UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Case No. 18-15104-DD

MAGALY PINARES and MARCOS PINARES,

Plaintiffs,

vs.

UNITED TECHNOLOGIES CORP., d/b/a PRATT & WHITNEY GROUP,

Defendant.
_____/

CASE NO. 10-CV-80883-MARRA
(Consolidated Case: Lead Action)

JOSELYN SANTIAGO and STEVE SANTIAGO, Co-Personal Representatives of the Estate of CYNTHIA SANTIAGO,

Plaintiffs-Appellants,

vs.

UNITED TECHNOLOGIES CORP., d/b/a PRATT & WHITNEY GROUP,

Defendant-Appellee.
_____/

CASE NO. 14-CV-81385-MARRA

Appeal from the United States District Court
For the Southern District of Florida, West Palm Beach Division

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APPELLANTS' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Local Rule 26.1-1, Appellants certify that the following is a complete list of the trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

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	(Consolidated Action Case No. 9:14-cv-81385)
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Peart, Yvette and Roderick, as parents and natural guardians of R.P. a minor	Consolidated Action Plaintiff
Pinares, Magaly	Consolidated Action Plaintiff
Pinares, Marcos	Consolidated Action Plaintiff
Pratt & Whitney Canada	Subsidiary of Defendant-Appellee
Pratt & Whitney Commercial Engine	Business Segment of Defendant-Appellee

Pratt & Whitney Global Service Partners	Global Service Partner of Defendant-Appellee
Pratt & Whitney Rocketdyne	Subsidiary of Defendant-Appellee
Reinhart, Honorable Bruce E.	United States Magistrate Judge for the Southern District of Florida
Rockwell Collins, Inc.	Subsidiary of Defendant-Appellee
Rolls-Royce PLC	Joint Venture Partner of Defendant-Appellant
Ryskamp, Honorable Kenneth L.	United States District Judge for the Southern District of Florida
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Schwalb, Kristina DeCarlo	Consolidated Action Plaintiff
Schwinghammer, Jr., Gregory J.	Appellate Counsel for Defendant-Appellee
Searcy Denney Scarola Barnhart & Shipley	Counsel for all Plaintiffs, excluding Magaly Pinares and Marcos Pinares
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State Street Bank & Trust Company	Wholly-owned subsidiary of State Street Corporation
State Street Corporation	Owns more than 10% of UTC stock
Stoica, Patricia	Consolidated Action Plaintiff
Thibodeau, Luz	Consolidated Action Plaintiff
Thibodeau, Steven	Consolidated Action Plaintiff

Tvenstrup, Kevin R.	Consolidated Action Plaintiff
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UTC Fire & Security	Subsidiary of Defendant-Appellee
UTC Power	Subsidiary of Defendant-Appellee
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Wise, Amanda	Consolidated Action Plaintiff
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By:/s/ *Bryan S. Gowdy*
Bryan S. Gowdy

STATEMENT REGARDING ORAL ARGUMENT

This Court should hold oral argument. The legal issue presented is novel in this Circuit. The district court adopted the reasoning of the only federal circuit court of appeals to address the issue. *See Halbrook v. Mallinckrodt, LLC*, 888 F.3d 971, 977-78 (8th Cir. 2018).

The issue involves the intersection of two federal laws, one of which preempts state law and the other of which adopts state law as the "rules for decision." The first law, 42 U.S.C. § 9658, applies to an "action brought under State law" and preempts the state statute of limitations when a hazardous substance causes a personal injury, as occurred in this case in which thorium-230 caused Cynthia Santiago to contract brain cancer at age 13. The second law, the 1988 amendments to the Price-Anderson Act ("PAA"), adopts "the law of the State" as the "substantive rules for decision" for an action arising out of a nuclear incident. Overlooking that context matters, the district court held that a hybrid PAA action, though grounded in state law, is not "brought under State law," and thus the court erroneously applied invalid, preempted state law to rule that Cynthia's action was untimely. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 375-77 (2004) (stating, in the context of a statute of limitations, "a cause of action may arise under both state and federal law"); *Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1306-07 (11th Cir. 1998) (calling a PAA action a "hybrid" action).

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STATEMENT OF JURISDICTION

Appellate jurisdiction

This Court has appellate jurisdiction of a final judgment or order under 28 U.S.C. § 1291. Establishing appellate jurisdiction in this case is more complicated than in most cases and thus requires some explanation.

Cynthia Santiago filed suit on November 7, 2014 in the district court, and her case was assigned case number 9:14-cv-81385. On July 14, 2016, the district court entered identical orders in twenty cases, called the Acreage Injury Cases, consolidating them for pretrial purposes. In Ms. Santiago's action (9:14-cv-81835), the order of consolidation is at docket entry 80. The lead consolidated action was *Pinares v United Technologies Corporation*, Case No. 10-80883-CIV-MARRA. The order of consolidation in *Pinares* is at docket entry 203. All docket entry citations (D.E. XXX) in this brief are to the *Pinares* docket unless expressly noted otherwise. All twenty consolidated actions involved individual plaintiffs who were suing the same defendant, United Technologies Corporation, the Appellee. (D.E. 203, at 1-3.)

The district court's order of consolidation expressly invoked Fed. R. Civ. P. 42. (*Id.* at 4.) The order was for case management purposes, as the court did not desire or need "duplicate cross-filings" in each of the twenty related actions. (*Id.* ¶ 3, at 4-5.) It directed the parties to file all submissions in only the lead *Pinares* case.

(*Id.* ¶ 3, at 5.) The court consolidated the twenty actions "for all pretrial purposes (all discovery proceedings (including expert discovery) and all pretrial motions (including dispositive motions))." (*Id.* ¶ 1, at 4.) The court also "reserve[d] ruling on whether all or some of these cases should be consolidated for trial." (*Id.* ¶ 2, at 4.) The court did not order any consolidation of the pleadings. (*See* D.E. 203.)

After Ms. Santiago's death, her parents, Appellants Joselyn and Steve Santiago, became the personal representatives of their daughter's estate, and they replaced Ms. Santiago as the Plaintiffs. (D.E. 206, 207.) Appellants filed their own amended complaint that was not joined by any of the plaintiffs from the other consolidated actions. (D.E. 219.) Appellee moved for summary judgment, Appellants responded, and Appellee replied. (D.E. 328, 345, 356.) Competing statements of fact were submitted. (D.E. 328, 340.) These summary judgment papers addressed only the claims pled by Appellants and not any claims pled by any of the other plaintiffs in their separate complaints in the other nineteen actions. The district court entered an order granting summary judgment in favor of Appellee on all of Appellants' claims based on the statute of limitation. (D.E. 407.) The court then entered a judgment stating Appellants "shall take nothing from [Appellee] in this action." (D.E. 408, at 2.) The court did not enter any order or judgment relating to the other individual plaintiffs' claims.

Given the foregoing procedural history, this Court has jurisdiction under 28 U.S.C. § 1291. *See generally Hall v. Hall*, 138 S. Ct. 1118 (2018). Under *Hall*, the fact that other plaintiffs from the other consolidated actions still have claims pending does not preclude this Court's § 1291 jurisdiction. *See generally id.*

Accordingly, Appellants are not required to seek certification from the district court under Fed. R. Civ. P. 54(b) for this appeal to proceed. However, if this Court were to disagree and conclude otherwise, then Appellants request this Court hold this appeal in abeyance and provide Appellants the opportunity to seek such a certification from the district court so this appeal can proceed.

The district court's jurisdiction.

The original complaint filed by Ms. Santiago invoked the district court's original jurisdiction under 42 U.S.C. §§ 2014, 2210(n)(2), which are part of the 1988 amendments to the Price-Anderson Act. *See infra* at 6-8 (full citation); (Case No. 9: 14-cv-81385, D.E. 1, ¶¶1-3, at 1.) Appellants' amended complaint noted this same jurisdictional allegation and alleged the district court had "pendant jurisdiction over the exposure allegations that do not stem from a nuclear incident." (D.E. 209, ¶ 1, 2.) Appellee admitted these jurisdictional allegations. (D.E. 298, ¶1, at 1-2.)

Section 2210(n)(2), Title 42 states, "With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction

without regard to the citizenship of any party of the amount in controversy." The terms in this jurisdictional statute – "public liability action" and "nuclear incident" – are further defined in 42 U.S.C. § 2014(q),(w),(hh).

STATEMENT OF THE ISSUES

Plaintiffs claim their daughter died because of a hazardous substance released by Defendant. The district court entered summary judgment based on Florida's statute of limitations. The court ruled Plaintiffs' suit was "a public liability action" under the 1988 amendments to the Price-Anderson Act ("PAA"), and thus "the substantive rules for decision" had to "be derived from the law of the State" where the nuclear incident occurred. 42 U.S.C. § 2014(hh); (D.E. 407, at 5-8.) In 1986, Congress enacted a statute, 42 U.S.C. § 9658, that preempted state statute of limitations under certain circumstances involving hazardous substances. The prefatory clause to § 9658 states, "In the case of any action brought under State law . . . ."

The Court must reverse if its answers the following question "no":

> **When Congress adopted the "law of the State" as the "substantive rules for decision" for a PAA public liability action, did it adopt state laws it had preempted two years earlier, under § 9658, for "any action brought under State law?"**

STATEMENT OF THE CASE

A. The complaints.

Cynthia Santiago turned age 18 in March 2014. (D.E. 368-14, at 11.)[1] Several months later, in November 2014, she filed this suit against Defendant, United Technologies Corporation. (D.E. 407, at 2; Case No. 9:14-cv-81385, D.E. 1, at 1.) She alleged her brain tumor was caused by Defendant's releases of radioactive materials. (Case No. 9:14-cv-81385, D.E. 1, at 1.) Less than two years later, Cynthia died, and her parents, as her estate's personal representatives, replaced her as the Plaintiffs. (D.E. 206, 207, 219.)

