No. 08-

IN THE

Supreme Court of the United States

SUNOCO, INC., SUN OIL COMPANY,
and CORDERO MINING COMPANY,

Petitioners,

v.

THOMAS McDONALD, MARIAN McDONALD,
and ALEX E. McDONALD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 309 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9658), which pre-empts "limitations periods" "specified in the State statute of limitations or under common law," includes and pre-empts state statutes of repose. There is a conflict between the United States Court of Appeals for the Ninth Circuit and the United States Court of Appeals for the Fifth Circuit on this question.

PARTIES TO THE PROCEEDING

Additional parties to the proceedings below that are not identified in the caption to the case are Third Party Defendants J.T. Batterson and Susan Batterson.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners submit the following statement of their corporate affiliations for the use of the Justices of this Court:

1. Petitioner Sunoco, Inc. is the successor in interest to Sun Company, Inc. (R&M), which owned 100% of Petitioner Sun Oil Company and Petitioner Cordero Mining Company.

2. Petitioner Sunoco, Inc. is a publicly traded company, which has no parent corporation. To the best of its knowledge, no single shareholder owns 10% or more of its stock.

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Miscellaneous

Petitioners Sunoco, Inc., Sun Oil Company, and Cordero Mining Company (collectively, "Sunoco") respectfully seek a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix ("App.") 1a-25a) is reported at 548 F.3d 774. The Order and Opinion of the District Court (App. 26a -63a) is reported at 423 F. Supp. 2d 1114.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 2008. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 9658 provides:

> **Actions under state law for damages from exposure to hazardous substances**
>
> **(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 107 [42 U.S.C. § 9607]. Nothing in this section shall apply with respect to any cause of action brought under section 107 of this Act [42 U.S.C. § 9607].

(b) Definitions. As used in this section —

(1) Title I [42 U.S.C. §§ 9601 *et seq.*] terms. The terms used in this section shall have the same meaning as when used in title I of this Act [42 U.S.C. §§ 9601 *et seq.*].

(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) 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) 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.

Oregon Revised Statutes § 12.115 provides:

Action for negligent injury to person or property.

(1) In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of.

(2) Nothing in this section shall be construed to extend any period of limitation otherwise established by law, including but not limited to the limitations established by ORS 12.110.

STATEMENT OF THE CASE

Section 309 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9658, pre-empts the trigger date for "limitations periods" "as specified in the State statute of limitations or under common law." Below, the United States Court of Appeals for the Ninth Circuit held that the term "statute of limitations" in Section 309 includes, and Section 309 therefore pre-empts, state statutes of repose. The Ninth Circuit holding is in direct conflict with a ruling by the Fifth Circuit, which held that Section 309 does not pre-empt statutes of repose because "[t]he plain language of [§ 309] . . . refers to state statutes of limitations —not state statutes of repose." *Burlington N. & Santa Fe Ry. Co. v. Skinner Tank Co.*, 419 F.3d 355, 364 (5th Cir. 2005). The Ninth Circuit's decision is contrary to this Court's CERCLA and pre-emption jurisprudence, pursuant to which congressional intent must not be inferred from a term or phrase absent in CERCLA.

Factually, this case arises out of a land sale from Petitioner Sun Oil Company, which was wholly owned by a predecessor in interest to Petitioner Sunoco, Inc.,[1] to Respondents Tom and Marian McDonald ("McDonalds"). The McDonalds allege that when they purchased the property from Sunoco in 1973, Sunoco orally misrepresented that former mercury mining operations on the land had removed all mercury from rock known as calcine, when in fact "trace amounts" remained. The McDonalds allege they lost the value that

1. Petitioners Sunoco, Inc., Sun Oil Company, and Cordero Mining Company are collectively referred to herein as "Sunoco."

would have been associated with mercury-free calcine and will incur costs in removing calcine that they spread on their private road. *See* App. 29a.

