No. 24-___

IN THE

Supreme Court of the United States

SUSAN MCBRINE AND DAVID L. PETRIE,

Petitioners,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether plaintiffs who bring actions against the United States under the Camp Lejeune Justice Act of 2022 have the right to trial by jury.

2. Whether parties who have been denied a statutory right to trial by jury may categorically obtain mandamus relief.

RELATED PROCEEDINGS

United States District Court (E.D.N.C.):

In re Camp Lejeune Water Litigation, No. 7:23-cv-897-RJ (E.D.N.C.) (Feb. 6, 2024) (striking jury-trial demand).*

United States Court of Appeals (4th Cir.):

In re Susan McBrine and David L. Petrie, No. 24-1542 (Aug. 23, 2024) (denying mandamus petition).

* At present, 2,182 actions against the United States are pending in the Camp Lejeune Water Litigation master docket cited above. The district court's decision struck the jury-trial demand in the plaintiffs' master complaint, affecting all of the individual actions. Accordingly, all 2,182 actions are directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Susan McBrine and David L. Petrie respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Fourth Circuit denying their petition for a writ of mandamus.

INTRODUCTION

This petition presents a question of overwhelming legal and practical importance: whether the decision below deprives a half million Americans of their right to trial by jury—a right that "'occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.'" *SEC v. Jarkesy*, 144 S. Ct. 2117, 2128 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

For over 30 years, the United States supplied water poisoned with toxic industrial chemicals to servicemembers and civilians who lived and worked at Marine Corps Base Camp Lejeune in North Carolina. As a result, countless Marines and other victims contracted cancer, Parkinson's disease, and other deadly conditions. The government went on to cover up its actions and failures for decades.

In the late 2000s, the government finally began to come clean about the scope of the Camp Lejeune disaster. Victims promptly filed administrative claims and legal actions under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2402, 2671 *et seq.* But the Department of Justice successfully invoked North Carolina's statute of repose to avoid all liability for the government's decades of wrongdoing. As a result,

thousands upon thousands of victims were left without recourse.

In 2022, Congress finally sought to remedy that injustice by enacting the Camp Lejeune Justice Act (CLJA). 28 U.S.C. ch. 171 prec. note. The CLJA creates a new cause of action that enables Camp Lejeune victims to secure monetary relief from the federal government. As relevant here, Subsection (d) of the CLJA vests exclusive jurisdiction over CLJA claims in the Eastern District of North Carolina and provides that "[n]othing in this subsection shall impair the right of any party to a trial by jury."

There is no mystery about what that sentence means: Congress expected CLJA plaintiffs to enjoy the right to try their claims to juries. The sentence could have no purpose other than to confirm that understanding. And the provision's legal context makes its meaning especially clear. For example, the provision's syntax—which essentially preserves a right that is assumed to exist—echoes the language of the Seventh Amendment and other provisions of the Bill of Rights. Further, while the CLJA incorporates many features of the FTCA, Congress declined to incorporate the FTCA's bar on jury trials, 28 U.S.C. § 2402. And even for skeptics of legislative history, the record here is particularly powerful: The Department of Justice objected to the CLJA's text specifically because it authorized jury trials, but Congress went ahead and enacted the law unchanged.

Yet when CLJA plaintiffs began filing suit in the Eastern District of North Carolina, the district court held that the statutory language is not sufficiently clear to authorize jury trials. Petitioners then sought

mandamus relief to restore their jury-trial rights—a procedure that this Court approved in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959)—but the United States Court of Appeals for the Fourth Circuit denied their petition without explanation.

For a number of reasons, that denial warrants this Court's immediate review.

First, to the extent that the Fourth Circuit embraced the district court's interpretation of the CLJA, it misconstrued this Court's decision in *Lehman v. Nakshian*, 453 U.S. 156 (1981), to require a particular declarative formulation for a statute to authorize jury trials against the United States—a sort of "magic words" test that this Court has repeatedly rejected for sovereign-immunity waivers. Under this Court's standard—whether Congress's intent is clearly discernible after exhausting all the "tools of statutory interpretation"—the CLJA authorizes jury trials. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388 (2023).

Second, to the extent that the Fourth Circuit concluded that a mandamus petition is not an appropriate vehicle to challenge the denial of a statutory right to a jury trial, as the government urged, that holding would not only conflict with *Beacon Theatres* but would also deepen a preexisting 7-1 circuit conflict on the question.