Their amended complaint alleged Cynthia's death was the result of a brain tumor caused by exposure to a nuclear incident. (D.E. 219, ¶¶ 1-2, at 2.) Cynthia contracted a brain cancer at age 13 in November 2009, which allegedly had resulted from exposure to radioactive and other carcinogenic materials. (*Id.* ¶ 6, at 2.) Cynthia's tumor allegedly was part of a cluster of pediatric brain cancers in Cynthia's neighborhood, the Acreage, occurring from 2001 to 2009, resulting from soil or water transfers from Defendant's nearby property to the Acreage. (*Id.* ¶¶ 7, 14-18, 26-29, at 3-7.) The soil transfers allegedly occurred by way of trucks from

[1] Unless otherwise noted, all citations herein are to Case 9:10-cv-80883 (the "Pinares case"). Cynthia's original complaint was in Case 9:14-cv-81385, which later was consolidated with the Pinares case and eighteen other cases arising out of Defendant's alleged contamination of the Acreage neighborhood. (D.E. 203.)

1993 to 2000 (*id.* ¶¶ 7, 38-39, 95-127, at 3, 10, 21-25), before Cynthia's birth and during her pre-kindergarten years. Plaintiffs alleged that several non-naturally occurring radioactive materials were in the Acreage (*id.* ¶¶ 30-33, at 7-9), including thorium-230 (*id.* ¶ 33, at 9), and that the contaminants were found in, and causally linked to, Defendant's property (*id.* ¶¶ 5, 34-37, 47-54, at 2, 9-10, 12-13).

On its property, Defendant allegedly used, with and without a license, multiple radioactive materials, including thorium. (*Id.* ¶ 64, at 15.) Defendant's practices allegedly contaminated its own property. (*Id.* ¶ 61, at 14.) Defendant allegedly transported its contaminated soil to sites from where it was eventually sold as fill, from 1993-2000, for the residential development of Cynthia's neighborhood. (*Id.* ¶ 62, at 14.)

The amended complaint had three operative counts for wrongful death.[2] (*Id.* at 25-36.) The first two counts were grounded in Florida common law, negligence and trespass. (*Id.* at 25-30.) A third count alleged a nuclear incident under the federal Price-Anderson Act. (*Id.* at 31-32). Plaintiffs alleged Defendant had violated federal regulatory standards in handling, storing, and disposing of radioactive materials (*id.* ¶¶ 80-88, at 19-20), and as a result, members of the public (including tumor victims

[2] A fourth count, based on Florida's RICO statute (D.E. 219 at 33-35), was dismissed at the pleadings stage (D.E. 284). Though designated in the notice of appeal (D.E. 411), Plaintiffs no longer seek to reverse that order.

in the cluster) were exposed at levels exceeding federal regulations (*id.* ¶¶ 83-86, at 20).

B. Summary judgment proceedings.

Defendant moved for summary judgment, Plaintiffs responded, and Defendant replied. (D.E. 328, 345, 356.) Each side presented extensive, competing statements of fact on the merits. (D.E. 329, 340.) The district court, however, concluded it was unnecessary to consider the merits because, in its judgment, Plaintiffs' claims were barred by the statute of limitations. (D.E. 407, at 2 n.1.) Indeed, the court's order setting a hearing directed the parties to limit their arguments to "preemption and the statute of limitations." (D.E. 365, at 2.)

The summary judgment order's analysis centered on two congressional acts from the 1980's:

(i) 42 U.S.C. § 9658 – Enacted in 1986 as an amendment to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). *See* Superfund Amendments and Reauthorization of 1986, Pub. L. No. 99-499, § 203(a), 100 Stat. 1695 (adding § 309 to Pub. L. No. 96-510, 94 Stat. 2767 (1980)).

(ii) Price-Anderson Amendments Act of 1988, Pub. L. No. 100–408, 102 Stat 1066 (codified as amended in scattered sections of 42 U.S.C.).

(*See* D.E. 407, at 4-8.)

Defendant's motion made no mention of the first law, § 9658, as its page-and-a-half argument on the statute of limitations discussed only Florida law and the

Price-Anderson Act ("PAA"). (D.E. 326, at 5-6.) It argued the facts underlying Plaintiffs' PAA claim were "indistinguishable" from their state-law negligence and trespass claims, and thus Florida's four-year statute of limitations applied. (*Id.* at 5.) Under Florida law, Defendant argued, the "clock on Plaintiffs' claims started when [Cynthia's] claim accrued – that is, when she was injured." (*Id.* at 6.) Cynthia indisputably was "injured," Defendant argued, when she was diagnosed with brain cancer at age 13 in November 2009. (*Id.*; D.E. 329, ¶ 7, at 2.) Thus, Defendant contended, because Cynthia failed to file suit with four years of that date (when she was still a minor), Cynthia's suit was untimely. (D.E. 328, at 6.)

In response, Plaintiffs argued, among other things, that Cynthia's suit was timely because of § 9658 (D.E. 345, at 10-14), though they candidly disclosed, and disagreed with, an Eighth Circuit decision holding § 9658 did not apply to PAA actions (*id.* at 13 (citing *Halbrook v. Mallinckrodt, LLC*, 888 F.3d 971, 977 (8th Cir. 2018)). In reply, Defendant urged the court to follow *Halbrook*.[3] (D.E. 356, at 2.) At the hearing, both parties argued § 9658's applicability. (*E.g.,* D.E. 369, at 13-17, 38-40, 42-52, 64, 69-72, 92, 98-101, 112.) Plaintiffs' counsel argued Florida law, as adopted by the PAA, would apply § 9658 because the "whole law of the state,"

[3] Defendant's reply also argued § 9658 did not apply because Plaintiffs had not shown the "conditions for CERCLA cleanup." (D.E. 356, at 2.) The district court did not address this argument in its summary judgment order (D.E. 407), but we do *infra* Argument E, at 50-54.

including § 9658, governs a "hybrid" PAA action. (*See* D.E. 369, at 44:24-45:12, 46:23-47:10, 49:12-13, 64:10-11, 71:16-72:6, 81:4, 112:16-19 (calling § 9658 the "FRCD").)

In its summary judgment order, the district court noted the PAA "mandate[d] all nuclear incidents be litigated in federal courts." (*Id.* at 5 (citing 42 U.S.C. § 2210(n)(2)).) Yet, the court observed, the PAA required it to "apply the substantive law of the state in which the nuclear incident occurred unless to do so is inconsistent with the PAA." (*Id.* (citing 42 U.S.C. § 2014(hh)).) The court then discussed how § 9658 "pre-empts statutes of limitations applicable to state-law tort actions for personal injury or property damage arising from the release of a hazardous substance, pollutant, or contaminant into the environment." (*Id.* (internal quotes omitted) (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 4 (2014)).) The court noted that § 9658 establishes a date on which the state-law limitations period begins to run – the "federally required commencement date." (*Id.*)

Before framing the dispositive question that would lead to its error, the court made two other points about these two laws. First, the court stated § 9658 "only applies to claims 'brought under state law,'" referring to § 9658(a)(1)'s prefatory clause, which states: "In the case of any action brought under State law . . . ." (*Id.* at 6 & n.2 (citing *Halbrook*, 888 F.3d at 977)). Second, because Plaintiffs' claims arose out of a mere "nuclear incident" and not an "extraordinary nuclear incident," the

PAA did not set a limitations period and instead applied the limitations period of the state where the nuclear incident occurred. (*Id.* at 6 (citing *Corcoran v. N.Y. York Power Auth.*, 202 F.3d 530, 542 (2d Cir. 1999)).)

Then, the court stepped directly into its reversible error by incorrectly framing the dispositive question as follows: "[W]hether the PAA or [§ 9658's] statute of limitations apply to Plaintiffs' claims[?]" (*Id.* (emphasis added).) The court's question, as framed, did not permit an answer that would allow both the PAA and § 9658 to apply. The court's question, as framed, did not contemplate that the PAA's "law of the State" would include § 9658 and other federal laws. (*See generally* D.E. 407.)

Having framed the dispositive question as a binary choice (PAA or § 9658), the court then stated how the answer to this question would determine the outcome: "If the PAA applies, Florida's four[-]year statute of limitations applies and Plaintiffs' claim is time barred . . . . If [§ 9658] applies, the claim is timely because Cynthia turned 18 a few months before filing suit." (*Id.* at 406.) In taking this binary approach, the court overlooked Plaintiffs' argument that, in adopting the "law of the State," the PAA had adopted all the State's laws, including federal laws like § 9658. (*See, e.g.*, D.E. 369, at 44-47, 71-72, 81, 112.) In other words, the court failed to grasp that, if the PAA applied, then § 9658 – as part of the "law of the State" – also applied to preempt Florida's statute of limitations.

The district court instead adopted the Eighth Circuit's reasoning in *Halbrook* and ruled Plaintiffs' claims were untimely:

> With respect to the appropriate statute of limitations, the Court finds the *Halbrook* case instructive. Like in the instant case, the plaintiffs sought to avoid the application of state[-]law limitations period and to invoke instead [§ 9658].The *Halbrook* Court, relying on [§ 2014(hh) of the PAA], explained that "Congress created a federal cause of action for public-liability claims concerning nuclear incident" and "spoke clearly" when stating that these types of claims "shall be deemed" to arise under federal law. . . . Based on that, the court held that [§ 9658] was inapplicable to the plaintiffs' claims. The Court finds *Halbrook* persuasive and rejects Plaintiffs' request to apply [§ 9658] in determining the statute of limitations.

