No. 13-339

IN THE
Supreme Court of the United States

CTS CORPORATION,
Petitioner,

v.

PETER WALDBURGER, ET AL.,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

BRIEF OF ENVIRONMENTAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MICHAEL J. BRICKMAN
Counsel of Record
RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN
LLC
1037 Chuck Dawley Boulevard
Building A
Mount Pleasant, SC 29464
(843) 727-6500
(mbrickman@rpwb.com)

April 2, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

LEGISLATIVE MATERIALS

OTHER MATERIALS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of law who work in the area of environmental law. They are familiar and concerned with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), one of the cornerstones of federal environmental law. *Amici* are also familiar and concerned with many aspects of the longstanding legal and policy problems raised by litigation over environmental contamination, and are interested generally in the development of environmental law. *Amici* believe that this case is an important one: it will affect the ability of many individuals and businesses to seek relief in the courts for various forms of environmental contamination and to hold accountable those responsible for such contamination. Because of that importance, *amici* believe this Court should make its decision based on complete and accurate information not only about CERCLA itself, but also about the legal background against which CERCLA was enacted.

This brief addresses one specific aspect of that legal background: the asserted distinction between statutes of limitation and statutes of repose, on which petitioner CTS Corp. ("CTS") relies heavily. In

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that neither any party nor any counsel for a party authored this brief in any part and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have consented to the filing of this brief; petitioner filed a letter granting blanket consent to the filing of *amicus* briefs, and written consent from respondents to the filing of this brief is being filed contemporaneously with the brief.

the view of *amici*, CTS's assertions are fundamentally incorrect. Although respondents address this issue, *see* Resp. Br. 23-28, *amici* hope that this Court may find useful a more detailed examination.

Amici are described below in alphabetical order.[2]

Ronald G. Aronovsky is a Professor of Law at Southwestern Law School. He has written and taught in the area of environmental law, including as it relates to CERCLA. He also previously litigated CERCLA cases while in private practice.

William W. Buzbee is a Professor of Environmental Law at Emory Law School, where he heads the school's Environmental and Natural Resources Law Program. He has written in the areas of environmental federalism and preemption, including as they relate to CERCLA. He also previously litigated CERCLA cases and handled transactions settling CERCLA liability while in private practice.

Donald T. Hornstein is the Aubrey L. Brooks Professor of Law at the University of North Carolina School of Law. He has written and taught in the areas of environmental law and environmental policy.

Alexandra Klass is a Professor of Law at the University of Minnesota Law School. She has written and taught in the areas of environmental law and tort law, including the interactions between CERCLA and state law remedies. She also previously litigated CERCLA cases while in private practice.

Thomas O. McGarity is the Joe R. and Teresa Lozona Long Endowed Chair in Administrative Law at the University of Texas at Austin School of Law. He has written and taught in the areas of environ-

---

[2] *Amici* join this brief as individuals; their institutions are set forth for purposes of identification only.

mental law and preemption, including as they relate to CERCLA.

Sidney A. Shapiro is a University Distinguished Chair in Law at Wake Forest University School of Law. He has written and taught in the areas of environmental law, tort law, and preemption, including as they relate to CERCLA.

Rena I. Steinzor is a Professor of Law at the University of Maryland School of Law. She has written and taught in the areas of environmental regulation and environmental policy, including as they relate to CERCLA. She also previously litigated CERCLA cases while in private practice and served as staff counsel to the Subcommittee on Commerce, Transportation, and Tourism in the House of Representatives from 1983 to 1987, including the time at which that body was considering the 1986 amendments to CERCLA.

A. Dan Tarlock is a Distinguished Professor of Law and the Director of the Program in Environmental and Energy Law at the Illinois Institute of Technology Chicago-Kent College of Law. He has written and taught in the areas of environmental policy, natural resources, and international environmental law, including as they relate to CERCLA.

