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1 P R O C E E D I N G S

2 (11:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 13-339, CTS Corporation v. Waldburger.

5 Mr. Murray.

6 ORAL ARGUMENT OF BRIAN J. MURRAY

7 ON BEHALF OF THE PETITIONER

8 MR. MURRAY: Mr. Chief Justice, and may it  
9 please the Court:

10 CTS should prevail here based on the text of  
11 Section 9658 as well as its structure, historical  
12 context, and other relevant considerations, all of which  
13 make clear that it is a federalism comprise having no  
14 effects on statutes of repose.

15 Section 9658 should be construed narrowly to  
16 do the one thing that Congress intended it to do, which  
17 is to postpone in some situations a single State law  
18 statute of limitations commencement date. We stand--

19 JUSTICE GINSBURG: How many -- how many  
20 States have -- this is -- this is a general statute of  
21 repose and nothing to do in particular with CERCLA; is  
22 that right?

23 MR. MURRAY: That's right.

24 JUSTICE GINSBURG: And how many States have such  
25 statutes?

1           MR. MURRAY:           Well, it gets a little  
2     confusing. The study group report indicated there were  
3     four of those States. I believe Respondents have  
4     pointed to four or five. There are also -- that have to  
5     do with personal injury. There are also myriad others  
6     that have to do with property damage. So it gets a  
7     little confusing to give a strict answer to that. But  
8     there were four statutes of repose squarely in the study  
9     group before -- before Congress when they enacted this.  
10    So Congress knew about these statutes of repose when  
11    they enacted this.

12           JUSTICE GINSBURG:           But if you were to  
13    prevail, then the parties concerned might well go to  
14    their State legislatures and say, enact a statute of  
15    repose. That will get us off the hook, even before the  
16    injured person is aware of the injury and of the cause  
17    of it. The result of that would be to totally defeat  
18    what Congress meant to do in saying the trigger is when  
19    you know the cause of the injury.

20           MR. MURRAY:           There has not been a rash of  
21    move to State legislatures since this law has been  
22    enacted, so we haven't seen that develop. But if I  
23    could respectfully disagree with the premise. I think  
24    Congress's purpose here was slightly narrower than  
25    saving all long-latent injury claims. I think what

1 Congress was worried about was expedition and making  
2 sure that it didn't force people to come to court  
3 before -- under a statute of limitations before they  
4 would be expected to.

5 And that's set out -- the statute itself  
6 accomplishes only one thing, Section (a)(1), and I'm  
7 reading from page 1 of our opening brief to the Court.  
8 "It does one thing only, which is if the applicable  
9 limitations period for one of these actions as specified  
10 in a State law statute of limitations or under common  
11 law provides a commencement date that's earlier than the  
12 Federal commencement date, then it substitutes the more  
13 favorable commencement date."

14 Commencement date, in turn, if we turn to  
15 page 2 -- and this is reading now from (b)(3) --  
16 "Commencement date means the date specified in a statute  
17 of limitations as beginning of the applicable  
18 limitations period," which again, (b)(2), applicable  
19 limitations period is defined as the period specified in  
20 a statute of limitations during which one of these civil  
21 actions may be brought.

22 So doing the algebra on the definitions,  
23 what Congress surgically wanted to do here was to change  
24 one thing and one thing only. If you had a less  
25 favorable State commencement date, which is the

1 beginning of which an action may be brought, which is  
2 accrual, if you have one of these less favorable State  
3 commencement dates for statute of limitations, Congress  
4 wanted to move that, keeping in place --

5 JUSTICE KAGAN: Why would it have wanted to  
6 do that and not also get rid of the statute of repose?  
7 I mean, presumably the idea is you should have some  
8 chance to sue after you've discovered the injury and the  
9 cause of the injury. And if here, the statute of repose  
10 is preventing that, why would Congress have wanted to  
11 modify a statute of limitations but not get rid of the  
12 statute of repose?

13 MR. MURRAY: I think Congress was trying to  
14 be very careful with what it was doing in this area  
15 because it knew it was operating in pretty much the  
16 heartland of State law and State prerogatives here.

17 And so while it was willing to go as far as  
18 the one study group recommendation and change statutes  
19 of limitations, a procedural mechanism, it wasn't  
20 willing to go right into the heart of the elements of  
21 the cause of action and start changing those because it  
22 perceived potentially serious federalism problems with  
23 doing that.

24 It would be akin to Congress passing a law  
25 that says rather than -- since these -- negligence is

1    what's at issue here.  Rather than negligence, Congress  
2    passing a law saying the duty of care will be strict  
3    liability.  I think there are serious constitutional  
4    problems with that as we've set out.  And so Congress  
5    was very careful to tread lightly here and preserve the  
6    prerogatives of the States to keep in place the statute  
7    of --

8           JUSTICE GINSBURG:           What would be the  
9    constitutional problem if Congress had said all people  
10   claiming an injury under this statute can commence the  
11   action three years after discovery of the cause, to say  
12   that?

13          MR. MURRAY:           To the extent that's a statute  
14   of limitations period, it's not a problem.  But to the  
15   extent it were to affect a statute of repose, North  
16   Carolina law is very clear that statutes of repose are  
17   an element of the cause of action.  In other words,  
18   unless you plead and prove this element of the North  
19   Carolina law cause of action, you're out of court.

20          Had Congress gone so far as to remove an  
21   element, I think you're in dangerous constitutional  
22   territory.  But --

23          JUSTICE GINSBURG:           What kind of -- I don't  
24   follow that.  A statute of repose is a time limitation;  
25   is that right?

1           MR. MURRAY:           It is. But a statute of repose  
2 is designed to accomplish something -- it's going after  
3 very different objectives than Congress was after with  
4 statutes of limitations. Statutes of limitations, of  
5 course, as this statute reflects, are designed --  
6 they're about diligence. They're about making sure that  
7 people don't sleep on their rights.

8           And so what Congress did here was it left in  
9 place State law as it found it, including the  
10 limitations period, the time period itself, and all it  
11 did was make one slight modification for those who might  
12 not have thought to be able to be as diligent as others  
13 and moved that date to a more favorable Federal  
14 commencement date.

15          JUSTICE SCALIA:          Suppose -- suppose a State  
16 has -- most of these statutes of repose are piggybacked  
17 on top of statutes of limitation, right? I mean, you  
18 know, you have to sue within 10 years after -- after you  
19 find -- you find the injury. But in any case, a suit  
20 must be brought within -- within 20 years after -- after  
21 the act. That's the basis of your suit, right? But  
22 let's assume you -- you have a State which only has a  
23 statute of -- of repose. It just says any suit for --  
24 for this act of negligence must be brought within 10  
25 years after the act occurred.



1           Is that still a statute of repose?           It seems  
2   to me then that would meet your -- your definition of --  
3   of the commencement time for suit, would have to be  
4   when -- when the act occurred, and then you have 10  
5   years from that.

6           MR. MURRAY:           A statute written in that sort  
7   of way which gives permission, which is exactly what  
8   Congress was focused on, might well be a statute of  
9   limitation. It doesn't sound like a statute of repose  
10  because, again, what Congress wanted to move was the  
11  beginning of the period in which --

12          JUSTICE SCALIA:          But that's the beginning.  
13  It doesn't give permission. It just says, you know,  
14  you're liable for negligence of -- in this -- in this  
15  area, but any suit must be brought within 10 years after  
16  the act occurred.

17          MR. MURRAY:           To the extent that a statute  
18  was that, and the State had only a statute of repose,  
19  then we don't believe 9658 would touch that at all. And  
20  that makes sense because what Congress was doing was  
21  taking State law as it found it -- and there's no  
22  obligation for States to have these causes of action at  
23  all. States could repeal these causes of action, and  
24  there would be no right to sue. States could change  
25  their statutes of limitations to a day after accrual,

1 and that would be fine, too.