(D.E. 407, at 7-8 (emphasis added) (quoting *Halbrook*, 888 F.3d at 978).)[4] This was error. *Infra* Argument, at 18-54.

C. Standard of review

This Court reviews *de novo* a summary judgement order, viewing the facts in the light most favorable to the non-movant. *E.g., Hillcrest Prop., LLP v. Pasco County*, 915 F.3d 1292, 1297 (11th Cir. 2019). Questions of statutory interpretation and preemption are also reviewed *de novo*. *E.g., Bailey v. Rocky Mountain Holdings, LLC*, 889 F.3d 1259, 1272 n. 28 (11th Cir. 2018).

[4] The district court also rejected Plaintiffs' argument under various Florida tolling and estoppel doctrines. (D.E. 407, at 8-14.) Plaintiffs do not challenge these rulings on appeal.

SUMMARY OF ARGUMENT

Context matters. A phrase may have different meanings in different contexts. The district court erred because it failed to understand the phrases an "action brought under" and an "action arising under" have one meaning in a jurisdictional context and another meaning in the context of a statute of limitations. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 375-77, (2004). It failed to appreciate that an "action may be brought under State law" in the context of a statute of limitations and at the same time "arise under federal law" for jurisdictional purposes. For this Court to properly perform its role of statutory interpretation, it must understand the text and the context of the applicable statute of limitations (42 U.S.C § 9658) and the law governing Cynthia's action (the Price-Anderson Act).

We start with the statute of limitation, § 9658. Congress was told in a 1982 report, which it had commissioned, that hazardous substances cause illnesses – like the cancer Cynthia contracted as a teenager. These injuries, Congress was told, have long latency periods that delay the victim's ability to ascertain the injury's cause. Congress also was told that a victim's only recourse lies in state (not federal) law and that most states' statutes of limitations began to run from when the victim knew of her injury (like cancer) and not from when the victim learned what caused her injury (like Defendant's release of a hazardous substance that caused Cynthia's cancer).

In 1986, Congress fixed the States' laws by establishing a national standard, § 9658. The statute preempted in part state statutes of limitations for injuries caused by exposure to a hazardous substance. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 18 (2014). The district court correctly agreed that if § 9658 applied, Cynthia's suit was timely filed.

While leaving intact the States' various limitation periods, § 9658 established a "federally required commencement date." That date generally starts running the limitations period from when the victim knew, or should have known, a hazardous substance caused her injury. 42 U.S.C. § 9658(b)(4)(A). Congress enacted "special rules" for minors (like Cynthia) and incompetent persons to effectively establish the earliest date when such persons should have known their injury's cause. *Id.* § 9658(b)(4)(B). Congress declared § 9658's commencement date would apply "[i]n the case of any action brought under State law." *Id.* § 9658(a)(1). The meaning of this prefatory clause is at the core of this dispute.

Two years later in 1988, Congress faced a different problem arising out of Three Mile Island. *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 477 (1999). Congress needed to consolidate in federal court all suits arising out of a "nuclear incident." It sought to manage those suits and the distribution of government-mandated funds to compensate victims. *Id.* at 477; *see* 42 U.S.C. § 2210(e)(1)&(o). Congress thus amended the Price-Anderson Act and established a "public liability

action," or as this Court has called it, a "hybrid" action. *Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1306-07 (11th Cir. 1998).

Though this newly-created hybrid action "arose under" a federal law (42 U.S.C. § 2210), Congress specified – much like in the FTCA and other federal acts – that the "substantive rules for decision" would be the "law of the State" where the nuclear incident occurred. 42 U.S.C. § 2014(hh). Whether these 1988 amendments to the PAA adopted invalid, preempted state law – and thus precluded § 9658's application – is also at the core of this dispute.

Returning to the meaning of the 1986 law, § 9658's purpose, as measured by its plain text, was to protect persons like Cynthia, a minor injured by a hazardous substance. The district court erroneously failed to apply § 9658's protection to Cynthia because it misinterpreted two phrases: (i) the "law of the State" used in the PAA and (ii) an "action brought under State law," § 9658(a)(1)'s prefatory clause.

The district court first failed to understand the PAA's "law of the State" included only valid state law and required application of all the State's laws, including federal laws like § 9658. Cases from the Supreme Court dating back more than a century teach this. This Court's PAA *Roberts* decision and FTCA cases from other circuits prove that in applying the "law of the State," a court must apply all the State's laws, including federal laws like § 9658.

The district court also failed to understand a PAA "public liability action" qualified as an "action brought under State law" within the meaning of § 9658(a)(1)'s ambiguous prefatory clause. The Supreme Court has ruled that phrases like "arise under" and "brought under" are ambiguous when used in the context of a statute of limitations and convey a different meaning than when these identical phrases are used in the context of a jurisdictional provision. *See Jones*, 541 U.S. at 375-77. In the statute-of-limitations context, the unanimous Court has stated "a cause of action may arise under both state and federal law." *Id.* at 376.

The PAA action is a "hybrid" action. It may "arise," or be "brought," under either state or federal law, depending on the context. In the jurisdictional context, a PAA action "arises under" federal law. *See* 42 U.S.C. § 2014(hh). Yet, in establishing a federal PAA action, § 2014(hh) adopts the "law of the State" where the nuclear incident occurred as the "substantive rules for decision." *Id.* A PAA action is thus "grounded in state law." *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1100 (7th Cir. 1994), and in the context of § 9658's statute of limitations, a PAA action is "brought under State law," 42 U.S.C. § 9658(a)(1).

Historical context supports our interpretation of these statues. When § 9658 was enacted, no federal actions existed for injuries caused by hazardous substances, as documented in the 1982 report commissioned by Congress. Thus, with the phrase "any action brought under State law," the 1986 Congress was not distinguishing

between federal and state actions. Instead, it was expressly preempting state law, and this act of preemption applied to state laws that might later be adopted by another federal act (the PAA). In amending the PAA, the 1988 Congress did not undo the 1986 Congress's work.

The district court erred by failing to harmoniously construe the PAA and § 9658 and by not following other canons. The court effectively interpreted these two federal laws as selectively preempting state law. That is, Congress purportedly preempted state laws when applied to a state claim, but it did not preempt these exact same state laws when applied to a federal claim. This selective preemption is a hyper-literal construction and not a fair textual reading; it makes no sense.

When read properly in context, § 9658 protects Cynthia and renders her suit timely. This Court should reverse the district court's summary judgment and remand for Cynthia's suit to be heard on the merits.

ARGUMENT

Section 9658 applies to Cynthia's suit because a PAA hybrid action is "brought under State law" in the context of a statute of limitations and because the "law of the State" adopted by the PAA includes § 9658, not preempted law.

A. Introduction

This Court must examine two congressional enactments from the 1980's: (i) 42 U.S.C. § 9658 enacted in 1986; and (ii) the 1988 amendments to the Price-Anderson Act ("PAA"). *See supra* at 8 (providing full citations to the public laws).

The first law, § 9658, is a "discovery rule" that preempts in part state statutes of limitations. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 4, (2014). Congress enacted § 9658 to address the long latency periods that typically occur with toxic torts. *See id.* The district court agreed that, if § 9658 applies, Cynthia's suit was timely. (D.E. 407, at 6.)

Section 9658 establishes a "federally required commencement date" for statutes of limitations: (i) "[i]n the case of any action brought under State law" (ii) "for personal injury[] or property damages . . . caused or contributed to by exposure to any hazardous substance . . . released into the environment from a facility."[5] 42 U.S.C. § 9658(a)(1). The federal commencement date is the date on

[5] The district court assumed, as Plaintiffs had alleged, this latter showing had been satisfied; that is, Cynthia's injuries and subsequent death were caused by exposure to a hazardous substance, thorium-230, released into the environment from a facility. (*See* D.E. 407, at 2.). Though the district court did not grant summary

which the state-law limitations period starts to run, and it preempts any earlier commencement date under state law. But § 9658 does not preempt the duration of the state-law limitation period (i.e., one year, two years, three years, etc.). *See id.* § 9658(a)(1)&(2), (b)(4); *CTS Corp.*, 573 U.S. at 18.

Generally under § 9658, the commencement date is when the plaintiff first knew, or should have known, her injury was caused by the hazardous substance. 42 U.S.C. § 9658(b)(4)(A). However, for minors and incompetent persons, § 9658 establishes "special rules" that effectively measure when such persons should know the cause of their injury. *Id.* § 9658(b)(4)(B). For example, for minors (like Cynthia), the commencement date is when the injured person reaches the age of majority under state law. *Id.* § 9658(b)(4)(B)(i).

If the district court had applied § 9658 to Cynthia's suit, it would have found her suit timely. Eighteen is the age of majority in Florida. Fla. Stat. § 743.07(1) (2018). In November 2014, less than a year after her eighteenth birthday, Cynthia filed this suit. (D.E. 407, at 2; D.E. 368-14, at 11; Case No. 9:14-cv-81385, D.E. 1, at 1.) Thus, under any plausible limitations period supplied by Florida law,[6]

judgment based on this latter showing, we address it herein in the abundance of caution. *Infra* Argument E, at 50-54.

[6] *See* Fla. Stat. § 95.11 (2014) (providing one year or more for all causes of action except claims arising out of prison disciplinary proceedings).

Cynthia's suit was timely if § 9658 applies. (*See* D.E. 407, at 6 ("If [§ 9658] applies, the claim is timely because Cynthia turned 18 a few months before filing suit.").)

