No. 19-982

In the Supreme Court of the United States

ERICA Y. BRYANT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred by applying its prior decision in this case interpreting a North Carolina statute of repose.

ADDITIONAL RELATED PROCEEDING

Supreme Court of the United States

Bryant v. *United States*, No. 14-1380 (Oct. 5, 2015)

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OPINIONS BELOW

The opinion of the court of appeals (19-737 Pet. App. (Pet. App.) 1-6) is not published in the Federal Reporter but is reprinted at 774 Fed. Appx. 564.[1] A prior opinion of the court of appeals (Pet. App. 19-34) is reported at 768 F.3d 1378. The opinion and order of the district court are reported at 263 F. Supp. 3d 1318. A prior opinion of the district court is not published in the Federal Supplement but is available at 2012 WL 12869566.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2019. A petition for rehearing en banc was denied on September 5, 2019. (Pet. App. 35-36.) On November 26, 2019, Justice Thomas extended the time

[1] The petition for a writ of certiorari incorporates (Pet. vi) the appendix to the petition for a writ of certiorari in *Douse* v. *United States*, No. 19-737 (filed June 26, 2019).

within which to file a petition for a writ of certiorari to and including February 2, 2020. The petition for a writ of certiorari was filed on February 3, 2020 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves consolidated actions that petitioners filed separately against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* The district court denied the government's motion to dismiss, concluding that petitioners' claims were not barred by the applicable North Carolina statute of repose. See Pet. App. 21. On interlocutory appeal, the court of appeals vacated and remanded. *Id.* at 19-34. This Court denied a petition for a writ of certiorari. 136 S. Ct. 71. On remand, the district court dismissed petitioners' claims based on the statute of repose. 263 F. Supp. 3d 1318. The court of appeals affirmed. Pet. App. 1-6.

1. Petitioners were residents at the Camp Lejeune Marine Corps base in North Carolina at various periods in the 1970s and 1980s. See Pet. App. 2. Almost two decades later, they were diagnosed with diseases, which they allege are attributable to contaminated drinking water that they consumed at Camp Lejeune. See *id.* at 2, 9. Petitioners claim that the government was negligent in failing to take appropriate steps to ensure that the water supply was safe, and in failing to warn them of chemicals in the water. See 263 F. Supp. 3d at 1325.

a. Beginning in 2009, petitioners began filing separate actions against the United States under the FTCA. The FTCA provides a limited waiver of the sovereign immunity of the United States and creates a cause of action for damages for personal injury "caused by the

negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1).

The Judicial Panel on Multi-District Litigation consolidated petitioners' cases for pretrial proceedings in the Northern District of Georgia, the venue in which one of the cases was proceeding and the location of a large number of relevant documents stemming from the government's investigation into environmental issues at Camp Lejeune. See *In re: Camp Lejeune, N.C. Water Contamination Litig.*, 763 F. Supp. 2d 1381 (J.P.M.L. 2011).

b. The government moved to dismiss petitioners' FTCA claims based on the North Carolina statute of repose that applies to actions "for personal injury or physical damage to claimant's property." N.C. Gen. Stat. § 1-52(16) (Supp. 2010). That provision states that the cause of action in such cases "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs," but that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." *Ibid.* The statute of repose extinguishes the cause of action based on when the defendant's act or omission occurred, regardless of when a plaintiff would reasonably have known of his injury. See *Black* v. *Littlejohn*, 325 S.E.2d 469, 474-475 (N.C. 1985); see also *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 9 (2014) ("Statutes of repose effect a legislative judgment that a defendant should be free

from liability after the legislatively determined period of time.") (citation and internal quotation marks omitted).[2]

The government's motion to dismiss argued that petitioners' FTCA claims were barred by Section 1-52(16)'s ten-year statute of repose, because those claims were filed almost two decades after petitioners were last exposed to the drinking water at Camp Lejeune. See Pet. App. 20. In response, petitioners argued that Section 1-52(16) was preempted by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq*. Petitioners also argued, in the alternative, that Section 1-52(16) contains an implicit exception for claims based on a latent disease.