2 All Congress did was move the date on which  
3 a statute of limitations begins to run till a later  
4 date.

5 JUSTICE KAGAN: But, Mr. Murray, in Justice  
6 Scalia's example, what in the text would prevent you  
7 from treating that -- the single statute, which is  
8 written as a statute of repose, what in the text is  
9 preventing you from saying that the statute applies to  
10 it?

11 MR. MURRAY: Yes, Your Honor. (B) (2) and  
12 (B) (3) read together, we believe, are the two pieces  
13 that would be most relevant. What Congress has chosen  
14 to move is the commencement date when State law is less  
15 favorable than Federal. Commencement date is defined as  
16 the beginning of the applicable limitations period. And  
17 applicable limitations period means a period in a  
18 statute of limitations when suit may be brought.

19 JUSTICE KAGAN: Right.

20 MR. MURRAY: A suit under North Carolina law  
21 may not be brought just because a defendant has made an  
22 act or omission. Indeed, under North Carolina law, a  
23 suit may not be brought until an action accrues. That's  
24 set out in --

25 JUSTICE KAGAN: But I think you're -- you're

1   messaging with the hypothetical now. I mean, assume that  
2   the statute of repose is all there is. Now, in fact,  
3   you're not going to get any suits because nobody is  
4   going to know that they're injured until they know that  
5   they're injured. But why wouldn't that be the  
6   commencement date is the thing that triggers the statute  
7   of repose, the last act or omission, and -- and the  
8   applicable limitations period is the 10 years?

9           MR. MURRAY:           If we were in a State where you  
10   were permitted to sue -- permission to sue was given  
11   based on the last act or omission of a defendant, then  
12   we would be in a different situation, but here  
13   permission to sue does not arise until your cause of  
14   action accrues. There's a distinction between the last  
15   act and omission of a defendant, which is what starts  
16   the running of the statutes of repose, on the one hand,  
17   and the accrual of a cause of action.

18          JUSTICE SCALIA:       Yes, but my hypothetical  
19   was different. There -- there is no such distinction.  
20   There is no statute of limitations. It's only what you  
21   call a statute of repose. And I think you have to say  
22   that in that situation, it is no longer a statute of  
23   repose, that it's a statute of limitations.

24          MR. MURRAY:           Again, so long as we're reading  
25   9658 to apply to and only to, it can apply when and only

1    when there is a less favorable State law commencement  
2    date.  If the State law, as you are positing it, it  
3    might well be a statute of limitations.  If the State  
4    law, as you're positing it, allows someone to bring a  
5    cause of action, that starts to sound like a cause  
6    of -- like a statute of limitations.  Here, the statute  
7    of repose is in no way tied to anything having to do  
8    with the plaintiff.  It is an end date which begins with  
9    defendant's last act or omission and ends 10 years later  
10   and is the end of the cause of action.  None of that is  
11   the beginning of an applicable limitations period, the  
12   beginning of when someone may bring a suit, when suit  
13   has accrued, in other words, under North Carolina law as  
14   we think 9658 --

15           JUSTICE SCALIA:           When was this statute  
16   enacted?  What was it?

17           MR. MURRAY:           1986.

18           JUSTICE SCALIA:           '86.  I thought--Okay.

19           MR. MURRAY:           It was not part of the --

20           JUSTICE SCALIA:           To tell you the truth, I've  
21   never heard of this distinction between statutes of  
22   repose and statutes of limitations.

23           MR. MURRAY:           Right.  Well, and there -- but  
24   to be clear, Congress hasn't always been perfectly clear  
25   and certainly some of this Court's decision as with

1 jurisdiction and standing have made some loose-- use of the  
2 language. But Congress certainly has written into  
3 various laws, some of which have been presented in the  
4 amicus briefs here, back-end, hard-end dates after which  
5 causes of action may not be brought. And all  
6 Congress --

7 JUSTICE SCALIA: Well, yes. But have they  
8 ever -- have they ever drawn a distinction between  
9 statutes of limitations and statutes of repose? Is  
10 there any Federal statute that makes that distinction  
11 or -- or is there any Federal statute which applies only  
12 to statutes of repose?

13 MR. MURRAY: There's no Federal statute that  
14 makes the distinction between limitations and repose,  
15 but there are -- as we -- have been set out here, many  
16 Federal statutes that give this hard-end, back-end  
17 protection to defendants and for important reasons,  
18 right? Remember that these statutes --

19 JUSTICE SCALIA: Oh yeah. It exists. I  
20 mean, these statutes exist, but -- but are they called  
21 statutes of repose? Or are they -- are they not  
22 considered, as I used to consider them when I was in law  
23 school and even as late as 1986, I -- I would have  
24 considered that a statutes of limitations. Now, you  
25 think Congress is smarter. They -- they know the law

1 better.

2 MR. MURRAY: We think Congress understood  
3 the distinction, and this is a harder question to  
4 answer, but for those who find resort to legislative  
5 history helpful here, remember what Congress did in  
6 1980, they passed CERCLA and then they commissioned --  
7 which was not about torts at all. CERCLA is a broad  
8 cleanup statute focused on, you know, without fault,  
9 without liability, cleaning up land.

10 It then commissioned a study group of  
11 leading folks to get together and figure out whether  
12 there should be a tort cause of action, whether there  
13 should be other changes made to the law, what else  
14 should be done in the tort arena. And that study group  
15 report was very clear on the distinction between  
16 statutes of repose, on the one hand, and statutes of  
17 limitations on the other. And that's what Congress --

18 JUSTICE KAGAN: Well, but in general,  
19 Mr. Murray, I think Justice Scalia is right, that, in  
20 general, Congress hasn't made this distinction. In  
21 general, this Court has not made this distinction. In  
22 general, I think this goes back to -- to Justice  
23 Ginsburg's point. The purpose behind this law, clearly,  
24 it doesn't matter either -- I mean, either way. If  
25 Congress wanted to make sure that people could sue after

1     discovering their injury, a statute of repose prevents  
2     that, as well as a statute of limitations does.

3             And yet you are asking us to imagine a  
4     Congress that has this very much in -- in its head, both  
5     the difference between these two things, and you said  
6     the reason that they wanted only to alter the one and  
7     not to alter the other is because they thought of the  
8     statute of repose as impinging on a State's  
9     constitutional prerogatives. Now, that's a very legally  
10    sophisticated Congress you're asking us to imagine.

11            (Laughter.)

12            JUSTICE KAGAN:            You know, to understand this  
13    distinction and then to say, oh, yes, look, the statute  
14    of repose is really an interference with substantive  
15    liability in a way that the statute of limitations is  
16    not and that might raise constitutional avoidance  
17    issues. I mean, I think that's -- that's -- that's  
18    pretty sophisticated stuff.

19            MR. MURRAY:            Two points, Your Honor. One,  
20    actually Congress, at least at this time, was very  
21    sophisticated, and we've set out, again --

22            (Laughter.)

23            MR. MURRAY:            For those who find legislative  
24    history to be helpful, we've set out several exchanges  
25    right on the floor between members of Congress where one

1 would ask, what is the difference between a statute of  
2 limitations and repose? Another would ask -- thank you  
3 for asking, and explain it really quite succinctly. So  
4 that at least at that time --

5 JUSTICE SCALIA: And everybody was listening  
6 to that. The chamber was full and --

7 (Laughter.)

8 MR. MURRAY: That was my first point.

9 But my second point is, we don't have to  
10 rest on the broad construction of statute of limitations  
11 versus statute of repose, sort of the broad definitional  
12 purpose. I come back to the text and the structure of  
13 the statute here, which again, only does one thing,  
14 moving a commencement date defined as the beginning of  
15 the period in which one of these actions may be brought.  
16 That simply does not define a statute of repose.