The McDonalds sued Sunoco in Jefferson County Circuit Court in the State of Oregon, under state law. Sunoco removed the case to the United States District Court for the District of Oregon on the basis of diversity jurisdiction. The McDonalds ultimately filed a third amended complaint, adding claims for negligence and negligence *per se*, and seeking a declaratory judgment.

After the completion of discovery, the district court granted Sunoco's motion for summary judgment, dismissing all of the McDonalds' claims, including the negligence claim. The district court ruled that the negligence claim was barred by Oregon's ten year Statute of Repose because it was brought more than thirty years after the act complained of — the alleged failure to warn and test the calcine at the time of the sale of the property. Or. Rev. Stat. § 12.115(1); App. 45a. The Oregon Statute of Repose bars the McDonalds' negligence claim unless it is pre-empted by CERCLA Section 309. App. 9a.

The CERCLA provision at issue (CERCLA Section 309), pre-empts the date that certain "state statute[s] of limitations" begin to run on an accrued claim for damages related to hazardous substances. 42 U.S.C. § 9658(a)(1). If the state statute of limitation begins to run on such a claim before the plaintiff knows of the damages and their cause, Section 309 inserts a rule of discovery. The duration of the state statute of limitation still applies, but it must begin to run on the basis of the

"federally required commencement date," which is the date the plaintiff "knew (or reasonably should have known)" of the damages and their cause. 42 U.S.C. §§ 9658(a)(1), (b)(4)(A).

The district court ruled that Section 309 did not pre-empt Oregon's Statute of Repose. App. 43a–45a. The district court relied on *Burlington Northern*, 419 F.3d at 362, which held that Section 309 does not pre-empt statutes of repose because in the plain language of Section 309 there is "no mention of peremptory statutes or statutes of repose." *Id.* at 362. The district court reasoned under *Burlington* that

> 'the plain language of § 9658 does not extend to statutes of repose' but only to statutes of limitation and that the 'differences between statutes of limitations and statutes of repose are substantive, not merely semantic.'

App. 44a (*quoting Burlington Northern*, 419 F.3d at 362). The district court dismissed the McDonalds' negligence claim on this basis, and subsequently entered its Order of final judgment on all of the McDonalds' claims. App. 64a.

The McDonalds appealed the dismissal of their claims for negligence, breach of contract, fraud, and contribution under Or. Rev. Stat. § 465.325. The Ninth Circuit affirmed the district court's dismissal of all claims except the negligence claim. In evaluating whether CERCLA Section 309 pre-empted the Oregon Statute of Repose, the Ninth Circuit recognized that the term "statute of repose" does not appear in Section

309. The court also recognized that statutes of limitation and statutes of repose are "distinct legal concepts with distinct effects." App. 7a. However, the Ninth Circuit stated "[t]he term 'statute of limitations' was ambiguous regarding whether it included statutes of repose when § 309 was enacted in 1986." App. 10a. The Ninth Circuit also stated "some cases recognized the differences between statutes of limitation and repose [but] a number of cases confused the terms or used them interchangeably." App. 10a.

On this basis, the Ninth Circuit then referenced two aspects of the legislative history. The first was a congressionally commissioned CERCLA study report that discussed the effects of state statutes of limitation, but separately recommended the "repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one." App. 14a (*quoting* CERCLA Section 301(e) Study Group Report). The second was a House Conference report stating: "[i]n the case of a long-latency disease, such as cancer, a party may be barred from bringing his lawsuit if the statute of limitations begins to run at the time of the first injury — rather than from the time when the party 'discovers' [the injury and its cause]." App. 15a.

On the bases of the foregoing two reports and its finding that the term "statute of limitation" was ambiguous, the Ninth Circuit held that "it is evident that the term 'statute of limitations' in § 309 was intended by Congress to include statutes of repose." App. 16a. The Ninth Circuit therefore found that Section 309 pre-empted the Oregon Statute of Repose, reviving the McDonalds' negligence claim.