The district court agreed with petitioners that CERCLA preempted Section 1-52(16)'s statute of repose. D. Ct. Doc. 13, at 23 (Sept. 29, 2011); see Pet. App. 21. The court accepted, however, the government's motion to determine in the alternative whether Section 1-52(16) contains an implicit exception for claims based on a latent disease, in order to facilitate a potential interlocutory appeal. See D. Ct. Doc. 68, at 2-5 (May 11, 2012). As to that question, the court agreed with the government that Section 1-52(16) does not contain an implicit exception for latent diseases. See *id.* at 5-16. The court found that the "plain language of the statute" "covers causes of action of negligence resulting in personal injury," and "[n]othing in the statute implies

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[2] North Carolina's Section 1-52(16) also establishes a three-year statute of limitations. But it is undisputed in this case that the applicable statute of limitations is the one established by the FTCA, 28 U.S.C. 2401(b), not in Section 1-52(16).

or even remotely indicates that it might contain an exception for latent diseases." *Id.* at 5-6.

2. The district court certified for interlocutory appeal its conclusions both that CERCLA preempted Section 1-52(16) and that Section 1-52(16) contains no exception for latent-disease claims. See Pet. App. 21. The court of appeals permitted the appeal. See *id.* at 20-21. While that appeal was pending, this Court held in *Waldburger* that CERCLA does not preempt North Carolina's statute of repose, 573 U.S. at 4, thereby abrogating the district court's ruling in this case in favor of petitioners. See Pet. App. 22.

The court of appeals then addressed petitioners' alternative argument that claims alleging a latent disease are exempt from Section 1-52(16), and the court agreed with the district court that the North Carolina statute of repose "contains no exception for latent diseases." Pet. App. 23. The court of appeals explained that "[t]he plain text of the statute is unambiguous" and "contains no exception for latent diseases," and moreover that "no other North Carolina statute excepts latent diseases from the statute of repose." *Ibid.*

The court of appeals next rejected petitioners' contention that their claims were saved from the statute of repose by statutory amendments that the North Carolina legislature enacted following this Court's decision in *Waldburger*. See Pet. App. 24-33. That legislation created an exception to Section 1-52(16)'s statute of repose for harm caused by contaminated groundwater. See N.C. Gen. Stat. §§ 1-52(16), 130A-26.3 (Supp. 2014). The court of appeals concluded, however, that as a matter of North Carolina state law, the new exception could not apply retroactively. See Pet. App. 27. The court relied on *McCrater* v. *Stone & Webster Eng'g Corp.*, 104 S.E.2d

858 (N.C. 1958), in which the North Carolina Supreme Court held that a statute extending the time for a plaintiff to file his claim would not be applied retroactively. See Pet. App. 27. The court of appeals found that "the amended statute of repose [here] contains a brand new exception for groundwater claims," *id.* at 32, and the North Carolina Supreme Court has held that a statute altering (as opposed to clarifying) a statute of repose does not apply retroactively, because to do so would deprive the defendant of a vested right, *id.* at 28 (citing *Ray* v. *North Carolina Dep't of Transp.*, 727 S.E.2d 675, 681 (N.C. 2012)).

The court of appeals observed that petitioners disputed, as a factual matter, whether the government's last act or omission relevant to their claim had occurred within ten years of their lawsuit, Pet. App. 34 n.13, so the court vacated the district court's order denying the government's motion to dismiss and remanded for further proceedings, *id.* at 34.

3. Petitioners filed a petition for a writ of certiorari. See *Bryant* v. *United States*, No. 14-1380 (filed May 19, 2015). They subsequently moved this Court to defer consideration of their petition until the Fourth Circuit ruled in *Stahle* v. *CTS Corp.*, 817 F.3d 96 (2016), which also raised the question whether the statute of repose in Section 1-52(16) contained an exception for latent diseases. This Court denied both the motion and the petition. 136 S. Ct. 71.