17 JUSTICE GINSBURG: I thought that what  
18 Congress was trying to do was to establish a Federally  
19 required commencement date, a Federal requirement -- a  
20 Federally requirement commencement date. So when you  
21 ask the question, how much time do I have to sue for one  
22 of these CERCLA injuries, the answer would be three  
23 years after you know the cause of your injury.

24 Now, on your -- taking out this statute of  
25 repose, there can no longer be a uniform answer to that



1 question.

2 MR. MURRAY: That's absolutely right. All  
3 Congress was -- there's no uniform answer to that  
4 question because a statute of repose does not meet the  
5 definition Congress set out in the statute as the  
6 beginning of the period in which an action may be  
7 brought. That is accrual. And that speaks to statute  
8 of limitations. The beginning of which an action may be  
9 brought has nothing to do, necessarily, with the last  
10 act or omission of the defendant, which is a statute of  
11 repose.

12 And again, it's a perfectly logical  
13 distinction for Congress to make, given what they were  
14 trying to do. The -- the statute itself makes clear  
15 that State law otherwise controls. They didn't touch  
16 any other part of State law. All they did was this  
17 narrow surgical strike at the beginning of statutes of  
18 limitations.

19 If I might reserve the rest of my time for  
20 rebuttal.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 Mr. Murray.

23 Mr. Palmore.

24 ORAL ARGUMENT OF JOSEPH R. PALMORE  
25 FOR UNITED STATES, AS AMICUS CURIAE

1                   SUPPORTING PETITIONER

2           MR. PALMORE:           Thank you, Mr. Chief Justice,  
3   and may it please the Court:

4           Section 9658 surgically modifies State law  
5   tort actions in one limited respect, and otherwise  
6   leaves them untouched, by changing the commencement date  
7   for the time period in which a civil action may be  
8   brought. The relevant time period --

9           JUSTICE GINSBURG:       So, Mr. Palmore, if -- if  
10   Congress -- if all of the States enact this 10 --  
11   10-year statute of repose, then that has totally  
12   undermined what Congress set about to do in 9658.

13          MR. PALMORE:           I respectfully disagree,  
14   Justice Ginsburg, because Congress had before it a  
15   report that identified the principal problem in this  
16   area as when statutes of limitations periods commenced.  
17   And it identified the problem as those -- that minority  
18   of States that commenced this running of statute of  
19   limitations period at a time of injury as opposed to  
20   discovery of injury and its cause.

21          It's critical to understand here that there  
22   were only four States, as counsel said, at the time that  
23   Congress enacted this statute that had statutes of  
24   repose, and those were States that all had discovery  
25   rules. There's no inconsistency between a statute of

1    repose and a statute of limitations with a discovery  
2    rule.  They typically go together, and they represent a  
3    compromise and a balancing of interest on the part of  
4    the States that makes enact -- enacted a, in a sense, a  
5    pro-plaintiff reform to adopt a discovery rule, but  
6    provided for defendants the certainty of a substantive  
7    cutoff at an outer range.  Those two things go together.

8           JUSTICE GINSBURG:           But, Mr. Palmore, the  
9    question I asked is suppose all of the States have these  
10   10-year statutes of repose.  Then there would be no  
11   occasion to invoke 9658, and the plaintiff would be out  
12   of court before the action accrued in some cases.

13          MR. PALMORE:           Well, Justice Ginsburg, I just  
14   need you to hypothesize a State that had -- didn't have  
15   a discovery rule and for some reason had -- additionally  
16   had a statute of repose.  I'm not sure why a State would  
17   do that.  The Federal statute would still work in that  
18   setting, but that wasn't the record before Congress.  As  
19   I said before, there were only four States who had  
20   statutes of repose.  There's no indication in the text  
21   or the legislative history that that was a focus of  
22   Congress's attention.

23          JUSTICE SCALIA:           Are you acknowledging that  
24   if a State had only a so-called statute of repose,  
25   that -- that the Federal limitation would apply to that?

1 It's only a statute of -- of repose piggybacked on what  
2 we've been calling a statute of limitations. It's only  
3 that one that survives.

4 MR. PALMORE: I think -- Justice Scalia, I  
5 think you have to look at the text and structure of the  
6 State law and see what is the commencement date of the  
7 time period.

8 JUSTICE SCALIA: I think you can answer the  
9 question yes -- yes or no.

10 MR. PALMORE: If they had only -- so if  
11 North Carolina didn't have a three-year statute of  
12 limitations and only had this 10-year statute of  
13 repose --

14 JUSTICE SCALIA: Right.

15 MR. PALMORE: -- I think our position would  
16 be the same, that Section 9658 would not apply. I'm not  
17 aware of any State that has such -- such a statute.  
18 There was no State mentioned in the study group --

19 JUSTICE SCALIA: That's why you want to give  
20 it away.

21 MR. PALMORE: That -- so I think the  
22 critical factor, as Mr. Murray said, was the  
23 definitions -- the nested definitions in this statute of  
24 the beginning of the applicable limitations period, and  
25 the applicable limitations period is the period

1 specified during which a civil action may be brought.  
2 When can you first go into court with a complete cause  
3 of action and file a complaint?

4 JUSTICE SCALIA: Okay. You have a statute to  
5 say there is -- there is a cause of action for X, okay,  
6 and a separate statute -- there exists a cause of action  
7 for X. And a separate statute which says any -- any  
8 suit for X cannot be brought after 10 years from the act  
9 of the defendant that is the basis for the claim. Okay?  
10 Why -- why isn't that the commencement date on which you  
11 can bring suit where -- where the act occurs.

12 MR. PALMORE: I think it depends on whether  
13 under State law you have a complete cause of action and  
14 can go into court, file a complaint and get relief. And  
15 I don't think we have to ask in the abstract, because if  
16 you look at page 3(A) of the government's brief, the  
17 appendix to the government's brief, you see what North  
18 Carolina law answers this question. It says, "Civil  
19 actions can only be commenced," it actually uses the  
20 same word, "within the periods prescribed in this  
21 chapter after the cause of action has accrued."

22 So in North Carolina, as is typical of every  
23 State that I'm familiar with, you -- the statute of  
24 limitations period begins to run when you have an  
25 accrued cause of action. Now, North Carolina has

1     adopted -- had actually adopted a discovery rule. So  
2     Section 9658 doesn't have any -- any purchase in this  
3     case because the -- the commencement date of the statute  
4     of limitations period is the same. But I think there  
5     are serious problems --

6             JUSTICE KAGAN:             I think what -- at least  
7     what I take from Justice Scalia's question is that if  
8     you think of the -- if you imagine -- and you're quite  
9     right that this doesn't exist in the real world -- but  
10    if you imagine a statute of repose existing  
11    independently, it actually would fit the language of  
12    this statute quite, you know, fine. The commencement  
13    date would be different. It would not be the date of  
14    accrual. It would be the date of the defendant's last  
15    act, but still the statute would work perfectly well.  
16    And I suppose if you think that, then -- then in a case  
17    in which there was both, the question would be why  
18    wouldn't you just apply this statute to both?

19            MR. PALMORE:            Well, I'd like to go to that  
20    question because I think that -- that goes to the -- the  
21    rather strained reading of the statute that Respondents  
22    advance. So Respondents suggest that when (a)(1) talks  
23    about a comparison between a Federal commencement date  
24    and the applicable limitations period under State law,  
25    Congress would have contemplated that there would be a

1 comparison to multiple limitations periods under State  
2 law.

3 Furthermore, it assumes that the solution  
4 that Congress would have arrived at to an issue with  
5 statutes of repose was to have a statute of repose  
6 period start with a discovery rule, which would be a  
7 creature unknown to the law. And third, they assumed  
8 that what Congress did here was contemplate that in a  
9 State like North Carolina that had two different time  
10 limitation periods of two different lengths, that  
11 Congress's solution was to require a common starting  
12 point for both rendering the longer limitations period  
13 strangely superfluous.