Yet, the district court concluded § 9658 was inapplicable, reasoning Cynthia's suit was not an "action brought under State law" per § 9658(a)(1)'s prefatory clause. (D.E. 407, at 6.) Why did the court conclude this when Plaintiffs' complaint pled Florida torts? (D.E. 219, at 25-30.) It reasoned the 1988 PAA amendments provided the exclusive cause of action for Cynthia's injuries. (D.E. 407, at 6-8.)

Those 1988 amendments created what this Court has described as a "hybrid" action. *Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir. 1998). Specifically, this hybrid action – formally called a "public liability action" – arises under 42 U.S.C. § 2210 and requires that "the substantive rules for decision in such action shall be derived from the law of the State" where the nuclear incident occurs. 42 U.S.C. § 2014(hh) (emphasis added); Pub. L. No. 100–408, § 11(b), 102 Stat 1066 (1988); *see also Roberts*, 146 F.3d at 1306-07. While federal law may "mold and shape" a PAA action, non-preempted "[s]tate law serves as the basis," and "provide[s] the content," for a PAA action, which is "grounded in state law." *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1100 (7th Cir. 1994); *accord Nieman v. NLO, Inc.*, 108 F.3d 1546, 1549 (6th Cir. 1997).

Contrary to this concept that a PAA action is "grounded in state law," the district court reasoned a PAA action is a "federal cause of action" deemed to "arise

under federal law" and thus § 9658 was inapplicable because it "applies only to claims 'brought under State law.'" (D.E. 407, at 7-8 (quoting § 9658(a)(1)'s prefatory clause and citing *Halbrook v. Mallinckrodt, LLC*, 888 F.3d 971, 978 (8th Cir. 2018))). In other words, the district court reasoned an action "arising under federal law" for purposes of federal jurisdiction cannot be an "action brought under State law" for purposes of a statute of limitations. (*Id.*)

We assume, without conceding, Cynthia's suit was a PAA "public liability action." We also concede a PAA action – called a "hybrid" action by this Court in *Roberts* – arises under federal law (§ 2210) and thus is a "federal action" for purposes of establishing federal jurisdiction. *See* U.S. Const. Art. III, § 2. Even with these assumptions, however, the district court erred when it failed to apply § 9658 to Cynthia's suit and deemed it untimely.

The district court's error can be best understood by first grasping why it misinterpreted the phrase "law of the State" in the PAA. That phrase required the court to apply in any PAA action all the State's laws, including § 9658 and other federal laws. It did not permit the court to apply invalid, preempted state law. *Infra* Argument B, at 22-28. The district court also misinterpreted § 9658(a)(1)'s prefatory clause ("any action brought under State law"). A PAA action, by adopting the "law of the State" for the "substantive rules for decision," is an "action brought under state law" in the context of § 9658's statute of limitations. *Infra* Argument C, at 28-

39. The court also failed to construe the PAA and § 9658 harmoniously and failed to follow other canons of textual interpretation. *Infra* Argument D, at 39-50. Accordingly, § 9658 applied to Cynthia's suit, and her suit was timely.

Finally, Defendant's alternative argument raised below and not addressed by the district court – that Plaintiffs purportedly had to show "conditions for [a] CERCLA cleanup" (DE 356, at 6) – is legally incorrect and factually refuted by the record. If there is any doubt on this alternative argument, this case should be remanded for a jury or the district court to consider the argument in the first instance. *Infra* Argument E, at 50-54.

B. The phrase "law of the State" in the PAA includes only valid law and requires courts to apply all the State's laws, including federal law like § 9658.

When Congress adopted the "law of the State" for the "substantive rules for decision" for a PAA action, *see* 42 U.S.C. § 2014(hh), what was the ordinary meaning of the "law of the State?" Case law provides two answers. First, "law of the State" unambiguously includes only valid state law and not preempted, invalid state law. *See infra* subpart 1, at 22-24. Second, in applying the "law of the State," a federal court must apply all the state's laws, including federal law like § 9658, just as the state courts would. *See infra* subpart 2, at 24-28.

1. The "law of the State" unambiguously means only valid, non-preempted law.

The PAA adopts the "law of the State" where the nuclear incident occurred as "the substantive rules for decision in [a public liability] action." 42 U.S.C. § 2014(hh). The phrase "law of the State" is not ambiguous. It "presumably takes its ordinary meaning" of "valid state law," not state law preempted by federal law. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469 (2015); *see* U.S. Const. Art. VI, cl. 2 (making federal law "the supreme Law of the Land"); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 490 (1989) (holding "the law of the place . . . gives no indication of any intention to apply only state law and exclude [federal] law" because, under "settled principles of federal supremacy, the law of any place in the United States includes federal law" (internal quotes omitted)); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 157 & n.12 (1982) (holding "that the incorporation of state law does not signify the inapplicability of federal law" and that the "'law of the jurisdiction' includes federal as well as state law."); *see also Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880) ("[T]he Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.").

In *DIRECTV*, the parties' contract stated that, if "the law of your state" rendered the contract's class arbitration procedures unenforceable, then the contract's entire arbitration section likewise would be unenforceable. 136 S. Ct. at

469. "[Y]our state" was California, which had a rule making arbitral class-action waivers unenforceable. *Id.* at 466. Previously, the Supreme Court had held California's rule was preempted by federal law. *Id.* (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011)). Nevertheless, the California court in *DIRECTV* applied the preempted state rule and refused to enforce the contract's arbitration section because, in its view, the "law of your state" included preempted state law. *See id.* at 467.

The Supreme Court reversed. It held that: "Absent any indication in the contract that ['the law of your state'] is meant to refer to invalid state law, it presumably takes its ordinary meaning: valid state law." *Id.* at 469. The Court rejected the contention that "the law of your state" was ambiguous, noting that neither the parties nor the dissent had found a single contract case, from any state, interpreting similar language to refer to invalid state laws. *Id.*

2. When a federal statute adopts state law, a court must apply all the State's laws, including federal law like § 9658.

Like the contract in *DIRECTV*, many federal statutes, including the PAA, adopt state law as the rules for decision in a federal cause of action. *See* Radha A. Pathak, *Incorporated State Law*, 61 Case W. Res. L. Rev. 823, 839-41 nn. 98-116 (2011). Just as the *DIRECTV* court could not find any contract case interpreting the "law of your state" to encompass invalid, preempted state law, *see* 136 S. Ct. at 469, no party here has found any case interpreting a federal statute as adopting invalid,

preempted state law as the rules for decision for a federal cause of action. To the contrary, this Court has rejected this proposition in the context of the PAA. *See Roberts*, 146 F. 3d at 1306-08.

In *Roberts*, a nuclear power plant was sued by a former employee who claimed he had contracted leukemia due to his exposure to radiation at the plant. 146 F. 3d at 1307. Because § 2014(hh)'s plain language adopted state law "unless such law is inconsistent with the provisions of [§ 2210]," 42 U.S.C. § 2014(hh), the employee argued this statute "preempt[ed] state law only to the extent it is inconsistent with § 2210" and preserved preempted state-law standards of care, *Roberts*, 146 F. 3d at 1307. This Court rejected this argument, holding that certain federal nuclear regulations preempted state law and provided the appropriate standard of care.[7] *Id.* at 1307-08 & n. 4.

The district court's reasoning here cannot be reconciled with *Roberts*. It does not matter that the preempting federal law, § 9658, comes from outside the PAA or the nuclear regulatory context. This point is proven by case law under the similar Federal Torts Claims Act ("FTCA"). *See Charles v. United States*, 15 F.3d 400, 402-03 (5th Cir. 1994) (discussed *infra*); *Caban v. United States*, 728 F.2d 68, 72 (2nd

[7]Plaintiffs contend the regulations cited in *Roberts*, and any other federal regulations, by their plain language do not apply to Defendant's use. This argument, however, is not germane to this appeal and will be for the district court to decide on remand.

Cir.1984) ("Applying the state's 'whole law' [under the FTCA] requires that we look to whatever law, including federal law, the state courts would apply in like circumstances involving a private defendant." (emphasis added)).

The FTCA is like the PAA. Both acts establish a federal cause of action and grant federal district courts jurisdiction over that action. *Compare* 28 U.S.C. § 1346(b)(1) (granting district courts "exclusive jurisdiction of civil actions on claims against the United States" for injuries resulting from a government employee's negligent or wrongful acts or omissions), *with* 42 U.S.C. §§ 2014(hh), § 2210(n)(2) (defining a federal "public liability action" as "arising under [§] 2210" and granting to federal district courts "original jurisdiction" over such an action "without regard to the citizenship of any party"). Similar to the PAA's adoption of "the law of the State" where the nuclear incident occurred as the "substantive rules for decision," 42 U.S.C. § 2014(hh), the FTCA adopts as substantive law "the law of the place where the [negligent or wrongful] act or omission occurred," 28 U.S.C. § 1346(b)(1).

Would the "law of the place" under the FTCA include a state's preempted, invalid law? No, of course not. *See Charles*, 15 F.3d at 402-03. In *Charles*, the plaintiff sued under the FTCA for injuries suffered while working on the government's ship. *Id.* at 401. The district court granted summary judgment for the government, reasoning it was the plaintiff's employer and thus immune from suit

under Louisiana's worker's compensation statute. *Id.* The plaintiff argued Louisiana's statute was preempted by another federal act, the LHWCA. *See id.* at 401-02.