4. On remand to the district court, the court granted the government's motion to dismiss petitioners' FTCA claims based on the North Carolina statute of repose. See 263 F. Supp. 3d 1318. As relevant here, petitioners attempted to oppose the application of the statute of repose by invoking the Fourth Circuit's decision in

Stahle, which by then had issued. See *id.* at 1327. In *Stahle*, the Fourth Circuit held that Section 1-52(16) contains an exception for latent diseases, contrary to the decision of the Eleventh Circuit in petitioners' case. See 817 F.3d at 100-111.

The district court rejected petitioners' argument, holding that the Eleventh Circuit's decision in this case was binding on it both as a matter of controlling precedent and because that decision was the law of the case. See 263 F. Supp. 3d at 1327-1329. Moreover, the court observed, the Fourth Circuit's decision in *Stahle* simply showed "that North Carolina law remains highly unsettled in this area." *Id.* at 1329; see *Stahle*, 817 F.3d at 114 (Thacker, J., concurring) (observing that "[t]he Supreme Court of North Carolina itself has sent mixed signals about the scope of § 1-52(16)," and that federal courts of appeals were divided about the state-law question). The district court also rejected petitioners' argument that *Stahle* was binding on it because some of the cases in this multidistrict litigation had been transferred from district courts in North Carolina, where they were filed. See 263 F. Supp. 3d at 1330-1336.

5. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1-6. As relevant here, the court held that its prior decision construing North Carolina state law remained controlling, because it had not been overruled by the Eleventh Circuit sitting en banc or by this Court. *Id.* at 3-4.

ARGUMENT

The question decided by the court of appeals is one of state law. The Eleventh Circuit correctly rejected petitioners' contention that the North Carolina statute of repose that applies to claims like those here, "for personal injury," N.C. Gen. Stat. § 1-52(16) (Supp. 2010),

does not apply to their claims alleging latent diseases caused by contaminated groundwater at Camp Lejeune in the 1970s or 1980s. See Pet. App. 24-33. This Court has already denied petitioners' prior petition for a writ of certiorari seeking review of that issue, 136 S. Ct. 71, and the same course is warranted here. In the decision below, the court of appeals simply held that its prior decision interpreting the North Carolina statute of repose in petitioners' cases remained good law. See Pet. App. 3-4. Petitioners advance various arguments why the court of appeals should have declined to follow its own precedent. None is persuasive, and the question presented does not warrant this Court's review.

1. a. Petitioners first contend (Pet. 8-11) that the court of appeals should have "defer[red]" to the Fourth Circuit's interpretation of North Carolina state law, because the Fourth Circuit encompasses North Carolina. But petitioners cite no authority for the proposition that a federal court of appeals should decline to follow its own published decision in the same case and should instead follow a later-issued decision from another court of appeals on a question of state law. The Sixth Circuit's decision in *In re Dow Corning Corp.*, 778 F.3d 545, 549 (2015) (cited at Pet. 9), did not involve a prior published decision from the court that directly resolved the same question in the same case. And as the Eleventh Circuit correctly recognized, its prior holding interpreting the North Carolina statute was "binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by [the court of appeals] sitting *en banc*." Pet. App. 4 (quoting *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (per curiam)) (emphasis omitted).

Moreover, the Eleventh Circuit had good reason not to depart from its prior decision in the particular circumstances of this case. This Court denied petitioners' prior petition for a writ of certiorari seeking review of that decision. See 136 S. Ct. 71. And although the Fourth Circuit reached a different conclusion about the meaning of state law in *Stahle* v. *CTS Corp.*, 817 F.3d 96 (2016), as the Eleventh Circuit observed, that decision merely underscored that the state of the law in North Carolina was unsettled. See Pet. App. 3 n.2 (citing *Stahle*, 817 F.3d at 114 (Thacker, J., concurring)); see also *Stahle*, 817 F.3d at 110 (majority opinion) (stating that the Fourth Circuit's opinion sought to resolve "tension among the dicta" in decisions of the North Carolina Supreme Court).[3] Under these circumstances, petitioners cannot show that the court of appeals erred by adhering to its prior published precedent, and that question is unworthy of this Court's review.

