No. 02-1036

In the Supreme Court of the United States

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.,
PETITIONERS

v.

RAYMOND FREIER, INDIVIDUALLY, AS
ADMINISTRATOR OF THE ESTATE OF ROSE FREIER,
DECEASED, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

R. JUSTIN SMITH
Attorney

Department of Justice
Washington, D.C. 20530- 0001
(202) 514-2217

QUESTIONS PRESENTED

The brief for the United States will address the following questions:

1. Whether 42 U.S.C. 9658, which preempts contrary state laws regarding the commencement of limitations periods in certain state-law tort actions involving hazardous substances, is a permissible exercise of congressional authority under the Commerce Clause.

2. Whether Section 9658 violates the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 303 F.3d 176. The opinions of the district court (Pet. App. 67a-148a, 149a-199a) are reported at 26 F. Supp. 2d 512 and 68 F. Supp. 2d 236.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2002. A petition for rehearing was denied on October 8, 2002 (Pet. App. 210a). The petition for a writ of certiorari was filed on January 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, to "counteract the environmental threats associated with hazardous waste disposal." *United States* v. *Olin Corp.*, 107 F.3d 1506, 1508 (11th Cir. 1997). The regulatory scheme established by CERCLA addresses, *inter alia*, the cleanup of hazardous waste sites and the reimbursement of cleanup costs. See *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 483 (1996).

The CERCLA provision at issue in this case, 42 U.S.C. 9658, establishes a "federally required commencement date" (FRCD) for certain state-law tort actions to redress injuries caused by hazardous materials. Section 9658 was enacted in the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 203(a), 100 Stat. 1695. Section 9658(a)(1) provides:

> 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 date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

42 U.S.C. 9658(a)(1). The term "federally required commencement date" is defined as "the date the plaintiff knew (or reasonably should have known) that the

personal injury or property damages referred to in [Section 9658(a)(1)] were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. 9658(b)(4)(A). In cases where a covered state limitations period would begin to run before the date the plaintiff knew or reasonably should have known of his injury and its cause, the effect of Section 9658(a)(1) is to preempt state law and to require that the commencement date of the limitations period will be determined on the basis of the federal rule.

Section 9658 had its origins in the report of a study group that was convened pursuant to Section 301(e) of CERCLA, 42 U.S.C. 9651(e), and charged 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." 42 U.S.C. 9651(e)(1). The study group was directed to consider, *inter alia*, "barriers to recovery posed by existing statutes of limitations." 42 U.S.C. 9651(e)(3)(F). The study group found that one of the primary obstacles to recovery under state laws was the commencement date for statutes of limitations:

> Commencement of the running of statutes of limitations can be a barrier to recovery under both common law and statutory remedies. This issue does not arise specifically from the applicable period of limitations which depends on the cause of action; the question is when the statute begins to run—the time when the action accrues. The plaintiff's ability to recover will often depend on whether a liberal discovery rule is applicable.

> Exposure to certain hazardous wastes may result in cancer, neurological damage, and in mutagenic and teratogenic changes. Most of these types of injuries have long latency periods, sometimes 20 years or longer. With long latency periods, a rule which starts the running of the statute from the time of exposure will defeat most actions before the plaintiff knows of his injury.

Superfund Section 301(e) Study Group, *Injuries and Damages from Hazardous Wastes-Analysis and Improvement of Legal Remedies, A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510)*, 97th Cong., 2d Sess. 43 (Comm. Print 1982) (Study Group Report). The study group endorsed a rule under which "an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause." *Id.* at 256.

When Congress adopted the FRCD provision in 1986, the Conference Committee explained that "[t]he study done pursuant to Section 301(e) of CERCLA by a distinguished panel of lawyers noted that certain State statutes deprive plaintiffs of their day in court. The study noted that the problem centers around when the statute of limitations begins to run rather than the number of years it runs." H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 261 (1986). The Conference Committee stated that Section 9658 "addresses the problem identified in the 301(e) study." *Ibid.*

2. The instant case arises out of tort suits filed under New York law for dozens of deaths and injuries allegedly caused by exposure to toxic substances released by the Pfohl Brothers Landfill, located near Buffalo, New York. Petitioners are alleged to have owned or oper-

ated the site, generated hazardous materials disposed of at the site, or transported hazardous materials to the site. See Pet. App. 7a-8a.