14 If Congress would have gone about this in a  
15 much more straightforward way if it had wanted to accept  
16 the study group's suggestion that it repeal -- or the  
17 suggestion was actually directed to the States -- that  
18 the States repeal statutes of repose, Congress would  
19 have done so expressly. It wouldn't have done so by  
20 awkwardly layering a discovery rule on top of statutes  
21 of repose.

22 And, Justice Scalia, this distinction  
23 between statutes of limitations and statutes of repose,  
24 we agree it's not the label that controls. We think  
25 Congress here showed by the way the definitions and the

1 way this provision works what it had in mind when it  
2 talked about statutes of limitations, but the -- the  
3 substantive difference between the two is something that  
4 both this Court's cases and the -- and the law generally  
5 recognized. The -- the North Carolina cases that we  
6 cite in our brief and the Petitioners cite Black and  
7 Boudreau, in particular, are quite clear in  
8 distinguishing between the two.

9 This Court in Lampf, when talking about the  
10 one-year, three-year limitations period under the  
11 securities laws distinguished between the two and said  
12 there would be no equitable tolling applied to the  
13 period of repose, the three-year limit in the securities  
14 laws. That didn't turn on the label, that turned on the  
15 substance of how these things work.

16 JUSTICE KENNEDY: Yes. It didn't turn on  
17 the label in part because -- I was looking at the  
18 opinion -- it talks about a statute of limitations. So  
19 that -- that helps the other side, although the repose  
20 period helps you.

21 MR. PALMORE: That's right. Justice  
22 Kennedy, it's not a question of labels. It's a question  
23 of the definitions in this statute and how this statute  
24 actually works. We agree the labels aren't dispositive.

25 And as we've discussed in our brief, Justice



1     Scalia, conflict of laws is another area in which  
2     the courts consistently draw a distinction between  
3     statutes of limitations, which they classify as  
4     procedural, and thus the forum State can apply its own  
5     statute of limitations law, and statutes of repose,  
6     which the courts --

7             JUSTICE GINSBURG:             Does -- does the  
8     restatement court statute of repose, are they going back  
9     to what -- at least I learned in law school, there was a  
10    statute of limitations and then there was a so-called  
11    built-in statute of limitations. Statute of limitations  
12    general covered all claims, but a built-in statute of  
13    limitations was considered to limit not simply the  
14    remedy, but the right.

15            MR. PALMORE:            That is the distinction that  
16    the North Carolina cases draw. Sometimes it can be  
17    specific to a statutory cause of action, sometimes it  
18    can be generally applicable. The policy consideration  
19    behind a statute of repose is related but distinct from  
20    a statute of limitations, which is about incentivizing a  
21    plaintiff to get into court quickly. The statute of  
22    repose is intended to provide certainty at the back end  
23    to a defendant so it can order its affairs, have  
24    insurance policies that make sense.

25            And that statute of repose, as an element of

1 substantive State law, will go with that defendant if  
2 it's sued in any other State where there might be venue  
3 or personal jurisdiction. As a substantive matter of  
4 North Carolina law, that statute of repose will follow.

5 So this is a distinction that the law has  
6 generally recognized and it wouldn't be at all  
7 surprising that in the context of a federalism  
8 compromise, which is what 9658 really was, that Congress  
9 would have chosen to mirror that same distinction. It  
10 would have decided to go after the principal problem  
11 that was before it, which was an issue of discovery  
12 rules, the absence of discovery rules in certain States,  
13 without more deeply intruding into the substance of  
14 State law. These are State law tort actions. They're  
15 quintessentially within the responsibility and the  
16 sovereignty of the States.

17 JUSTICE KAGAN: Mr. Palmore, what do you  
18 think the commencement date in this case was?

19 MR. PALMORE: The commencement date in this  
20 case, I think, was probably in 2009, when, under both  
21 North Carolina law and the Federal commencement date,  
22 when these Respondents learned from the EPA that their  
23 well water was contaminated. Because at that time, they  
24 both discovered their injury and they understood the  
25 cause, so --

1 JUSTICE KAGAN: But how could that be the  
2 beginning of the period during which his suit may be  
3 brought? I mean, he couldn't bring suit on that date.

4 MR. PALMORE: Well, we think the best way --

5 JUSTICE KAGAN: It seems something sort of  
6 internally contradictory in your interpretation here.

7 MR. PALMORE: We think there are two ways of  
8 looking at it and either way the Petitioner is correct.  
9 One is you look at just the statute of limitations  
10 period, which is the applicable limitations period for  
11 purposes of the statute. So that 2009 would be the  
12 commencement date there, even if there might be a  
13 separate barrier to relief. But second, even if you say  
14 there is no commencement date under State law, then  
15 under (a)(1), there is no commencement date under State  
16 law a fortiori that had -- that was earlier than the  
17 Federal commencement date. So you end up at the same  
18 place.

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
20 Mr. Korzen.

21 ORAL ARGUMENT OF JOHN J. KORZEN

22 ON BEHALF OF THE RESPONDENTS

23 MR. KORZEN: Mr. Chief Justice, and may it  
24 please the Court:

25 I'd like to start with the plain wording of

1 9658, but first just say a sentence or two about the  
2 purpose. The purpose of Section 9658 is to preserve  
3 claims for latent harm from environmental releases, from  
4 a facility of hazardous waste, until the person  
5 discovers the cause of that latent harm. And latent  
6 harm, which is all over the legislative history, but  
7 which neither of my friends for the Petitioners  
8 mentioned, latent harm is what this statute was preserved-- passed  
9 for. And latent harm includes things such as the  
10 groundwater contamination in this case, or cancer such  
11 as in the Camp Lejeune case.

12 CHIEF JUSTICE ROBERTS: Well, and the whole  
13 purpose of a statute of repose is -- is very different.  
14 That's to give you a drop, you know, completely finish  
15 date, so whatever was -- was latent or not latent, it's  
16 over with. It's a different purpose than a statute of  
17 limitations.

18 MR. KORZEN: Yes, Your Honor. But Congress  
19 was concerned about preserving claims. And it had one  
20 purpose here, I agree it had one purpose, but the one  
21 purpose of 9658 was to give a uniform trigger date for  
22 everybody to have the time to bring a claim, start to  
23 run, only after they discovered their harm. And that is  
24 cut off by a statute of repose just as it would be -- by  
25 a repose period just as it would be by any other

1 limitation.

2 JUSTICE KENNEDY: Well, I think there's --  
3 there's merit to your argument. But the point is that  
4 there is no cause of action if there's a repose period  
5 and -- and that suit is commenced later. And the study  
6 commission did recognize this distinction between  
7 limitations and repose. I agree with Justice Scalia. I  
8 didn't have Justice Ginsburg's law professor, but I  
9 -- this was new for me.

10 (Laughter.)

11 MR. KORZEN: Your Honor, it was new. If I  
12 could circle back to the study group in just a minute.  
13 In fact --

14 JUSTICE KENNEDY: Other than it was  
15 mentioned in Lampf, but in a confusing way.

16 MR. KORZEN: Agreed. And I would also like  
17 to circle back to Lampf. But first, Petitioner's own  
18 brief on page 32 says that this was a newly emerging  
19 technological--terminological distinction, a newly emerging  
20 terminological distinction as of 1986.

21 And to return back to one of Justice Kagan's  
22 questions, it expects an awful lot for Congress to have  
23 been aware of that and -- and made this distinction that  
24 it's not even made to this day in 2014.

25 JUSTICE SOTOMAYOR: It was aware of it

1 because the study group used the two terms and they knew  
2 there were two different statutes because they were  
3 told.

