No. 08-1053

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state statute providing that an action for negligence may not be brought "more than 10 years after the act or omission complained of" establishes a "limitations period" that is subject to a provision in the Comprehensive Response, Compensation, and Liability Act, 42 U.S.C. § 9658, establishing a uniform discovery rule for the commencement of limitations periods applicable to state-law causes of action for personal injury or property damage resulting from the release of a hazardous substance, pollutant, or contaminant from a facility.

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Factual Background

Ray Whiting Jr. and Harry Hoy developed the Horse Heaven Mine in 1934 and operated it until 1936. Between 1936 and 1973, the mine was owned by Sunoco, Inc., its predecessor Sun Oil Company, or one of its subsidiaries. In 1973, Sun Oil Company conveyed the mine to respondents Thomas and Marian McDonald. In the deed conveying the property to the McDonalds, Sun reserved "all of the oil, gas, and other mineral rights" in the property to itself, but specifically excluded rights to "surface materials which are used for road-building or construction purposes, such as . . . calcine . . . except such quantities as are reasonably used or useful in the enjoyment of [Sun's] reserved rights." Pet. App. 2a-3a.

At the time the McDonalds purchased the property, it contained a large pile or piles of calcine tailings. Calcine is a crushed rock waste product left after mercury ore is processed into mercury. At Horse Heaven, the calcine tailings were deposited in a pile or piles on the surface of the property surrounding the mine. *Id.* at 3a. Unknown to the McDonalds, some mercury remained in the calcine at Horse Heaven. In recent testing, Sunoco found that one sample exceeded Oregon's numeric soil cleanup level for mercury (80 mg/kg) by 50 percent. Sunoco sampled only the top six inches of the pile, and the McDonalds believe that mercury concentrations are even higher deeper in the pile. Ct. App. Excerpts of Record 66, 10, 144.

Prior to the 1973 sale of the property by Sun to the McDonalds, Thomas McDonald met with Ray Whiting and a representative of Sun. As McDonald testified at his deposition, the Sun representative told him at that meeting that mercury and other heavy metals had been extracted

from the ore and that the calcine contained no mercury. During that conversation, McDonald said that he intended to use the calcine for road construction or to sell it commercially as decorative rock. Pet. App. 3a-4a.

On several occasions between 1973 and 2001, Mr. McDonald brought some of the calcine to his home and put it on his driveway and parking lot. *Id.* at 4a.

In 1982, the McDonalds transferred 40 acres of property, including the mine, to Ray Whiting and his wife, but reserved rights to the calcine tailings until 2007. The Whitings later conveyed the property to their daughter and grandson, who currently own the property containing the mine and are third-party defendants in this action. *Id.*

In 2001, the Oregon Department of Environmental Quality ("DEQ") requested information regarding possible contamination at Horse Heaven. Until then, the McDonalds did not know that the calcine was potentially contaminated. In 2002, concerned that handling of the calcine tailings would create a threat of an environmental release, DEQ instructed the McDonalds not to remove or disturb the calcine piles at Horse Heaven without DEQ approval. *Id.*

Proceedings Below

On August 25, 2003, the McDonalds sued Sunoco in Oregon state court. Sunoco removed the case to the United States District Court for the District of Oregon. After discovery, the McDonalds filed an amended complaint alleging that Sunoco had sold the McDonalds calcine rock located near the Horse Heaven Mercury Mine, which Sunoco had represented and warranted to be clean,

but which the McDonalds discovered no sooner than October 1, 2001, was contaminated. The McDonalds also alleged that they had brought the calcine to their residential property and, believing it to be clean as represented by Sunoco, placed it on their driveway and parking lot. The complaint states claims for negligence, breach of contract, fraud, negligence per se, cost recovery, and contribution. The negligence claim is based on Sunoco's failure to test the calcine before the sale and failure to warn that the calcine was contaminated or potentially contaminated and that it had not been tested. *Id.* at 2a, 4a-5a, 18a.

On August 15, 2005, Sunoco moved for summary judgment. The district court granted Sunoco's motion on all claims. With respect to the negligence claim, dismissal turned on the district court's ruling that the McDonalds' claim was barred by Oregon's 10-year statute of repose for negligent injury to person or property, notwithstanding that they did not know about their injury until 2001, more than 10 years after the injury occurred. *Id.* at 5a.

The Ninth Circuit reversed the dismissal of the negligence claim but affirmed dismissal of the other claims. The court began by quoting section 309 of the Comprehensive Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9658, which provides that, in applicable cases, the commencement date for purposes of the "applicable limitations period (as specified under the State statute of limitations or under common law)" is a "federally required commencement date"—"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 or pollutant or

contaminant concerned." 42 U.S.C. § 9658(b)(4). CERCLA defines "applicable limitations period" as "the period during which a civil action" may be brought under state law for damages caused or contributed to by hazardous substances. *Id.* § 9658(b)(2). And "commencement date" means "the date specified in a statute of limitations as the beginning of the applicable limitations period." *Id.* § 9658(b)(3).