SUMMARY OF ARGUMENT

Congress passed 42 U.S.C. § 9658 as part of CERCLA to enable plaintiffs who were injured by acts of environmental contamination to seek relief against defendants who released toxic chemicals into the environment, even though the plaintiffs might not know that they were injured – and indeed might not *be* injured – until many years after the chemicals' release. Respondents (collectively, "Waldburger") ably show why the text, history, and purpose of CERCLA compel the conclusion that Congress meant § 9658 to superimpose a federally required commencement date on all time limits to bring suit imposed by state law – including the subcategory of time limits that courts sometimes refer to as "statutes of repose."

This brief addresses and amplifies one point in support of Waldburger's position: when Congress passed CERCLA in 1986 – and indeed continuing to the present day – the term "statute of limitations" was often used in a broad sense that encompasses "repose" periods such as the one at issue here. Petitioner CTS Corp. ("CTS") argues that, by 1986, the term "statute of limitations" had become a term of art with a limited, narrow meaning that did not include statutes of repose. But an examination of the ways in which Congress, the courts, and commentators have used and defined the terms "statute of limitations" and "statute of repose" shows that CTS's terminological argument is wrong.

I. This Court has often and recently used the term "statute of limitations" in a broad sense that easily includes the 10-year period in N.C. General Statutes § 1-52(16), the time limit at issue here. That term encompasses any statute that "estab-

lish[es] the period of time within which a claimant must bring an action," *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013), which is just what § 1-52(16) does. Although most limitations periods begin to run no earlier than a potential plaintiff can bring an action – that is, when the cause of action accrues – CTS errs when it claims that "accrual" is part of the definition of a statute of limitations. This Court has recognized in *Heimeshoff* and in other cases that there is a presumption that limitations periods begin to run at the time of accrual, but that is not an invariable rule. When a time period does not follow that rule, it is still a statute of limitations so long as it is designed to promote the goal generally served by such periods: "certainty and repose" for defendants. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1234 (2014).

II. The term "statute of repose" has a number of meanings. As an initial matter, Congress practically never uses the term at all. The current U.S. Code contains no reference to any "statute of repose" or "repose period," and only one uncodified law contains any such reference. That is so even though Congress has created numerous time periods that fit CTS's description of a statute of repose. Congress simply has not used CTS's preferred label.

As for the courts, their use of the term has evolved over time. This Court's older cases, which contain the large majority of its uses of the term "statute of repose," use it simply to mean any statute that serves the policy of repose, including any statute of limitations. The term began to acquire an additional, specialized meaning in the 1970s and 1980s, referring specifically to the type of period at issue here – a period that runs from some independent

event rather than from the accrual of a cause of action, and that is distinguished from a traditional statute of limitations. Contrary to CTS's assertions, however, those narrower meanings are not and never have been exclusive for either "statute of limitations" or "statute of repose." Instead, this Court and other courts have continued to use both terms in their older, broader senses, and have recognized their overlapping and interchangeable definitions.

III. Examples from the U.S. Code further show that Congress and this Court can and often do describe a "statute of repose" (using the narrow definition of that phrase) as a "statute of limitations," a "limitations period," or a measure for the "limitation of actions." Congress has created time periods that fit the narrow "repose" definition in the varying contexts of securities law, aviation tort claims, the Employee Retirement Income Security Act of 1974, the Fair Housing Act, and the Vaccine Act. In some instances, Congress even indicated in the legislative history that it intended to create a "statute of repose." In every instance, however, Congress used "limitations" language in the statute itself; and, in several instances in the securities context, this Court has likewise used the term "statute of limitations" to describe a "repose" period.

In sum, the terminological distinction that CTS seeks to draw cannot withstand scrutiny. There is no reason to think that Congress would have referred specifically to a "statute of repose" in CERCLA to show its intent to preempt N.C. General Statutes § 1-52(16) and similar statutory time periods. On the contrary, there is every reason to think it would have considered such periods as within the accepted, broad definition of a "statute of limitations."