Third, few questions of statutory interpretation have such immediate and overwhelming practical importance. A *half million* victims of the Camp Lejeune water contamination have filed administrative claims with the Navy, a prerequisite to filing suit under the CLJA. Thousands of judicial actions are already

pending in the district court. A correction of the district court's fundamental error in construing the statute years from now would require reversing numerous bench verdicts. Postponing this Court's definitive resolution of the jury-trial question therefore risks an enormous and entirely unnecessary waste of party and judicial resources. That question, moreover, is a pure issue of statutory interpretation, and no circuit conflict is possible because the CLJA channels all litigation to the Eastern District of North Carolina.

Finally, the CLJA is no ordinary statute. It aims to redress the United States government's own horrific mistreatment of those who devoted their lives to keeping us safe. Many of the victims are elderly and ailing. They deserve to have their claims heard by their fellow citizens, as Congress prescribed.

This Court should grant review.

OPINIONS BELOW

The order of the Fourth Circuit denying mandamus relief (App. 1a) is not reported. The opinion of the district court striking petitioners' jury-trial demand (App. 10a-49a) is reported at 715 F. Supp. 3d 761. The district court's order denying petitioners' motion to certify the jury-trial question for interlocutory appellate review (App. 2a-9a) is not reported but is available at 2024 WL 2198651.

JURISDICTION

The decision of the Fourth Circuit denying mandamus relief was entered on August 23, 2024. App. 1a. The decision of the Fourth Circuit denying rehearing was entered on October 4, 2024. App. 50a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Subsection (d) of the CLJA (28 U.S.C. ch. 171 prec. note) provides:

> The United States District Court for the Eastern District of North Carolina shall have exclusive jurisdiction over any action filed under subsection (b), and shall be the exclusive venue for such an action. Nothing in this subsection shall impair the right of any party to a trial by jury.

STATEMENT

1. In 1941, Congress authorized the construction of a "Marine Corps training area" on the east coast of the United States. Act of Apr. 5, 1941, tit. II, 55 Stat. 123, 128. The government then built Marine Corps Base Camp Lejeune in Onslow County, North Carolina. App. 57a, 63a. It has long been the largest Marine Corps base on the east coast of the United States.

From 1953 to 1987—over 30 years—various above-ground activities contaminated Camp Lejeune's water-distribution systems with industrial chemicals. App. 63a-80a. During that time, as many as one million people were exposed to the water at Camp Lejeune. App. 58a. According to the federal Agency for Toxic Substances and Disease Registry (ATSDR), the water contained concentrations far exceeding—in some cases by multiple orders of magnitude—the maximum acceptable levels of chemicals like trichloroethylene, perchloroethylene, and benzene. *See* ATSDR, ASSESSMENT OF THE EVIDENCE FOR THE DRINKING WATER CONTAMINANTS AT CAMP LEJEUNE

AND SPECIFIC CANCERS AND OTHER DISEASES (Jan. 13, 2017) ("ATSDR Assessment").[1]

That decades-long contamination caused Camp Lejeune's residents and workers to contract many types of cancers and other deadly diseases at abnormally high rates—including leukemia, non-Hodgkin's lymphoma, kidney disease, and Parkinson's disease. *See* ATSDR Assessment 13-14. So many infants at the base died either in the womb or shortly after birth that a section of Camp Lejeune's cemetery is known as "Baby Heaven." *See* Anna Schecter, Cynthia McFadden, and Melissa Chan, *Their babies died when Camp Lejeune's water was poisoned. But justice has been hard to find*, NBC NEWS (Sep. 18, 2023).[2]

Even after the contamination was finally contained, the government concealed what had happened for years. It was not until 2008—in response to an act of Congress—that the government began to fully identify and notify affected servicemembers and other victims. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 315, 122 Stat. 3, 56-57.

As a result, more than a thousand victims sued the government under the FTCA. The Judicial Panel on Multidistrict Litigation consolidated the cases in the

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[1] https://tinyurl.com/s6g2b1h4; *see also* Trichloroethylene (TCE); Regulation Under the Toxic Substances Control Act (TSCA), 89 Fed. Reg. 102568 (Dec. 17, 2024); Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA), 89 Fed. Reg. 103560 (Dec. 18, 2024) (generally banning the manufacture and use of trichloroethylene and perchloroethylene).

[2] https://tinyurl.com/rhtuf7s.

