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**WALDBURGER v. CTS CORPORATION: ENSURING THE
PLAINTIFF’S DAY IN COURT AS A MATTER OF PRINCIPLE**

JESS KYLE*

In *Waldburger v. CTS Corporation*,¹ the United States Court of Appeals for the Fourth Circuit held that the Federally Required Commencement Date (“FRCD”) provision² of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980³ (“CERCLA”) preempted North Carolina’s ten-year statute of repose⁴ for real property claims.⁵ The plaintiffs were thus empowered to bring their nuisance claims under state law against a manufacturer allegedly responsible for contamination of their properties with hazardous substances.⁶ The *Waldburger* court characterized the case as primarily a matter of statutory interpretation,⁷ albeit in the context of preemption, and both the majority and dissent performed the same two-step interpretive exercise of plain meaning analysis and a conditional

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1. 723 F.3d 434 (4th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3130 (U.S. Jan. 10, 2014) (No. 13-339).

2. 42 U.S.C. § 9658 (2006). The FRCD provision preempts statutes of limitations that commence earlier than its discovery rule, which refers to “the date the plaintiff knew (or reasonably should have known) that the personal injury of property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.” *Id.* § 9658 (b)(4)(A). This Note will refer to both the FRCD and to Section 9658 as the preempting provision.

3. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

4. A statute of repose is a statute “barring any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury,” BLACK’S LAW DICTIONARY 1546 (9th ed. 2009), while a statute of limitations “bars claims after a specified period . . . based on the date when the claim accrued (as when the injury occurred or was discovered).” *Id.*

5. *Waldburger*, 723 F.3d at 437–38.

6. *See id.* at 437 (“Concluding that North Carolina’s ten-year limitation on the accrual of real property claims barred the suit, the district court granted CTS’s . . . motion to dismiss.”).

7. *Id.* at 442 (“Determining whether § 9658 affects the operation of North Carolina’s ten-year limitation is an exercise in statutory interpretation.”).

turn toward legislative history.⁸ The court did not, however, spell out the more specific principles of interpretation *within* its broader interpretive method that justified its own conclusion over any others.⁹ As the case goes to the Supreme Court of the United States,¹⁰ the principled grounds distinguishing the majority's conclusion as correct remain regrettably unclear.¹¹

This Note seeks to clearly articulate why the Fourth Circuit's conclusion is the right one, and elaborates on the *Waldburger* majority's reasoning as necessary to this task.¹² Further, this Note argues that the Supreme Court should affirm the *Waldburger* holding for the following three reasons. First, the Fourth Circuit's decision is supported by a flexible approach to plain meaning analysis that appropriately searches for "public" meaning and avoids absurdity.¹³ Second, the *Waldburger* outcome reflects a more credible use of legislative history to effectuate Congress's purpose in enacting the FRCD.¹⁴ Third, the "presumption against preemption" has substantially less weight in this case given certain anomalous features of the FRCD.¹⁵ These considerations support affirming *Waldburger*, and the Supreme Court would thereby better equip a plaintiff victim of long-latency injuries caused by toxic substances to have her day in court.

I. THE CASE

In 2009, David Bradley and Renee Richardson discovered that the well water at their Asheville, North Carolina, home contained two carcinogenic solvents.¹⁶ Bradley and Richardson had purchased their land from Mills Gap Road Associates,¹⁷ which had itself acquired a fifty-four-acre tract of land in 1987 from CTS Corporation ("CTS") that included the Bradley-Richardson property.¹⁸ From 1959 to 1985, CTS operated the Mills Gap Road Electroplating Facility ("Electroplating Facility") on the land.¹⁹ As part of its operations, it manufactured and disposed of electronics, which

8. *Id.* at 442, 446, 450.

9. *See infra* Part IV.A.

10. *CTS Corp. v. Waldburger*, 134 S. Ct. 896 (Jan. 10, 2014) (mem).

11. *See infra* Part IV.A.

12. *See infra* Parts IV.B–D.

13. *See infra* Part IV.B.

14. *See infra* Part IV.C.

15. *See infra* Part IV.D.

16. *Waldburger v. CTS Corp.*, 723 F.3d 434, 437, 440 (4th Cir. 2013). The toxins were trichloroethylene ("TCE") and cis-1, 2-dichloroethane ("DCE"). *Id.* at 437.

17. *Id.* at 440.

18. *Id.*

19. *Id.*

required it to store significant amounts of toxic solvents and other hazardous materials.²⁰

When CTS sold its Electroplating Facility property to Mills Gap Road Associates, it assured the latter that the land was in “an environmentally clean condition,” that “no on-site disposal or otherwise wanton disposal methods were practiced,” and that “no threat to human health” remained.²¹ Upon discovery of the contaminants in their water supply, Bradley and Richardson joined twenty-three neighboring landowners to bring a nuisance action against CTS in 2011.²² The group of landowners filed claims asserting diminution of property value and fears for present and future health of self and family.²³ They requested reclamation²⁴ of toxins in addition to monetary damages.²⁵

The United States District Court for the Western District of North Carolina dismissed the landowners’ complaint on the basis that North Carolina’s ten-year limitation for filing actions related to real property barred the claim.²⁶ In dismissing the complaint, the district court rejected the landowners’ argument that the FRCD preempted the state’s statutory limitation.²⁷ The landowners appealed the judgment to the United States Court of Appeals for the Fourth Circuit.²⁸

II. LEGAL BACKGROUND

The FRCD is an amendment provision in CERCLA that expressly preempts state statute of limitations commencement dates for certain tort actions.²⁹ Application of the FRCD had a slow start as courts struggled to interpret its scope.³⁰ The FRCD has also faced, and prevailed against, Tenth Amendment and Commerce Clause challenges.³¹ Recently, courts

20. *Id.* The court explains that “CTS ‘manufactures’ and ‘disposes of’ electronics and electronic parts, and from 1959 to 1985 . . . CTS stored notable quantities of TCE and manufactured products using TCE, cyanide, chromium VI, and lead.” *Id.*

21. *Id.*

22. *Id.* at 437, 440.

23. *Id.* at 440.

24. “Reclamation” is an environmental cleanup procedure defined as “[t]he act or an instance of improving the value of economically useless land by physically changing the land.” BLACK’S LAW DICTIONARY 1385 (9th ed. 2009).

25. *Waldburger*, 723 F.3d at 440.

26. *Id.* at 441.

27. *Id.* The district court adopted the dismissal recommendation of the magistrate court, which “reasoned that the ten-year limitation is a statute of repose and that because § 9658 mentions only statutes of limitations, it is inapplicable here.” *Id.*

28. *Id.* at 435.

29. *See infra* Part II.A.

30. *See infra* Part II.B.

31. *See infra* Part II.C.

began to address the question of whether the FRCD should displace not only state statutes of limitations but also state statutes of repose.³²

A. *From CERCLA (1980) to SARA (1986): Origins of the FRCD*

The FRCD is embedded in CERCLA, a federal environmental statute that creates a liability scheme for hazardous waste cleanup,³³ but the FRCD only preempts state law so that *state* law claims may be brought.³⁴ This feature is easier to understand when the FRCD is contextualized within the ill-fated battle for a federal cause of action for toxic tort claims. During the congressional debates preceding the passage of CERCLA, an early Senate bill included a federal cause of action for injuries associated with hazardous substance exposure.³⁵ The provision encountered strong opposition, and it was replaced by the establishment of a blue ribbon commission (the “Study Group”)³⁶ purposed with “determin[ing] the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment.”³⁷

In 1982, the Study Group submitted its report to Congress.³⁸ According to the Study Group, the inadequacy of common law and statutory remedies was not state statutes of limitations *per se*, but their commencement dates.³⁹ The Study Group recommended that states change their statutes of

32. *See infra* Part II.D.

33. Environmental disasters involving hazardous wastes helped prompt Congress to act quickly to pass legislation advancing the remedial goal of cleaning up toxic waste sites. *See Administration Testimony to the Subcommittees on Environmental Pollution and Resource Protection*, S. REP. NO. 69-849, at 55 (1980) (statement of Sen. John C. Culver, Chair, S. Subcomm. on Res. Prot.) (describing toxic chemical disasters at Love Canal, New York, and James River, Virginia, as motivation for enactment of federal legislation to clean up old waste dumps and abandoned hazardous waste sites and prevent new ones from forming).

34. 42 U.S.C. § 9658(a)(1) (2006).

35. S. 1480, 96th Cong. § 4 (1979) (“Notwithstanding the ordinary requirements for proof of cause . . . a person liable under this section for any discharge, release, or disposal of any hazardous substance shall be liable for all medical expenses . . . if a reasonable person could conclude that such medical expenses and the injury or disease which caused them are reasonably related to such discharge, release or disposal The inability of a claimant to demonstrate (1) the particular identity of the substance which caused the injury or disease, (2) the particular source of such substance, (3) the pathway of such substance en route to the injured party, or (4) an explanation of the etiology of the substance in the injured party, shall not bar recovery.”).

36. The Study Group was comprised of three people selected by each president of the American Bar Association, American Law Institute, Association of American Trial Lawyers, and National Association of State Attorneys General, totaling twelve selectees. 42 U.S.C. § 9651(e)(2).

37. *Id.* § 9651(e)(1).

38. SUPERFUND SECTION 301(E) STUDY GRP., INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, S. DOC. NO. 97-571 (1982) [hereinafter STUDY GROUP REPORT].