The Ninth Circuit rejected the rule in the Fifth Circuit, distinguishing *Burlington Northern* based on factual differences and also criticizing the Fifth Circuit because it "failed to analyze the meaning of 'statute of limitations' at the time § 309 was adopted." App. 14a. The Fifth Circuit, by contrast, had looked to the "ordinary meaning of the words used" in Section 309, *Burlington Northern*, 419 F.3d at 362 (*quoting Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)), including 'statute of limitations,' and found it was "bound by that plain language," *id.* at 364.

Review from this Court is now warranted to reconcile the conflicting views of the Ninth and Fifth Circuits regarding whether Section 309 of CERCLA pre-empts state statutes of repose, and to remove the confusion on this important question in the lower federal and state courts.

REASONS FOR GRANTING THE PETITION

In this case, the Ninth Circuit effectively re-drafted Section 309 of CERCLA by adding a non-existent provision pre-empting state statutes of repose. The Ninth Circuit's decision intrudes into an area of law traditionally belonging to the states and runs contrary to this Court's CERCLA jurisprudence, this Court's pre-emption doctrine, and a ruling on the same issue by the Fifth Circuit. The conflict between the Ninth and Fifth Circuits exemplifies similar conflict and disarray on the same issue in some federal district and state courts. A ruling from this Court is needed to reconcile the split in the Circuits and end the confusion below.

I. The Ninth Circuit's Opinion Re-Writes CERCLA Section 309 By Effectively Inserting New Language into the Statute

CERCLA Section 309 partially pre-empts "limitations period[s]" "*as specified in the State statute of limitations or under common law.*" 42 U.S.C. § 9658(a)(1) (emphasis added). It operates by imposing a discovery rule on those state limitation periods that do not already contain one. *Id.* Specifically, Section 309 requires that any such "limitations period" begin running only on the "federally required commencement date" ("FRCD") if that is earlier than the period provided in the state "limitations period." *Id.*; 42 U.S.C. § 9658(b)(4)(A). The FRCD is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance . . . ." *Id.* Accordingly, where it applies, Section 309 changes the

trigger date, but notably not the duration or other aspects, of the applicable state limitation period. *See* 42 U.S.C. §§ 9658(a)(1), (a)(2).

Section 309 states on its face that it applies to "the applicable limitations period," and this is defined as "the period specified in a *statute of limitations* during which a civil action [for damages from hazardous substances] may be brought." 42 U.S.C. § 9658(b)(2) (emphasis added). Section 309 contains no provision applicable to statutes of repose, which are unmentioned in Section 309 or CERCLA in its entirety.

The Ninth Circuit's opinion re-writes the text of Section 309 by adding state statutes of repose. Specifically, the Ninth Circuit ruled that Oregon's ten year Statute of Repose, which bars claims brought more than ten years after the "act or omission complained of," Or. Rev. Stat. § 12.115, did not bar the McDonalds' state tort claims (brought nearly thirty years after the act complained of) because CERCLA Section 309 pre-empted the Oregon Statute of Repose. App. 7a. This holding conflicts with the express language in both Sections 309(a)(1) and 309(b)(2) limiting pre-emption to a "State statute of limitations."

There is a fundamental distinction between statutes of limitations and repose that has long been recognized throughout state and federal jurisprudence. Statutes of limitation begin to run when a cause of action "accrues" — i.e., when a plaintiff incurs damages and a claim therefore legally exists or, in the language of Section 309, when the claim "may be brought." 42 U.S.C. § 9658(b)(2); *Bay Area Laundry & Dry Cleaning*

Pension Trust Fund v. Ferbar Corp., 522 U.S. 192, 201 (1997) ("All statutes of limitation begin to run when the right of action is complete . . . .") (*quoting Clark v. Iowa City*, 87 U.S. 583 (1875). Statutes of repose, like the Oregon Statute of Repose in this case, by contrast, run from the "date of the act or omission complained of," regardless of when or whether a claim ever accrues, and regardless of when or whether damages are incurred. *See* Or. Rev. Stat. § 12.115(1); App. 7a ("statutes of repose are designed to bar actions after a specified period of time has run from the occurrence of some event other than the injury which gave rise to the claim") (*quoting Raithaus v. Saab-Scandia of America, Inc.*, 784 P.2d 1158, 1160 (Utah 1989)).