ARGUMENT

The phrases "statute of limitations" and "limitations period" were in 1986 and are today commonly used to refer to a broad range of time limitations to bring suit, including the particular category of limitations period sometimes called a "statute of repose." CTS's arguments in this case rest on the contrary, erroneous premise that there is a "fundamental difference" between a "statute of limitations" and a "statute of repose," so that, "[a]t the time Congress enacted § 9658 in 1986, the phrase 'statute of limitations' was a recognized term of art that did not encompass statutes of repose." Pet. Br. 21, 28. This brief supplements Waldburger's persuasive showing, *see* Resp Br. 23-28, that CTS is incorrect. The rigid terminological distinction portrayed by CTS does not even exist today. At the very least, no such distinction was clearly established when Congress enacted CERCLA.

I. THE TERMS "STATUTE OF LIMITATIONS" AND "LIMITATIONS PERIOD" HAVE A BROAD GENERAL MEANING

Courts generally use the phrase "[s]tatute[] of limitations" to refer to a law that "establish[es] the period of time within which a claimant must bring an action." *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013); *see Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1234 (2014) (quoting *Heimeshoff*); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998) ("[A] typical statute of limitations provide[s] that a cause of action may or must be brought within a certain period of time."). Statutes of limitations "characteristically embody a 'policy of repose, designed to protect defendants,'" *Lozano*, 134 S. Ct. at 1234 (quoting *Burnett v. New York Cent.*

R.R. Co., 380 U.S. 424, 428 (1965)), and promote "'certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities,'" *id.* (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)).

That general definition of a "statute of limitations" has been in use for more than a century. *See*, *e.g.*, *Levy v. Stewart*, 78 U.S. (11 Wall.) 244, 249 (1871) (explaining that "[s]tatutes of limitations . . . proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period"); 1 Horace G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 1, at 2-3 (4th ed. 1916) ("[S]tatutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are . . . statutes of limitation."), *quoted in Beach*, 523 U.S. at 416.

CTS asserts that it is a defining characteristic of a "statute of limitations" that it begins to run "'on the date when the claim accrued.'" Pet. Br. 21 (quoting *Black's Law Dictionary* 1546 (9th Cir. 2009)). This Court's cases say otherwise. True, there is a default presumption that a "limitations period commences when the plaintiff has a complete and present cause of action," which is also referred to as the time that the cause of action "accrues." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418-19 (2005) (internal quotation marks omitted). The presumption, however, is only a presumption and can be overcome by evidence of contrary legislative intent. *See Heimeshoff*, 134 S. Ct. at 610-11 ("[W]e have recognized that statutes of limitations do not inexorably commence upon accrual."). This Court has never suggested that a statute of limitations ceases to be a statute of limitations merely

because it is triggered by some event other than the accrual of a cause of action.

On the contrary, when this Court has needed to determine as a matter of federal law whether a particular time period should be treated as a "statute of limitations," it has asked whether that period "'serves the same "basic policies [furthered by] all limitations provisions"'" – that is, "certainty and repose." *Lozano*, 134 S. Ct. at 1234 (quoting *Young v. United States*, 535 U.S. 43, 47 (2002), in turn quoting *Rotella*, 528 U.S. at 555) (alteration in *Lozano*). The fact that the North Carolina statute at issue here has special features intended to make it more protective of those basic policies thus merely underscores that it is a type of statute of limitations.

II. THE TERM "STATUTE OF REPOSE" HAS MULTIPLE MEANINGS THAT HAVE EVOLVED OVER TIME

Congress itself has never used the term "statute of repose" in legislation. The word "repose" appears in only one subsection of the entire U.S. Code, and that appearance has nothing to do with the timeliness of suit.[3] Only one uncodified law, enacted in 1992, refers to a "period of limitation or repose," Act of Aug. 11, 1992, Pub. L. No. 102-339, § 3, 106 Stat. 869, 869-70 (suspending such periods for certain Indian land claims), and it does so in a section headed "Statute of Limitation," which suggests that Congress in 1992 thought the overall heading encompassed the repose

