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

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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This case presents a split in the circuits on an important and ripe question of statutory construction and federal pre-emption of state law. Below, the Ninth Circuit assumed groundlessly that Congress conflated statutes of limitations and statutes of repose when it pre-empted statutes of limitation lacking discovery triggers in Section 309 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9658. *See* Pet. App. 5a-18a. The Ninth Circuit rejected both the plain language of Section 309, and a well-reasoned ruling of the Fifth Circuit. While Section 309 expressly pre-empts "State statute[s] of limitations," it notably makes no reference to statutes of repose, and the legislative history further demonstrates that statutes of repose were intentionally excluded from Section 309. 42 U.S.C § 9658(a)(1); Pet. 21-22. The Respondents have provided no valid reason for this Court to refrain from reviewing the split in the Circuits regarding the preemptive scope of Section 309.

I. The Conflict Between The Ninth and Fifth Circuits and Other Courts is Meaningful and Important

As demonstrated in the Petition, the Ninth Circuit's decision conflicts directly with the Fifth Circuit's ruling in *Burlington Northern & Santa Fe Ry. Co. v. Skinner Tank Co.*, 419 F.3d 355 (5th Cir. 2005); Pet. 14-16. Respondents do not dispute the legal conflict but argue that the cases can be distinguished factually because the *Burlington Northern* plaintiff discovered the injury prior to the expiration of the statute of repose. Br. in Opp. 6; *see also* Pet. App. 13a-14a. This factual difference

is irrelevant because the date of discovery was not the basis of either the Fifth or Ninth Circuit decision. Both circuits based their decisions on the text of the statute. The Ninth Circuit found that Section 309 was ambiguous and concluded Congress meant to include statutes of repose. Pet. App. 10a, 14a–18a. The Fifth Circuit, by contrast, found the text of Section 309 was clear and did not pre-empt statutes of repose because it refers only to "state statutes of limitations – not state statutes of repose." *Burlington Northern*, 419 F.3d at 364. The conflict between the circuits on this purely legal issue cannot be shrugged off with a factual distinction.

Respondents also contend that "*Burlington Northern* provides a weak basis for review" because the issue had not been well briefed by those parties. Br. in Opp. 6. However, the quality of the briefing is immaterial to the quality of a court's decision and reasoning. *See Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) (a judgment may be upheld "on any ground which the law and the record permit").

Respondents argue that the issue of Section 309 pre-emption "does not arise often enough to warrant this Court's attention." Br. in Opp. 7. In fact, at least ten decisions from federal and state courts have now addressed this issue, the majority within the last two years, culminating in the current circuit split. *See* Pet. 15-16. In addition, statutes of repose, like the Oregon statute below and those in other states that are directly or potentially in jeopardy, evidence an important policy decision by state legislatures that commerce must be relieved from the potential of defending against some

claims in perpetuity.[1] Courts may not invalidate those state statutes and policies without a clear and express mandate from Congress to do so as expressed in the plain language of a statute. *See* Pet. 17-23. The Ninth Circuit's re-drafting of CERCLA contravenes these important considerations.

Respondents contend that the Section 309 pre-emption issue is "only beginning to percolate in the lower courts," and this Court should "allow the courts more time to consider the issue before stepping in." Br. in Opp. 7. But this Court routinely grants certiorari to resolve conflicts between two federal courts of appeals, however recently the conflict may have arisen. *See, e.g., Altria Group, Inc. v. Good*, 129 S. Ct. 538, 542 (2008) (granting certiorari to resolve a split between the First and Fifth Circuits on an issue both courts decided in 2007); *Pac. Bell Tel. Co. v. linkLine Communs., Inc.*, 129 S. Ct. 1109, 1116-17 (2009) (granting certiorari to resolve a conflict between decisions of the Ninth and D.C. Circuits issued in 2007

1. Numerous states have statutes of repose either directly affected by the existing court decisions, or potentially in jeopardy in those circuits that have not yet addressed the issue. *See, e.g.*, Or. Rev. Stat. § 12.115; Or. Rev. Stat. § 30.905; Ala. Code § 6-5-502(c); *Fisher v. Ciba Specialty Chems. Corp.*, No. 03-0566-WS-B, 2007 U.S. Dist. LEXIS 76174, at *64-67 (S.D. Ala. Oct. 11, 2007) (20 year common law rule of repose); Alaska Stat. § 09.10.055(a); Conn. Gen. Stat. §§ 52-577, 52-577a(a); Kan. Stat. Ann. § 60-513(b); N.C. Gen. Stat. § 1-52(16); Tex. Civ. Prac. & Rem. § 16.012(b); Ga. Code Ann. § 51-1-11(b)(2), (c); Ind. Code § 34-20-3-1(b); Iowa Code § 614.1(2A); 735 Ill. Comp. Stat. 5/13-213(b)(2); Ohio Rev. Code Ann. § 2305.10(C)(1); Neb. Rev. Stat. Ann. § 25-224(2); Tenn. Code Ann. § 29-28-103(a); S.D. Codified Laws § 15-2A-3; Colo. Rev. Stat. § 13-80-107(1)(b).

and 2005, respectively); *EC Term of Years Trust v. United States*, 550 U.S. 429, 433 (2007) (granting certiorari to resolve a split between the Ninth and Fifth Circuits that arose in 2006).