Individually and together, CERCLA Sections 309(a)(1) and 309(b)(2) apply not to statutes of repose, but only to those state laws that govern the "period . . . during which a civil action . . . may be brought," 42 U.S.C. § 9658(b)(2), "as specified in the State statute of limitations or under common law," 42 U.S.C. § 9658(a)(1). A statute of repose like the Oregon statute is not a "statute of limitation" nor is it "common law," and it is not triggered only once a "civil action . . . may be brought," as is the case with statutes of limitation. *See* Or. Rev. Stat. § 12.115(1). It begins running earlier, once the initial "act" occurs, regardless of whether a cause of action exists at that point. *Id.*

The Ninth Circuit acknowledged the important distinctions between statutes of limitation and repose. App. 7a ("Statutes of limitations and statutes of repose are distinct legal concepts with distinct effects."). The Ninth Circuit's opinion therefore makes no "textual sense" in light of Section 309's express inclusion of statutes of limitations and exclusion of statutes of repose. *See United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2336 (2007) (rejecting an interpretation of CERCLA that made "little textual sense").

Because a statute of repose begins to run when the act or omission occurs, not when the resulting injury occurs or is known, the federally required commencement date applicable under Section 309 cannot be applied to a statute of repose without invalidating the statute of repose altogether. *See* Or. Rev. Stat. § 12.115; § IV, *infra.* The FRCD runs from when a party "knew (or reasonably should have known)" it was injured by a hazardous substance, not from when the initial act or omissions occurred. Thus, in the context of "hazardous substances" claims, the Ninth Circuit's ruling invalidates state statutes of repose entirely, converts them to statutes of limitation, and then inserts the CERCLA discovery rule. This has no support in the text of CERCLA. Certiorari is warranted to avoid such judicial redrafting of a federal statute, and avoid federal vitiation of a state statute without a federal mandate.

II. The Ninth Circuit and Fifth Circuit Are in Conflict, as Are Other Courts

The Ninth Circuit's addition of "statute of repose" to Section 309 conflicts with an earlier ruling by the Fifth Circuit in *Burlington Northern*, 419 F.3d at 363. In *Burlington Northern*, the Fifth Circuit ruled that Section 309 does not pre-empt state statutes of repose because the express language of Section 309 is limited to statutes of limitation, and the two types of statutes are different. The Fifth Circuit stated: "The plain language of § 9658, however, refers to state statutes of limitations — not state statutes of repose. This court is bound by that plain language, absent express congressional intent to the contrary. Congress did not express a contrary intent in this instance." *Id.* at 364.

The Ninth Circuit attempted to distinguish *Burlington Northern* based on *dicta* and factual differences that were irrelevant to the Fifth Circuit's holding on this purely legal question of federal statutory interpretation. The Ninth Circuit noted that the plaintiff in *Burlington Northern* had knowledge of his damages prior to the expiration of the Texas statute of repose, whereas the McDonalds alleged they did not discover their damages until after the expiration of the Oregon Statute of Repose. App. 13a-14a ("[b]ecause the discovery in *Burlington Northern* occurred prior to the expiration of time under the statute of repose, § 309's policies against destroying a plaintiff's claims before they could be asserted underlying § 309 were not in issue" in *Burlington Northern*).

This distinction was immaterial because the Fifth Circuit did not base its ruling on whether the plaintiff was on notice but on whether Section 309 applied to a statute of repose in the first place. There is no escaping that the Ninth and Fifth Circuit opinions conflict. Perhaps for this reason, the Ninth Circuit attacked the Fifth Circuit's reasoning, arguing that it "failed to analyze the meaning of 'statute of limitations' at the time § 309 was adopted." App. 14a. The Fifth Circuit, however, need not have analyzed the meaning of "statute of limitations" because the Fifth Circuit found no ambiguity in the plain language of Section 309 or in the term "statute of limitations," and "[in] cases involving statutory construction, a court begins with the plain language of the statute." *Burlington Northern*, 419 F.3d at 362 ("the reach of the plain language of § 9658 does not extend to statutes of repose").