39. *Id.* at 43.

limitations relevant to personal injury caused by hazardous substances to limitations periods triggered by discovery of the injury and its cause instead of the date of hazardous substance exposure.⁴⁰ Such changes would allow plaintiffs suffering injuries dormant well beyond the state statute of limitations to hold the responsible parties liable.⁴¹

Congress ultimately neither enacted a federal cause of action nor accepted the recommendation of the Study Group. Although a federal cause of action was again promoted in the years preceding CERCLA's reauthorization, such efforts failed in both the House⁴² and Senate.⁴³ The House Committee on Energy and Commerce drafted the political compromise,⁴⁴ which would become CERCLA Section 9658 as part of the Superfund Amendments and Reauthorization Act of 1986 ("SARA").⁴⁵ The critical text of Section 9658 reads:

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date⁴⁶ which is earlier than the federally required commencement date,⁴⁷ such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.⁴⁸

Section 9658 thus provides for express preemption of state law, but not all state statutes of limitations will be preempted where the state law claims specified in Section 9658 are made. That is, the FRCD is triggered only where a state's commencement date is earlier, and so if a state already has adopted a similar discovery rule commencement date, the FRCD might not

40. *Id.* at 255–56.

41. *Id.*

42. H.R. 2582, 98th Cong. §§ 9011–9012 (1983) (bill proposed by Rep. Edward J. Markey).

43. S. 917, 98th Cong. § 5 (1983) (bill proposed by Senator Stafford); S. 945, 98th Cong. § 4 (1983) (bill proposed by Senator Mitchell).

44. H.R. REP. NO. 99-253, pt.1, at 34–35, 105–06 (1985) [hereinafter HOUSE COMMITTEE REPORT].

45. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

46. This refers to the “date specified in a statute of limitations as the beginning of the applicable limitations period.” 42 U.S.C. § 9658(b)(3) (2006).

47. This refers to the “date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.” *Id.* § 9658(b)(4)(A).

48. *Id.* § 9658(a)(1).

apply.⁴⁹ Further, “preemption,” in this context, does not simply mean that the federal rule displaces state statutes entirely; the limitations period itself remains untouched, but it *commences* later.⁵⁰ Thus, the FRCD addresses the problem at which efforts toward a federal cause of action were aimed—permitting toxic tort plaintiffs their day in court—but it does so by narrowly targeting certain types of state law actions governed by certain kinds of limitations periods.⁵¹

B. Defining the Substantive Scope of the FRCD—Injury and Cause of Action

The scope of application of the FRCD was initially defined very strictly, requiring that plaintiffs have a federal law claim under CERCLA as well as a state law claim.⁵² This standard soon relaxed, dropping the CERCLA claim requirement, although CERCLA definitions continue to constrain FRCD application.⁵³ Further, questions remain as to what specific kinds of state law actions are relevant to the FRCD.⁵⁴

1. The Relationship Between CERCLA and the FRCD

An early case in which the FRCD was considered set a highly restrictive standard of application. In *Knox v. AC & S, Inc.*,⁵⁵ the plaintiffs brought suit for injuries allegedly caused by workplace exposure to asbestos.⁵⁶ The court held that this type of injury was not within the scope of the FRCD because the FRCD was intended to apply to “situation[s] where a state cause of action exists in conjunction with a CERCLA cause of action.”⁵⁷ The *Knox* court inferred such congressional intent from Section 9658’s placement within CERCLA generally and its incorporation of a

49. See, e.g., *Village of Milford v. K-H Holding Corp.*, 390 F.3d 926, 932 (6th Cir. 2004) (finding that Michigan’s discovery rule is “functionally identical” to the FRCD and so the state discovery rule applied); *O’Connor v. Boeing North American, Inc.*, 311 F.3d 1139, 1148 (9th Cir. 2002) (finding that California’s discovery rule would commence earlier than the FRCD, and so was preempted by the FRCD); *Presque Isle Harbor Dev. Co. v. Dow Chem. Co.*, 875 F. Supp. 1312, 1319 (W.D. Mich. 1995) (finding Michigan’s standard “functionally identical” to the FRCD so that the latter did not apply).

50. 42 U.S.C. § 9658(a)(1).

51. *Id.*

52. See *infra* Part II.B.1.

53. See *infra* Part II.B.1.

54. See *infra* Part II.B.2.

55. 690 F. Supp. 752 (S.D. Ind. 1988).

56. *Id.* at 754.

57. See *id.* at 758 (“In fact, the wording of § 9658 and its incorporation of the terms of CERCLA and the CERCLA definition of those terms indicate that the provision was limited to application in the situation where a state cause of action exists in conjunction with a CERCLA cause of action. That not being the case here, the court finds that § 9658 is inapplicable . . .”).

number of CERCLA definitions.⁵⁸ This interpretation meant that plaintiffs injured by exposure to hazardous substances or pollutants could not litigate their state law claims unless they were also attempting to bring an action against parties for liability under CERCLA.⁵⁹

The limiting *Knox* interpretation did not become the prevailing standard of FRCD applicability. Another early case, *Covalt v. Carey Canada, Inc.*,⁶⁰ maintained the requirement that the words in Section 9658 that are CERCLA terms of art cannot be interpreted independently.⁶¹ The *Covalt* court, however, did not find an accompanying CERCLA claim necessary for the FRCD to apply.⁶² The upshot was a less restrictive threshold test requiring (1) a “hazardous substance”⁶³ or “pollutant or contaminant” (2) “released”⁶⁴ (3) “into the environment”⁶⁵ (4) from a “facility.”⁶⁶ The problem with the workplace asbestos claim before it, the *Covalt* court found, was that this injury did not constitute a “release” into the “environment.”⁶⁷ Although very few broad applications of *Covalt*’s definitions test exist,⁶⁸ the “increasingly more common” scope-of-CERCLA approach has been for courts to demand that “the CERCLA definitions . . . are met, both from a

58. *Id.*

59. See 42 U.S.C. § 9607(a)(4) (2006) (describing potentially liable parties and the costs they may incur, including “all costs of removal or remedial action,” “any other necessary costs,” and “costs of any health assessment”). *Id.*

60. 860 F.2d 1434 (7th Cir. 1988).

61. *Id.* at 1436–37 (explaining that “a reading of this sort trivializes statutory language”).

62. See *id.* at 1436 (finding only that “[w]hether § 9658 applies depends on whether the asbestos to which Covalt was exposed . . . was ‘released into the environment from a facility,’” as opposed to finding that the CERCLA elements must be met *and* that there must be an independent CERCLA cause of action).

63. 42 U.S.C. § 9601(14). This code definition includes a number of designated substances. *Id.*

64. See 42 U.S.C. § 9601(22) (defining the term “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment,” and stating some exclusions including wholly intra-workplace hazards).

65. 42 U.S.C. § 9601(8). The term “environment” encompasses “(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States . . . and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.” *Id.*

66. 42 U.S.C. § 9601(9). The term “facility” includes “(A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon . . . or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . .” *Id.*

67. *Covalt*, 860 F.2d at 1436–37.

68. See, e.g., *Kowalski v. Goodyear Tire & Rubber Co.*, 841 F. Supp. 104, 108 (W.D.N.Y. 1994) (finding release into the environment where toxic chemicals transferred from husband’s clothing to wife each day).

pleading and evidentiary standpoint.”⁶⁹ Many claims have consequently been barred by state statutes of limitations for not showing the proper kind of injury.⁷⁰

The first reported application of FRCD preemption was in *Bolin v. Cessna Aircraft Co.*⁷¹ After discovering the “probable human carcinogen” of TCE in their wells, plaintiff landowners brought suit against the owner and operator of a nearby aircraft manufacturing plant.⁷² Plaintiffs alleged state law causes of action including negligence, intentional public and private nuisance, and strict liability for ultrahazardous substances.⁷³ The defendant in *Bolin* conceded that “plaintiffs’ state claims fall within the terms of [the FRCD],” and the court ruled that the plaintiffs’ claims were timely under Section 9658.⁷⁴ Post-*Bolin*, courts continued to find preemption of state statutes of limitations where the CERCLA definitions test was met.⁷⁵

2. *The Relationship Between the FRCD and Wrongful Death Actions*

Another issue relating to the kind of injuries to which the FRCD can apply is whether the FRCD can revive wrongful death claims. This issue is less settled than the controversy over how connected plaintiffs’ injuries must be to CERCLA causes of action and key statutory terms,⁷⁶ but is just as much a matter of judicial statutory interpretation. In *Freier v. Westinghouse Electric Corp.*,⁷⁷ the Second Circuit held that wrongful death claims fall within the scope of Section 9658.⁷⁸ Although Section 9658 refers simply to “personal injury” claims,⁷⁹ the *Freier* court pointed to the fact that Congress had spoken broadly of its concern about “harm” posed by hazard-

69. Cal R. Burnton, *CERCLA’s Toxic Tort Discovery Rule: It’s Not as Clear as It Reads*, 25 TOXICS L. REP. (BNA), July 15, 2010, at 710.

70. See, e.g., *Becton v. Rhone-Poulenc, Inc.*, 706 So.2d 1134, 1142 (Ala. 1997) (finding that plaintiff failed to show all CERCLA elements); *Rivas v. Safety-Kleen Corp.*, 98 Cal.App.4th 218, 238–40 (2002) (same).