Moreover, there is nothing to be gained by postponing review. CERCLA Section 309 either pre-empts state statutes of repose or it does not — there is no middle ground or void of insight that subsequent lower court decisions might fill to better inform this Court's deliberative process. Every future case will either be in conflict with the Fifth Circuit's adherence to the plain language of Section 309, or the Ninth Circuit's importation of statutes of repose.

II. The Ninth Circuit has Decided the Dispositive Legal Question At Issue With Finality, Warranting This Court's Review Now

Respondents wrongly contend that this case is not sufficiently final for review. The Ninth Circuit remanded the negligence claim based solely on its interpretation of Section 309 and rejection of the Fifth Circuit's contrary ruling. This single issue presented by the Petition is purely legal, ripe for review, and if reversed, dispositive of the case.

The Ninth Circuit's remand on the sole remaining claim does not insulate the Ninth Circuit's threshold legal determination from this Court's immediate review. Indeed, this Court has on numerous occasions granted certiorari to resolve circuit splits on important legal questions or interpret controlling statutory provisions regardless of further proceedings below on remaining

claims. Just last year, for example, the Court granted certiorari to resolve a circuit split on pre-emption where, as here, the court of appeals had reversed a summary judgment award and remanded to the district court. *Altria Group*, 129 S. Ct. at 542; *see also F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 160-161 (2004) (certiorari granted to resolve circuit split on threshold issue of statutory interpretation prior to proceeding further below); *United States v. General Motors*, 323 U.S. 373, 374, 377 (1945) (reviewing just compensation issue "fundamental to the further conduct of the case" despite remand for trial by appellate court); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 191-93 (1976) (granting certiorari on statutory interpretation issue despite appellate ruling on summary judgment allowing claims to proceed in trial court). In revealing contrast to the cases cited above and to this case, none of Respondents' cited cases presented an inter-circuit conflict, let alone on a finally decided question of law. Br. in Opp. 8.

Indeed, it is well-recognized that "the interlocutory status of the case may be no impediment to certiorari where . . . Supreme Court intervention may serve to hasten or finally resolve the litigation." Eugene Gressman, *et al.*, *Supreme Court Practice* § 4.18 at 282 (9th ed. 2007). The Court has thus granted certiorari where judicial economy would not be served by denying review of a controlling legal issue pending proceedings on remand. *See, e.g.*, *F. Hoffman-La Roche*, 542 U.S. at 160-61 (reviewing appellate court's reversal of granted motion to dismiss, based on controlling statutory interpretation issue); *Ernst & Ernst*, 425 U.S. at 191-93 (reviewing appellate court's reversal of summary

judgment for defendant, to determine whether Securities Exchange Act and regulations permitted a claim based on negligence).

Here, if the Ninth Circuit decision is overturned, the case will be over. Review now will also hasten resolution of the confusion in the federal courts that will only be prolonged if this Court defers review. No proceedings below will bear further on the pre-emptive effect of Section 309, the issue raised for review.

Respondents' heavy reliance on Justice Scalia's concurrence accompanying the Court's denial of certiorari in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) ("*VMI*") is misplaced. Justice Scalia did not suggest that certiorari cannot be granted under the circumstances here. Crucial to his opinion and the outcome in *VMI* was the appellate court's remand of the case for selection of a remedy that would itself raise the same constitutional equal protection issues when inevitably resubmitted for the Court's review. Unlike here, the appellate court's position in *VMI* was subject to reassessment following remand.

In this case, in contrast, the Ninth Circuit has issued its final judgment as to the pre-emptive effect of CERCLA Section 309, creating a circuit split on this question, and any further proceedings below will have no bearing on this legal question. As repeatedly demonstrated by cases like *Altria Group*, *supra*, the circuit split on an important and finally decided legal question such as the one here warrants review now.

III. The Ninth Circuit's Decision Conflicts with this Court's Established Jurisprudence Governing Statutory Interpretation and Federal Pre-Emption of State Laws

A. The Ninth Circuit's Decision Is Inconsistent with this Court's Standards of Statutory Interpretation

Contrary to Respondents' contention, Petitioners do not suggest a "CERCLA-specific rule[] of [statutory] construction." Br. in Opp. 9-10. Rather, the Ninth Circuit's ruling conflicts with this Court's established rules of statutory construction applicable to all statutes. The Court's application of those rules in the CERCLA context is particularly relevant here because the meaning of CERCLA is at issue. *See* Pet. 17-18.