While both the Ninth and Fifth Circuits found that statutes of repose and statutes of limitation are different, the Ninth Circuit assumed Congress did not know what the term "statute of limitations" meant when it limited CERCLA preemption to a "State statute of limitations." The Ninth Circuit thus re-wrote the statute to include statutes of repose, whereas the Fifth Circuit presumed that Congress chose the language of Section 309 intentionally, and gave the language of the provision its plain and ordinary meaning.

The conflict between the Ninth and Fifth Circuits exemplifies broader confusion in federal and state courts, which have reached conflicting rulings regarding the pre-emptive effect of Section 309 with regard to

state laws of repose. *See, e.g.*, *Evans v. Walter Indus., Inc.*,, 579 F. Supp. 2d 1349, 1363-64 (N.D. Ala. 2008) (following *Burlington Northern*, holding that Section 309 does not pre-empt the Alabama rule of repose); *German v. CSX Transp., Inc.*, 510 F. Supp. 2d 630, 633-34 (S.D. Ala. 2007) (following *Burlington Northern*, holding no Section 309 pre-emption of state common law rule of repose); *Fisher v. Ciba Specialty Chems. Corp.*, No. 03-0566, 2007 U.S. Dist. LEXIS 76174, at *64-67 (S.D. Ala. Oct. 11, 2007) (distinguishing *Burlington Northern*, ruling that CERCLA pre-empts the state common law rule of repose); *Abrams v. Olin Corp.*, 248 F.R.D. 283, 290 (S.D. Ala. 2007) (holding that Section 309 pre-empts the state common law rule of repose); *A.S.I., Inc. v. Sanders*, 835 F. Supp. 1349, 1358 (D. Kan. 1993) (Section 309 pre-empts Kansas statute of repose); *Clark County v. Sioux Equip. Corp.*, 753 N.W. 2d 406, 417 (S.D. 2008) (Section 309 does not pre-empt a statute of repose); *Angeles Chemical Co. v. Spencer & Jones*, 4th Cal. App. 4th 112, 117, 126 (Cal. Ct. App. 1996) (Section 309 "eliminat[es]" the statute of repose).

In fact, the district court in this case, which ruled Section 309 does not pre-empt statutes of repose, had previously ruled the opposite in another case. *Buggsi, Inc. v. Chevron U.S.A., Inc.*, 857 F. Supp. 1427 (D. Or. 1994). While the district court's subsequent decision in this case was more consistent with the statute, it is plain that absent this Court's review, both federal and state courts will be left in confusion, resulting in needless expenditure of judicial and litigant resources.

III. The Ninth Circuit's Decision Contradicts this Court's CERCLA Jurisprudence

The Ninth Circuit's insertion of the term "statute of repose" into Section 309 conflicts with this Court's direction that where a term is absent from CERCLA, "CERCLA's silence is dispositive" and requiring that CERCLA be strictly construed according to its plain terms. *United States v. Bestfoods*, 524 U.S. 51, 70 (1998) (rejecting a CERCLA specific rule of derivative liability because "such a rule does not arise from congressional silence, and CERCLA's silence is dispositive"); *see also Cooper Indus. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (the clear meaning of CERCLA's text must control, regardless of the "principal concerns of our legislators").

Most recently, in *Atlantic Research Corp.*, 127 S. Ct. at 2336, this Court cautioned against adopting a "textually dubious construction" that would threaten the meaning of the provision as a whole, *id* at 2337, or "destroy the symmetry" between sections, *id.* at 2336. Ignoring this injunction, the Ninth Circuit opinion, by incorporating statutes of repose into the term 'statute of limitations' in Section 309 "destroy[s] the symmetry" between Section 309(a)(1) (referring to "applicable limitations period . . . as specified in the State statute of limitations . . ."), Section 309(b)(2) (defining "applicable limitations period" with reference to a "statute of limitations" governing when an accrued claim "may be brought"), and Section 309(b)(4)(A) (defining FRCD as the date the plaintiff knew of his "personal injury or property damages" and their cause). Statutes of repose are unrelated to concepts of accrual, knowledge, and

damages, the mandatory factors under Sections 309(a)(1), (b)(2), and (b)(4)(A). *See* 42 U.S.C. §§ 9658(a)(1), (b)(2), (b)(4)(A).