71. 759 F. Supp. 692 (D. Kan. 1991).

72. *Id.* at 697–98.

73. *Id.* at 698.

74. *Id.* at 704, 709.

75. See, e.g., *Rockwell Int’l Corp. v. Wilhite*, 143 S.W.3d 604, 617 (Ky. Ct. App. 2003) (finding plaintiff’s claims not barred by statutes of limitations where injury involved release of PCBs); *Tower Asphalt, Inc. v. Determan Welding & Tank Serv., Inc.*, 530 N.W.2d 872, 876 (Minn. Ct. App. 1995) (finding plaintiff did not need underlying CERCLA claim where injury involved hazardous solvents); *Soo Line R.R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1487 (D. Minn. 1992) (finding that statutes of limitations did not bar actions for injuries involving continuous release of hazardous substances).

76. See *supra* Part II.B.1.

77. 303 F.3d 176 (2d Cir. 2002).

78. *Id.* at 200.

79. 42 U.S.C. § 9658(a)(1) (2006).

ous substance exposure in commissioning the Study Group.⁸⁰ Further, a denial of wrongful death damages would suggest that “a company whose handling of hazardous wastes caused personal injury would be financially better off if its victim died,” an unacceptable consequence in the court’s view.⁸¹

In *Lee v. CSX Transportation, Inc.*,⁸² the District Court of Appeal of Florida for the Second District declined to follow *Freier*. Citing numerous principles of statutory interpretation,⁸³ the *Lee* court held that wrongful death actions do not fall within the category of “personal injury” actions, and therefore the FRCD does not apply to them.⁸⁴ The court emphasized two principles of interpretation: that the common law meaning of statutory terms is deemed intended by Congress unless there is a contrary indication,⁸⁵ and that historic state police powers should be respected unless preemption is the “clear and manifest purpose of Congress.”⁸⁶ Given that wrongful death actions have long been considered distinct from personal injury actions, and that, of the two legal terms, the FRCD refers only to the latter, the *Lee* court found that interpretive principles recommended against preemption.⁸⁷

C. *The FRCD Confronts Constitutional Challenges*

The FRCD has faced Tenth Amendment⁸⁸ and Commerce Clause⁸⁹ challenges. It survived Tenth Amendment challenges on the basis that it has not been found to strip states of essential sovereign power,⁹⁰ and it survived Commerce Clause challenges on the basis of its demonstrated connection to interstate commerce.⁹¹

80. *Freier*, 303 F.3d at 199.

81. *Id.* at 200.

82. 958 So. 2d 578 (Fla. Dist. Ct. App. 2007).

83. *Id.* at 580–81.

84. *Id.* at 582.

85. *Id.* at 580–81.

86. *Id.* at 581 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

87. *Id.* at 582–84.

88. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

89. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to “regulate Commerce with foreign Nations, and among the several States”).

90. *See infra* Part II.C.1.

91. *See infra* Part II.C.2.

1. Tenth Amendment Challenges

A handful of cases have addressed defendants' claims that the FRCD violates the Tenth Amendment.⁹² For example, in *Bolin*, the defendant argued that the FRCD unconstitutionally infringes on state sovereignty by requiring the states to permit claims that state law otherwise bars.⁹³ The *Bolin* court relied on *Garcia v. San Antonio Metropolitan Transit Authority*⁹⁴ in its response that the Tenth Amendment does not stipulate an affirmative restriction on the constitutional authority of Congress to "legislate under power otherwise conferred by the commerce clause."⁹⁵ Further, the *Bolin* court argued that *Garcia* did not set a standard for determining what would show an unconstitutional stripping of "core" or "essential" attributes of state sovereignty, making it difficult to appeal to the amendment to challenge congressional legislation.⁹⁶ Later cases would also assert that the FRCD does not direct state courts to apply federal law in a way prohibited under the Tenth Amendment; rather, it establishes the "modest requirement" that courts "recognize the Federal Commencement Date of a state-law claim."⁹⁷ In sum, the FRCD has survived any Tenth Amendment-based challenge it has faced.

2. Commerce Clause Challenges

Some cases that considered Tenth Amendment challenges to the FRCD also addressed arguments that the enactment of the FRCD exceeded congressional authority under the Commerce Clause. Courts rejected these arguments on the basis that the FRCD is "an integral part of" the wider CERCLA regulatory program, and the main subject of CERCLA—disposal of hazardous waste—is well-connected to interstate commerce.⁹⁸ Beyond its clear remedial goals, CERCLA was meant to induce those generating, transporting, storing, or disposing of hazardous wastes to "voluntarily . . . pursue appropriate environmental response actions with respect to inactive hazardous waste sites."⁹⁹ The FRCD has thus been held to be an exercise of congressional power that neither violates the Tenth Amendment nor exceeds Commerce Clause authority.

92. See, e.g., *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176 (2d Cir. 2002); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991).

93. *Bolin*, 759 F. Supp. at 705.

94. 469 U.S. 528 (1985).

95. *Bolin*, 759 F. Supp. at 705.

96. *Id.* at 706.

97. See *Freier*, 303 F.3d at 204–05.

98. See, e.g., *id.* at 202 (stating that "wastes are commonly transported in interstate commerce").

99. *Id.* at 203 (quoting H.R. REP. NO. 96-1016(I), at 17).

D. Rise of the Repose Debates

Until fairly recently, the issue of statute of repose preemption was not controversial.¹⁰⁰ This changed, however, when the Fifth Circuit ruled that the FRCD plainly does not preempt state statutes of repose.¹⁰¹ A circuit split emerged when the Ninth Circuit held that the FRCD does preempt state statutes of repose.¹⁰²

1. A Controversy with a Long Latency Period

The first judicial considerations of FRCD application consistently held that state statutes of repose were not preempted,¹⁰³ but they reached their holdings by finding the FRCD inapplicable to claims involving injuries that did not bear sufficient relation to CERCLA causes of action or at least its definitions.¹⁰⁴ This point was acknowledged in *A.S.I., Inc. v. Sanders*,¹⁰⁵ where the defendant argued that the FRCD cannot preempt statutes of repose given that they are “substantive” as opposed to “procedural” law.¹⁰⁶ The *Sanders* court referenced *Knox, Covalt, Electric Power Board of Chattanooga v. Westinghouse*,¹⁰⁷ and *First United Methodist Church v. U.S. Gypsum Co.*¹⁰⁸ to show the distinction between statutes of limitations and statutes of repose was not viewed as legally relevant.¹⁰⁹ A decade later, the court in *Morgan v. Exxon Corp.*¹¹⁰ found that the statute of repose at issue was not preempted because the toxic contamination injury did not meet the CERCLA definitions test for FRCD application.¹¹¹ The *Morgan* court also did not recognize a legal issue concerning the distinctiveness of statutes of repose.¹¹²

The decision of the Fifth Circuit in *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co.*¹¹³ altered the legal landscape with respect to the category of state limitation law susceptible to preemption. The court in *Burlington* held that the FRCD does not preempt a state statute of repose because of the “substantive, not merely semantic” differences be-

100. See *infra* Part II.D.1.

101. See *infra* Part II.D.1.

102. See *infra* Part II.D.2.

103. See *supra* Part II.B.

104. See *supra* Part II.B.

105. 835 F. Supp. 1349 (D. Kan. 1993).

106. *Id.* at 1358.

107. 716 F. Supp. 1069 (E.D. Tenn. 1988).

108. 882 F.2d 862 (4th Cir. 1989).

109. *Sanders*, 835 F. Supp. at 1358.

110. 869 So. 2d 446 (Ala. 2003).

111. *Id.* at 451–52 (noting CERCLA’s “petroleum exclusion”).

112. *Id.* (focusing only on whether CERCLA definitions were met).

113. 419 F.3d 355 (5th Cir. 2005).

tween these statutes and statutes of repose.¹¹⁴ The court looked to the plain language of the FRCD that provides for preemption of statutes of limitations but not statutes of repose, and found that these statutes had very different meanings and, thus, the latter were not automatically subsumable under the former.¹¹⁵ In particular, “awareness of injury is not a factor in determining when the time period of a statute of repose starts to run. Unlike a statute of limitations, a statute of repose creates a substantive right to be free from liability.”¹¹⁶ Lower courts began to follow *Burlington’s* conclusion that statutes of repose, in light of their distinction from statutes of limitations, were not preempted by the FRCD.¹¹⁷

2. A Decision by the Ninth Circuit Resulted in a Circuit Split

In *McDonald v. Sun Oil Co.*,¹¹⁸ the Ninth Circuit held that the FRCD includes state statutes of repose and explained its disagreement with the *Burlington* decision.¹¹⁹ The *McDonald* court cited a number of cases in the years preceding SARA that involved confusion or the interchangeable use of statutes of limitations and statutes of repose.¹²⁰ According to the *McDonald* court, these cases showed ambiguity in the meaning of “statute of limitations,” and therefore justified looking beyond the plain meaning of the statute to see what legislative history revealed about congressional intent.¹²¹ The *McDonald* court found that Congress’s main concern in enacting the FRCD was to ensure that plaintiffs’ claims dealing with long-latency injuries are not barred and that preemption of statutes of repose was necessary to affect this purpose.¹²²

114. *Id.* at 362.

115. *Id.* at 362–63.

116. *Id.* at 363 (internal quotation marks omitted).