---

[3] *See* 30 U.S.C. § 1265(b)(3) (referring twice to the "angle of repose," an engineering term). The statement in text reflects a search of the WestlawNext database "United States Code Unannotated" conducted on March 27, 2014. *See also McDonald v. Sun Oil Co.*, 548 F.3d 774, 784 (9th Cir. 2008) (reporting an identical result from a similar search).

periods affected by its legislation.[4] Notably, all this is true even though Congress has enacted numerous statutes that this Court and other courts have characterized as statutes or periods of "repose." *See infra* Part III (discussing examples).

Courts and commentators use the phrase "statute of repose" in a number of different ways, and legal and scholarly usage has changed over time. This Court has most often used the phrase in its older cases to refer to a statute that promotes the policy of repose. *See*, *e.g.*, *Shipp v. Miller's Heirs*, 15 U.S. (2 Wheat.) 316, 324 (1817) (Story, J.) ("The statute of limitations is emphatically termed a statute of repose; it is made for the purpose of quieting rights, and shutting out stale and fraudulent claims.").[5] In this general, normative sense, there is no distinction between a statute of "repose" and one of "limitations." The Court and its members continued to use the term "statute of repose" in this way in the 1970s and 1980s with some regularity, *see*, *e.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 659, 663 (1987) (describing the application of a "2-year statute [of limitations]" to a claim under 42 U.S.C. § 1981 as

---

[4] The statement in text reflects searches of the WestlawNext databases "Statutes at Large," "U.S. Public Laws," and "U.S. Public Laws – Historical," all conducted on March 27, 2014. *See also In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 900 F. Supp. 2d 1055, 1065 (C.D. Cal. 2012) (reporting an identical result from a similar search).

[5] *See also*, *e.g.*, *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 136 (1938) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time."); *United States v. Wiley*, 78 U.S. (11 Wall.) 508, 513 (1871) ("Statutes of limitations are indeed statutes of repose.").

"consistent with . . . the general purposes of statutes of repose"),[6] and it has done so as recently as 2007, *see Wallace v. Kato*, 549 U.S. 384, 391 (2007) (describing a two-year statute of limitations as a "supposed statute of repose").

The general, broad definition of the term "statute of repose" coexists with several technical, narrower definitions. Those definitions arose primarily from late-twentieth-century efforts to reform state tort law by imposing stricter time limits on the ability of plaintiffs to bring actions. *See* Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 587-88 (1980-81) ("McGovern") (describing the passage of "statutes of repose" to benefit architects, contractors, doctors, and product manufacturers). The purpose of the new "repose" periods was to cut off after a certain period the possibility of liability even though some plaintiffs would have individually persuasive reasons for not having brought suit earlier – such as not having known of their injury, or even never having been injured at all, before the cut-off date.

The use of the term "statute of repose" to describe those innovations in state law led to considerable linguistic confusion. As of 1981, one commentator surveying the field observed five different views of

---

[6] *See also United States v. Kubrick*, 444 U.S. 111, 117 (1979) (describing the purposes of "[s]tatutes of limitations" and adding that "[t]hese enactments are statutes of repose"); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978) (quoting a lower court's description of § 5(i) of the Clayton Act, 15 U.S.C. § 16(i)); *Jones v. Thomas*, 491 U.S. 376, 392 (1989) (Scalia, J., dissenting) ("[T]he Double Jeopardy Clause is a statute of repose for sentences as well as for proceedings.").

the relationship between a statute of "limitation" and one of "repose":

> In the most general sense, a statute of repose and a statute of limitation are identical – "legislative enactments [that] prescribe the periods within which actions may be brought." . . . A second definition suggests that a statute of repose is a general term that encompasses various statutes, including statutes of limitation. . . . A third approach indicates that a statute of repose is merely one type of statute of limitation. . . . The fourth definition holds that a statute of repose is distinct from a statute of limitation because it begins to run at a time unrelated to the traditional accrual of the cause of action. . . . A fifth definition of "statute of repose" has been found in the "useful safe life" provisions of product liability statutes.