More fundamentally, there simply is no reference to a statute of repose in Section 309, and the Ninth Circuit's "textually dubious construction" thus runs contrary to *Atlantic Research*, as well as the rest of the Court's line of CERCLA jurisprudence. Therefore, the petition should be granted in order to help preserve the integrity of this Court's CERCLA jurisprudence.

IV. The Ninth Circuit's Interpretation Conflicts with this Court's Pre-Emption Jurisprudence

In ruling that Section 309 pre-empts the Oregon Statute of Repose, the Ninth Circuit pre-empted state law, contrary to the criteria that govern pre-emption. Adherence to this Court's pre-emption jurisprudence was required here because the Ninth Circuit pre-empted a state statute of repose, a substantive state law that falls squarely within the "historic power of the State." *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002) ("allowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States").

The governing principle in evaluating whether a federal statute such as Section 309 pre-empts such state statutory law, is:

> [w]hen "Congress intends to alter the 'usual constitutional balance between the States and

> the Federal Government,' it must make its intention to do so '*unmistakably clear* in the language of the statute.'" . . . This principle applies when Congress "intends to pre-empt the historic powers of the States . . . ." In such cases, the clear statement principle reflects "an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."

Raygor, 534 U.S. at 543-44 (internal citations omitted); *see also Rice v. Santa Fe Elevator Corp*, 331 U.S. 218, 230 (1947) ("we 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").

Congress did not come close to imposing "an unmistakably clear" or "clear and manifest" intent to pre-empt the statute of repose with Section 309 as required by this Court. *See Rice* 331 U.S. at 230 (Congressional intent to pre-empt must be "clear and manifest"). The term 'statute of repose' appears nowhere in the CERCLA. The Ninth Circuit asserted that the use of the term "statute of limitations" was ambiguous, and read 'statute of repose' into that term and Section 309 based on a tortured reading of the legislative history.[2] But if the Ninth Circuit were correct

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2. The Ninth Circuit found that the term "statute of limitation" was ambiguous on the basis of some misuse of the term "statute of repose" in some cases, App. 10a-11a, and based on two

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that the statute is ambiguous, this is only evidence that the statute demonstrates no "unmistakably clear" or "clear and manifest" intent to pre-empt as required by

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law review articles identifying some confusion in the use of the terms 'statute of limitation' and 'statute of repose,' App. 11a (n.4). In none of the cases identified by the Ninth Circuit was the distinction between statutes of limitation and repose an issue or at all important to the outcome of the case. Where the difference between the two statutes was squarely before a court prior to (and since) enactment of Section 309 in 1986, the court identified important differences between the two statutes. *See, e.g., City of Aurora v. American La France Corp.*, No. 81 C 6638, 1984 U.S. Dist. LEXIS 20667, at *3-4 (N.D. Ill. Jan. 6, 1984) (two statutes differ); *Chamberlain v. Schmutz Mfg. Co., Inc.*, 532 F. Supp. 588, 590 (D. Kan. 1982) (discussing differences between statutes of limitation and repose); *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 825 (Colo. 1982) ("[S]tatutes of repose differ from other statutes of limitation since they may bar a cause of action before it accrues."); *Bauld v. J.A. Jones Constr. Co.*, 357 So. 2d 401, 402 (Fl. 1978) (recognizing the "fundamental difference in character" between statutes of repose and of limitation); *Tindol v. Boston Housing Auth.*, 487 N.E.2d 488, 490 (Mass 1986) (statute of limitations is "of an entirely different legal genre" than a statute of repose).