117. *See* *Evans v. Walter Indus.*, 579 F. Supp. 2d 1349, 1364 (N.D. Ala. 2008) (“[T]he court agrees with the Fifth Circuit and courts following *Burlington* and holds that the plain language of § 9658 does not encompass a rule of repose and, therefore, does not preempt Alabama’s twenty-year rule of repose.”); *German ex rel Grace v. CSX Transp., Inc.*, 510 F. Supp. 2d 630, 633 (S.D. Ala. 2007) (“As discussed in *Burlington*, the text of § 9658 does not mention statutes or rules of repose but instead discusses only statutes of limitation. Under the principles of statutory construction, the plain language of § 9658 should be given effect.”). *But see* *Fisher v. Ciba Specialty Chems. Corp.*, No. 03-0566-WS-B, 2007 WL 2995525, at *20 (S.D. Ala. Oct. 11, 2007) (concluding that Alabama’s common law rule of repose was preempted by the FRCD).

118. 548 F.3d 774 (9th Cir. 2008).

119. *Id.* at 782; *see also* *Moore v. Walter Coke, Inc.*, No. 2:11-cv-1391-SLB, 2012 WL 4731255, at *13 (N.D. Ala. Sept. 28, 2012) (finding that the FRCD preempted Alabama’s rule of repose); *Abrams v. Ciba Specialty Chems. Corp.*, 659 F. Supp. 2d 1225, 1235 (S.D. Ala. 2009) (same).

120. *McDonald*, 548 F.3d at 781 n.3.

121. *Id.* at 782–83 (looking to both a House Conference Report and the STUDY GROUP REPORT, *supra* note 38, as guiding legislative history).

122. *Id.*

III. THE COURT'S REASONING

In *Waldburger v. CTS Corporation*, the United States Court of Appeals for the Fourth Circuit reversed and remanded the judgment of the United States District Court for the Western District of North Carolina, and held that CERCLA Section 9658 preempted North Carolina's ten-year statute of repose.¹²³ In so holding, the court enabled the landowners' nuisance claim.¹²⁴ The court reasoned that the reference to "statute of limitations" in Section 9658 was ambiguous,¹²⁵ and that legislative history suggested Congress intended for CERCLA's discovery rule to preempt state statutes of repose as well as statutes of limitations.¹²⁶ Further, the court stressed that, in determining the status of state statutes of repose, a balance must be struck between the rights of plaintiffs and defendants rather than permitting such statutes to stand only for defendants' rights.¹²⁷

The court addressed the question of whether CERCLA's discovery rule preempts state statutes of repose in addition to statutes of limitations as a straightforward question of statutory interpretation.¹²⁸ The discovery rule in Section 9658 states that "if the applicable limitations period for [an] action . . . provides a commencement date which is earlier than the federally required commencement date," the federal date is controlling.¹²⁹ The narrower legal issue, then, was whether a statute of repose fit the meaning of "applicable limitations period,"¹³⁰ which according to Section 9658 will be "specified in the State statute of limitations or under common law."¹³¹

The court found Section 9658 ambiguous and reasoned that it could be interpreted as applying to North Carolina's statute of repose.¹³² The repose statute is located with other statutes of limitations in a statutory section titled, "Limitations, Other than Real Property."¹³³ For the court, this meant that the statute of repose fit under Section 9658, since it was a limitation period and was technically "specified in the State statute of limitations."¹³⁴ The court briefly touched on two "additional observations" to support its finding of ambiguity.¹³⁵ First, citing *McDonald*, the court called attention

123. 723 F.3d 434, 445 (4th Cir. 2013).

124. *Id.*

125. *Id.* at 442–43.

126. *Id.* at 443–44.

127. *Id.* at 444–45.

128. *Id.* at 442.

129. 42 U.S.C. § 9658(a)(1) (2006).

130. *Waldburger*, 723 F.3d at 442.

131. 42 U.S.C. § 9658(a)(1).

132. *Waldburger*, 723 F.3d at 442–43.

133. *Id.* at 442.

134. *Id.*

135. *Id.* at 443.

to the historical tendency of statutes and prior case law to fail to distinguish statutes of limitations and statutes of repose, and argued that this established ambiguity in the statutory text.¹³⁶ Second, the court pointed to a “lack of internal consistency” within Section 9658, and so concluded it “fail[ed] to manifest a plain meaning.”¹³⁷

After finding Section 9658 ambiguous, the court looked to the House Conference Report preceding SARA’s passage in order to determine whether Congress intended preemption of statutes of repose.¹³⁸ The court concluded that it did intend preemption because the Conference Report indicated that Congress was concerned with the problem of plaintiffs’ claims being barred before they are aware of them, which results from statutes of limitations and statutes of repose alike.¹³⁹ Further, noting that CERCLA has been labeled “the most remedial of all federal environmental statutes,”¹⁴⁰ the court found that a liberal construction standard was appropriate.¹⁴¹ The “unmistakable goal” of Congress was to ensure that relief from toxic contamination could be secured, and therefore allowing state statutes of repose to stand in the way of such relief, the court argued, would thwart Congress’s goal.¹⁴²

The court also challenged the notion that statutes of repose are, at their core, concerned with the rights of defendants.¹⁴³ The court noted that such statutes always involve a balancing of plaintiffs’ and defendants’ rights, and the circumstances of the case at bar suggested that North Carolina’s repose statute needed to “tip in favor of plaintiffs.”¹⁴⁴ The FRCD could and should, the court concluded, be interpreted as preempting state statutes of repose.¹⁴⁵

Judge Davis wrote a brief concurring opinion.¹⁴⁶ He asserted that the dissenting opinion treated the plain meaning rule too much like a “rule of

136. *See id.* (“[G]iven the inconsistent manner in which the term has been used, it is entirely probable that in 1986, when Congress added § 9658 to CERCLA, it intended ‘statute of limitations’ to include precisely the type of ten-year limitation that we are dealing with here.”).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* (quoting Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 286 (1996)).

141. *See id.* at 443–44 (rejecting exclusion of the North Carolina statute of repose from application of § 9658 as “too narrow an approach”).

142. *Id.* at 444.

143. *Id.* at 444–45.

144. *Id.* at 445.

145. *Id.*

146. *Id.* (Davis, J., concurring).

law” as opposed to an “axiom of experience.”¹⁴⁷ Judge Davis applauded the willingness of the court to look at statutory context and other “persuasive evidence” of Congress’s intent, should such evidence exist.¹⁴⁸

Judge Thacker, dissenting from the majority opinion, argued that the plain meaning of § 9658 compels the exclusion of statutes of repose from preemption; that even if the statute was ambiguous, congressional intent was to exclude statutes of repose; and, that the presumption against preemption would counsel against permitting Section 9658 to reach statutes of repose.¹⁴⁹ Judge Thacker stressed that Section 9658 repeatedly used the term “statute of limitations,” but never the conceptually distinct “statute of repose.”¹⁵⁰ She argued that the definition of “statute of limitations” that was available to Congress when SARA was passed made clear that statutes of limitations were sometimes called “statutes of repose,” but not vice versa.¹⁵¹ Further, Judge Thacker pointed out that the Study Group responsible for making CERCLA recommendations did include statutes of repose (portrayed as distinct from statutes of limitations), but their language on this point was noticeably absent from SARA.¹⁵² Finally, Judge Thacker suggested that the majority’s holding did not give proper deference to the standard presumption against preemption.¹⁵³ She found that the majority ignored North Carolina’s ability to carve into law a substantive right to escape tort liabilities after a given time period, although this ability “is unquestionably a traditional field of state regulation.”¹⁵⁴ For these reasons, Judge Thacker concluded that she would have affirmed the lower court’s decision.¹⁵⁵

IV. ANALYSIS

In *Waldburger v. CTS Corporation*, the United States Court of Appeals for the Fourth Circuit held that CERCLA Section 9658 preempted

147. *Id.* (internal quotation marks omitted).

148. *Id.*

149. *Id.* (Thacker, J., dissenting).

150. *See id.* at 448–49 (noting that Congress did not include the phrase “statute of repose” in § 9658 and arguing that “statute of limitation” was different in meaning and unambiguous when the provision was adopted).

151. *See id.* (defining “statute of limitations” as a “statute . . . declaring that no suit shall be maintained . . . unless brought within a specified period of time after the right accrued. Statutes of limitations are statutes of repose” (quoting BLACK’S LAW DICTIONARY 835 (5th ed. 1979))).

152. *Id.* at 450–52 (suggesting that despite the language of the 301(e) Report, Congress “chose to leave” § 9658 without any reference to statutes of repose).

153. *Id.* at 453.

154. *Id.*

155. *Id.* at 454.

North Carolina's ten-year statute of repose.¹⁵⁶ The plaintiffs were consequently able to bring their state nuisance claims against a manufacturer that had allegedly contaminated their properties with hazardous substances.¹⁵⁷ The *Waldburger* majority and dissent used the same basic method of statutory interpretation, but this Note explores the principled differences between the two regarding their applications of plain meaning analysis and guidance by legislative history.¹⁵⁸ This Note further argues that, although the *Waldburger* majority did not clarify these differences or their potential implications,¹⁵⁹ it reached the right conclusion for three main reasons: First, its decision is supported by a flexible approach to plain meaning analysis that appropriately searches for "public" meaning¹⁶⁰ and avoids absurdity;¹⁶¹ second, its decision reflects a proper use of legislative history that emphasizes proximity and specificity;¹⁶² third, the *Waldburger* majority's conclusion is not undermined by the presumption against preemption, as anomalous features of the FRCD limit the presumption's relevance.¹⁶³ The Supreme Court should, then, affirm the Fourth Circuit's *Waldburger* holding.