Id. at 582-86 (footnote omitted). The article goes on to use N.C. General Statutes § 1-52(16) – the statute at issue in this case – as an illustration of the third category: a statute of repose that is "merely one type of statute of limitation." *Id.* at 583.[7] A 1991 edition of a leading treatise on limitations principles set forth the same five definitions. *See* I Calvin W. Corman, *Limitation of Actions* § 1.3.2.1, at 30-31 (2d ed. 1991) ("Corman") (summarizing and incorporating

---

[7] *See* McGovern, 30 Am. U. L. Rev. at 583-84 (describing the situation in which "a statute of repose is the portion of a statute of limitation that places a cap or outer limit on a statute that begins to run when a party discovers the existence of an injury or a cause of action," and citing examples including § 1-52(16)); *see also* I Corman § 1.3.2.1, at 30 (adopting a similar "cap or outer limit" definition).

McGovern's "[f]ive definitions").[8] CTS's discussion of the issue cites sources that focus on the fourth definition noted by the McGovern article. *See* Pet. Br. 29-33. CTS ignores, however, the substantial contrary evidence showing that the fourth definition was not the only one (and not even necessarily the most commonly used one) in 1986.

This Court and its members have used the terms "statute of repose" or "period of repose" in the narrow sense invoked by CTS in only a small number of cases, all decided after 1990. *See Credit Suisse*, 132 S. Ct. at 1419, 1421 (using "statute of repose" in summarizing an argument the Court did not reach); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991) (plurality) (referring in passing to "suit[s] . . . barred . . . by statutes of limitation or repose"); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (referring to the three-year period established by 15 U.S.C. § 77m as a "period of repose inconsistent with tolling").[9] Further, in *Lampf* – its most extensive discussion of any repose period to date – the Court also called the same three-year period "a portion of a[] . . . statute of limitations," 501 U.S. at 362 n.8, dispelling any suggestion that it might have meant to adopt the sort of rigid taxonomy for which CTS advocates. *See infra* p. 18.

---

[8] This Court has previously relied on the Corman treatise as an authority on limitations issues. *See*, *e.g.*, *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) (citing Corman with approval); *Merck & Co. v. Reynolds*, 559 U.S. 633, 645 (2010) (same); *Wallace*, 549 U.S. at 391 (same).

[9] *See also Stogner v. California*, 539 U.S. 607, 652 (2003) (Kennedy, J., dissenting) (discussing certain state laws that "toll . . . limitations periods for minors . . . even when the tolling conflicts with statutes of repose").

Lower courts have recognized that the terms "statute of limitation" and "statute of repose" often are and have been used in interchangeable or overlapping ways. In the circuit split that led this Court to take this case, both the Fourth and Ninth Circuits took that view. *See McDonald*, 548 F.3d at 781 & nn.3-4 (collecting cases and articles); *see also* Pet. App. 13a (following *McDonald*'s "historical analysis") (internal quotations marks omitted). The Second and Tenth Circuits reached the same conclusion in another recent pair of cases that interpreted the phrase "statute of limitations" as used in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and in the Housing and Economic Recovery Act of 2008. *See FHFA v. UBS Americas Inc.*, 712 F.3d 136, 142-43 (2d Cir. 2013) ("[a]lthough statutes of limitations and statutes of repose are distinct in theory, the courts – including the Supreme Court and this Court – have long used the term 'statute of limitations' to refer to statutes of repose"); *NCUA v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1266 (10th Cir. 2013) (noting "abundant examples of cases that use the term 'statute of limitations' in the broad, generic sense and often treat statutes of repose as a subcategory"), *petition for cert. pending*, No. 13-576 (U.S. filed Nov. 8, 2013).