The court noted that statutes of limitations and statutes of repose are distinct legal concepts. However, looking to case law and legal literature from 1986 and earlier, the court found ambiguity about whether the term "statute of limitations" included statutes of repose at the time of section 309's enactment. Pet. App. 10a-11a. For example, the court cited two law review articles, one from 1980 and one from 1990, that discuss the numerous definitions of "statute of limitations" and that note that the terms "statutes of limitations" and "statutes of repose" were sometimes used "interchangeably." *Id.* at 10a-11a nn. 3-4.

Because the meaning of "statute of limitations," standing alone, is ambiguous, the court looked to the purpose and legislative history of section 309 to discern the scope of the term. The court noted that the Conference Report discussing section 309 described statutes of limitations and the problem of applying them to long-latency injuries in terms that apply equally to statutes of limitations and statutes of repose. The Conference Report also stated that section 309 would address the problem described in a legislative report prepared by the "Superfund Section 301(e) Study Group." That report had recommended that states reform their statutes of limitations in cases involving hazardous substances, a recommendation

intended to cover "the statutes of repose which, in a number of states have the same effect as some statutes of limitations in barring plaintiff's claim before he knows he has one." *Id.* at 14a-15a.

The court of appeals concluded:

> Taken together, the reports show that Congress's primary concern in enacting § 309 was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of precisely the type of circumstances involved in this case. This predicament can be caused by either statutes of limitations or statutes of repose, and is probably most likely to occur where statutes of repose operate. Thus, given the ambiguity of the term "statute of limitations" at the time of the adoption of § 309, taken alongside the only evidence of Congressional intent, it is evident that the term "statute of limitations" in § 309 was intended by Congress to include statutes of repose.

Id. at 15a-16a.

REASONS FOR DENYING THE PETITION

I. There Is No Meaningful Split Among The Circuits.

Although section 309 was enacted in 1986, only two federal courts of appeals have addressed the issue presented. As Petitioner states, those two courts came to different conclusions. Nonetheless, the disagreement between the decision below and the decision in *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co.*, 419 F.3d 355 (5th Cir. 2005), does not warrant review for several reasons.

First, in *Burlington Northern*, neither party briefed the question presented here or even suggested in its briefing that section 309 did not preempt the state statute of repose.[1] Instead, with regard to the statute of repose, the parties disputed whether section 309 applied in a case where no CERCLA claims were or could have been asserted, and they argued over various questions of state law, such as the retroactive application of an amendment to the state statute of repose. Because the Fifth Circuit reached its decision with no adversarial briefing or argument on the question presented here, *Burlington Northern* provides a weak basis for review.

Second, in *Burlington Northern*, the plaintiff's injury was discovered when a tank ruptured, prior to the expiration of the statute of repose. Yet the plaintiff did not file its complaint until 16 months later. The court found that, on those facts, the case did "not involve the delayed discovery [that section 309] was intended to address." *Id.* at 364-65. In contrast, here, the McDonalds' injury was not discovered until after the statute had run. Unlike *Burlington Northern*, this case presents precisely the sort of scenario that section 309 aims to address.

Third, the issue presented here is very narrow, as section 309 applies only to cases involving state-law claims for personal injury or property damage, only arising from exposure to a hazardous substance, pollutant, or contaminant, and the issue arises only where the state statute of repose has run before the plaintiff files suit. Moreover, the terms "hazardous substance," "pollutant," and "contami-

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[1]The appellate briefs are available on Westlaw at 2004 WL 3591804, 2005 WL 3186188, and 2005 WL 3186187.

nant" do not include petroleum, 42 U.S.C. § 9601(14), (33), and therefore section 309 does not apply to claims relating to gasoline, diesel, heating oil, and other oil spills—spills that commonly lead to state-law toxic tort claims. *See* Jospeh Ybarra, *Refining California's "Consent" Defense in Environmental Nuisance Cases*, 74 So. Cal. L. Rev. 1191, 1195-96 (2001); *see, e.g.*, *State v. LVF Realty Co.*, 873 N.Y.S.2d 664 (N.Y. App. Div. 2009).

The paucity of decisions interpreting this 23-year-old statutory provision confirms that this issue does not arise often enough to warrant this Court's attention. In fact, although Petitioner (at 16) cites five district court cases and one state supreme court case that address this issue, five of these six cases are from 2007 or 2008 (and four are from Alabama). On the other hand, the recency of the decisions suggests that, to the extent that the issue may be important, it is only beginning to percolate in the lower courts and the Court can consider the question if a genuine and serious conflict develops. For that reason as well, the Court should allow the courts more time to consider the issue before stepping in.