The district court, adopting the recommendations of the magistrate judge, held that the private respondents' claims were barred by the applicable statute of limitations. The court found that Section 9658 applies to survival and wrongful death claims, rejecting petitioners' contention that the statute's reference to actions for "personal injury" excluded suits based on the death of a person other than the plaintiff. The district court also rejected petitioners' arguments that the FRCD provision exceeds Congress's power under the Commerce Clause and that it violates the Tenth Amendment. The court found, however, that under the FRCD provision, the private respondents' claims accrued no later than the end of 1991 and were therefore barred by the applicable New York limitations period. See Pet. App. 11a-16a, 30a-33a.

3. The private respondents appealed, and petitioners cross- appealed, pressing (*inter alia*) their constitutional challenges to the FRCD provision. Pursuant to 28 U.S.C. 2403(a), the United States intervened in the court of appeals to defend the constitutionality of Section 9658. The court of appeals vacated the judgment of the district court and remanded for further proceedings. Pet. App. 1a-66a.

a. The court of appeals agreed with the district court that the FRCD provision applies to survival and wrongful death actions. Pet. App. 38a-43a.

b. The court of appeals held that Section 9658 is a valid exercise of congressional authority under the Commerce Clause. Pet. App. 43a-50a. The court explained that "the generation and disposal of waste material by companies in connection with the manu-

facture or processing of products is a business activity, and * * * the storage of such wastes by others is economic activity." *Id.* at 47a. The court further observed that "such wastes are commonly transported in interstate commerce," and that "even wholly intrastate disposal of hazardous wastes can threaten interstate and foreign commerce, as those wastes can contaminate streams that run through landfills and feed into tributaries of navigable waters." *Ibid.*

The court of appeals determined that the FRCD provision plays a significant role in achieving CERCLA's overall objectives. Thus, the court explained that "one of CERCLA's goals was to induce companies generating, transporting, dumping, and storing, etc., hazardous wastes voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." Pet. App. 49a (internal quotation marks omitted). The court found it "plain that the FRCD provides such inducement." *Ibid.* The court explained that Section 9658

> gives companies responsible for hazardous wastes greater incentives to clean up the waste sites, for it exposes those companies to a longer period of liability for the harms those sites cause to human health and the environment. The longer the period of liability, the more likely it is that a responsible company will bear the expense of the harms it has caused. The greater the potential cost to the company, the greater the likelihood that the company will strive to avoid liability by taking appropriate remedial actions with respect to its hazardous waste sites. And the more remedial action that is undertaken voluntarily, the less the need for government intervention, and the cleaner the environment.

Id. at 49a-50a.

c. The court of appeals rejected petitioners' Tenth Amendment challenge to the FRCD provision. Pet. App. 50a-52a. The court observed that Section 9658 "does not conscript into federal service either the state's legislature or its executive branch," but "simply requires courts in which state-law toxic tort claims are asserted to recognize that such a claim did not accrue before the plaintiff knew or reasonably should have known the cause of the injury." *Id.* at 51a. The court found that requirement to be "squarely within Congress's long established powers under the Supremacy Clause of the Constitution." *Ibid.* The court explained that, "consistent with the Tenth Amendment, Congress may create federal causes of action that state courts are obligated to adjudicate. Or it may enact a federal law that preempts a state-law cause of action, thereby foreclosing state courts from entertaining such a state-law claim. Or Congress may, as it has done on occasion, simply extend a state limitations period." *Ibid.* (citations omitted). The court concluded that "[t]he FRCD, which requires no action by a state's legislative or executive officials, but only the application of federal law by the courts to recognize the Federal Commencement Date of a state-law claim, does not violate the Tenth Amendment." *Id.* at 52a.

d. The court of appeals held that the district court had erred in its application of the FRCD provision to the private respondents' claims. Pet. App. 52a-62a. The court held that the standard set forth in Section 9658 for determining when a state-law limitations period will commence, which focuses on when a plaintiff knew or reasonably should have known the cause of his injury, could not be satisfied by proof that by 1991 the private respondents should have had a "reasonable

suspicion" that their injuries had been caused by hazardous materials. *Id.* at 53a-54a. The court also held that the district court had failed to view the evidence in the light most favorable to the private respondents (the parties against whom summary judgment had been sought). *Id.* at 57a. The court of appeals therefore concluded that the district court's grant of summary judgment was improper because "the record did not permit the court to conclude that no reasonable fact-finder could fail to infer that [respondents] reasonably should have known prior to the end of 1991 that the Landfill was the cause of the injuries." *Id.* at 61a.