The cases cited by Petitioners demonstrate that this Court has consistently read CERCLA according to its plain language, and has admonished against reading terms into CERCLA that do not appear there, or reading CERCLA in a way that destroys the symmetry between its provisions. Pet. 17. Respondents do not contest these principles, but make the unsupported assertion that the Ninth Circuit's opinion is "fully consistent" with them. Br. in Opp. 10. On the contrary, the Ninth Circuit ignored the plain text by inserting the term "statute of repose" into Section 309, defeating the symmetry between Sections 309(a)(1), 309(b)(2), and 309(b)(4)(A). *See* Pet. 17-18. All of these provisions refer expressly to statutes of limitation or accrual and discovery of claims. These concepts are antithetical to statutes of repose, which run regardless of claim accrual or discovery. *See id.* This only highlights the need for review.

B. The Ninth Circuit's Opinion Conflicts with this Court's Pre-Emption Jurisprudence

Respondents acknowledge that the Ninth Circuit undertook no pre-emption analysis, thus ignoring this Court's pre-emption jurisprudence. Br. in Opp. 11. Respondents also cite *Medtronic, Inc. v. Lohr*, in which this Court stated that "[i]n *all* pre-emption cases . . . 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.'" 518 U.S. 470, 485 (1996) (emphasis added) (citation omitted). Br. in Opp. 11. The Ninth Circuit failed to make this required starting "assumption." *See* Pet. 18-23. Moreover, unlike in *Medtronic*, the pre-emption found by the Ninth Circuit had no basis in the structure or purpose of the statute. *See* Pet. 17-23.

Respondents contend that the Ninth Circuit's failure to undertake any pre-emption analysis nonetheless "presents no conflict with pre-emption jurisprudence," because after determining that the statute was ambiguous, the Ninth Circuit consulted legislative history. Br. in Opp. 12. The conflict with this Court's pre-emption jurisprudence is inescapable, however. If the language of Section 309 is ambiguous, requiring consultation of legislative history, as the Ninth Circuit ruled, it cannot pre-empt state law because congressional intent to pre-empt state law must be "clear and manifest." *See* Pet. 18-23. Further, the legislative history revealed only that Congress had in fact considered including statutes of repose in Section 309 but then did not reference them in the statute. *Id.* The Ninth Circuit's failure to apply the proper pre-emption standard merits review.

C. The Ninth Circuit Incorrectly Held that Congress Confused or Equated "Statute of Limitation" and "Statute of Repose" in Section 309

Respondents argue that the terms "statute of limitation" and "statute of repose" were used interchangeably in 1986 when Section 309 was adopted and therefore the Ninth Circuit was correct to find an ambiguity in the term. Br. in Opp. 12-14. Like the Ninth Circuit, Respondents rely on the loose use of the terms in a few cases where the distinction between the two types of statutes was not material to the outcome of the case, and on two law review articles. *Id.*

The merits of this disagreement regarding congressional knowledge and intent are not yet at issue on a certiorari petition, but do highlight the propriety of granting certiorari based on the importance of adherence to statutory language, statutory structure, and congressional intent. As described in the Petition, at the time Congress enacted Section 309, Congress had before it a congressional study group report that asserted a need to pre-empt statutes of limitations lacking discovery triggers and separately recommended the "repeal of the statutes of repose." Pet. 8. The report differentiated between the two types of statutes by name and effect in at least two places, yet Congress revealingly chose only to pre-empt "statutes of limitation" when it drafted Section 309. Pet. 8, 21-22. The Ninth Circuit turned this differentiation on its head, concluding that Congress must have meant to pre-empt statutes of repose, even though it had acknowledged their distinction and then omitted any reference to statutes of repose from Section 309.

Like the Ninth Circuit, Respondents also unduly place much weight on this Court's occasional generic use of the phrase "repose" and "limitation" in cases where the distinction between statutes of limitations and repose was immaterial. Br. in Opp. 12-13. As one court aptly explained regarding such references to "repose:"

> Reading the cited opinions in context, it is obvious that the Court was not conflating or confusing statutes of limitations and rules of repose, but rather using the word "repose" to refer to the policy interest underlying state statutes of limitations. The fact that the term "repose" may have been used to refer to statutes of limitations in several past Supreme Court opinions does not demonstrate that state statutes of limitations are linked inextricably to state rules of repose.

Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1218 n.3 (11th Cir. 2001); *see also* Pet. 19-22. Far from blurring statutes of limitations and repose, Congress recognized the distinction sharply in the legislative history of Section 309. For these reasons too, the contrary decision below merits review.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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