Petitioners have found no case in this Court turning on the important differences between statutes of limitation and statutes of repose. The Ninth Circuit relied on a number of Supreme Court cases it asserted "confused the terms or used them interchangeably" to support its view that the term "statute of limitation" was an ambiguous term, but none of these opinions evaluated the difference between a statute of limitation and repose. In such cases, the Court was discussing *policies* of repose that underlie limitations periods, and was not confusing or equating statutes of limitation with statutes of repose. The Court's use of the word "repose" in some past cases addressing

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the jurisprudence of this Court. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (presumption against pre-emption applies if statute is susceptible of more than one reading); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963) (a court is "not to conclude" that Congress intended to pre-empt state law "in the absence of an *unambiguous* congressional mandate to that effect.") (emphasis added); *see also Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005) (faced with two plausible readings of a statute, there is a "duty to accept the reading that disfavors pre-emption").

Based on the Ninth Circuit's premise that the term "statute of limitations" is ambiguous, the Ninth Circuit turned to the legislative history of Section 309. App. 11a-12a, 14a. But this too demonstrates no clear congressional intent to pre-empt statutes of repose. A congressional report compiled prior to the enactment of Section 309 noted the distinction between statutes of limitation and statutes of repose. The omission of statutes of repose from the language of Section 309 in the wake of such discussion of statutes of repose in the legislative history only highlights that Congress was advised of the distinction, and pointedly opted not to include statutes of repose in Section 309. App. 14a (quoting CERCLA study recommending that in addition to adoption of discovery rule on statutes of limitation,

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(Cont'd)
statutes of limitation does not indicate that statutes of limitation and statues of repose are the same, nor does it support the Ninth Circuit's view that the term "statute of limitations" as used by Congress in Section 309 was ambiguous.

that statutes of repose be "repeal[ed]"). This highlights, if anything, that there was no clear intent to pre-empt statutes of repose with Section 309; Congress left statutes of repose out intentionally.

The term "statute of limitations," which was used in Section 309, is well established in American jurisprudence, *see Bay Area Laundry*, 522 U.S. at 201, and the Ninth Circuit ignored this Court's rule that even if 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 Group, Inc.* 129 S. Ct. at 543 (*quoting Bates*, 544 U.S. at 449); *Florida Lime & Avocado Growers*, 373 U.S. at 147. The plain meaning of the term "statute of limitations" is not "statute of repose," thus disfavoring inclusion of the term under pre-emption doctrine.

Furthermore, Congress indicated the limited nature of the pre-emption authorized by Section 309 with respect to the statute of limitations. Section 309 provides only for a federal accrual date, and thus changes only the trigger date of statutes of limitation that do not already run based on a "discovery rule." Congress did not eliminate state statutes of limitation, much less repeal statutes of repose with respect to hazardous substances, as would be the case with statutes of repose under the Ninth Circuit's decision. *See* 42 U.S.C. § 9658(a)(2) (providing state statute of limitation applies except as modified in Section 309); H.R. Rep. No. 99-962, at 261 (1986) (Conf. Rep.), *reprinted in* U.S.C.C.A.N. 2835, 3276, 3354 (Section 309 is meant to address "when the statute of limitation begins to run rather than the number of years it runs").

In fact, contrary to Congressional intent with respect to the statute of limitations, the Ninth Circuit opinion has the effect of vitiating statutes of repose in hazardous substances cases because the very nature of a trigger date for a statute of repose is that it runs from the act complained of rather than accrual, knowledge, or reason to know of a cause of action. Or. Rev. Stat. § 12.115(1). By imposing the contrary requirements of the FRCD on statutes of repose, the Ninth Circuit essentially renders them statutes of limitation, contrary to state law and contrary to the stringent requirements for pre-emption.

In short, the Ninth Circuit's opinion not only runs contrary to this Court's pre-emption doctrine, it reveals that the Ninth circuit simply gave no consideration to the criteria governing pre-emption. These considerations provide additional grounds to grant certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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