A. *Differences Based on Principles of How to Apply the Same Method of Statutory Analysis Exist Between the Waldburger Majority and Dissenting Opinions*

Although the *Waldburger* majority and dissent ostensibly follow one approach to statutory interpretation to determine whether the FRCD preempts North Carolina's statute of repose,¹⁶⁴ their opposing conclusions

156. *Id.* at 438 (majority opinion).

157. *Id.* at 437–38.

158. *See infra* Part IV.A.

159. *See infra* Part IV.A.

160. *See infra* Part IV.B.1.

161. *See infra* Part IV.B.2.

162. *See infra* Part IV.C.

163. *See infra* Part IV.D.

164. The general approach of the majority and dissent—plain meaning analysis and then consideration of sources, such as legislative history, if the text is ambiguous—at least appears straightforward and unlikely to unravel into controversy. The commitment to both sticking to the text and reaching into legislative history is a somewhat eclectic mix of textbook doctrines but a common interpretive strategy of judges. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (stating that “virtually all . . . judges are ‘textualists,’ in the sense that all consider the text the starting point for statutory interpretation and follow statutory plain meaning if the text is clear,” and “virtually all . . . judges are also ‘purposivists,’ in the sense that all believe that statutory interpretation ought to advance statutory purposes, so long as such interpretations do not impose on words a meaning they will not bear”). Further, a primary purpose of engaging plain meaning analysis over competing approaches is to limit opportunities for judges to widen the pool of candidate meanings in

suggest deeper doctrinal fissures. Key differences in interpretive preference can be gleaned from a brief comparison of the types of resources called upon by the majority and dissent for their respective analyses of the FRCD.¹⁶⁵ The majority, for example, favors a broader “historical analysis,” accounting for the work of scholars and courts to determine the plain meaning of “statute of limitations” in 1986,¹⁶⁶ and is attentive to the implications of textual inconsistency.¹⁶⁷ In contrast, the dissent turns solely to *Black’s Law Dictionary*.¹⁶⁸ On finding ambiguity, the extraneous guides the majority selected are the House Conference Report and remedial purpose canon.¹⁶⁹ On assuming ambiguity for the sake of argument, the dissent selects only the *Study Group Report* to divine congressional intent.¹⁷⁰ Finally, the majority does not find the presumption against preemption salient enough to merit any consideration,¹⁷¹ while the dissent finds it strong enough to counsel against preemption if the statute was found ambiguous.¹⁷²

Judge Davis’s concurrence marks a fine point of departure for assigning the differences in interpretive style between the majority and dissent doctrinal import. Judge Davis suggested that the problem with the dissenting opinion is its rigid application of the plain meaning rule, a rule which “does not preclude . . . persuasive evidence” and wider considerations of context.¹⁷³ This observation admits of generalization in the sense that the majority consistently evinces greater willingness to take up broader or more liberal interpretive devices and avoids rigid adherence to established rules

questionable ways. See Donald G. Gifford, William L. Reynolds & Andrew M. Murad, *A Case Study in the Superiority of the Purposive Approach to Statutory Interpretation: Bruesewitz v. Wyeth*, 64 S.C. L. REV. 221, 229 (2012) (explaining that proponents of plain meaning analysis hope to prevent “unbridled judicial subjectivity” that might result from considering resources like legislative history before establishing textual ambiguity). It is striking, then, that judges utilizing a plain meaning approach should produce different results. See *id.* at 224 (suggesting how, at least at first glance, it seems odd that two Supreme Court justices using plain meaning analysis should reach opposing conclusions).

165. See *supra* Part III.

166. See *supra* note 136.

167. See *supra* text accompanying note 137.

168. See *supra* note 151.

169. See *supra* notes 138–142 and accompanying text.

170. See *supra* note 152 and accompanying text.

171. The majority simply states that “[d]etermining whether § 9658 affects the operation of North Carolina’s ten-year limitation is an exercise in statutory interpretation.” *Waldburger v. CTS Corp.*, 723 F.3d 434, 442 (4th Cir. 2013). The dissent, however, notes that the case arises “in the context of federal preemption,” and expands on the importance of this by devoting a full section to discussing the presumption against preemption. *Id.* at 446, 453 (Thacker, J., dissenting).

172. See *supra* text accompanying notes 153–154.

173. *Waldburger*, 723 F.3d at 445 (Davis, J., concurring) (quoting *Watt v. Alaska*, 451 U.S. 259, 266 (1981)).

or presumptions.¹⁷⁴ The dissent, though, keeps close to the text and to the formal meaning of words, and does not view recognized presumptions as contextually flexible.¹⁷⁵ The majority and dissent also each seem to have some means of distinguishing better and worse legislative history guides, as they select different sources to help interpret what Congress meant by “statute of limitations.”¹⁷⁶ There are, then, narrower and principled distinctions underlying the majority-dissent rift.

Unfortunately, the Judge Davis concurrence is the only real gesture in *Waldburger* toward sorting the conclusions of the majority and dissent on the basis of explicit legal principle.¹⁷⁷ The core problem with the court’s reluctance to link its outcome to more specific interpretive positions is that, as *Waldburger* is a case that deepened a circuit split,¹⁷⁸ its most productive contribution perhaps would have been to clarify why opposing conclusions do not apply plain meaning analysis and recourse to legislative history as well.¹⁷⁹ Moreover, absent this explanatory contribution, some risk was created that political reasons would be read into the *Waldburger* decision, to the detriment of its persuasive value.¹⁸⁰ Although the fear that legal deci-

174. For example, the majority appeals to the remedial purpose canon, which justifies liberal construction, and treats neither the plain meaning rule nor presumption against preemption as hard and fast rules. *See id.* at 442–44 (majority opinion).

175. For example, the dissent relies on law dictionary definitions and does not recognize the potential contextual flexibility of the presumption against preemption. *See id.* at 448, 453 (Thacker, J., dissenting).

176. *See supra* Part III.

177. It is nevertheless significant that Judge Davis perceived a need to write a concurrence. The majority does not address its interpretive means where they differ from those of the dissent, but Judge Davis sought to place the majority and dissent in direct conversation to shed light on how their views relate to “important, overarching principle[s].” *Waldburger*, 723 F.3d at 445 (Davis, J., concurring). Given that the concurrence is only one paragraph, however, it can only be the start of such a conversation.

178. *See supra* Part II.D.2.

179. Interestingly, statutory interpretation debates concerning whether the FRCD preempts wrongful death limitations statutes involve at least one case, *Lee v. CSX Transportation, Inc.*, in which the court explicitly rejects the reasoning of the United States Court of Appeals for the Second Circuit because it “did not make reference to the principles applicable to interpreting the scope of federal statutes preempting state law” and so seemed to be merely “a strong policy argument.” 958 So.2d 578, 583 (Fla. Dist. Ct. App. 2007). For a review of the issue of the FRCD and wrongful death preemption, see Part II.C.2. The repose debates relating to the FRCD are no less a matter of persuasive statutory interpretation than are the wrongful death debates, and so the *Waldburger* court is vulnerable as well to other courts’ rejections of its conclusions because it did not offer narrower guiding principles throughout its reasoning.

180. *See* Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naïve Legal Realism*, 83 ST. JOHN’S L. REV. 231, 238–40 (2009) (discussing the ease with which judges’ conclusions become viewed as ideological biases emanating from partisan politics); Brian Z. Tamanaha, *The Several Meanings of “Politics” in Judicial Politics Studies: Why “Ideological Influence” Is Not “Partisanship,”* 61 EMORY L.J. 759, 759–65 (2012) (describing how a lack of clarity regarding judges’ “high” or principled bases for decision-making often leads to dismissals of conclusions as petty political opinions). Regarding *Wald-*

sions will be made on the basis of will rather than judgment is hardly new,¹⁸¹ the potential for judges to find and operate within grey areas of the law is at its height in cases turning on construal of statutory meaning.¹⁸² It is worthwhile, then, to consider in detail the reasons why the Fourth Circuit majority rightly decided *Waldburger*.

B. The Waldburger Holding Is Supported by a Flexible Approach to Plain Meaning Analysis That Appropriately Searches for “Public” Meaning and Avoids Absurdity

The *Waldburger* court’s consideration of the meaning of “statute of limitations” in Section 9658 reflects an approach to plain meaning analysis that searches for “public” meaning rather than “technical/legalist” meaning, and is thereby able to ascertain congressional intent.¹⁸³ Further, the court’s willingness to look at the wider context and implications of the text, if pushed further, would show how the plain (literal) meaning of the text can lead to absurdity.¹⁸⁴ Therefore, two key reasons the Supreme Court should affirm the Fourth Circuit’s *Waldburger* holding are that it is the outcome of the better of two varieties of plain meaning analysis,¹⁸⁵ and it does not result in any absurd consequences.¹⁸⁶

1. The Waldburger Majority’s Conclusion That Section 9658 Preempted North Carolina’s Statute of Repose Is Supported by a Plain Meaning Analysis That Appropriately Focuses on “Public” Meaning

The *Waldburger* court implicitly relies on a popular or “public” meaning variant of plain meaning analysis. Professor Victoria Nourse has called

burger, the worry about politicized judging would likely translate into an association of the majority with a liberal, “pro-environment” agenda, given *Waldburger*’s strengthening of CERCLA’s preemptive power.