DISCUSSION

1. Relying principally on this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), petitioners contend (Pet. 5-9) that Section 9658 exceeds Congress's authority under the Commerce Clause. That argument lacks merit and does not warrant this Court's review.

a. In *Lopez*, this Court held that the Commerce Clause did not authorize Congress to enact a statute criminalizing the possession of a gun within 1000 feet of the grounds of a school. The Court explained that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." 514 U.S. at 567. Similarly in *United States* v. *Morrison*, 529 U.S. 598 (2000), the Court held that Congress had exceeded its authority under the Commerce Clause when it created a private right of action for damages for victims of gender-motivated violence. The Court emphasized that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613.

CERCLA, by contrast, directly regulates economic activity. As the court of appeals observed, "the generation and disposal of waste material by companies in connection with the manufacture or processing of products is a business activity, and * * * the storage of such wastes by others is economic activity." Pet. App. 47a. CERCLA addresses the cleanup of contaminated sites and the allocation of costs associated with such sites, including costs of cleanup, damages to natural resources, and (through the FRCD provision) compensation for personal injuries and property damage. This Court has recognized that the disposal of hazardous waste is an activity in interstate commerce. See *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 337, 340 n.3 (1992) (noting that in 1992, only 16 States had commercial hazardous waste landfills); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Res.*, 504 U.S. 353, 359 (1992) ("Solid waste, even if it has no value, is an article of commerce".). Compare *Hodel* v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 275-283 (1981) (sustaining Surface Mining Control and Reclamation Act of 1977 under the Commerce Clause).

b. Petitioners do not question the constitutionality of the CERCLA provisions that govern on-site cleanup and cost-allocation. See Pet. App. 49a.[1] Rather, peti-

[1] The lower federal courts have held that CERCLA's provisions governing on-site cleanup and the allocation of associated costs are valid exercises of Congress's authority under the Commerce Clause. See *Olin Corp.*, 107 F.3d at 1510-1511; *United States* v. *Glidden Co.*, 3 F. Supp. 2d 823, 840-843 (N.D. Ohio 1997), rev'd in part on other grounds, 204 F.3d 698 (6th Cir. 2000); *United States* v. *NL Indus.*, 936 F. Supp. 545, 556-563 (S.D. Ill. 1996); *Nova Chem., Inc.* v. *GAF Corp.*, 945 F. Supp. 1098, 1105-1106 (E.D. Tenn. 1996).

tioners focus on the FRCD provision alone and contend (Pet. 8-9) that it is not sufficiently related to interstate commerce to qualify as valid Commerce Clause legislation. As the court of appeals recognized, however, Section 9658 is "an integral part of [a] regulatory program" that, "when considered as a whole," is a permissible exercise of Congress's Commerce Clause authority. Pet. App. 45a (quoting *Hodel* v. *Indiana*, 452 U.S. 314, 329 n.17 (1981)). CERCLA includes provisions that establish emergency authority to remove hazardous substances and prevent health risks to those near a site, 42 U.S.C. 9604; create a national plan for responding to releases of hazardous substances, 42 U.S.C. 9605(a); establish authority to clean up contaminated sites, 42 U.S.C. 9606(a); and apportion liability for cleanup costs and natural resource damages, 42 U.S.C. 9607. By increasing the likelihood that persons harmed by hazardous materials will obtain compensation for their injuries, the FRCD provision furthers CERCLA's purpose of "'induc[ing]' companies generating, transporting, dumping and storing, etc., hazardous wastes 'voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.'" Pet. App. 49a (quoting H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. 1, at 17 (1980)). As the Study Group Report emphasized, "the economic cost of injury should be carried by the industry or enterprise that creates [it], because efforts to reduce the cost will result in greater care and more safety and protection of the public." Study Group Report 248.[2]

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[2] In enacting CERCLA, Congress had before it an abundance of evidence relating to the economic costs and harms associated with improper waste disposal. See generally *Olin Corp.*, 107 F.3d at 1511. Personal injuries and property damage are among those

Thus, by providing additional incentives for private remediation efforts, Section 9658 complements other CERCLA provisions intended to reduce the incidence of harms caused by hazardous materials. "The greater the potential cost to the company, the greater the likelihood that the company will strive to avoid liability by taking appropriate remedial actions with respect to its hazardous waste sites. And the more remedial action that is undertaken voluntarily, the less the need for government intervention, and the cleaner the environment." Pet. App. 49a-50a. Section 9658 also complements other CERCLA provisions intended to achieve an equitable apportionment of the costs that result from improper storage and disposal of hazardous substances.