In response, the government argued "'the FTCA adopts state law without regard to whether that state law conflicts with, or has been preempted by, any other federal law,' such as the LHWCA." *Id.* at 402 (emphasis added) (quoting the government's argument). The government further argued "the 'law of the place' to which the FTCA refers is the state law immunity provision, and not any conflicting federal law which the Louisiana courts may apply in its stead." *Id.* at 402 (quoting 28 U.S.C. § 1346(b)(1)). The Fifth Circuit rejected these arguments. It reasoned "that the law of the place referred to by the FTCA is 'the whole law of the State where the act or omission occurred.'" *Id.* (quoting *Richards v. United States*, 369 U.S. 1, 11, (1962)). In applying the "law of the place" under the FTCA, the federal district court had to apply the federal LHWCA insofar as it preempted the state statute because Louisiana courts, in applying Louisiana law, had to apply the federal LHWCA and not the preempted state statute. Thus, the Fifth Circuit vacated the district court's decision. *See id.* at 403.

* * * *

In summary, what these cases teach is this. First, "law of the State," as used in the PAA, includes only valid state law and not preempted, invalid state law. *See, e.g., DIRECTV*, 136 S. Ct. at 469. Second, when applying the "law of the State"

under the PAA, a federal court must apply all the state's laws, including federal law like § 9658, just as the state courts would. *See, e.g., Charles*, 15 F.3d at 402-03. The district court's reasoning here contravened these principles by narrowly, and erroneously, construing the preemptive scope of § 9658. We explain that error next.

C. Section 9658's preemption applies to state laws adopted by the PAA because a hybrid PAA action is "brought under State law," even if it arises under federal law for jurisdictional purposes.

Section 9658 is a statute of limitations, not a jurisdictional statute. It preempts aspects of the States' statutes of limitations, and this preemption applies to these same state laws when they are adopted by a federal act, like the PAA. The district court, however, read § 9658 differently. Following the Eighth Circuit's reasoning, it concluded that, in applying the "law of the State" under a PAA action, it could not apply § 9658 because the prefatory clause states: "In the case of any action brought under State law . . . ." (D.E. 407, at 6 & n.2 (citing *Halbrook*, 888 F.3d at 977 and 42 U.S.C. § 9658(a)(1)). According to the district court, if a claim "arises under federal law" in a jurisdictional context, then it cannot be an "action brought under State law" in the statute-of-limitations context. (*See* D.E. 407, at 8 (citing *Halbrook*, 888 F.3d at 978)).

The district court's interpretation of § 9658 misses the mark for two reasons. First, in the context of a statute of limitations, a PAA action is an "action brought under State law" within the meaning of § 9658(a)(1)'s ambiguous prefatory clause,

even if a PAA action arises under federal law for jurisdictional purposes. *Infra* subpart 1, at 29-35; *see also Roberts*, 146 F. 3d at 1307 (calling a PAA action a "hybrid" action). Second, the historical context of § 9658's enactment shows Congress was not drawing a line between federal and state causes of action because, as Congress was told in a report it commissioned, no federal causes of action existed in 1986 for injuries caused by hazardous substances. *Infra* subpart 2, at 35-39.

1. A hybrid PAA action is an "action brought under State law" within the meaning of § 9658(a)(1)'s ambiguous prefatory clause, even if it arises under federal law for jurisdictional purposes.

The district court reasoned that if an action "arises under federal law" for purposes of jurisdiction, then the action could not be "brought under State law" for purposes of a statute of limitations. (*See* D.E. 407, at 8 (citing *Halbrook*, 888 F.3d at 978).) This reasoning was error. An action may be "brought under State law" for statute-of-limitations purposes, even if it "arises under federal law" for jurisdictional purposes.

"The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *E.g., Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). When read in a statute of limitations, the phrase "any action brought under State law" is ambiguous because, in this context, an action may arise under both state and federal law. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 375-77 (2004). A PAA action arises under both state and

federal law. *Cf. Roberts*, 146 F.3d at 1307 (labeling a PAA action a "hybrid" action). It adopts "the law of the State" for its "substantive rules for decision," *see* 42 U.S.C. § 2014(hh), and thus it may be considered an "action brought under State law" for purposes of § 9658's statute of limitations, even if it arises under federal law for jurisdictional purposes.

The meaning – or ambiguity – of the phrase "brought under State law" becomes evident when placed in context. *See* 42 U.S.C. § 9658(a)(1). "Brought under" resembles another phrase – "arising under" – used in many jurisdictional provisions. *See, e.g.,* U.S. Const. Art. III, § 2; 28 U.S.C. §§ 1331, 1334(b), 1338(a). Unquestionably, when used in the same context, these two phrases – "brought under" and "arising under" – could bear the same meaning. For instance, in the jurisdictional context, the Supreme Court has concluded the phrases "brought to enforce" and "arising under" are synonymous. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1566 (2016).

But these linking phrases ("brought under"/"arising under") may bear different meanings when used in different contexts. *See Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (providing multiple examples of the "identical language" conveying "varying content" when used in different statutes and contexts). For example, the phrase "arising under" has one meaning in the context of Article III jurisdiction and a different meaning in the context of statutory jurisdiction. 13D

Charles Alan Wright et al., *Federal Practice and Procedure* § 3562 (3d ed. Nov. 2018 update). In the context here, the Court is not construing any jurisdictional provision, at all. It is construing a statute of limitations, § 9658.

The Supreme Court has held these two contexts – jurisdictional provisions and statutes of limitations – are different. *See Jones*, 541 U.S. at 375-77. It has held that, while the phrase "arising under" may have one meaning in a jurisdictional context, it carries a different meaning in a statute of limitations. *See id*. And, the Court has held, the meaning of "arising under" may be ambiguous in the context of statute of limitations. *Id.* Ambiguities also may exist when the phrase "brought under" is used in the context of a statute of limitation. *See Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,* 545 U.S. 409 (2005) (holding, in the context of a statute of limitations, "'a civil action under section 3730'" was ambiguous and analogizing this phrase to the "similarly unqualified phrase 'action brought under section 3730") (quoting 31 U.S.C. § 3731(b)&(c)); *see also E.E.O.C. v. Liberty Trucking Co.*, 695 F.2d 1038, 1041 (7th Cir. 1982) (finding "actions brought under this title" was ambiguous).

In *Jones*, the Supreme Court interpreted a federal statute, § 1658, that set a catchall statute-of-limitations period for a "civil action arising under an Act of Congress enacted after [December 1, 1990]." 28 U.S.C. § 1658(a)(1); *see* 541 U.S. at 371. The Court had to decide whether § 1658 applied to a civil action arising under

42 U.S.C. § 1981, a statute that was enacted before 1990 and amended in 1991. *See id.* at 371-72. The petitioners urged the Court to construe the "arising under" language in § 1658 identically to how it was construed in the context of federal jurisdictional provisions. *Id.* at 375. The Court declined to do so. *Id.* It acknowledged its "expositions of the 'arising under' concept" in the jurisdictional context "[were] helpful in interpreting the term as it is used in § 1658['s statute of limitations]." *Id.* Yet, the Court unanimously concluded that the "expositions" in these "other contexts" did "not point to one obvious answer" and that "the meaning of the term 'arising under' [was] not so clear" in the context of § 1658's statute of limitations. *Id.*

In reasoning that applies equally to the instant case, the Court explained the "arising under" phrase was ambiguous and subject to differing interpretations when used in a statute of limitations:

> Chief Justice Marshall's statement that a case arises under federal law for purposes of Article III jurisdiction whenever federal law "forms an ingredient of the original cause," *Osborn v. Bank of United States*, [22 U.S. 738,] 823 (1824), supports petitioners' view that their causes of action arose under the 1991 amendment to § 1981, because the 1991 Act clearly "forms an ingredient" of petitioners' claims. But the same could be said of the original version of § 1981. Thus, reliance on *Osborn* would suggest that petitioners' causes of action arose under the pre–1991 version of § 1981 as well as under the 1991 Act, **just as a cause of action may arise under both state and federal law**.

Id. at 375–76 (emphasis added); *see also id.* at 376-77 (rejecting the petitioners' argument that "arising under" was unambiguous).

The *Jones* Court held "arising under" (which is similar to "brought under") was subject to differing, reasonable interpretations when used by a statute of limitations to describe the claims subject to the statute. *See id.* at 375-77. In the context of a statute of limitations, one reasonably may deduce that "a cause of action may arise under both state and federal law." *Id.* at 376. In a similar vein, the phrase in § 9658(a)(1) – "any action brought under State law" – could encompass an action that arises under both state law and federal law. A "hybrid" action is an apt descriptor for such an action. *See Roberts*, 146 F.3d at 1307.

Applying *Jones* to this case, it may be true that federal law "forms an ingredient" of a PAA public liability action. But the same can be said of state law. *See* 541 U.S. at 375-76. Indeed, the "law of the State" provides "the substantive rules for decision" for a PAA action, except to the extent the state law is inconsistent with 42 U.S.C. § 2210. 42 U.S.C. § 2014(hh). And § 2210 says little, if anything, on the elements and defenses for a PAA action, as it addresses primarily licensing and indemnity. *See* 42 U.S.C. § 2210. Thus, the "law of the State," at the very least, "forms an ingredient" – the most critical ingredient – in a PAA action. *See O'Conner*, 13 F.3d at 1100 (noting a PAA action is "grounded in state law"). A PAA action may be read fairly to "be brought under State law" in the context of § 9658's statute of limitations, even if a PAA action arises under federal law for jurisdictional purposes. *See* 42 U.S.C. § 9658(a)(1); *Jones*, 541 U.S. at 375-77; *see also Roberts*,

146 F. 3d at 1307 (describing a PAA action as a "hybrid" action); *cf. Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986) (discussing how "a state-created cause of action" may "arise under" federal law, in the context of a federal jurisdictional statute, because of the "presence of a federal issue"); *DelCostello v. Int'l Broth. of Teamsters*, 462 U.S. 151, 164–65 (1983) (recognizing an employee's suit was a "hybrid" action, as it arose under two federal acts, and deciding which statute of limitations should apply).