The same point is further supported by a number of other circuit cases making similar observations – some in the 1980s and 1990s, but others more recently. Such cases include *Wike v. Vertrue, Inc.*, 566 F.3d 590 (6th Cir. 2009), which noted that courts "sometimes distinguish" statutes of limitations and repose but also "often employ these terms as synonyms," *id.* at 595; *Caviness v. DeRand Resources Corp.*, 983 F.2d 1295 (4th Cir. 1993), which described "a statute

of repose [as] a subspecies" of the general category of "statutes of limitations," *id.* at 1300 n.7; *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215 (10th Cir. 1991), which, after distinguishing between statutes of "repose" and of "limitations," noted that "[b]oth types of statutes are often referred to as statutes of limitations," *id.* at 1218 n.2; and *Hatfield v. Bishop Clarkson Memorial Hospital*, 679 F.2d 1258 (8th Cir. 1982), which rejected the notion that there is any "sharp distinction between 'statutes of limitations' and 'statutes of repose,'" *id.* at 1263.[10]

Two state supreme courts have made similar observations. *See Barrett v. Montesano*, 849 A.2d 839, 845 (Conn. 2004) ("[T]his court often has used the term 'statute of limitations' to refer to other statutes that technically function more like statutes of repose."); *Landis v. Physicians Ins. Co. of Wisconsin, Inc.*, 628 N.W.2d 893, 907 n.16 (Wis. 2001) ("[T]he terms 'statute of repose' and 'statute of limitations' have long been two of the most confusing and interchangeably used terms in the law."). Both *Barrett* and *Landis* further noted that, even though some *courts* observe a careful distinction between repose and limitation periods, it is rare for *legislatures* to do so. *See Barrett*, 849 A.2d at 845-46 (noting the Connecticut "legislature's repeated apparent use of

---

[10] Even courts that have endorsed a firm *conceptual* distinction between limitations and repose periods have acknowledged that the *terms* often are used interchangeably. *See*, *e.g.*, *Fields v. Legacy Health Sys.*, 413 F.3d 943, 952 n.7 (9th Cir. 2005) ("the distinction between statutes of limitations and statutes of repose is often blurred"); *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1434 n.17 ("Although the two concepts differ, the terminology has become interchangeable."), *amended on denial of reh'g*, 947 F.2d 897 (10th Cir. 1991), *vacated on other grounds*, *Dennler v. Trippet*, 503 U.S. 978 (1992).

the phrase 'statute of limitations' as also encompassing a statute of repose"); *Landis*, 628 N.W.2d at 907 ("[T]he legislature has not used the words 'repose,' 'statute of repose,' or 'statutes of repose' in the text of *any* statute in force. It is apparent that the phrase 'statute of repose' is judicial terminology and is not featured in legislative lingo."). That is true in the federal system as well, and it is all the more reason that this Court should not draw any inference from the fact that Congress did not use the particular word "repose" in CERCLA.

III. CONGRESS AND THE COURTS OFTEN DESCRIBE "REPOSE" PERIODS USING "LIMITATIONS" LANGUAGE

Numerous specific examples illustrate the general point that neither Congress nor this Court has ever adopted the rigid terminological distinction for which CTS argues in its brief. On the contrary, there are quite a few situations in which one or more of Congress, this Court, and the lower federal courts have referred to the same statutory time period as a statute or period of "limitations" and a statute or period of "repose."

A. Securities Law: 15 U.S.C. § 77m, 28 U.S.C. § 1658(b)

Perhaps the most prominent example of a federal statute structurally similar to N.C. General Statutes § 1-52(16) can be found in the three-year period created by 15 U.S.C. § 77m and the analogous five-year period created by 28 U.S.C. § 1658(b). These periods govern claims for fraud and other misrepresentations or omissions under federal securities law. Both statutes create a shorter period that runs from an investor's discovery of the claim and a longer period that runs from some act or omission of the

defendant. *See* 15 U.S.C. § 77m (one year after "discovery of [an] untrue statement or . . . omission" or of a "violation"; three years after "the security was bona fide offered to the public" or was sold); 28 U.S.C. § 1658(b) (two years after "discovery of the facts constituting the violation" or five years after the "violation" itself).