Even considered in isolation, moreover, the FRCD provision bears a substantial nexus to interstate commerce and constitutes a valid exercise of Commerce Clause authority. Both as a general matter and in this case, improper disposal and storage of hazardous materials is typically the result of commercial activity. Compensation of persons injured by such practices is therefore an appropriate subject of federal concern. Acting pursuant to the Commerce Clause, Congress may regulate the manner in which injuries associated with such activities are redressed. Cf. *United States* v. *Kunzman*, 125 F.3d 1363, 1365 (10th Cir. 1997) (Congress may act pursuant to the Commerce Clause to

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costs. The potential harms are very substantial. At the time of the Study Group Report, there were between 431 and 2000 hazardous waste sites presenting a danger to human health. Study Group Report 22. In this case alone, plaintiffs seek to recover medical costs, lost wages, and other expenses associated with dozens of deaths and injuries.

reallocate costs associated with fraud in securities transactions), cert. denied, 523 U.S. 1053 (1998).[3]

c. Petitioners identify no decision that has held the FRCD provision to be unconstitutional. Absent a conflict in authority, petitioners' Commerce Clause challenge does not warrant this Court's review.

2. Petitioners contend (Pet. 10-17) that Section 9658 violates the Tenth Amendment by superseding the States' decisions regarding the time when the limitations periods for state-law causes of action will begin to run. Petitioners' Tenth Amendment claim lacks merit.[4]

a. Contrary to petitioners' contention (Pet. 11), Congress in enacting Section 9658 has not "commandeered" any State's "legislative process." Section 9658 does not require the enactment of any form of state legislation. Nor does its implementation require action by any state executive official. See Pet. App. 51a (noting that FRCD provision "does not conscript into federal service either the state's legislature or its executive branch"). Rather, "the FRCD simply requires *courts* in which state-law toxic tort claims are asserted to recognize that such a claim did not accrue before the plaintiff

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[3] Recognition of federal authority in this sphere presents no risk that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *Morrison*, 529 U.S. at 615. The FRCD provision addresses the narrow problem of injuries resulting from hazardous materials, and it operates in the context of a broader statutory scheme that heavily regulates hazardous substances.

[4] The court of appeals did not address the question, reserved by this Court in *Pierce County* v. *Guillen*, 123 S. Ct. 720, 732 n.10 (2003), whether private parties have standing to assert Tenth Amendment claims that are based on allegations that state prerogatives have been invaded.

knew or reasonably should have known the cause of the injury." *Ibid.* (emphasis added).

Even as applied to suits filed in state court, Section 9658 raises no serious Tenth Amendment concern. Congress's authority to preempt state law, and the concomitant obligation of state courts to apply valid federal law rather than inconsistent state law, are established features of our federal system. As this Court recognized in *New York* v. *United States*, 505 U.S. 144 (1992), federal "statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *Id.* at 178-179; see *Printz* v. *United States*, 521 U.S. 898, 907, 928-929 (1997); Pet. App. 52a.

Petitioners' Tenth Amendment challenge to Section 9658 is especially misguided in the instant case, which was filed in federal district court based on diversity of citizenship. See Pet. App. 77a, 163a. Implementation of the FRCD provision in this setting requires no action by any state official whatever. And petitioners have presented no argument that Congress is barred from enacting a federal accrual rule to govern state-law causes of action falling within the federal courts' diversity jurisdiction. Cf. *Hanna* v. *Plumer*, 380 U.S. 460, 469-472 (1965); *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 722, 726 (1988) (holding that the Full Faith and Credit Clause "does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State," and explaining that "the society which adopted the Constitution did not regard statutes of limitations as substantive provisions, * * * but rather as procedural restrictions fashioned by each jurisdiction for its own courts").

b. This Court's decision in *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870), establishes that Congress may, in appropriate circumstances, preempt the state rules that would otherwise govern the determination whether a state-law cause of action has been timely filed. The federal law at issue in *Stewart* was enacted in 1864 and provided that applicable limitations periods in civil and criminal cases would be tolled for the period during which the actions could not be prosecuted because of the Civil War. See *id.* at 494, 504-505. The case involved a contract action filed in Louisiana state court. *Id.* at 500-501. This Court first held that the statute applied to actions brought in state as well as federal courts. See *id.* at 505-506. The Court then rejected the argument that the law, so construed, exceeded Congress's authority under the Constitution. See *id.* at 506-507.