The district court here contravened the Supreme Court's reasoning in *Jones*. Specifically, the district court reasoned that if a claim "arose under federal law" in a jurisdictional context, then it could not be an "action brought under State law" in the statute-of-limitations context. (*See* D.E. 407, at 8 (citing *Halbrook*, 888 F.3d at 977-78)). This reasoning was incorrect. An action "arising under federal law" for jurisdictional purposes may be "brought under State law" for statute-of-limitations purposes. *See Jones*, 541 U.S. at 375-77.

Thus, used in this statute-of-limitations context, "brought under State law" is ambiguous. What is a court to do when a statute is ambiguous? The court "must look beyond the bare text of [the statute] to the context in which it was enacted and the purposes it was designed to accomplish." *E.g., Jones*, 541 U.S. at 377. For example, in construing the ambiguous phrase "arising under" in § 1658's statute of limitations, the Supreme Court in *Jones* considered the legal history and congressional study that

led to § 1658's enactment. *See id.* at 377-80. We now undertake that same type of analysis with respect to § 9658.

2. Section 9658's historical context shows Congress used "any action under State law" to expressly preempt state law, not to distinguish between federal and state actions.

A statute must be read in its historical context. *See, e.g., New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (interpreting a phrase in accordance with how it was understood in the year the statute was enacted). Statutes "cannot be divorced from the historical framework in which they exist," and "the circumstances surrounding a bill's enactment evince legislative intent." 2B Sutherland Statutory Construction § 49:1 (7th ed. Nov. 2018). A judge's historical understanding should not be limited to the original meaning of the text's words or phrases, but also should include the historical context in which the text was written. *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 69, at 400 (2012); *see also Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 471 (2001) (interpreting the Clean Water Act in "its statutory and historical context").

By using the phrase "any action brought under State law" in § 9658(a)(1), Congress was expressly preempting state law. It was not drawing a line between federal and state actions. As the ensuing historical discussion shows, Congress was told in a report that it commissioned that no federal causes of action existed at the time of § 9658's enactment. At that time, a person injured by a hazardous substance

had only one avenue for relief: state law. Thus, it is implausible that Congress's use of "any action brought under State law" was distinguishing between federal and state actions. Instead, Congress used this phrase to expressly preempt state law.

Though enacted in 1986, § 9658's history starts in 1980, the year Congress enacted CERCLA. That act mandated a study to determine "the nature, adequacy, and availability of existing remedies under [the] present [statutory and common] law in compensating for harm to man from the release of hazardous substances." Pub. L. No. 96-510, § 301(e)(3)(A), 94 Stat. 2767 (1980). Congress directed the study to examine the "barriers" imposed by statutes of limitations. *Id.* § 301(e)(3)(F). A study group submitted its report to Congress in July 1982. *See* Senate Committee on Environment and Public Works, Superfund Section 301(e) Study Group, Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies, 97th Cong., 2d Sess. (Comm. Print 1982) (the "Report"). The Supreme Court has relied on this Report to construe § 9658. *See CTS Corp.*, 573 U.S. at 5.

The 1982 Report to Congress methodically documented how, at that point in time, only state law provided remedies for personal injuries and property damages. Report at 72-75, 125.[8] The Report examined the federal statutes providing benefits to individuals for personal injuries and property damages (including the pre-1988

[8] An addendum to this brief includes excerpts to the Report. The page citations herein are to numbers on the top center of each page. The Report's table of contents refers to a different set of numbers on the bottom center of each page.

version of the Price-Anderson Act), and it concluded: "None of these statutes is aimed at providing remedies for personal injury or damage[, or for property damages] due to hazardous waste . . . ." *Id.* at 73, 125.

The Report also examined state statutes and common law. *Id.* at 90-130. The bulk of the Report's discussion on available remedies centered on state common-law causes of action, including two torts (negligence and trespass) pled here. *See id.* at 96-124, 126-30. The Report concluded a private litigant seeking damages for personal injuries or property damages "must rely on state law, and primarily on state common law." *Id.* at 130 (emphasis added).

The Report also examined state statutes of limitations and recommended changes. *See* Report 43-45, 255-56. It noted hazardous substances cause injuries like "cancer" that "have long latency periods, sometimes 20 years or longer." *Id.* at 43. Though thirty-nine States (including Florida) had adopted discovery rules "in some form" for their statutes of limitations, these rules often did not protect a plaintiff because they started the limitations period from when the plaintiff discovered, or should have discovered, the injury. *Id.* at 43, 133 & n.4. These state rules were insufficient, the Report concluded, because a plaintiff "may not even be aware of the initial exposure" or "may not connect early symptoms with a known exposure." *Id.*

The Report noted a subset of thirteen States had adopted a discovery rule more protective of plaintiffs under which the limitations period started when the plaintiff

"ascertain[ed] a causal connection between [her] injury and the earlier exposure or should reasonably be able to do so." *Id.* at 43-44 (emphasis added). Based on this model, the Report recommended all States should "clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or its disease and its cause." *Id.* at 256 (emphasis added) (quoted in *CTS Corp.*, 573 U.S. at 5).

Rather than wait for the States to change their statutes of limitations, Congress in 1986 responded to the Report by enacting § 9658. *CTS Corp.*, 573 U.S. at 5. With § 9658, Congress chose the model of the discovery rule employed by the subset of thirteen States, as § 9658's limitations period "begin[s] to run when a plaintiff discovers, or reasonably should have discovered, that the harm in question was caused by the contaminant." *CTS Corp*., 573 U.S. at 4 (emphasis added); *accord* 42 U.S.C. § 9658(b)(4)(A).[9]

In sum, the Report contextualizes the historical scene when Congress enacted § 9658 in 1986. At that time, a private plaintiff could not bring a federal cause of action for injuries caused by a hazardous substance; such actions could be brought only under state law. Thus, in using the phrase "any action brought under State law," Congress was not distinguishing between federal and state causes of actions, as there

[9] For minors (like Cynthia) and incompetent persons, § 9658(b)(4)(B) sets "special rules" that, in effect, determine when such persons should have known the cause of their injuries.

was no such distinction to be made, or that even existed, in 1986 in the context of hazardous substances. Instead, this phrase – given its ordinary, contextualized meaning – must be read as Congress expressly exercising its power, under the Supremacy Clause, to replace state law with federal law. *Cf.* H.R. Conf. Rep. No. 99-962, § 203, at 261 (1986)[10] (included in addendum) ("[Section 9658] provides for a Federal commencement date for State statutes of limitations which are applicable to harm which results from exposure to a hazardous substance.").

D. The district court failed to harmoniously construe the PAA and § 9658, and it violated other standard canons of interpretation.

The district court's interpretation of the PAA and § 9658 failed to harmoniously construe these statutes or read them fairly with common sense. Instead, the district court effectively construed the PAA as impliedly repealing § 9658. This interpretation violated standard canons of statutory interpretation.

1. A harmonious reading of the PAA and § 9658 would result in a PAA action arising under federal law for jurisdictional purposes and being brought under State law for purposes of § 9658's statute of limitations.

This case concerns the intersection of two federal laws: the 1988 PAA amendments and § 9658 enacted in 1986. A harmonious reading of these two laws – as is required by standard canons – would result in a PAA action arising under

[10] This Court previously has relied on this congressional report to construe § 9658. *Tucker v. S. Wood Piedmont Co.*, 28 F.3d 1089, 1091, 1093 (11th Cir. 1994).

federal law for purposes of federal jurisdiction but being brought under State law for purposes of § 9658's statute of limitations.

The district court's reasoning for granting summary judgment was that § 9658 applies only to actions "brought under State law," and that, with the PAA, "Congress created a federal cause of action" and purportedly "spoke clearly" that PAA actions "arise under federal law." (D.E. 407, at 8 (internal quotes omitted).) Congress, however, did not speak so clearly. Indeed, this Court has characterized a PAA action as a "hybrid" action. *Roberts*, 146 F.3d at 1307. And the Supreme Court has indicated that the PAA does not "wholly displace" state law, but instead merely authorizes federal jurisdiction over what is, essentially, a "state claim." *See Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003).

Congressional acts "should be construed harmoniously if possible." *E.g., Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 941 (11th Cir. 2001). A court should not conclude the later act (here, the PAA) impliedly repealed the earlier act (here, § 9658) unless the two acts are in "irreconcilable conflict" or the latter act "covers the whole subject of the earlier one and is clearly intended as a substitute." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). To comply with these canons, a court should examine the two acts' language, purpose, and structure to determine if they can be read harmoniously. *E.g., Tug Allie-B*, 273 F.3d at 941-42.

Enacted in 1986, § 9658's purpose, by its terms, was modest – to partially pre-empt statutes of limitations applicable to state-law tort actions "for personal injury or property damage arising from the release of a hazardous substance, pollutant, or contaminant into the environment." *CTS Corp.*, 573 U.S. at 3-4. In contrast, the 1988 PAA amendments served a more expansive, and very different, purpose. The historical context was the multitude of suits pending in federal and state courts as a result of the 1979 Three Mile Island nuclear accident. *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 477 (1999). Congress thus established a federal "public liability action" as the "mechanism" for consolidating in federal court all claims arising out of a nuclear incident. *Id.*at 477.