181. See Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 873–74 (2008) (“Concerns about judicial bias are longstanding: critics of Lochnerism argued that the judges substituted their conservative policy preferences for the liberal preferences of the Roosevelt government and many state legislatures.”).

182. See Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. (forthcoming 2014) (explaining that statutes are subject to far more ambiguity than commonly perceived because they contain not only “lexical” ambiguity or ambiguity which arises “from the meaning of individual words,” but also “structural” ambiguity, which arises “from the semantic structure of the sentence as a whole” and the resultant frequent appearance of “opaque verbs”).

183. See *infra* Part IV.B.1.

184. See *infra* Part IV.B.2.

185. See *infra* Part IV.B.1.

186. See *infra* Part IV.B.2.

attention to the finer distinctions within plain meaning analysis, which she parses into an approach seeking the popular meaning of words versus one that seeks the technical or legalist meaning.¹⁸⁷ The latter appears the narrower of the two approaches, and so has appeal for those most concerned to avoid any unnecessary widening of candidate meanings of textual terms.¹⁸⁸ By favoring a broader consideration of what Congress meant by “statute of limitations,”¹⁸⁹ the *Waldburger* court opted for a mode of analysis suited for finding what the meaning would have been in the public political realm in which Congress acts.

More specifically, the court engaged a public meaning approach in at least two ways that suggested its superiority over a more technical interpretation of “statute of limitations.” First, it was attentive to the recent period of historical development and interplay of the concepts of statutes of limitations and statutes of repose.¹⁹⁰ A legal dictionary definition attempts to capture the formal meaning of a term but may provide only a bare snapshot where the meaning is fluctuating in the broader social context and still unsettled.¹⁹¹ Second, the court’s plain meaning inquiry reflected a realistic view of Congress that did not assume congressmembers have law dictionaries in hand as they debate and bargain or that they speak primarily to lawyers and judges instead of their constituency.¹⁹² The common theme here, indicative of a public meaning approach, is a flexible responsiveness to the public context in which a term was used and to the public audience addressed during the legislative process.¹⁹³

187. Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 1000–03 (2011) (distinguishing between ordinary/popular meaning as “prototypical” meaning that selects for the core or best example of a term, and technical/legalist meaning as meaning that selects for all examples in the sense of “detach[ing] chunks of text from the statute and . . . hold[ing] them up to the light to test their logical extent”). This Note refers to “ordinary/popular/prototypical” meaning simply as “public” meaning, as Professor Nourse occasionally does as well. See *id.* at 1005 (“The very existence of two kinds of plain meaning calls for a theory concerning when a court should apply expert meaning and when it should apply public or prototypical meaning.”).

188. See *id.* at 1003 (explaining that textualists, associated with “a more restrained view of statutory interpretation,” tend to favor legalist meaning in plain meaning analysis and claim “they do not ‘add’ meaning to text”).

189. See *Waldburger v. CTS Corp.*, 723 F.3d 434, 443 (4th Cir. 2013) (seeking the wider historical context of “statute of limitations” and noting interchangeable uses of this term and “statute of repose”).

190. *Id.*

191. See Nourse, *supra* note 187, at 1002 (relating a “shell-and-kernel” metaphor in which legalist meaning only captures the shell, and portraying legalist meaning also with the quoted phrase, “he who sticks to the letter of the law will only stick to its bark”).

192. The *Waldburger* majority notably eschewed recourse to dictionaries altogether. See *Waldburger*, 723 F.3d at 442–43 (not consulting a dictionary for consideration of whether § 9658 is ambiguous).

193. See Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO L.J. 1119, 1132–33 (2011) (pointing

Elucidating the *Waldburger* majority's reliance on a less narrow variant of plain meaning analysis helps to strengthen the force of its conclusion. The main argument given by the court in support of finding Section 9658 ambiguous rests on somewhat shaky grounds because it suggests that North Carolina's statute of repose might be subject to preemption by virtue of being codified with a collection of "statutes of limitations periods."¹⁹⁴ However, Section 9658 only references "*statute* of limitations,"¹⁹⁵ the singular form, and the statute of repose is not really a limitations period "specified in the State *statute* of limitations" pertinent to the plaintiffs' cause of action.¹⁹⁶ The court even reveals some awareness that its primary argument might "seem to be stretching to find ambiguity."¹⁹⁷ Therefore, far from being a mere "additional observation,"¹⁹⁸ the court's brief points concerning the historical evolution of the statutes of limitations/statutes of repose distinction formed the basis for a strong argument in favor of the existence of relevant ambiguity.

Further, although *Waldburger* reads as though reasonable minds might simply disagree on the matter of Section 9658's ambiguity, placing emphasis on a public meaning variant of plain meaning analysis shows why the decision is more convincing than other conclusions. The dissent, for example, relied on the technical/legalist meaning from *Black's Law Dictionary* to argue that "statute of limitations" was sufficiently plain, and so failed to adequately account for the historical element of unclear, shifting meanings and for realistic portrayals of how legislators draft their legislative proposals.¹⁹⁹ The opposing player in the circuit split, the Fifth Circuit,²⁰⁰ paid no heed to the ambiguities of relevant public meanings at the time SARA

out that "[o]rdinary meaning is important in statutory interpretation because members talk to the public, their constituents, at least as much as they act as expert legal draftsmen. Public constituencies increase members' incentives to use prototypical meanings These incentives . . . apply even in statutory text.").

194. *Waldburger*, 723 F.3d at 442–43 ("First, the ten-year bar is located with the statutes of limitations periods in a section titled, 'Limitations, Other than Real Property.' As such, it is a limitations period 'specified in the State statute of limitations or under common law.'" (citations omitted) (quoting 42 U.S.C. § 9658(a)(1) (2006))).

195. 42 U.S.C. § 9658 (a)(1)–(b)(2–3) (emphasis added).

196. *Id.* § 9658 (a)(1) (emphasis added).

197. *Waldburger*, 723 F.3d at 443.

198. *Id.*

199. *See supra* notes 187–188 and accompanying text. The dissenting opinion did acknowledge that the distinction between statutes of limitations and statutes of repose was at one historical point unclear, but went on to state that "[u]sing the dictionary definition of 'statute of limitations' available to Congress in 1986, it is clear that there is no ambiguity as to the meaning of that term at the time § 9658 was enacted." *Waldburger*, 723 F.3d at 448 (Thacker, J., dissenting).

200. *See Burlington N. & Santa Fe R.R. Co. v. Poole Chem. Co.*, 419 F.3d 355, 358 (5th Cir. 2005) (concluding "that § 9658 does not preempt the Texas statute of repose").

was passed, and therefore failed to account for the evolution in the actual ordinary use of statutes of limitations and statutes of repose.²⁰¹ As the *Waldburger* holding is not susceptible to the defects of an unduly narrow and temporally troubled approach to plain meaning analysis, the Supreme Court should affirm.

2. *The Waldburger Majority's Conclusion That Section 9658 Preempted North Carolina's Statute of Repose Avoids Absurd Consequences, Unlike a Conclusion Based on Plain Meaning as Literal Meaning*

The *Waldburger* court showed concern with the consequences of adopting the facially plain language of Section 9658, although it did not go so far as to make an absurdity-based argument.²⁰² The court highlighted the internal inconsistency within Section 9658, namely, that it at first includes common law limitations periods in the scope of preemption, but elsewhere references only a “statute of limitations.”²⁰³ This does show inconsistency; but, given that *Waldburger* involves a statutory and not a common law limitation, the inconsistency lacks direct bearing on the facts of this case.²⁰⁴ A review of the repose preemption cases decided by several courts in Alabama,²⁰⁵ however, reveals why a conclusion that repose statutes are within the preemptive scope of Section 9658 escapes absurd consequences.

201. The *Burlington* court cited cases from 2004 and 1991 to define “statute of repose,” and cited cases ranging from 1984–1999 to define “statute of limitations.” *Id.* at 362–64. Only cases from 1986 (the year of SARA’s passage) and preceding years, however, would have been useful for understanding what Congress had meant by “statute of limitations” in § 9658.

202. The absurdity doctrine provides: “If a given statutory application sharply contradicts commonly held social values, then [courts presume] that this absurd result reflects imprecise drafting” and not Congress’s intent. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389–90, 2389 n.7 (2003). “Commonly held social values” can be defined as “a shorthand for the array of moral, economic, political, and other values shared by the society in which a legislature operates.” *Id.* at 2389 n.7.

203. Compare 42 U.S.C. § 9658(a)(1)(2006) (“[I]f the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than . . .”), with 42 U.S.C. § 9658(b)(2)(2006) (“The term ‘applicable limitations period’ means the period specified in a statute of limitations during which a civil action . . . may be brought.”), and 42 U.S.C. § 9658(b)(3) (2006) (“The term ‘commencement date’ means the date specified in a statute of limitations as the beginning of the applicable limitations period.”).

204. At least one court that considered whether the FRCD preempted a common law rule of repose responded to the inconsistency by recognizing that “courts are discouraged ‘from adopting a reading of a statute that renders any part of the statute mere surplusage.’” *Abrams v. Ciba Specialty Chems. Corp.*, 659 F. Supp. 2d 1225, 1236 (S.D. Ala. 2009) (quoting *Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 944 (11th Cir. 2001)).