Northern District of Georgia. *In re Camp Lejeune, N.C. Water Contamination Litig.*, 763 F. Supp. 2d 1381 (J.P.M.L. Feb. 4, 2011). The government moved to dismiss the suits under, *inter alia*, North Carolina's statute of repose. *See* N.C. Gen. Stat. § 1-52(16); *In re Camp Lejeune, N.C. Water Contamination Litig.,* 2012 WL 12869566, at *1 (N.D. Ga. May 11, 2012). The Eleventh Circuit ultimately agreed that the statute of repose barred the claims. *Bryant v. United States*, 768 F.3d 1378, 1385 (11th Cir. 2014), *cert. denied*, 577 U.S. 913 (2015); *In re Camp Lejeune, N.C. Water Contamination Litig.*, 774 F. App'x 564, 568 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 2825 (2020). Camp Lejeune's victims were thus left without legal recourse.

2. In 2022, Congress enacted and President Biden signed the Camp Lejeune Justice Act as Section 804 of the Honoring our PACT Act, Pub. L. No. 117-168, 136 Stat. 1759, 1802-04 (Aug. 10, 2022) (codified at 28 U.S.C. ch. 171 prec. note). As the title reflects, Congress designed the CLJA to remedy the injustice of denying compensation to the victims of the government's decades-long failure to ensure safe water at Camp Lejeune.

The CLJA authorizes any person who was exposed to the water at Camp Lejeune for at least 30 days between August 1953 and December 1987 to obtain monetary relief from the United States for harm caused by that exposure. CLJA § 804(b), (e). It defines causation broadly, requiring only proof of "one or more relationships between the water at Camp Lejeune and the harm," which a plaintiff can establish through evidence "sufficient to conclude that a causal relationship is at least as likely as not." CLJA § 804(c).

As relevant here, Subsection (d) is titled "Exclusive Jurisdiction and Venue." Its first sentence vests the United States District Court for the Eastern District of North Carolina with "exclusive jurisdiction over any [CLJA] action" and makes that court "the exclusive venue for such an action." The second sentence then provides: "Nothing in this subsection shall impair the right of any party to a trial by jury."

Although Congress chose to enact a new cause of action rather than authorize Camp Lejeune victims to sue under the FTCA, the CLJA does replicate certain features of the FTCA. Subsection (h), for example, incorporates the FTCA's requirement that plaintiffs administratively exhaust their claims before filing suit, 28 U.S.C. § 2675. Subsection (g) bars punitive damages, just as the FTCA does, 28 U.S.C. § 2674. And Subsection (i) establishes a combatant-activities exception that mirrors an exception in the FTCA, 28 U.S.C. § 2680(j). But consistent with Subsection (d)'s preservation of the right to trial by jury, the CLJA does not incorporate the FTCA's bar on jury trials, 28 U.S.C. § 2402.

3. Immediately after the CLJA took effect, victims of Camp Lejeune's toxic water started filing administrative claims with the Navy—with a total of over 500,000 claims filed to date. *See* Diana Novak Jones, *Camp Lejeune claims over contaminated water exceed 500,000*, REUTERS (Aug. 21, 2024).[3] After the Navy failed to act on their claims within six months, effecting a constructive denial, *see* 28 U.S.C. § 2675(a), thousands of plaintiffs filed suit in the Eastern District of North Carolina. The district court appointed

[3] https://tinyurl.com/p5s5xc1.

several attorneys to a leadership group charged with litigating common issues for all CLJA plaintiffs.[4] The leadership group then filed a master complaint demanding a jury trial. App. 57a-112a. The government moved to strike the demand on the grounds that plaintiffs have no Seventh Amendment right to a jury trial against the United States, *see McElrath v. United States*, 102 U.S. 426, 440 (1880), and the CLJA does not grant plaintiffs the right to trial by jury, despite its express preservation of that right in Subsection (d), App. 10a, 24a-25a.

In an opinion joined by the Eastern District's four active judges, the district court granted the government's motion. App. 10a-49a. The court construed this Court's decision in *Lehman*, *supra*, to mean that causes of action against the United States must be tried to the bench unless Congress "unequivocally, affirmatively, and unambiguously grant[s] the right to a trial by jury." App. 23a. It then held that the CLJA does not supply the requisite "clarity" to authorize jury trials. App. 44a. The court held that such clarity could have been achieved by a provision entitled "Jury Trials In Actions Against The United States" that stated: "Any action against the United States under [the CLJA] shall, at the request of either party to such action, be tried by the court with a jury." App. 43a-44a.

In an effort to give the second sentence of Subsection (d) some function, the district court speculated that Congress could have intended to preserve the

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[4] The leadership group has established a website (www.camplejeunecourtinfo.com) to provide victims and the public with updates on CLJA litigation.

right to a jury trial for hypothetical third-party defendants impleaded by the United States or for CLJA claimants whom the United States countersues for fraud, even though the CLJA does not create or otherwise apply to other causes of action and even though the Seventh Amendment guarantees trial by jury for damages claims against private parties. *See* App. 30a-34a. Based on that assigned function, the district court determined that its interpretation did not "render[] the second sentence of subsection 804(d) superfluous." App. 34a.