The PAA's creation of a federal public liability action, decided under substantive state-law rules of decision, may "resemble[]" complete preemption. *Id.* at 484 n. 6. But the PAA does not completely preempt state law, or provide an exclusive cause of action, like true complete-preemption statutes do (*e.g.*, ERISA). *See Cook v. Rockwell Intern. Corp.*, 790 F.3d 1088, 1097-98 (10th Cir. 2015). Now-Justice Gorsuch, writing for the Tenth Circuit, explained that the PAA's preemption is distinguishable from other federal acts that completely preempt state law because, by its express terms, the PAA leaves untouched a wide body of state law. *See id.* at 1097. Now-Justice Gorsuch buttressed his point – that the PAA was not a "true complete preemption statute" – by noting the Supreme Court itself had

acknowledged the PAA is not such a statute. *Id.* (citing *Anderson*, 539 U.S. at 8-9). Summing up several PAA cases from the Supreme Court, now-Justice Gorsuch observed that, though "the federal government alone [is authorized] to promulgate before-the-fact nuclear safety regulations," Congress has "done little to forbid states from indirectly regulating nuclear safety through the operation of traditional after-the-fact tort law remedies." *Id.* at 1097-98.

These after-the-fact state tort law actions are largely intact and not preempted because the PAA expressly preserved the "law of the State" as the "substantive rules for decision" for a PAA action. 42 U.S.C. § 2014(hh). Thus, this Court has characterized a PAA action as a "hybrid" action because, though it may "arise" under a federal statute, the action's rules of decisions are grounded in state tort law. *See Roberts*, 146 F. 3d at 1306-08; *see also O'Conner*, 13 F.3d at 1100 (noting that, while federal law may "mold and shape" a PAA action, it is "grounded in state law"). A fair reading would be that a PAA action may arise under federal law for jurisdictional purposes, but the action is "brought under State law" for purposes of § 9658's statute of limitations. Moreover, by adopting the "law of the State," the PAA did not adopt preempted state law, and thus § 9658 should preempt, and replace, the commencement date for any state statute of limitations. *See supra* Argument B, at 22-28.

In sum, this Court must construe the PAA and § 9658 harmoniously, if possible, to give effect to both laws. A harmonious reading is possible. The PAA is a hybrid action that arises under federal law for jurisdictional purposes and under state law for purposes of § 9658's statute of limitations.

2. Reading federal statutes as preempting state law only when applied to a state claim – and not when the state law is applied to a federal claim – is neither a fair textual reading nor consistent with common sense.

The district court's interpretation of the PAA and § 9658 is one of "selective preemption." It goes like this. By enacting § 9658, Congress preempted state laws when they are applied to a state claim, but it did not preempt the exact same state laws when they are applied to a federal claim. (*See* D.E. 407, at 5-8.). This reasoning is a strict, hyper-literal construction that does not comport with a fair reading of the text[11] or common sense.[12]

Justice Scalia and Mr. Garner, in their oft-quoted book, disapproved of a similar type of selective preemption. *See* Scalia and Garner, *supra* § 47, at 293-94. Specifically, they criticized the notion that Congress would "preempt state law

[11] *See* Scalia and Garner, *supra* § 62, at 355-58 (rejecting strict constructionism in favor of a "fair reading" method of interpreting text); *id.* at 39-41 (same).

[12] *See, e.g., Pereira v. Sessions,* 138 S. Ct. 2105, 2110 (2018) (citing "the plain text, the statutory context, and common sense" as bases to construe a statute); Scalia and Garner, *supra* § 39, at 252 (noting the canon requiring statutes to be construed harmoniously rested on the principle that the "law should make sense").

enacted by statute or regulation but not . . . preempt state common law applied by juries and the courts." *Id.* While acknowledging such selective preemption was "theoretically possible," Scalia and Garner opined that "such a disposition makes so little sense that it would take the clearest of language to adopt it." *Id.* The "relevant question," they opined, should be "whether the federal statute establishes a national standard." *Id.*

Scalia's and Garner's reasoning applies here. The district court, by following the Eighth Circuit's *Halbrook* decision, missed the relevant question. It got swept away by a hyper-literal reading of the phrase an "action brought under State law." The relevant question is: Did § 9658 establish a national standard? Yes, it did. That standard precludes a limitations period from commencing before a plaintiff knows, or has reason to know, her injuries were caused by a hazardous substance.[13] 42 U.S.C. § 9658(b)(4)(A). While theoretically Congress could preempt state laws when applied to state claims and preserve those exact same state laws when applied to federal claims, this reading "makes so little sense" that it should take the "clearest of language" for this Court to accept that reading. *See* Scalia and Garner, *supra* § 47, at 293-94. No such language exists in the PAA or § 9658.

[13] As previously mentioned, this national standard has "special rules" for minors and incompetent persons. 42 U.S.C. § 9658(b)(4)(B); *see supra* note 9 at page 38.

The district court's version of selective preemption makes even less sense than the version criticized by Scalia and Garner. For example, since § 9658's enactment in 1986, Florida's claims-accrual rules have been inoperative in the context of state claims seeking damages for injuries caused by hazardous substances. They have not been subjected to judicial interpretation or legislative revision. No court may apply these rules to such a state claim in light of § 9658. And why would a state legislature revise these preempted, inoperative state rules? Such a revision would not change any outcome under state law and would apply only insofar as the state law is applied to federal claims. The district court's hyper-literal reading of § 9658 means that state legislatures have the power to alter the outcome of a federal claim, but not a state claim. This result is contrary to how our federal system normally operates: Congress enacts federal laws and state legislatures enact state laws, not vice versa. *See* U.S. Const. Art. I, § 1; *id.* Amend. X

While Congress may adopt state law as the rules for decision in a federal action (as it has done in the PAA), it should be presumed – absent clear statutory language to the contrary – that Congress is adopting only valid state law presently in operation as modified by any preemptive federal law. *See supra* Argument B.1, at 22-24. When Congress adopts state law as the rules for decision in a federal action, courts must apply all the State's laws, including preempting federal law, just as a state court must apply all the State's laws, including preempting federal law, in

adjudicating a state action. *See supra* Argument B.2, at 24-28; U.S. Const. Art. VI, cl. 2. A court should not presume, as the district court here did, that Congress adopted as the rules for decision in a federal action the very same state laws it expressly preempted for state actions.

Instead, it should be presumed Congress adopts state law as part of federal law to serve federal interests. *See* Pathak, *supra*, 61 Case W. Res. L. Rev. at 846. Oddly, here, the district court's ruling did the opposite. It effectively held the PAA's adoption of state law undermined the congressional policy enacted in § 9658. Section 9658's plain text, along with the commissioned 1982 Report, shows Congress enacted this statute to protect victims of hazardous substances like Cynthia, a minor victim who contracted cancer and did not file suit until years later when she became an adult. 42 U.S.C. § 9658(a)(4)(B); Report 43. Nothing about the text of the PAA, or the context of its 1988 enactment, suggests Congress was repealing in part the statute, § 9658, it had enacted two years before. We explain this point next.

3. The 1988 enactment of the PAA amendments did not repeal § 9658's preemption of state-law statutes of limitations.

As previously noted, a subsequent act (here, the PAA) may be deemed to have impliedly repealed an earlier act (here, § 9658) only if: (i) the two acts are in "irreconcilable conflict" or (ii) the latter act "covers the whole subject of the earlier one and is clearly intended as a substitute." *Carcieri*, 555 U.S. at 395. Neither of

these bases apply. As discussed above, the PAA and § 9658 can be construed harmoniously, and nothing in the two laws' text, structure, or purposes suggests Congress enacted the PAA as a substitute for § 9658. *See supra* Argument D.1, at 40-43. Nevertheless, in the abundance of caution, we explain in this subpart the relevant statutory history leading up to the 1988 PAA amendments and why those amendments did not impliedly repeal § 9658.

a. History of the PAA relevant to statutes of limitations.

In the last seventy plus years, Congress has enacted many laws to regulate the nuclear industry. *See, e.g., Roberts*, 146 F.3d at 1306. Relevant to the applicable statute of limitations is congressional actions in 1966 and 1988.

In 1966, Congress amended the PAA to protect victims of "extraordinary nuclear occurrences" (ENOs). *Lujan v. Regents of the Univ. of Calif.*, 69 F. 3d 1511, 1514 & n.2 (10th Cir. 1995) (citing Pub. L. No. 89-645, 80 Stat. 891, 891). One provision in the 1966 amendments has been read by courts to establish a statute of limitations for ENOs based on when a plaintiff "'first knew, or reasonably could have known, of his injury or damage and the cause thereof.'" *Id.* at 1515 (quoting Pub. L. No. 89-645, 80 Stat. 891, 892); *accord* 42 U.S.C. § 2210(n)(1)(F). However, the ENO statute of limitations does not apply in this case because, as the district court correctly concluded, Plaintiffs' claims do not arise out of an "extraordinary nuclear occurrence." (D.E. 407, at 6 & n.3.)

In 1988, Congress again amended the PAA to extend federal jurisdiction over "public liability actions" arising out of any "nuclear incident," not just an "extraordinary nuclear occurrence." *Lujan*, 69 F. 3d at 1515-16 (citing Pub. L. No. 100–408, § 11, 102 Stat 1066, 1076 (1988)); *accord* 42 U.S.C. §§ 2014(hh), 2210(n)(2). But, unlike with ENOs in 1966, Congress failed in 1988 to specify an applicable statute of limitation for public liability actions arising out of nuclear incidents. *See* Pub. L. No. 100–408, § 11(b), 102 Stat 1066 (1988); 42 U.S.C. §§ 2014(hh), 2210(n)(2).

b. Congress's silence in the 1988 PAA amendments means it adopted state statutes of limitations, but only to the extent those statutes were consistent with § 9658.

Given Congress's failure to specify in 1988 a statute of limitations for PAA public liability actions arising out of nuclear incidents, where should courts look for an applicable statute of limitations? State law, but not state law that has been preempted or that contradicts federal law. This answer can be taken from two different pathways.

