of the common law were to be strictly construed." Hon. Antonin Scalia & Bryan A. Garner, *Reading Law* 365 (2012).

In crafting § 9658, Congress also balanced the interests of potential plaintiffs against the countervailing interests of potential defendants, who have an important and well-recognized stake in obtaining repose. This legislative balancing can be seen in the many plaintiff-friendly recommendations that were put forward by the study group but rejected by Congress. *See* Pet. App. 34a (citing Study Group Report 240-51). For example, the study group recommended adoption of modified evidentiary presumptions and liberal joinder rules—yet those proposals were not adopted. *See ibid.* So even if § 9658 were largely meant to benefit plaintiffs, "[i]t does not follow that this remedial purpose requires us to interpret every uncertainty in the Act in favor of" plaintiffs. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007). On the contrary, "the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Id.*

Here, § 9658 furthers Congress's remedial purposes insofar as it preempts statutes of limitations. But § 9658 simultaneously preserved statutes of repose and so respected the public's important interest in avoiding perpetual vulnerability to litigation for long-past actions. Of course, Congress also could have indiscriminately imposed CERCLA liability on any person who happens to occupy land adjacent to a CERCLA site. That would advance broad remedial purposes; but it is not the law. By allowing its own conception of statutory purpose to trump statutory text, the decision below implemented its own vision of good tort policy, in place of what Congress deliberately enacted. "Given the clear meaning of the text, there is no need . . . to consult the purpose of CERCLA at all." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004).

2. In any event, the analysis of the decision below fails even on its own terms. According to the majority, Congress enacted § 9658 "to 'address the problem identified in the study group report,'" and statutes of repose constitute "precisely the barrier that Congress intended § 9658 to address." Pet. App. 14a-15a (quoting H.R. Conf. Rep. No. 99-962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354 (alterations and ellipsis omitted)). But that is demonstrably incorrect.

First, the "problem identified" in the study group report was a problem concerning statutes of limitations—namely, the failure of many States to adopt so-called "liberal discovery rules" that run from the date when the cause of injury is discovered. *See* Study Group Report 28. As the study group put it: "The plaintiff's ability to recover will often depend on whether a liberal discovery rule is applicable." *Id.*; *see also id.* ("[T]he question is . . . the time when the action accrues."). That "problem" has nothing to do with statutes of repose. Indeed, when specifically reviewing North Carolina law—including its ten-year statute of repose—the study group noted that the State had adopted a discovery rule and, as a result, its "statute of limitations will not bar a private cause of action arising from latent personal injuries." Study Group Report Appendix B-10.

Second, the study group's recommendation as to "Statutes of Limitations" was that the States should voluntarily adopt a more liberal discovery rule relating to the cause of the injury, as opposed to the traditional rule or a relatively stringent discovery rule pertaining to the discovery of injury. *See* Study Group Report 240-41 ("The Study Group recommends 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 injury or disease and its cause."). Thus, § 9658 fully addressed the "problem identified" in the study group's report by legislating a liberal discovery rule—and without preempting statutes of repose.

Finally, the study group did *not* recommend that States categorically abolish statutes of repose, much less that the Federal Government preempt those laws. Instead, the study group recommended that States—on their own initiative—"repeal *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.* (emphases added). This language suggests that the study group recommended only that "a number of states" *voluntarily* repeal their statutes of repose. *Id.* That recommendation plainly does not equate to compulsory federal preemption of *all* state statutes of repose. Yet that is precisely the effect of the Fourth Circuit's strained reading: *every* state statute of repose—no matter how reasonable, no matter how minimally burdensome to plaintiffs—is preempted. On that rule, *every* potential CERCLA defendant nationwide must be eternally vulnerable to civil suit. Nothing in the study group—much less § 9658—contemplated that extreme result.

In sum, the decision below was simply wrong when it asserted that its "stance goes no further than that contemplated by the study group that Congress commissioned." Pet. App. 17a. Even if overarching statutory "purposes" should sometimes guide statutory interpretation, the decision below erred by imput-

ing such a simplistically one-sided "remedial" purpose to § 9658.

3. The openly legislative character of the decision below becomes most obvious at its conclusion. In a self-conscious effort to reassure all "entities that wish to rest in the security of statutes of repose"—which is to say, everyone—the decision below reviewed "the well-known policies underlying" statutes of repose and promised that "we are not ignorant of these policies, nor have we turned a blind eye to their importance." Pet. App. 16a. The analysis that follows is risible.

The decision below actually found it reassuring that, without statutes of repose, "necessary evidence will disappear as time passes, and intervening causes will complicate efforts to pin costs on one party." Pet. App. 17a. One would have thought that these points would counsel in favor of *preserving* statutes of repose. After all, the loss of "necessary" *defense* evidence could easily result in the imposition of unjustified, disproportionate, or misallocated liability. As this Court once put it when using the broad meaning of the phrase "statutes of repose":

> [S]tatutes of repose . . . *protect defendants* and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

Kubrick, 444 U.S. at 117 (emphasis added) (collecting cases); *cf.* Pet. App. 17a (trivializing *Kubrick* as simply being concerned "that cases are processed efficiently"). In the view of the decision below, however, any

lost evidence meant only that "*plaintiffs* may not be able to establish a cause of action or recover damages." *Id.* (emphasis added) This reasoning ignores *Kubrick*'s insight that courts can wrongly impose liability on defendants based on a record clouded by the passage of time.

The decision below also saw fit to minimize the interest in finality advanced by statutes of repose. All that the Fourth Circuit says on this point is that "defendants will not *necessarily* be endlessly subjected to the possibility of litigation." *Id.* (emphasis added). The qualification drains that sentence of meaning. The whole point of repose is reassurance—to *know* that what is past is past.

C. The Decision Below Erred By Not Resolving Any Ambiguity Based On Interpretive Canons

Finally, even if § 9658 were ambiguous, and even if it had a uniformly "remedial" purpose, the decision below would *still* be wrong because it failed to resolve the statute's supposed ambiguity based on applicable interpretive canons—namely, the presumption against preemption and constitutional avoidance. As the decision below vividly illustrates, those settled canons offer a far more neutral and principled basis for resolving statutory questions than recourse to judicially constructed "remedial" purposes.

Here, as the dissenting opinion below observed, the "ability of a state to create a substantive right to be free from liability under its own state tort law is unquestionably a traditional field of state regulation." Pet. App. 35a (Thacker, J., dissenting); *see, e.g.*, *Raygor*, 534 U.S. at 544; *Hillsborough Cnty.*, 471 U.S. at 715. Therefore, § 9658 triggers the well-settled

presumption against preemption, and the Fourth Circuit should have construed any ambiguity to *avoid* preemption. *See Altria*, 555 U.S. at 77; *see supra* Section II.A. Alternatively, § 9658 should be construed in light of the canon of constitutional avoidance. *See supra* Section II.B.

But the majority did not follow any recognized canon of interpretation. Instead, it relied on CERCLA's supposedly remedial purpose to interpret all ambiguities in *favor* of preemption. When doing so, moreover, the Fourth Circuit did not even mention the presumption against preemption or offer an explanation of why that presumption somehow does not apply here. Pet. App. 7a-16a. By flipping settled interpretive principles on their head, the decision below contradicted this Court's precedents. It should not be allowed to stand.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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FEBRUARY 24, 2014

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