205. *Moore v. Walter Coke, Inc.*, No. 2:11-cv-1391-SLB, 2012 WL 4731255, at *1, *8 (N.D. Ala. Sept. 28, 2012); *Abrams*, 659 F. Supp. 2d at 1226; *Fisher v. Ciba Specialty Chems. Corp.*, No. 03-0566-WS-B, 2007 WL 2995525, at *1, *20 (S.D. Ala. Oct. 11, 2007).

The interesting twist in the Alabama repose cases was that they each involved a common law rule of repose, rather than a statute of repose.²⁰⁶ As the *Waldburger* court noted, the core text of Section 9658 provides for preemption of common law limitations periods with commencement dates earlier than the FRCD.²⁰⁷ Accordingly, two district courts in Alabama found that the state's common law repose rule was preempted.²⁰⁸ This seems like a fair application of the plain meaning rule for Section 9658, which specifically references "common law" limitations periods.²⁰⁹ Statutes of repose are not, of course, referenced by Section 9658, which led the Fifth Circuit to conclude that the plain meaning of Section 9658 did not support preemption.²¹⁰

Consider the implications, however, of accepting this argument based on facial plain meaning while also accepting—again based on facial plain meaning—that Section 9658 includes common law limitations periods: Despite the lack of any relevant distinction between repose rules under the common law and those codified in statutes, plaintiffs like the *Waldburgers* in states that happened to have common law repose rules could have their cases heard, while those in states with statutes of repose would have their claims barred. Even further, plaintiffs like the *Waldburgers* would have their claims barred by a ten-year statute of limitations, while other plaintiffs might face a twenty-year (or longer) common law rule of repose yet still be able to bring their action. The stunningly arbitrary character of this outcome, which clashes roughly with societal expectations of fairness, makes it appear absurd that Congress could have intended it.²¹¹

206. See *Moore*, 2012 WL 4731255, at *1 (finding that § 9658 "applies to Alabama's rule of repose"); *Abrams*, 659 F. Supp. 2d at 1231 ("Here, however, there is no statute of repose, but there is instead a rule of repose created by Alabama common law."); *Fisher*, 2007 WL 2995525, at *14 (same).

207. 42 U.S.C. § 9658(a)(1).

208. See *Moore*, 2012 WL 4731255, at *13 (concluding that Alabama's common law rule of repose was subject to preemption by the FRCD); *Abrams*, 659 F. Supp. 2d at 1229 (same); *Fisher*, 2007 WL 2995525, at *20 (same).

209. *But see* *Evans v. Walter Indus.*, 579 F. Supp. 2d 1349, 1364 (N.D. Ala. 2008) (holding that § 9658 "does not encompass a rule of repose and, therefore, does not preempt Alabama's twenty-year rule of repose"). Note, however, that the *Evans* court must move *away* from the plain meaning of the statute, which refers to common law limitations periods, to reach its conclusion. *Id.* at 1363–64.

210. See *supra* Part II.D.1.

211. A number of absurdity doctrine cases have involved rejections of the consequences of literal meaning that also call to mind this sort of arbitrariness or unfairness. See, e.g., *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1090–91 (10th Cir. 1997) (doubting that Congress could have intended the result that employers could invoke the "direct threat" defense under the American Disabilities Act against some classes of persons but not others from whom such threat could be received); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226–27 (7th Cir. 1997) (refusing to apply RICO warranty fraud liability to a defendant when such warranty would not apply if the defendant had not happened to operate through franchise dealers rather than its own dealership).

The *Waldburger* court was attuned to the broader textual context in which Congress deployed the term “statute of limitations,” but it did not consider the consequences of the common law provision beyond an issue of consistency relevant only to common law rules of repose.²¹² As the “mother of all consequentialist canons,”²¹³ the absurdity prohibition can be controversial for those who wish to stay tightly tethered to the text. The *Waldburger* majority, however, demonstrated an openness looking toward the broader implications of the text and its structure during its plain meaning analysis.²¹⁴ This flexibility guided the court to a finding of preemption, which, as the conclusion that sensibly permits the FRCD to replace the functional commencement dates of both common law repose rules and statutes of limitations, is the conclusion that should be affirmed by the Supreme Court.

C. *The Waldburger Majority’s Conclusion That Section 9658 Preempted North Carolina’s Statute of Repose Is the Result Recommended by Recourse to Legislative History That Properly Emphasizes Principles of Proximity and Specificity*

All sources of legislative history are not created equal.²¹⁵ The *Waldburger* court did not openly acknowledge this reality, but nonetheless rightly drew on the House Conference Report for guidance after establishing the textual ambiguity of Section 9568.²¹⁶ The two main documents that courts have relied upon when addressing what legislative history suggests about FRCD preemption of statutes of repose are the House Conference Report and the *Study Group Report*.²¹⁷ The *Waldburger* dissent used the latter to

212. See *supra* text accompanying note 137.

213. Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1011 (2011). Schacter writes that “[b]y definition, the absurdity doctrine is oriented precisely to avoiding bad policy consequences.” *Id.*

214. See *supra* text accompanying note 137.

215. See, e.g., Eric Lane, *The Real Politik of Writing and Reading Statutes*, 76 BROOK. L. REV. 967, 976 (2011) (quoting Judge Nicholas Politan of the United States District Court for the District of New Jersey as claiming that the task of looking at legislative history is “to sift through it, determine what is hot stuff, what is good stuff, what is bad stuff . . . and then make a judgment”); Victoria Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 73 (2012) (offering the “common sense” view that methods of statutory interpretation should “defer[] to Congress’s own rules”); Matthew B. Todd, *Avoiding Judicial In-Activism: The Use of Legislative History to Determine Legislative Intent in Statutory Interpretation*, 46 WASHBURN L.J. 189, 211–13 (2006) (recognizing that most courts reject remarks made subsequent to a bill’s passage as offering useful insight into congressional intent, and that statements made by a legislator to an empty house are poor support for what Congress was “thinking”).

216. See *Waldburger v. CTS Corp.*, 723 F.3d 434, 443–44 (4th Cir. 2013) (majority opinion) (selecting legislative history without discussion of how to select best sources).

217. See, e.g., *McDonald v. Sun Oil Co.*, 548 F.3d 774, 782–83 (9th Cir. 2008) (stating that “[t]wo significant items of legislative history referencing this issue” [of what Congress meant by

argue that Congress must have been aware of the distinction between statutes of limitations and statutes of repose.²¹⁸ The introduction of a principle of differentiation among the countless types of documents to which courts might appeal is needed for an explanation as to why a reliance on the *Study Group Report* is less effective than reliance on the House Conference Report, or other possible sources.

The most effective uses of legislative history center the principles of proximity and specificity because these principles help illuminate Congress's intent at or near the time a bill was passed and on point to a particular issue.²¹⁹ That is, "proximity" is temporal, and proximate legislative history is that which is nearest in time to the passage of the legislation, but not after.²²⁰ In the case of FRCD preemption, proximity would recommend examination of SARA's legislative history that privileges the House Conference Report immediately preceding final debate and passage.²²¹ Proximity is balanced by the principle of specificity, which refers to a substantive attribute and filters for relevant content.²²² Specificity would recommend, then, looking at statements relating to the introduction of Section 9658 in particular, which first appears in the Report of the Committee on Energy and Commerce,²²³ or to debates involving the provision.²²⁴ Significantly, these principles suggest that the *Study Group Report* is highly dubious as a source of legislative history for at least two reasons. First, it does not speak to the FRCD provision in particular at all, as this legislative option was not its recommendation.²²⁵ Second, the *Study Group Report* is years removed in time, as it was submitted in 1982, and SARA was not passed until 1986.²²⁶ The dissent's assertion that one brief mention in the *Study Group*

'statute of limitations'] are the STUDY GROUP REPORT, *supra* note 38, and House Conference Report); *Burlington N. & Santa Fe R.R. Co. v. Poole Chem. Co.*, 419 F.3d 355, 364 (5th Cir. 2005) (using the House Conference Report to confirm its conclusion that Congress did not intend to preempt the Texas statute of repose at issue).

218. *See supra* note 152 and accompanying text.

219. *See* Nourse, *supra* 215, at 110–11 (pointing out that bills and understandings of the issues they raise can change dramatically over time, and so looking for particular issues raised as close to the bill's passage as possible is most prudent; and, identifying this way of using legislative history as reflecting principles of proximity and specificity).

220. *Id.*; *see also* Todd, *supra* note 215, at 211–12.

221. *See* Nourse, *supra* note 215, at 98 ("It is the conventional and correct wisdom that, of all legislative history 'apart from the statute itself, [conference committee reports are] the most reliable evidence of congressional' decisions." (quoting *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 977 (9th Cir. 1999))).

222. *Id.* at 97 (describing how copious legislative history resources could be substantially thinned by picking out where a "key statutory term" [or provision] was introduced).

223. HOUSE COMMITTEE REPORT, *supra* note 44, at 1797–98.

224. 131 CONG. REC. 11547–71 (1985) [hereinafter House Debate].

225. STUDY GROUP REPORT, *supra* note 38, at 255–56.

226. *See supra* Part II.A.

Report of “statute of repose” as something distinct from “statute of limitations” was enough to effectively put Congress “on notice”²²⁷ seems, then, a rare and rather too-charitable portrayal of congressmembers’ long-term memory capacities.