4 Now, how you make assumptions, I'm assuming  
5 that if there's a report, as there was with this, that  
6 people would be responding to it in the legislation  
7 that's being drafted.

8 MR. KORZEN: Yes, Your Honor. Yes, Justice  
9 Sotomayor. Let me -- let me talk about that distinction  
10 for just a minute. The study group report, and it's a  
11 very impressive work, about 700 pages long -- one time,  
12 one time does it use the term "statutes of repose." And  
13 in that one use, it's within the heading of statute of  
14 limitations. And what the study group said is that in a  
15 handful of States, statutes of repose have the same  
16 effect of statute of limitations without a discovery  
17 rule as barring people's claims before they know they've  
18 been harmed. And it said nothing about one is  
19 substantive, one is procedural. It just said they have  
20 the same effect.

21 JUSTICE SCALIA: And therefore -- and  
22 therefore it should be repealed, not and therefore  
23 should be covered by the Federal statute.

24 MR. KORZEN: Both recommendations, Justice  
25 Scalia, both recommendations -- and this is crucial --

1 both recommendations in the study group report were  
2 directed at the States. It said States should adopt  
3 discovery rules and States should repeal statutes of  
4 repose.

5 Congress didn't wait on either of those.  
6 Congress --

7 JUSTICE SCALIA: Anyway, as the government  
8 argued, it doesn't matter. It's not a matter of  
9 terminology. It's a matter of reality. It's a matter  
10 that these two things, whether they were given different  
11 names in 1986 or not, are quite different things. And  
12 do you -- do you deny that they are quite different  
13 things, and that therefore the statute may apply quite  
14 differently?

15 MR. KORZEN: I do, Your Honor. I do deny  
16 that they are quite different. They have at core the  
17 same basic similarity of defining a period when an  
18 action may be brought, and that's the language used in  
19 the secondary authorities of the day and used by  
20 Congress. They both define periods when an action may  
21 be brought.

22 Now, there are some distinctions that again  
23 have emerged more clearly in some lower courts since  
24 1986, but they have at bottom, even to this day, the  
25 fact that they are both periods when an action may be

1 brought.

2 CHIEF JUSTICE ROBERTS: Well, why would  
3 you -- why would these four States have two of them  
4 then? I mean, if they are doing the same thing, why  
5 have two different ones?

6 MR. KORZEN: The States that have those,  
7 Your Honor, don't even classify them as statutes of  
8 repose. In fact, the North Carolina one here, and you  
9 can see it on page 3 of the red brief, it's not in the  
10 blue brief -- but the North Carolina statute, what we're  
11 talking about is one sentence out of paragraph 16 in a  
12 statute of limitations --

13 JUSTICE KENNEDY: But it -- but it's an  
14 important difference because in the States that have  
15 repose statutes there can be no tolling. I mean that's  
16 huge; a minor, an incompetent person can't sue.

17 MR. KORZEN: That is a difference, Your  
18 Honor, but it's not a difference that was significant to  
19 Congress. Congress was trying to preserve claims for  
20 people of latent harm --

21 JUSTICE KENNEDY: I'm saying that repose  
22 statutes, when they exist, impose substantial hardships  
23 on people that the State otherwise protects, minors and  
24 incompetents. They are out of luck.

25 MR. KORZEN: Well, in 9658 there is in fact



1 provisions for minors and incompetents, and so statutes  
2 of limitations typically have those, but yet they are  
3 included in 9658.

4 JUSTICE KENNEDY: That's the whole point.  
5 Statutes of repose do not.

6 MR. KORZEN: Which suggests 9658 had  
7 statutes of repose in mind. There would be no need to  
8 protect minors for a statutes of limitations where there  
9 is equitable tolling.

10 But putting aside tolling --

11 JUSTICE KENNEDY: Well, I think -- no, I  
12 think we all concede that what we're talking about here  
13 is a statute of limitation. We're not saying it's also  
14 a statute of -- everyone can see that there is a statute  
15 of limitations here. The Federal law is a statute of  
16 limitation and so it protects minors.

17 But the question is whether or not this  
18 other statute of repose supersedes it. So you can't look--  
19 you can't quote us to the -- to the minors part of the  
20 statute and say that it isn't -- because that doesn't  
21 address the point. You still have the general equitable  
22 point that, that the position of the Petitioner might  
23 frustrate Congress's intent.

24 MR. KORZEN: Well, putting aside minors,  
25 Your Honors, the plain language here applies to any type

1 of period. Whether you call it a limitations period or  
2 a repose period, the plain language applies here.

3 JUSTICE KAGAN: Do you -- is your  
4 understanding of the operation of this statute is the  
5 applicable limitations period -- do you see the statute  
6 as applying seriatim first to the statute of limitations  
7 and then to the statute of repose, or is the applicable  
8 limitations period the period that you can sue when you  
9 combine those two?

10 MR. KORZEN: It -- in most States, you just  
11 have one period, so in this State --

12 JUSTICE KAGAN: No, here.

13 MR. KORZEN: Yes, here we have a hybrid  
14 statute of limitations. That's what it's been called.  
15 It's also been called a bifurcated statute of  
16 limitations. It's also been called a two-tiered statute  
17 of limitations.

18 JUSTICE KAGAN: Yes, I just want to know how  
19 do you apply this statute to what we have here?

20 MR. KORZEN: Yes.

21 JUSTICE KAGAN: Is there a single applicable  
22 limitations period which represents the period when,  
23 given both clauses, you can sue, or are you saying that  
24 there are two applicable limitations periods?

25 MR. KORZEN: In this statute, two, and in a

1 small number of other States, there are two periods,  
2 both a 3-year period and a 10-year period.

3 JUSTICE SCALIA: Well, then you stumble into  
4 the difficulty that Petitioner pointed out, or maybe it  
5 was the government pointed out. (A) (1) does not refer  
6 to two statutes of limitations. It says if the  
7 applicable limitations period for such action as specified in  
8 the State statute of limitations provides a commencement  
9 date which is earlier. Now, you know, if they were  
10 really covering two different, or envisioned that in  
11 some States you had two statutes of limitations, it  
12 seems to me they should have phrased it differently: If  
13 the applicable limitations period or periods for such  
14 action as specified in the States' statutes of  
15 limitations provide -- provides a commencement date or  
16 commencement dates, something like that. It's all in  
17 the singular.

18 MR. KORZEN: Yes, Justice Scalia. Let me  
19 address the singular point. What we have here again is  
20 a hybrid statute of limitations with two periods, which  
21 were rare then and rare now. But in that rare  
22 situation, the applicable limitations period is the one  
23 that a defendant is asking the court to apply to dismiss  
24 a case with prejudice. And in this case, that's the  
25 10-year period. That's the applicable limitations

1 period.

2 Now, the Petitioner, on the other hand, and  
3 the government, they both say there's no period in this  
4 case -- there's no period in this case where a case may  
5 have been brought. So in other words, under their  
6 reading, there is no applicable period, and that -- the  
7 statute here can easily be read to have two periods --

8 JUSTICE SOTOMAYOR: I don't know why you  
9 are -- you are even caring. Isn't the applicable  
10 limitations period, as far as you are concerned, the  
11 period in which you can bring a suit? And that would be  
12 the shorter one under all circumstances. And aren't you  
13 saying that statutes of repose are preempted because you  
14 couldn't bring a suit?

15 MR. KORZEN: Yes, Your Honor. And  
16 that's shows -- that gets to the contradiction that was  
17 brought up during the Petitioner's argument. The  
18 Petitioner argues that Congress only addressed one part  
19 of the study group's recommendations, the discovery rule  
20 but not repose periods. But on the other hand they  
21 argue, under our reading, a repose period would never  
22 apply. And that's -- that shows that the study group's  
23 recommendations were carried out.