Both of these statutes meet the broad definition of a "statute of limitations" that this Court set forth most recently in *Lozano* and in *Heimeshoff*: they give a plaintiff a limited time to bring suit so as to provide securities defendants with certainty about their possible liability and repose after the statute has run. *See supra* Part I. But the three- and five-year periods contained within these statutes also meet the narrow definition of a "statute of repose" that CTS erroneously asserts had become clearly distinct from a statute of limitations by the time that CERCLA was enacted in 1986. Indeed, as already noted, this Court recognized in *Lampf* that the three-year period has the characteristics of a "period of repose" and stated that it would therefore not be subject to equitable tolling. 501 U.S. at 363; *see supra* p. 13.

Despite those repose-like characteristics, Congress and this Court have nevertheless referred to the three- and five-year periods of § 77m and § 1658(b) as statutes of limitations. Congress did so in their titles, which designate § 77m as a measure for the "[l]imitation of actions," § 77m, and § 1658(b) as a "statute of limitations for securities fraud," Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, tit. VIII, § 804, 116 Stat. 745, 800, 801. Section 1658(b) was enacted with that title in 2002, well after the time at which CTS incorrectly claims that a sharp distinction between limitations and repose terminology had already emerged.

This Court likewise referred in *Lampf* to the entire "1-and-3-year structure" that appears in § 77m as a statute of limitations. *See* 501 U.S. at 362 (describing that structure as the most "appropriate statute of limitations" for securities fraud claims); *id.* at 362 n.8 (referring to the three-year period as "a portion of an express statute of limitations"). It has done so as to both § 77m and § 1658(b) in other cases before and since. *See Merck*, 559 U.S. at 638 (referring to the 2-and-5-year structure of § 1658(b) as the "applicable statute of limitations"); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995) (stating that *Lampf* "provides a uniform, national statute of limitations" for securities fraud actions); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976) ("Section 13 specifies a statute of limitations of one year . . . [but not] to exceed three years from the time of offer or sale").

This Court's repeated description of § 77m and § 1658(b) as statutes of limitations is particularly significant because of the structural similarity between the securities statutes and N.C. General Statutes § 1-52(16). All three provisions contain a shorter period with a discovery rule capped by a longer period running from the defendant's act or omission that caused harm – what has been "termed [a] 'bifurcated' or 'two-tier' statute[]." McGovern, 30 Am. U. L. Rev. at 584 (footnotes omitted). This Court thought it correct in 1976 (*Ernst*), in 1991 (*Lampf*), in 1995 (*Plaut*), and in 2010 (*Merck*) to call such a bifurcated framework a statute of limitations. That is enough to show that the broader meaning of that term not only was current in the 1980s and 1990s but also remains in use today.

B. General Aviation Revitalization Act of 1994

The General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat 1552 ("GARA"), *reprinted in* 49 U.S.C. § 40101 note, contains an 18-year time limit on certain actions for damages against certain aircraft manufacturers, a period it repeatedly describes as a "limitation period" and an "applicable limitation period." *Id.* §§ 2(a)(1), 2(a)(2), 3(3), 108 Stat. 1553. That 18-year period nevertheless shares the characteristics that CTS identifies with a repose period: it begins running from the delivery of the aircraft or a part of the aircraft, regardless of the date on which a particular plaintiff's cause of action based on any defect in that aircraft might accrue. Congress itself identified the period as a "statute of repose" in the legislative history, *e.g.*, H.R. Rep. No. 103-525(I), at 1, 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638, and courts have adopted the same description, *see*, *e.g.*, *Crouch v. Honeywell Int'l, Inc.*, 720 F.3d 333, 337, 339 (6th Cir. 2013) ("period of repose"). GARA thus shows that Congress can and does use the phrase "applicable limitations period" – the same language that appears in CERCLA's § 9658(a)(1) and § 9658(b)(2) – when it consciously means to refer to a repose period.