II. The Lack Of Finality In This Case Underscores That Review Should Be Denied.

The interlocutory nature of the ruling below also offers a compelling reason to deny review. This Court has jurisdiction to review interlocutory decisions of federal courts of appeals under 28 U.S.C. § 1254(1). Nonetheless, "[o]rdinarily, in the certiorari context, 'this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary

inconvenience and embarrassment in the conduct of the cause.'" Eugene Gressman, *et al.*, *Supreme Court Practice* § 4.18, at 280 (9th ed. 2007) (quoting *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893)); *see also*, *e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916) (interlocutory decisions are reviewed only "in extraordinary cases").

The posture of this case is anything but extraordinary. The McDonalds brought state-law tort, contract, and statutory claims against Sunoco, the former owner of the mine and the calcine piles. Sunoco removed the case to federal court and moved for summary judgment on all claims. The district court granted the motion, and the Ninth Circuit reversed only as to the negligence claim, which it remanded to the district court for trial. On remand, Sunoco will retain all other legal defenses it may have, and the trier of fact may still decide in its favor on any lawful ground. If Sunoco prevails on the merits of the negligence claim or on any other dispositive ground, review on the question presented in the petition would not be necessary (or appropriate).

This case is a less appropriate vehicle for interlocutory review than was *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) ("*VMI*"), when the Court denied review. There, the Fourth Circuit had held that the Commonwealth of Virginia's sponsorship of a military college for men only was unconstitutional, but the district court had yet to rule on the appropriate remedy. This Court denied certiorari on the ground that the decision was not sufficiently final because the remedy phase was not complete. *See id.* at 946 (Scalia, J., concurring). The Court recognized that there would be time enough to review the

decision if necessary after the remedial portion of the case had concluded, *id.*, and, in fact, it later did so. *See United States v. Virginia*, 518 U.S. 515 (1996). Here, the lower court has not yet issued any decision regarding liability, let alone the appropriate remedy.

The McDonalds of course believe that they will prevail on the merits. If they do, Petitioners may appeal from the final decision and, ultimately, petition this Court for review of the question presented here or any other federal issue. *See VMI*, 508 U.S. 946 (Scalia, J., concurring). Moreover, unlike the *VMI* case, which was *sui generis*, here, if Petitioners are correct that the appellate courts "will be left in confusion," Pet. 16, the question presented will arise frequently, and there will be any number of appropriate future cases that will allow this Court to resolve it. In the meantime, the Court should stay its hand and allow this case to run its course.

III. The Decision Below Is Consistent With This Court's Jurisprudence And Is Correct.

Petitioners contend that the decision below conflicts with CERCLA jurisprudence and preemption jurisprudence. In reality, the Petition does not describe any conflicts on these points—and the decision below presents no conflict on these points. Rather, the petition uses these contentions to argue the merits of the question presented. The court of appeals' opinion responds to each of Petitioner's arguments, and Petitioner offers nothing new to rebut the court's response.

A. Petitioners assert (at 17) that the decision below contradicts this Court's CERCLA jurisprudence, which, they suggest, sets forth CERCLA-specific rules of con-

struction. Yet each of the three cases cited simply interprets CERCLA according to traditional canons of statutory construction. Thus, *United States v. Bestfoods*, 524 U.S. 51 (1998), did not reject a rule of derivative liability because of an interpretative rule particular to CERCLA. To the contrary, the Court rejected such a rule because it would have established a "CERCLA-specific rule of derivative liability that would banish traditional standards and expectations." *Id.* at 70.

Likewise, *Cooper Industries v. Aviall Services, Inc.*, 543 U.S. 157 (2004), did not establish a CERCLA-specific rule of interpretation, instructing courts to construe the statute more narrowly than standard rules of construction would suggest. Rather, that case held that, "[g]iven the clear meaning of the text," as seen from its language and the provision as a whole, "there is no need . . . to consult the purpose of CERCLA." *Id.* at 167.

And finally, although Petitioners focus their argument on *United States v. Atlantic Research Corp.*, 551 U.S. 128, 127 S. Ct. 2331 (2007), that case also presents no conflict and, like *Bestfoods* and *Cooper Industries*, is of little if any relevance here. *Atlantic Research Corp.* concerned the meaning of the term "other person" in CERCLA section 107(a)(4)(B). The Court noted the oft-repeated maxim that "[s]tatutes must be read as a whole," *id.* at 2236, and applied that maxim to avoid "a textually dubious construction that threathen[ed] to render the entire provision a nullity." *Id.* at 2337. To the extent that it is relevant at all, the opinion in *Atlantic Research Corp.* is fully consistent with the opinion below, as each discerns the meaning of a statutory term by looking beyond the term in isolation.