First, under 42 U.S.C. § 2014(hh), "the substantive rules for decision" are the "the law of the State" where the nuclear incident occurred. As argued above, the "law of the State" includes only valid, non-preempted state law. *Supra* Argument B, at 22-28. In the context of hazardous substances, § 9658 preempted state statute of limitations (like Florida's statute) that commence the running of a limitations period

before the plaintiff knew, or reasonably should have known, of both her injury and the cause of that injury. *See supra* Argument C.2, at 35-39.

Second, many federal causes of actions established by Congress before 1990 – like the PAA public liability action – lack a federal statute of limitations.[14] *See Jones*, 541 U.S. at 371, 377-78, 382. For these pre-1990 causes of action, the "settled practice" has been "to adopt a [state] time limitation as federal law," provided that the state limitation is "not inconsistent with federal law or policy." *Id.* at 377 (emphasis added). Here, any state statute of limitations that begins a limitation period before the plaintiff knows, or reasonably should know, of the cause of her injury is expressly preempted by, and thus inconsistent with, federal law. *See* 42 U.S.C. § 9658(a)(1). Under the pre-1990 "settled practice," the borrowed state statute of limitations (Florida Statutes, Chapter 95) must yield to the contrary federal law (§ 9658). *See Jones*, 541 U.S. at 377.

Either of these pathways takes this Court to the same conclusion. That is, this Court must adopt, or borrow, only those portions of a state statute of limitations that Congress has not preempted with § 9658.

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[14] Federal causes of action that were "made possible by a post-1990 [congressional] enactment" and that lack a specified statute of limitations are subject to the "catchall" statute of limitations in 28 U.S.C. § 1658, which was enacted in 1990. *See Jones*, 541 U.S. at 371, 382. A PAA public liability action was made possible by the 1988 amendments to the PAA and thus is not subject to this catchall statute of limitations.

Finally, Defendant may note that, in *Lujan*, the Tenth Circuit concluded Congress had not mandated a discovery rule to PAA claims arising out of nuclear incidents like "it [had] done with claims arising out of ENOs and with state-law claims arising out of exposure to hazardous substances under CERCLA." 69 F. 3d at 1518 (citing 42 U.S.C. § 9658.) However, in a footnote, the Tenth Circuit stated: "[The plaintiff] has not argued and we do not reach the question of CERCLA's effect, if any, on a public liability claim under [the PAA]." *Id.* In contrast, here, Plaintiffs do argue that § 9658 (a 1986 amendment to CERCLA) preempts in part state statute of limitations adopted or borrowed by the PAA.

E. Plaintiffs satisfied § 9658's other conditions, and any dispute on whether they were satisfied should be remanded for the district court or a jury to resolve in the first instance.

In a single paragraph, Defendant raised an alternative argument in its summary-judgment reply: Plaintiffs purportedly had failed to show "conditions for [a] CERCLA cleanup" for § 9658 to apply. (D.E. 356, at 6 (citing *Barnes ex rel. Estate of Barnes v. Koppers, Inc.*, 534 F.3d 357, 365 (5th Cir. 2008).) The district court did not address this argument. (D.E. 407.) The argument is legally incorrect and implicates factual questions that should be resolved by a jury, or the district court, in the first instance.

Barnes does not impose any extra-textual conditions for § 9658's application. In fact, it expressly rejected the argument that "a CERCLA suit must be pending or

that the plaintiff's state law injury claims have to be filed in conjunction with a CERCLA suit." *Barnes*, 534 F.3d at 365 (citing *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1149 (9th Cir. 2002)). Instead, *Barnes* merely holds plaintiffs must "carry [their] burden" to show that § 9658 applies. *Id.* As explained herein, Plaintiffs have carried their burden, and at the very least, created a factual issue for a jury to resolve.

Under § 9658's text, the federal commencement date applies if the following conditions are satisfied: (a) an "action brought under State law," (b) "for personal injury," (c) that was "caused or contributed to by exposure to any hazardous substance," (d) which was "released" (e) "into the environment" (f) "from a facility."[15] 42 U.S.C. § 9658(a)(1); *see also* 42 U.S.C. § 9658(b)(1) (adopting definitions from subchapter I of Chapter 103 of Title 42, which defines "release," "environment," and "facility"). Each of these conditions has been satisfied:

(a) Action brought under State law. *See supra* Argument A-D, at 18-50. This was the only condition addressed by the district court below. (D.E. 407, at 5-8.)

[15] The letters (a)-(f) in the text are not in the statute but are added for clarity. One could add another condition: the state-law commencement date must start before § 9658's commencement date for the latter date to apply. 42 U.S.C. § 9658(a)(1). However, this condition is satisfied because, under the district court's summary judgment order, the state commencement date starts before § 9658's commencement date. (D.E. 407, at 10-14.)

(b) Personal injury. A deadly brain tumor is a personal injury. (Case No. 9:14-cv-81385, D.E. 1; D.E. 219; D.E. 326 at 6; D.E. 329 at 2 ¶¶ 7-8; D.E. 340 at 8 ¶7(a),(h); D.E. 322-47 at 23.)

(c) Caused by exposure to a hazardous substance. Thorium-230, a hazardous substance, caused Cynthia's brain tumor. (D.E. 340 at 38 ¶36(a), (b), 40 ¶41(a)-(d), 42 ¶45(a)-(d); D.E. 322-7 at 36-39; D.E. 322-20 at 3-7; D.E. 322-40 at 1-3; D.E. 368-69 at 15, 17); *see* 42 U.S.C. § 9601(14) (defining "hazardous substance"); 40 C.F.R. § 302.4, Appendix B (classifying thorium-230 as a "hazardous substance"). Plaintiffs' expert opined "with reasonable toxicological certainty" that her brain tumor was "casually induced from her childhood exposures to ionizing alpha radiation from Thorium." (D.E. 322-7 at 39.)

(d) Released.[16] Defendant "released" thorium-230 into the environment, as evidenced by the fact that thorium-230 was found in the soil at Defendant's facility, including its scrapyard, a known thorium waste disposal area.

[16] "Release" includes virtually any type of discharge of a hazardous substance. *See* 42 U.S.C. § 9601(22). Although the definition of "release" includes a narrow source-material exclusion, this exclusion does not apply because (1) Defendant's licenses are not subject to financial protection requirements under 42 U.S.C. § 2210 with respect to thorium-230 (D.E. 322-11; D.E. 335-3; D.E. 338-5 at 25, 96:14-97:8, 27, 102:10 – 104:25; D.E. 340 at 17-18, ¶13(a)-(g)); and (2) Defendant's facility is not a uranium mill processing site, *see* 42 U.S.C. § 7912(a)(1) (listing processing sites in primarily western states); *id.* § 7942(a) (regarding New Mexico cooperative agreement).

(D.E. 340 at 14 ¶¶11(a), 12(a), 38 ¶36(a)-(b); D.E. 322-20 at 3-9.) Plaintiffs' expert further opined, within a reasonable degree of scientific certainty, that Defendant's hazardous substances, including thorium-230, had migrated offsite to the Acreage. (D.E. 322-20 at 3.)

(e) Environment. The soil at Defendant's Palm Beach campus, including its scrapyard, and the Acreage are "environments," as they are "land surface or subsurface strata." 42 U.S.C. § 9601(8); (D.E. 322-20 at 3-7.)

(f) Facility. Defendant's Palm Beach campus is a "facility" because it is a "site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9); (D.E. 329 at 1 ¶2; D.E. 322-20 at 3-7; D.E. 335-26 at 12-16; D.E. 340 at 1-2 ¶1(a), (d).)

Some of the factual predicates for these conditions – for example, whether Defendant disposed of or "released" thorium-230, and whether thorium-230 "caused or contributed to" Cynthia's brain tumor – overlap with the merits of the case. The parties hotly contest some of these facts. (D.E. 340 at 11-21, 37-51.)

This is an appeal of a summary judgment order. A jury, rather than the court, should resolve any disputed facts. *See Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 162 (4th Cir. 1992) ("In general, issues of fact bearing on the application of a statute of limitations are submitted, as are other issues of fact, for determination by

the jury."). The district court in its order did not make any findings on the merits of the case or conditions (b)-(f). (D.E. 407.) Thus, if any doubt exists on whether Plaintiffs satisfied conditions (b)-(f), this Court should remand for the district court to address these issues in the first instance. *See, e.g., Underwriters at Lloyds Subscribing to Cover Note B0753PC1308275000 v. Expeditors Korea Ltd.*, 882 F.3d 1033, 1053-54 (11th Cir. 2018) (remanding for district court to address factual issue in the first instance).

CONCLUSION

This appeal is about interpreting statutes in context. The district court erred because it read the PAA and § 9658 out of context. A PAA hybrid action is an "an action brought under State law," § 9658(a)(1), even if it "arises under" federal law for jurisdictional purposes, § 2014(hh). The "law of the State" to be applied in a PAA action includes § 9658 and excludes preempted state law. This Court should reverse the district court's summary judgment and remand for further proceedings consistent with the legal principles stated herein.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Rule 32(a)(7), Federal Rules of Appellate Procedure, in that it contains 12,533 words (including words in footnotes), excluding the parts of the document exempted by FRAP 32(f), according to the word-processing system used to prepare this brief. This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY service by U.S. Mail and CM/ECF a true and correct copy of the foregoing along with seven copies upon the following clerk of court on April 9, 2019:

Clerk of Court
U.S. Court of Appeals for the 11th Circuit
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I FURTHER CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system which will serve a Notice of Docket Activity on April 9, 2019 to the following:

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