C. ERISA: 29 U.S.C. § 1113(1)

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), contains a six-year period after which "[n]o action may be commenced" for a breach of fiduciary duty. *Id.* § 1113. The six-year period runs from either "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could

have cured the breach or violation." *Id.* § 1113(1). Congress gave this period the title "[l]imitation of actions," *id.* § 1113, and referred to it in the legislative history as a "statute of limitations."[11] In *Heimeshoff*, this Court also called § 1113 as a whole a "statute of limitations." 134 S. Ct. at 613. As the Fourth Circuit recently noted, however, § 1113(1) meets the narrow definition of a "statute of repose" because it "begins immediately upon 'the last action which constituted a part of the breach or violation'" – regardless of "'whether any injury has resulted.'" *David v. Alphin*, 704 F.3d 327, 339 (4th Cir. 2013) (citation omitted).

D. Fair Housing Act: 42 U.S.C. § 3613(a)(1)(A)

The Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA"), contains a two-year period for claims based on a "discriminatory housing practice" that runs from "the occurrence or the termination of . . . [that] practice." *Id.* § 3613(a)(1)(A). In *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) (en banc) (Kozinski, J.), the court of appeals held that, in the case of a building that violates the FHA's disability-access requirements, this period can run out before a particular plaintiff is even injured for the violation and even has the opportunity to sue. *See id.* at 463. So construed, the period effectively became a "statute of repose" as CTS uses the term – a point that was highlighted by the dissent. *See id.* at 468 (Fisher, J., dissenting). The majority, however, continued to refer to the period as a "statute of limitations" and a

---

[11] *See* H.R. 10470, 93d Cong. § 698, 1974 WL 186653, at *110 (1973) (earlier version of the bill titling a similar section as "statute of limitations"); S. Rep. No. 93-127, at 47 (1973), 1974 U.S.C.C.A.N. 4838, 4882 (referring to predecessor provision as "statute of limitations").

"limitations period" throughout its opinion. *See id.* at 459-61, 463.

E. Vaccine Act: 42 U.S.C. § 300aa-16(a)(1)

The Vaccine Act, 42 U.S.C. § 300a-1 *et seq.*, contains a 28-month time limit for claims under the National Vaccine Injury Compensation Program. *See id.* § 300aa-16(a)(1). The period bars any petition for compensation based on a vaccine "administered before [the effective date of this title]" that is "filed . . . after the expiration of 28 months after [the effective date of this title]." *Id.* Congress gave this period the title of "[l]imitation of actions," *see id.* § 300a-16, but courts have called it a "statute of repose," in part because the date it sets bears "no relation to the date . . . on which the . . . claim accrue[s]." *Weddel v. Secretary of Health & Human Servs.*, 100 F.3d 929, 932 (Fed. Cir. 1996). It is thus another example where a court considered the application of the "repose" label to be consistent with a legislative indication that a time period was a "[l]imitation" period.

* * *

In sum, CTS's terminological distinction between "limitations" and "repose" periods lacks grounding in the way that legislators or judges actually use those words. At the very least, CTS fails to establish that a clear distinction could be drawn in usage when CERCLA was established in 1986. As a result, CTS cannot show that, by using the terms "statute of limitations" and "limitations period" in CERCLA, Congress meant to leave intact "repose" periods such as the one created by N.C. General Statutes § 1-52(16). For the reasons persuasively set forth in Waldburger's brief, the better reading of CERCLA is that Congress meant to preempt such periods

and give victims of environmental contamination a reasonable opportunity to recover for their injuries.

CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted.

MICHAEL J. BRICKMAN
Counsel of Record
RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN
LLC
1037 Chuck Dawley Boulevard
Building A
Mount Pleasant, SC 29464
(843) 727-6500
mbrickman@rpwb.com

April 2, 2014