Beyond showing why appeals to the *Study Group Report* are unconvincing, however, attention to specificity in particular points to an overlooked but telling House debate.²²⁸ Representative Barney Frank attempted to insert a federal cause of action provision for toxic tort plaintiffs, but did not receive the votes.²²⁹ Statements from legislators who blocked the provision pointed to the FRCD to explain why a federal cause of action was an unnecessary measure for addressing the problem of claims barred due to the long latency periods of certain injuries.²³⁰ The FRCD provision already in the draft bill was understood to mean that “all persons, regardless of which State they live in, will be able to sue for damages when they know they have been damaged,”²³¹ and so the FRCD “already takes care of any problems that anyone from any State might have by having confusion as to how long he has or she has in which to bring a cause of action.”²³² The legislative history of Section 9658 suggests, then, that the FRCD was indeed intended to address various limitations periods that might bar plaintiffs’ actions.

Another sense in which looking to the principle of specificity in addition to proximity strengthens the force of the court’s decision is that this permits more of the justificatory burden behind the court’s holding to be shifted away from its reliance on the remedial purpose canon.²³³ The remedial purpose canon has been problematized, especially by positivist political theory and the rise of social choice theory, which both challenge the notion of Congress having one identifiable “intent.”²³⁴ Rather, battles are won and lost and compromises struck.²³⁵ Legislative history from the House debate shows, however, the status of both SARA and the FRCD provision as com-

227. *Waldburger v. CTS Corp.*, 723 F.3d 434, 452 (4th Cir. 2013) (Thacker, J., dissenting).

228. *See* House Debate, *supra* note 224, at 4320–39.

229. *Id.* at 4338–39.

230. *Id.* at 4323–31.

231. *Id.* at 4323 (statement by Rep. Glickman).

232. *Id.* at 4324 (statement by Rep. Breaux).

233. The *Waldburger* court appealed to the remedial purpose canon, which instructs a liberal standard of construction when the statute at issue is remedial. *See supra* notes 140–142 and accompanying text.

234. *See* Manning, *supra* note 202, at 2390 (“[T]he legislative process is simply too complex and too opaque to permit judges to get inside Congress’s ‘mind.’”).

235. *See id.* at 2410 (“[B]ecause legislation is often the product of compromise, judges cannot reliably use idealized background legislative intent . . .”).

promise legislation,²³⁶ thus countering any claims of an inaccurate depiction of the legislative process. Further, and significantly, the Supreme Court has indicated its reluctance to broadly interpret CERCLA through appeal to the remedial purpose canon, which is a common interpretive strategy in lower courts.²³⁷ Yet as the *Waldburger* holding has both proximate and specific legislative history to support it, the Supreme Court has good reason to affirm.

*D. The Challenge of the General Presumption Against Preemption
Can Be Met Due to the Anomalous Features of the FRCD*

The *Waldburger* court largely ignores the relevance of concerns about federalism in its decision,²³⁸ but the dissent and prior courts struggling with FRCD preemption have acknowledged the existence of and challenge presented by the presumption against preemption.²³⁹ The primary reason for the presumption against preemption is to protect the “sphere of sovereignty” belonging to the states.²⁴⁰ As Judge Thacker points out in her dissent, the presumption against preemption is most relevant in “fields the states traditionally regulate,”²⁴¹ and states surely typically regulate the creation of substantive rights protecting against state law liability.²⁴² Another important and much more recently articulated reason to appreciate the presumption is the worry that preemption will bar recourse to state liability regimes without providing federal remedies in their stead.²⁴³ The

236. See House Debate, *supra* note 224, at 4323 (statement by Rep. Glickman recognizing that SARA was compromise legislation and that the FRCD is an option between the federal cause of action and the barring of plaintiffs’ claims).

237. “[A]lthough the vast array of lower court decisions on CERCLA almost invariably broadly interpret CERCLA in light of the broad remedial purposes that Congress had in mind, the Supreme Court ‘has in almost every CERCLA case it has gotten, narrowly interpreted the statute, most recently in 2009 in [*Burlington N. & Santa Fe R.R. v. United States*, 556 U.S. 599 (2009)].” Perry Cooper, *SCOTUS Likely to Reverse 4th Circuit Ruling in CERCLA Preemption Case*, *Panelists Say*, BNA SNAPSHOT (Feb. 10, 2014) (quoting Professor Robert Percival, University of Maryland Francis King Carey School of Law).

238. Only the dissent addresses the presumption against preemption. See *Waldburger v. CTS Corp.*, 723 F.3d 434, 453 (4th Cir. 2013) (Thacker, J., dissenting).

239. See *id.*; *Lee v. CSX Transp., Inc.*, 958 So.2d 578, 583 (Fla. Dist. Ct. App. 2007) (asserting that the remedial purpose canon is unpersuasive with regard to FRCD preemption because the FRCD “preempts state law within a field traditionally occupied by the states” (internal quotation marks omitted)).

240. See Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 260 (explaining how federal legislation is regarded as “constitutionally suspect where it intrudes into areas of traditional state regulation” (internal quotation marks omitted)).

241. *Waldburger*, 723 F.3d at 453 (internal quotation marks omitted).

242. *Id.*

243. See Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1558 (2009) (“[T]here appears to be a growing trend toward using principles

presumption is thus important both for its protection of states' traditionally occupied fields and protection of some plaintiffs' very access to justice.

Recognizing the general significance of the presumption against preemption does not necessitate a different conclusion than FRCD preemption of state statutes of repose because the FRCD provision is unique in ways that weaken the presumption's applicability. Its anomalous quality is that it is federal law that preempts certain state laws, but only so that substantive *state law* claims may be brought by the plaintiffs.²⁴⁴ This means that CERCLA's FRCD provision is designed to leave state tort law intact.²⁴⁵ Further, it only preempts state laws where they differ from the content of the FRCD, leaving in place discovery-based limitations with the same effect.²⁴⁶ This reflects Congress's restraint of its preemptive legislation potential.²⁴⁷ Although Section 9658 creates national uniformity of commencement dates for tort actions within its scope, its preemptive impact does not raise the same concerns about protecting state law as would preemption of the tort actions themselves, or preemptive legislation broader in scope than necessary to achieve Congress's purpose.²⁴⁸

Indeed, more accurately stated, the "worry" about the impact of FRCD preemption on states' powers is that state courts would have to hear more actions brought under state law than the state judged it should²⁴⁹—a problem of *too much* application of state law. Consequently, plaintiffs' access to justice has been increased rather than taken away by preemption.²⁵⁰ Thus, the court rightly refused, and remained consistent with its more contextually aware approach to statutory interpretation,²⁵¹ to treat the presump-

of federal constitutional law to limit the ability of states to grant their citizens the right to obtain private redress for harm under tort law.”).

244. 42 U.S.C. § 9658(a)(1) (2006) (providing that “[i]n the case of any action brought under State law for” certain tort claims involving hazardous substances, the FRCD preempts only any applicable commencement dates).

245. See House Debate, *supra* note 224, at 4332 (statement by Rep. McCollum explaining that a federal cause of action should not be created, but that Congress should “[l]et the State laws apply”).

246. See *supra* text accompanying notes 49–50.

247. Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1269 (2010) (citing as one example of safeguards that show that Congress “is perfectly able to accommodate federalism concerns in crafting preemptive federal legislation” that “Congress often elects only to preempt state and local laws that *are different from* federal law, thus leaving intact state and local laws that are identical or substantially similar to federal mandates”).

248. *Id.*

249. See *Waldburger v. CTS Corp.*, 723 F.3d 434, 453 (4th Cir. 2013) (Thacker, J., dissenting) (suggesting that federalism concerns are weighty where preemption would deprive a state of its ability “to create a substantive right to be free from liability under its own state tort law”).

250. See *id.* at 445 (majority opinion) (“In so holding, we simply further Congress’s intent that victims of toxic waste not be hindered in their attempts to hold accountable those who have strewn such waste on their land.”).

251. See *supra* Part IV.A.

tion against preemption as a hard and fast rule. The federalism concerns associated with preemption merit serious consideration, but the presumption against preemption should not be dispositive in the case of the FRCD. A potential Supreme Court finding of preemption need not, then, be undermined by the presumption against preemption.

V. CONCLUSION

In *Waldburger v. CTS Corporation*, the Fourth Circuit determined that CERCLA Section 9658 preempted North Carolina's ten-year statute of repose for real property.²⁵² Although the court's reasoning might have been helpfully clarified and expanded, as this Note has sought to do, the *Waldburger* decision is correct for three main reasons.²⁵³ First, it is supported by a variant of plain meaning analysis that searches for "public" versus technical or legalist meaning and avoids absurdity.²⁵⁴ Second, it resulted from an emphasis on the principles of proximity and specificity where legislative history is consulted for guidance.²⁵⁵ Finally, the presumption against preemption does not undermine the decision, as the FRCD is a singular provision regarding which the presumption has far less weight.²⁵⁶ The Supreme Court should therefore affirm *Waldburger*, and by so doing, effectively secure access to justice for plaintiffs injured by long-latency, difficult-to-detect personal injury and property damages.

252. *Waldburger*, 723 F.3d at 438.

253. *See supra* Part IV.A.

254. *See supra* Part IV.B.

255. *See supra* Part IV.C.

256. *See supra* Part IV.D.