24 JUSTICE SCALIA: But, you know, the statute  
25 does not refer to your cause of action, so it's hard to

1 say that the period refers to -- it refers to is the  
2 period that you are trying to get around. It says if  
3 the limitations period for such action, that is, any  
4 action brought under -- any action brought under State  
5 law.

6 I think to read that as applying to whatever  
7 limitations period is asserted by -- against a  
8 particular plaintiff, I find it hard to read it that  
9 way. It seems to me they're referring to a limitations  
10 period for the action that exists under State law,  
11 regardless of what is alleged in the particular  
12 complaint. Anyway, I -- I think you got a real problem  
13 with the singular versus plural phrasing of number (1).

14 MR. KORZEN: Well, to say one more thing  
15 about singular versus plural, we have cited the  
16 Dictionary Act, 1 U.S. A. -- 1 U.S.A. -- U.S.C. 1 which says  
17 that the singular ordinarily is read as the plural.  
18 Now, I know there's been a couple of decisions saying  
19 that's a rarely-applied rule.

20 JUSTICE KAGAN: But I mean, I take it, Mr.  
21 Korzen, that your argument is a little bit different. I  
22 mean, it seems Justice Scalia would have a point if it  
23 just said if the limitations period. Your argument is  
24 that you put in the word "applicable" and it actually  
25 makes the statute read a little bit differently. It

1 suggests that there are plural limitations period and  
2 the one that this provision applies to is whichever one  
3 happens to be applicable as you apply the provision.

4 MR. KORZEN: I think that's exactly right,  
5 Justice Kagan --

6 JUSTICE SCALIA: Yeah, except they are both  
7 applicable to this cause of action. They -- both of  
8 those periods are applicable. You run afoul of one of  
9 them, but not of the other one. It doesn't mean  
10 they're -- they are not both applicable. Anyway, this  
11 is -- this is -- it is angels on the head of a pin,  
12 isn't it?

13 (Laughter.)

14 MR. KORZEN: If I could speak a little bit  
15 about commencement date, commencement date is defined as  
16 the beginning of the period when an action may be  
17 brought. And Petitioner and the government argue that  
18 there never was a period when an action may be brought  
19 here. And in fact -- however, on page 18, we've cited  
20 numerous authorities that define a repose period as  
21 exactly that, when an action may be brought. That's a  
22 definition for a repose period.

23 JUSTICE GINSBURG: But if you take this, the  
24 facts of this case, 10-year statute of repose, there was  
25 never a time when these plaintiffs -- when this -- these

1 plaintiffs had an action that could be brought, just  
2 because the 10-year limitation ended their right to sue  
3 before they had a claim.

4 MR. KORZEN: Yes, Your Honor, except that  
5 that's not how the terms are defined. And we've cited  
6 cases on page 18 of -- North Carolina cases, in fact,  
7 and also the corpus Juris section that Petitioner relied  
8 on defining a statute of repose exactly as that, as a  
9 period when an action may be brought when.

10 Now, in their reply brief, Petitioner  
11 says -- faced with those authorities, Petitioner says,  
12 Well, no, no, a repose period is actually a period after  
13 which an action may not be brought.

14 But that's really just two ways of saying  
15 the same thing. When an action may be brought or a  
16 period after which an action may not be brought.

17 CHIEF JUSTICE ROBERTS: Well, it depends  
18 whether they have a discovery rule or not, whether it's  
19 a period when an action may be brought or whether it's a  
20 period after which an action may not be brought. And  
21 the whole purpose of this was to require a discovery  
22 rule. And once you require a discovery rule, the  
23 statute of repose has completely independent meaning,  
24 complete -- serves a completely independent office.

25 MR. KORZEN: The purpose, however, Mr. Chief

1 Justice, was to preserve claims for latent harm, no  
2 matter what the period was that began. The purpose was  
3 to have a uniform trigger date that started the time to  
4 bring an action once you had discovered your harm.

5 And if you use the defined terms here, then  
6 it applies to any type of period, whether you call it a  
7 limitations period or repose period, no matter what you  
8 call it.

9 CHIEF JUSTICE ROBERTS: Well, but the  
10 purpose of the statute of repose is not to preserve  
11 latent causes of action. It's quite the opposite. It's  
12 to put an end to in particular latent causes of action  
13 that haven't been brought.

14 MR. KORZEN: Yes, Your Honor, but Congress's  
15 purpose was to preserve claims, no matter what the  
16 period was. Congress's -- Congress was concerned about  
17 people not having their day in court -- and this is in  
18 the House conference report; it's all over the study  
19 group report -- people not having their day in court  
20 because a period ran before they -- began to run before  
21 they discovered their harm. And that applies to whoever --

22 JUSTICE SOTOMAYOR: Was Congress doing away  
23 with -- I don't know if any such State exists, but  
24 assume a State said, nah, we're tired of environmental  
25 claims. You can't have them. We're not going to have



1 one at all. Was Congress preempting that decision?

2 MR. KORZEN: Not here in 9658, Your Honor.

3 No, Congress was preempting the commencement date --

4 JUSTICE SOTOMAYOR: So why isn't a repose  
5 like that? Why isn't a statute of repose simply a  
6 decision that you just can't have a claim at all if it's  
7 older than 20 years old?

8 MR. KORZEN: Well, going back to the plain  
9 wording, Your Honor, it has a commencement date. It has  
10 a beginning. It begins from the defendant's last act.  
11 It does have a beginning. And it's not --

12 JUSTICE GINSBURG: But it's not a  
13 commencement date in terms -- "commencement" means  
14 commencement of a lawsuit. The true trigger for the  
15 statute of repose here is not a commencement of a  
16 lawsuit date. It is the commencement of the running of  
17 the limitation period. But it isn't the time when you  
18 can commence a lawsuit.

19 MR. KORZEN: It is the beginning of the  
20 period of a time when an action may be brought, which is  
21 exactly how Congress defined the term. It is -- it does  
22 have a commencement date because it does have a  
23 beginning, and it does define a period when an action--

24 JUSTICE GINSBURG: But you couldn't commence  
25 an action. Say the last -- the defendant commits the

1 last act, and then plaintiff sues the next day. Well,  
2 plaintiff can't sue the next day because the plaintiff  
3 doesn't know that she's been injured.

4 MR. KORZEN: Correct, Your Honor. But that  
5 is not how Congress defined the terms. Congress gave specific--

6 JUSTICE GINSBURG: They picked up -- they  
7 picked up on State statutes. And as I understand it,  
8 the very purpose of the statute of repose or the  
9 built-in statute of limitations is to check the  
10 discovery rule, to say, we don't want the discovery rule  
11 to operate after a certain amount of time, a certain  
12 amount of time has passed.

13 So the notion of what has been called a  
14 statute of repose and a discovery rule, the very purpose  
15 of the repose statute is to say no discovery here.

16 MR. KORZEN: That is -- that is correct,  
17 Your Honor, and that was not Congress's purpose.  
18 Congress wasn't -- in this specific area of hazardous  
19 waste released into the environment, Congress's purpose  
20 wasn't figuring out the difference between these  
21 different statutes and whether the State wanted to bar  
22 claims or not. Congress was trying to preserve claims,  
23 and used defined terms that do preserve claims, no  
24 matter what -- no matter what you call the type of  
25 period. Congress was trying to preserve claims for long

1 latency illness. That's very apparent.

2 And my friends, the Petitioner and the  
3 government, you'll notice in their brief they maybe  
4 mentioned latency once. Today at oral argument, neither  
5 have mentioned latency. That's -- that's what Congress  
6 was concerned about. It's all over the study group  
7 report. It's in the House conference report more times  
8 than they brought up here. Latency and long latency  
9 illness is exactly what Congress was concerned about.  
10 And repose periods affect that more than any other type  
11 of limitations period.