4. Petitioners are two CLJA plaintiffs. They moved to certify the district court's order for interlocutory appeal under 28 U.S.C. § 1292(b). The district court denied the motion. App. 2a. The court stated that if a plaintiff is "unhappy with the result of the bench trial," he or she can "appeal once the court enters final judgment." App. 7a. The court added that it intends to resolve "countless cases" through bench trials. *Ibid.*

Petitioners then asked the Fourth Circuit to issue a writ of mandamus directing the district court to vacate its order striking the jury-trial demand—the procedure that this Court has approved for challenging the denial of a jury-trial right. *See, e.g.*, *Beacon Theatres*, 359 U.S. at 511. The government opposed mandamus relief on the ground that the CLJA does not authorize jury trials. Response in Opposition, *In re McBrine*, No. 24-1542 (4th Cir. July 8, 2024), ECF 11 at 6-21 ("Gov't Resp."). The government argued in the alternative that mandamus relief is not categorically available to remedy the denial of a statutory (as opposed to constitutional) jury-trial right and that the ordinary mandamus factors are not met here,

primarily because petitioners could seek review of the order striking the jury-trial demand through an ordinary appeal after a bench verdict. *Id.* at 21-23.

The Fourth Circuit denied mandamus relief without opinion. App. 1a. It then denied petitioners' request for panel rehearing or rehearing *en banc*. App. 50a.

REASONS FOR GRANTING THE PETITION

This Court should grant review and reverse the denial of petitioners' mandamus petition. The unexplained decision of the court of appeals rested either on the conclusion that the CLJA does not authorize jury trials or on the view that mandamus relief is not categorically available to remedy the erroneous denial of a statutory jury-trial right. Both questions warrant this Court's immediate review.

With respect to the proper interpretation of the CLJA's jury-trial provision, the district court's ruling rested on an erroneous understanding of this Court's decision in *Lehman*, *supra*, to effectively require a particular declarative formulation even if the traditional tools of statutory interpretation point decisively in favor of jury trials. Only this Court can definitively clarify the *Lehman* standard. To the extent that the Fourth Circuit instead rested its decision on the view that mandamus relief is not categorically available to remedy the denial of the CLJA jury-trial right, that would conflict with this Court's holding in *Beacon Theatres*, *supra*, and deepen a lopsided circuit conflict. That procedural question thus independently merits this Court's review, and it could not be presented in a later appeal from a final judgment.

Even apart from those considerations, this case presents the rare statutory-interpretation issue in which its sheer practical importance alone warrants a grant of certiorari. In enacting the CLJA, Congress entrusted the Judiciary with providing redress for the numerous victims of decades of government wrongdoing at Camp Lejeune—nearly a million servicemembers and civilians who spent time at the base between the mid-1950s and the late 1980s, drinking and bathing in water contaminated by industrial chemicals. Whether Congress intended those claims to be resolved by judges or juries is the most fundamental and significant question about the regime that Congress instituted. That is the sort of question that should be answered by the Nation's highest court. And it should be answered now, not after years of bench trials, especially given how many elderly and seriously ill people have brought suit under the statute. Those victims—many of whom were willing to make the ultimate sacrifice for our country—should have the opportunity to see justice in their lifetimes.

I. THE QUESTION OF WHETHER CLJA PLAINTIFFS HAVE THE RIGHT TO A JURY TRIAL WARRANTS REVIEW

The CLJA secures the right to trial by jury for actions brought against the United States under the statute. The second sentence of Subsection (d) provides that "[n]othing in this subsection shall impair the right of any party to a trial by jury." The only sensible understanding of that provision is that Congress expected CLJA plaintiffs to enjoy the right to a jury trial. That conclusion follows from a host of textual and contextual considerations. *See* pp. 17-24, *infra.* But at a more basic level, it is just common sense:

Why would Congress write an entire sentence preserving the right to trial by jury if it did not intend CLJA plaintiffs to have that right? It wouldn't.

Yet the district court rejected that straightforward conclusion. To the extent the court of appeals embraced that holding, the decision below contravened this Court's settled framework for determining whether a statute waives the United States' sovereign immunity and rested on a misreading of *Lehman*, *supra*. Especially given that no other court of appeals will have the opportunity to construe the statute in light of the CLJA's exclusive-venue provision, this Court's review is warranted.