b. Petitioners next contend (Pet. 8) that the court of appeals should have set aside its prior precedent because some of their cases (though not all, see Pet. 11 n.3) were originally filed in district courts in the Fourth Circuit before they were transferred to the Northern District of Georgia by the Judicial Panel on Multi-District Litigation. As an initial matter, although petitioners

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[3] Petitioners contend (Pet. 10) that the Fourth Circuit's interpretation of the North Carolina statute of repose to exempt latent-disease claims long predates *Stahle* and also predates the Eleventh Circuit's prior decision in this case. See 817 F.3d at 100-101. But Judge Thacker disagreed with that argument in her concurring opinion in *Stahle*. See *id.* at 111 (stating that prior Fourth Circuit precedent had "construed a North Carolina statute significantly different than the one at bar"). In any event, the Eleventh Circuit based its interpretation of North Carolina law on the unambiguous statutory text. See Pet. App. 23.

raised this argument in the district court, they did not preserve it in the court of appeals, and that court accordingly did not address it. See Bryant C.A. Br. 12-20 (arguing that the Eleventh Circuit should defer to the Fourth Circuit for reasons not premised on transfer); Burns & Gross C.A. Br. 16-33 (same); Jones C.A. Br. 13 n.1 (discussing transfer in a footnote); Rivera C.A. Br. 11-30 (not arguing that the Eleventh Circuit should defer to the Fourth Circuit). Cf. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'") (citation omitted).

In any event, petitioners' argument is meritless. They observe (Pet. 8) that, when a case is transferred in a multi-district litigation, "the transferee court * * * is bound to apply the state law that the transferor court would have applied," and furthermore that their FTCA claims required the application of North Carolina state law. But those arguments do not assist petitioners, because the court of appeals *did* apply North Carolina law in this case. Petitioners' cited authorities do not suggest that the Eleventh Circuit was bound by the Fourth Circuit's interpretation of North Carolina law as opposed to its own interpretation.

2. Petitioners properly do not suggest that the Eleventh Circuit's resolution of a question of North Carolina state law warrants this Court's review. In any event, the Eleventh Circuit's analysis is correct. As that court explained in its earlier opinion, the statute of repose in North Carolina Section 1-52(16) is unambiguous and does not contain any exception for causes of action involving latent diseases. See Pet. App. 23.

Petitioners invoke (Pet. 11-15) the North Carolina legislature's revision of the statute of repose to exclude claims related to groundwater contamination. But as the Eleventh Circuit explained at length in its prior decision, that revision cannot be applied retroactively as a matter of North Carolina law as determined by the North Carolina Supreme Court. See Pet. App. 24-33. Petitioners do not mention that holding; they do not attempt to explain why it was incorrect; and they do not provide any reason why the issue is now more worthy of this Court's review than it was the last time this Court declined to consider it. The decisions cited by petitioners, which concern the effect of amendments to *federal* statutes on pending cases, are entirely irrelevant to this case, which turns on North Carolina's law of retroactivity. See Pet. 13-14 (citing *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), and *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004)).

Finally, petitioners contend (Pet. 10-11) that "the North Carolina Supreme Court views disease claims as fundamentally different from personal injury claims," citing *Wilder* v. *Amatex Corp.*, 336 S.E.2d 66 (1985). That argument is mistaken. *Wilder* addressed a different statute of repose, since repealed, N.C. Gen. Stat. § 1-15(b) (Supp. 1976), that the North Carolina Supreme Court understood to correspond only to claims based on "occupational diseases." 336 S.E.2d at 72. The North Carolina Supreme Court expressly distinguished the statute that it considered in *Wilder* from the general personal-injury statute of limitations at issue here, in Section 1-52(16). See *id.* at 69. The court "note[d], importantly, that [Section 1-15(b)] is not intended to be a statute of limitations governing all negligence claims,

such as the statute of limitations contained in the first clause of [*Section 1-52(16)*]." *Ibid.* (emphasis added).

In sum, petitioners seek review of an unpublished decision that merely applied the Eleventh Circuit's prior precedent—which was established in petitioners' own case—to resolve a question of state law. The petition meets none of this Court's criteria for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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