12 So if I could talk a little bit about the  
13 purpose of the Act. The evolution of this statute is  
14 very important here. It dates back to 9651, which was  
15 enacted in 1980, when CERCLA itself was enacted. 9651  
16 set up the study group to study barriers to recovery,  
17 to -- in cases involving harm to man and the  
18 environment, barriers to recovery.

19 And the study group was a very distinguished  
20 group with attorneys generals and others from the legal  
21 community. And the study group determined that a main  
22 barrier to recovery were limitations periods that ran  
23 before people discovered their harm and unanimously  
24 recommended that States act to enact discovery rules but  
25 also abolish repose periods. And then the House

1 conference report states that's what was addressed, the  
2 problem of long latency illnesses --

3 JUSTICE KAGAN: But it seems an awfully  
4 strange way to abolish a repose period, right? I mean,  
5 one way to abolish a repose period is just to abolish a  
6 repose period. Another way is to say what Congress  
7 seems to have said here, which is move the first date of  
8 the period of repose up to a new Federal commencement  
9 date so that the period of repose wholly -- is wholly  
10 redundant as to the limitations period.

11 Now, that's a kind of strange way to do a  
12 pretty simple thing, isn't it?

13 MR. KORZEN: I disagree, Justice Kagan.  
14 It's a very short statute. And what you've just said,  
15 as the amicus brief -- as the amicus brief for Jerome  
16 Ensminger and others pointed out, it's a very simple  
17 and effective way of accomplishing this. It's a short  
18 statute, and then, as you say, it does away with repose  
19 periods that have actually run. So it's actually a  
20 fairly compact and effective way of doing that.

21 Yet also, it's also respectful for States'  
22 rights in a couple of ways. It -- rather than creating  
23 a new cause of action, it allows the State -- the  
24 content of State law to continue. It's just the  
25 starting point that was affected. It's respectful of

1 States' rights in that way. And also very few States  
2 even have one of these repose periods. So it was a very  
3 simple and effective way to do it, not a -- you know,  
4 perhaps it could be done -- be done differently. And we  
5 could always say Congress could be more clear. But it's  
6 actually a very simple and clear and effective way of  
7 doing that.

8 And the other side by saying that the  
9 statute effectively eliminates repose periods shows how  
10 effective that is. That's on Petitioner's brief,  
11 page 14. It's in the government's argument today, that  
12 the statute makes repose periods superfluous. Or in  
13 other words, they've been abolished. It's actually a  
14 very, very simple and short --

15 CHIEF JUSTICE ROBERTS: Well, wait. On the  
16 one hand I thought you just told us they were respectful  
17 of the States' concerns. And now you say they  
18 completely abolished repose periods.

19 MR. KORZEN: Yes, Your Honor, I said it  
20 was -- yes, Mr. Chief Justice. It's respectful in that  
21 it allowed State law to continue. And if you look at  
22 what Congress was facing --

23 CHIEF JUSTICE ROBERTS: Well, I'm sorry.  
24 Not the State law with respect to repose.

25 MR. KORZEN: No. But the State -- the State

1 tort claims we're talking about, such as nuisance and  
2 trespass and negligence, and the entire content of State  
3 law is respected. And I do have to correct something my  
4 friend Mr. Murray said. Repose periods under North  
5 Carolina law, they are not an element of a defense that  
6 has -- that has to be pled.

7 I've been a North Carolina attorney  
8 continuously since 1992. I have to tell you as an  
9 officer of the court, they are not pled as part of  
10 complaints. And when somebody wants to move based on a  
11 repose period, they do it the same way they would move  
12 to dismiss under any limitations period under a Rule  
13 12(b) (6) or 12(b) (2) motion.

14 JUSTICE KENNEDY: Is it waived if it's not  
15 pled?

16 MR. KORZEN: Is which waived?

17 JUSTICE KENNEDY: Is the statute of repose  
18 waived if it's not raised as a defense?

19 MR. KORZEN: There are conflicting State  
20 cases on that. I think some say -- well, it would be  
21 pled at some point. It doesn't have to be raised as an  
22 affirmative defense, as some cases say. It doesn't have  
23 to be raised as an affirmative defense, as some cases  
24 say. But it is raised in the same way. It's not an  
25 element -- it's not an element a court would look at in,

1     like, a Twombly-Iqbal-type situation and say, well, you  
2     didn't plead this as an element.

3             JUSTICE ALITO:             What if the State wanted to  
4     enact a very long statute of repose, and they said,  
5     look: We want to protect latent claims, but there has  
6     to be some limit. So we're going to -- we're going to  
7     enact a statute of repose of 30 years or 50 years.  
8     Under your reading, that would be wiped out as well,  
9     right?

10            MR. KORZEN:            It would, Your Honor, and the  
11     reason why, the reason why is what the Congress was  
12     concerned about here, which was long latency periods.  
13     And periods of up to 40 years are mentioned in the study  
14     group report. And though that seems like a long period,  
15     see, this is really a policy decision. Limitations  
16     periods are really pure policy. This Court said so back  
17     in 1945 and other times, and Congress made that as a  
18     policy decision.

19            If the polluter is not on the hook after 30  
20     years, who would be, Justice Alito? It would be the  
21     innocent neighbor living nearby? The innocent cancer  
22     victim? All of us as taxpayers? Congress made that  
23     policy choice that it should be the polluting company  
24     that's put the environmental -- hazardous waste into the  
25     environment.

1           And, again, it has limited -- it does have a  
2   very specific focus, this statute. It's limited to  
3   hazardous wastes released from a facility into the  
4   environment. And in that situation, Congress made the  
5   policy choice: The polluter, you are on the hook, you  
6   stay on the hook, you clean it up as long as it takes.

7           And the other side -- the result -- think  
8   about what the result would be here for the other side.  
9   After 10 years, no liability. The incentive there would  
10   be, instead of clean-up, which is the reason 9658 has  
11   been passed, instead of clean-up, that would encourage  
12   cover-up. And Congress did not want that. Congress  
13   wanted, again, polluters to be on the hook as long as it  
14   took to clean up. In the --

15           JUSTICE GINSBURG:           It encouraged what did  
16   you say?

17           CHIEF JUSTICE ROBERTS:           But you said it  
18   wanted to have polluters on the hook, but they didn't  
19   even take -- if the State did not have any basis of  
20   recovery, this did nothing about that at all. It did  
21   not -- it did not require States to adopt particular  
22   remedies or extend the remedies to cover this. If they  
23   didn't have remedies for this type of action, the act --  
24   the provisions we're talking about now did nothing about  
25   that at all.



1           MR. KORZEN:           Well, 9658, Mr. Chief Justice,  
2   talks about any action under State law for harm to  
3   people or property from hazardous wastes released into  
4   the environment. And so 9658 was specifically looking  
5   at actions for this type of environmental harm.

6           JUSTICE SCALIA:       But the more you talk about  
7   horribles that could happen, a State could say, with  
8   respect to the special cause of action for creating harm  
9   to individuals by hazardous waste, the statute will  
10   begin upon discovery and it will last for 3 months. A  
11   State could do that, right? And that would comply with  
12   this law, wouldn't it? A 3-month statute of  
13   limitations. All the Federal law refers to is when the  
14   statute commences. But it -- it still is left up to the  
15   State to say how long the statute can be, isn't it?

16          MR. KORZEN:           As long as -- what 9658  
17   establishes, Justice Scalia, is a floor. States can do  
18   more, but the floor is --

19          JUSTICE SCALIA:       No, no.

20          MR. KORZEN:           When you've discovered your  
21   harm.

22          JUSTICE SCALIA:       You can answer "yes" or  
23   "no" to that, I think. The State can make the statute  
24   of limitations as short as it wants so long as it  
25   commences upon the discovery.