In sustaining the validity of the federal tolling provision, this Court observed that "Congress is authorized to make all laws necessary and proper to carry into effect the granted powers." 78 U.S. (11 Wall.) at 506. The Court concluded that Congress's war power "carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections." *Id.* at 507. The Court rejected the defendant's contention that "as to matters not intrusted to the government of the United States, the State courts are considered as courts of another sovereignty. As Congress cannot create the State courts, as it cannot establish the ordinary rules of property, obligations, and contracts, * * * it cannot prescribe rules of proceeding for such State courts." *Id.*

at 498 (footnote omitted) (argument of counsel). The Court's decision in *Stewart* makes clear that Congress possesses constitutional authority to preempt the rules that would otherwise govern the timeliness of state-law causes of action, where such preemption is a "necessary and proper" means of carrying into effect Congress's enumerated powers.[5]

c. Because petitioners' Tenth Amendment challenge to Section 9658 lacks merit, and because no conflict in authority on this issue exists, plenary review by this Court is not warranted. A related question is currently pending before the Court, however, in *Jinks* v. *Richland County*, No. 02-258 (argued March 5, 2003). *Jinks* involves the application of the federal supplemental jurisdiction statute, 28 U.S.C. 1367. Section 1367(a) and (c) codify pre-existing judge-made rules and define the circumstances under which a federal court should exercise pendent jurisdiction over a state-law claim that is factually related to a federal cause of action. Section 1367(d) provides that, when a pendent state-law claim asserted under Section 1367(a) is dismissed by the federal court and subsequently refiled in state court, the applicable statute of limitations is tolled during the pendency of the federal action and for 30 days thereafter. In *Jinks*, the South Carolina Supreme Court held

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[5] CERCLA heavily regulates hazardous substances, and it makes parties who handle or dispose of such materials liable for cleanup costs irrespective of when that activity occurred. See *Olin Corp.*, 107 F.3d at 1511-1515; 42 U.S.C. 9613(g)(2) (establishing limitations periods for cost recovery actions that run from the time of the cleanup activity rather than the handling or disposal of hazardous substances). Persons who handle or dispose of hazardous substances therefore have a greatly reduced expectation of repose, lessening the interest of a State in enforcing a restrictive limitations period in private tort actions.

that Section 1367(d) is unconstitutional as applied to a state-law claim against a county defendant, on the ground that the federal statute impermissibly intrudes upon the State's authority to define the conditions upon which its political subdivisions will be subject to suit. See *Jinks* v. *Richland County*, 563 S.E.2d 104, 107-109 (S.C. 2002).

In addition to contending that Section 1367(d) is unconstitutional as applied to suits against a State's political subdivisions, the respondent in *Jinks* makes the broader argument that Section 1367(d) is invalid in all its applications, on the theory that "Congress' attempt to alter the application of a state law statute of limitations to be applied in state courts to state law claims represents an unconstitutional intrusion upon state sovereignty." 02-258 Resp. Br. at 17; see *id.* at 17-22. Although the FRCD provision addresses the commencement date of a state limitations period, rather than the rules that govern tolling of the limitations period once it has begun to run, each provision potentially requires a state-law cause of action to be treated as timely even though it would be time-barred as a matter of state law. This Court's decision in *Jinks* may therefore be relevant to the proper disposition of petitioners' Tenth Amendment challenge to CERCLA's FRCD provision. For that reason, the petition for certiorari in the instant case should be held pending the decision in *Jinks* and then disposed of as appropriate in light of that decision.[6]

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[6] The United States intervened in the court of appeals pursuant to 28 U.S.C. 2403(a) to defend the FRCD provision against petitioners' constitutional challenges. The government did not address any question concerning the proper application of Section 9658 to the facts of this case, and we take no position on those questions (see Pet. 17-30) in this Court.

CONCLUSION

With respect to the question whether 42 U.S.C. 9658 violates the Tenth Amendment, the petition for a writ of certiorari should be held pending this Court's decision in *Jinks* v. *Richland County*, No. 02-258 (argued March 5, 2003), and then disposed of as appropriate in light of that decision. With respect to the question whether Section 9658 exceeds Congress's authority under the Commerce Clause, the petition should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

R. JUSTIN SMITH
Attorney

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