B. Petitioners also contend (at 18-19) that the decision below conflicts with the Court's preemption jurisprudence. Their theory is that Congress did not make "unmistakably clear" that statutes of repose are preempted by section 309 and, therefore, that they are not. To begin with, the court of appeals' opinion approaches the issue as a question of statutory construction, framing its analysis in light of accepted interpretative principles. Pet. App. 9a, 14a. The opinion says nothing to question or contradict this Court's preemption jurisprudence.

Moreover, Petitioners' suggestion of conflict is based on their misunderstanding that the ambiguity or clarity of a statutory term must be discerned by viewing the term in isolation. In fact, as the Court explained in a case about the scope of an express preemption provision, congressional intent "primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (citation omitted). "Also relevant, however, is the 'structure and purpose of the statute as a whole.'" *Id.* (citation omitted).

Thus, Petitioners' argument proceeds from a false premise: that the scope of section 309 is not clear. The court below held to the contrary. The court held that, given the meaning and use of the pertinent terms in 1986, the meaning and scope of the term "statute of limitations," standing alone, was ambiguous and, therefore, that other tools of statutory construction were needed to discern the statute's plain meaning. Applying those tools (purpose, context, legislative history), the court found that the meaning of the term was "evident." Pet. App. 16a. Petitioners seem to agree that preemption is proper where

congressional intent is "evident," and thus the decision below presents no conflict with preemption jurisprudence.

C. The decision below is also correct. In the case law and literature at the time of section 309's enactment, "'statutes of limitations' and 'statutes of repose' [were] terms sometimes loosely employed as interchangeable." *School Bd. of City of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325, 327 (Va. 1987). Indeed, a contemporary scholar explained that "statute of repose" had several accepted meanings. "In the most general sense, a statute of repose and a statute of limitation are identical—'legislative enactments prescribe the period within which actions may be brought.'" Francis McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 582 (1980). The term "statute of repose" was also sometimes used as "a type of statute of limitation." *Id.* at 583 (citing state statutes from 1979 and 1980); *see, e.g.*, *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 825 (Colo. 1982) (differentiating statutes of repose from "other statutes of limitation"), *cited in* Pet. 20 n.2. And another usage took "statute of repose" to be the more general term, encompassing statutes of limitations. McGovern, 30 Am. U.L. Rev. at 583 (citing cases from 1975, 1972, and 1851).

Indeed, this Court has used the terms "statute of limitations" and "statute of repose" interchangeably. For instance, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), the Court stated the question presented as "*which statute of limitations* is applicable to a private suit brought pursuant to § 10(b) of the Securities Exchange Act of 1934 and to Securities and Exchange Commission Rule 10b-5, promulgated there-

under." *Id.* at 352 (citations omitted; emphasis added). And one of the three choices for "which limitations period" applied was a statute of repose. *Id.* at 355; *see also*, *e.g.*, *Wallace v. Kato*, 549 U.S. 384, 391, 395 (2007) (using "statute of repose" and "statute of limitations" interchangeably); *United States v. Epollito*, 543 F.3d 25, 46 (2d Cir. 2008) ("Statutes of limitations are statutes of repose."); *Moore v. Winter Haven Hosp.*, 579 So. 2d 188, 190 (Fla. App. 1991) (explaining that "a statute of repose is a form of a statute of limitations and the terms are often used interchangeably," and holding that "'statute of repose' is subsumed in the general term 'statute of limitations'" in statutory provision at issue because, to hold otherwise, would "frustrate the legislative intent" of the provision).

Further illustrating the interchangeable nature of the terms, the provision that the Court referred to as a "statute of repose" in *Lampf* is set forth under the heading "Statute of limitations." 15 U.S.C. § 10(b)(4). Indeed, a search of the United States Code reveals that Congress never uses the term "statute of repose," although it indisputably enacts statutes of repose. *See*, *e.g.*, 15 U.S.C. § 78r(c) ("period of limitations" providing that action must be brought "within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued"); 15 U.S.C. § 1635(f) (3-year "time limit for exercise of right"); 15 U.S.C. § 1711 ("Limitation of actions" establishing 3-year period from signing of agreement for filing actions alleging violations of disclosure requirements involving interstate land sale agreements); 49 U.S.C. § 40101, note, General Aviation Revitalization Act of 1994, §§ 2(a) & 3(3) (for actions against manufacturers of aircraft based on injuries

occurring in accident, setting "limitation period" of 18 years from delivery of aircraft to first purchaser, seller, or lessor).

Because the meaning of the term "statute of limitations" at the time of enactment of section 309 (and since) is not clear when considered on its own, the court below turned to section 309's legislative history and purpose. As described above and in the opinion below, *see supra* pp. 4-5 & Pet. App. 16a, those indicia of statutory meaning made "evident" that the term "statute of limitations" as used in section 309 includes "statutes of repose," according to our present understanding of those two terms.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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