1           MR. KORZEN:           Yeah, yes, Your Honor, discovery  
2 of the cause of the harm.

3           JUSTICE SCALIA:       So I can -- I can imagine a  
4 lot of horrors that can occur with that, just as you  
5 can imagine horrors that occur under the other system.

6           MR. KORZEN:           Yes, yes, certainly, Your Honor.

7           A couple of other points.           The Petitioner's  
8 argument and the government's argument relies very much  
9 on accrual, and "accrual" was not a term even used in  
10 9658. The plain wording does not even use "accrual,"  
11 and so that's something we wanted to point out.

12           And the study group report itself on page 59  
13 envisioned tort liability under the Federal Tort Claims  
14 Act if the government was the owner of property and had  
15 been negligent with the property. So actions against  
16 the government were foreseen.

17           The study group report again -- the concern  
18 expressed repeatedly about latency also noted that the  
19 problem here is due to groundwater contamination from  
20 industrial solvents. That's exactly what we have in  
21 this case. So back in 1982, the study group envisioned  
22 the problems that the country was having, which was  
23 groundwater contamination from industrial solvents.  
24 This contamination --

25           JUSTICE GINSBURG:       The study group was

1 making recommendations to the States, and it made two  
2 discrete recommendations. One is time the statute of  
3 limitations from awareness of the injury and its cause;  
4 and the second was, instructing to the States, don't  
5 have any repose statutes because they will defeat our  
6 purpose of taking into account latency.

7       So the study group is addressing State law.  
8 Then Congress does something different. It provides a  
9 Federal limitation period that is based on discovery of  
10 the injury plus the cause. The second recommendation  
11 made by the study committee abolished statutes of  
12 repose. Congress didn't do that.

13       MR. KORZEN:       Well, I disagree as to them not  
14 having done both, Your Honor. If you -- Congress did  
15 not use the word "repose" in 9658. The -- you know, but  
16 the word choice doesn't matter. If you use the  
17 definitions, Congress effectively did both, and that --  
18 that's our argument. Congress-- Congress did do both. Rather than  
19 waiting on the States to do both, Congress itself did  
20 both in 9658.

21       And to follow up an earlier question of  
22 yours, Justice Ginsburg, a result to the contrary here  
23 would result -- could result in a race to the bottom, if  
24 you will, where States were then incentivized or, you  
25 know, lobbied to enact repose periods. Other States

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1     could do this, and that would be the sort of race to the  
2     bottom Congress would not want. So that is possible.

3             CHIEF JUSTICE ROBERTS:             Is there any sign  
4     that that's happening? I mean, it seems to me that  
5     these are, as you know, rare and have been rare for some  
6     time, right? I mean -- do you really expect States to  
7     start suddenly enacting statutes of repose?

8             MR. KORZEN:             With today's lobbying climate,  
9     I wouldn't put it past the realm of possibility. And it was something--

10            THE COURT:             Are there lobbyists on both  
11     sides of the issue?

12            MR. KORZEN:             I -- I don't want to hazard a  
13     guess as to the relative powers of the lobbyists, but I  
14     think they may -- I think they may go one way and not in  
15     favor the environment.

16            JUSTICE KENNEDY:             Do you want us to write an  
17     opinion that we can't trust State legislatures?

18            MR. KORZEN:             No, Your Honor. What I meant  
19     with that was to follow up an earlier question of  
20     Justice Ginsburg's that I thought was suggesting that.

21            If I could end with one -- with one final  
22     hypothetical. Imagine two individuals at age 18 both  
23     enrolling in -- enlisting in the Marines. And one is  
24     stationed by the government in Camp Pendleton in  
25     California and, after 10 years of being transferred out

1 of Camp Pendleton, develops a fatal cancer. His  
2 relatives would not at all be barred because there is no  
3 repose period in California.

4 Imagine another individual, enlisted at the  
5 same time, stationed by the government at Camp LeJeune  
6 in North Carolina, and after being sent from North  
7 Carolina, developed the same cancer. The relatives in  
8 California would have a claim, the North Carolinians --  
9 the relatives of the North Carolinian would not.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Murray, you have four minutes remaining.

12 REBUTTAL ARGUMENT OF BRIAN J. MURRAY

13 ON BEHALF OF THE PETITIONER

14 MR. MURRAY: Thank you, Your Honors.

15 Briefly, I just would cite -- just to  
16 respond to a point my brother made here. I would cite  
17 the Hargett v. Holland, 447 S.E.2d 787 in the North  
18 Carolina Supreme Court, as well as Tipton and Young  
19 Construction Company, 446 S.E.2d 603 from the North  
20 Carolina Court of Appeals, both of which made clear that  
21 statutes of repose are conditions precedent that must be  
22 specifically pled under North Carolina law.

23 But the broader point is simply this:  
24 CERCLA as originally enacted is a cleanup statute  
25 designed to tag people who have touched the property at

1 all with cleanup responsibility regardless of fault.  
2 That's what it did when it was enacted in 1980 and  
3 that's what it still continues to do today.

4 When Congress, in 1986, in response to the  
5 study group report, enacted this 1960 -- 9658 section,  
6 this small surgical change, it did so using defined  
7 terms that -- and it said what it meant and it meant  
8 what it said. Applicable limitations period doesn't  
9 mean any one that might apply, it's defined in the  
10 statute, and may be brought is linked up with beginning  
11 of may be brought. That is classic formulation at the  
12 beginning of the statute of limitations, not a statute  
13 of repose, which commences with defendant's last act.

14 And again, this just makes sense. In  
15 drafting this statute, Congress was expressly trying to  
16 minimize -- it may or may not have had in its head  
17 specifically the presumption against preemption, but  
18 this Court presumes that it does. It was seeking to  
19 minimize intrusion into a traditional area of State  
20 regulation, and we know that because the statute on its  
21 face says: "State law generally applies except as  
22 provided in this provision." It leaves all the State  
23 law intact other than this commencement date and  
24 conspicuously does so. And the presumption against  
25 preemption, and the legislative history only confirmed

1 this, Congress wanted 50 flowers to bloom in this area  
2 and it didn't cut that off. And for good reason.

3       Repose is an important piece of this puzzle.  
4 It's the counterbalance to the discovery rules that were  
5 being enacted by these States in this tumultuous period.  
6 By setting a statute of repose, you avoid the very real  
7 possibility that a client like mine can be sued over a  
8 site -- I mean, there's a fence around a hole in the  
9 ground there now. My client hasn't -- has abandoned  
10 this site in 1987. This suit was brought in 2009.  
11 Asking clients to defend these cases, where are the  
12 documents? Where are the witnesses? How do you avoid  
13 vexatious litigation designed to shake down settlements  
14 40, 50 and 60 years after you've abandoned a site?

15       What Congress did here makes absolute sense  
16 and the narrow and surgical way in which they did it,  
17 given that they were acting in a traditional field of  
18 State law supremacy, makes all the sense in the world.

19       JUSTICE SOTOMAYOR:           Counsel, that last  
20 argument about, you know, liability 30, 40 years later,  
21 I think 46 States have that. Have it that way. And  
22 Congress wasn't all that worried about that and there  
23 isn't a very strong policy argument that -- that says  
24 it's not -- that it's so fundamentally unfair that you  
25 shouldn't do it.

1           MR. MURRAY:           Well, again, Your Honor,  
2   actually, a lot of those States have statutes of repose  
3   that deal with property specifically, not personal  
4   injury. It gets a little bit messy because there's not  
5   a perfect match there. But the bottom line is the way  
6   in which Congress acted here is not at all surprising,  
7   given that they knew they were acting in a traditional  
8   State field, from the heartland of State authority  
9   which, was State tort law.

10           Unless the Court has further questions.

11           CHIEF JUSTICE ROBERTS:           Thank you, counsel.

12           Counsel.           The case is submitted.

13           (Whereupon, at 12:16 p.m., the case in the  
14   above-entitled matter was submitted.)

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