A. The CLJA Authorizes Jury Trials Against The United States

The district court misapplied this Court's precedents and reached an erroneous interpretation of the CLJA's jury-trial provision.

1. A federal law waives the United States' immunity from suit when Congress makes its intent to do so "unmistakably clear in the language of the statute." *Lac du Flambeau*, 599 U.S. at 387 (quotation omitted). But that "clear-statement rule is not a magic-words requirement," and waiving immunity does not require Congress to "state its intent in any particular way." *Id.* at 388, 394 (quotation omitted). Rather, the standard "is simply whether, upon applying traditional tools of statutory interpretation," Congress's intent "is clearly discernable from the statute itself"—"regardless of whether [Congress] articulated its intent in the *most* straightforward way." *Id.* at 388, 394 (quotation omitted); *accord Dep't of Agri. Rural Develop. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 51-52 (2024) (courts

evaluate "the clarity of each statute * * * on its own terms" (quotation omitted)).

The same approach applies to the sub-question of whether Congress intended to authorize jury trials in suits against the United States. This Court has explained that because the United States' submission to jury trials "is one of the terms of [the government's] consent to be sued," it too must be "unequivocally expressed," just like "a waiver of immunity itself." *Lehman*, 453 U.S. at 160 (quotation omitted). So as with sovereign-immunity waivers, no particular formulation is needed to authorize jury trials, and courts must use the "traditional tools of statutory interpretation," not look for magic words, to ascertain whether Congress "unambiguously expressed the requisite intent." *Lac du Flambeau*, 599 U.S. at 388 (quotation omitted).

The Court applied that approach in *Lehman*, the Court's most recent decision evaluating whether a statute authorizes jury trials against the United States. There, the Court held that amendments to the Age Discrimination in Employment Act of 1967 (ADEA) did not authorize jury trials merely by granting federal employees the right to bring suit against the United States for "such legal or equitable relief as will effectuate the purposes of this Act." *Lehman*, 453 U.S. at 157-58, 167-69 (quoting 29 U.S.C. § 633a(c)).

To reach that conclusion, the Court employed the full panoply of traditional interpretive tools. The Court began by examining statutes that had been construed not to authorize jury trials against the United States. *Lehman*, 453 U.S. at 161. Each of those provisions either prohibited jury trials, *e.g.*, 28 U.S.C. §§ 1346(b), 2402 (1976), or, like the ADEA provision,

said nothing at all about jury trials, *e.g.*, 28 U.S.C. § 1491 (1976).

The Court then examined the ADEA's structure, explaining that a different ADEA provision "*expressly* provide[d] for jury trials" in suits against state and local governments. *Lehman*, 453 U.S. at 162. That provision demonstrated "that [Congress] knew how to provide a statutory right to a jury trial when it wished to do so elsewhere in the very legislation cited." *Id.* (quotation omitted). The Court also looked to statutory history, noting that when Congress amended the ADEA to add a jury-trial right to the state-and-local-governments provision, it "declined an opportunity to extend a right to trial by jury to federal employee plaintiffs." *Id.* at 167-68; *see id.* at 162 n.10.

Lehman then went on to consider the statute's broader context. The Court distinguished its prior decision in *Lorillard v. Pons*, 434 U.S. 575 (1978), which had inferred a jury-trial right from the phrase "legal or equitable relief" in an earlier version of another ADEA provision, in part on the ground that the other provision had "incorporate[d] the enforcement scheme of the Fair Labor Standards Act," which included the "practice of making jury trials available." *Lehman*, 453 U.S. at 162-63; *see id.* at 166-68.

In addition, *Lehman* pointed to an earlier decision, *Galloway v. United States*, 319 U.S. 372 (1943), as an example of a case in which Congress had clearly indicated its intent to authorize jury trials. *See Lehman*, 453 U.S. at 160, 162. In *Galloway,* the Court held that a World War I-era statute authorizing compensation for injured servicemembers "ha[d] made [the Seventh Amendment] applicable" by providing for jury trials

against the federal government. 319 U.S. at 388-89 & n.18. Importantly, that congressional choice was not explicit in the statute; it was instead an implication from the statute's amendment history—in particular, Congress's decision to eliminate a cross-reference to the Tucker Act's bar on jury trials.[5] That implication from the statute's history sufficed to unequivocally express that the United States consented to jury trials, as the Court had also held in its earlier decision in *Pence v. United States*, 316 U.S. 332, 334 n.1 (1942). *See Galloway*, 319 U.S. at 389 n.18.

Lehman's analysis thus underscores that a careful examination of statutory text, structure, history, and

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[5] The original version of the *Galloway* statute had been construed to authorize jury trials, despite the fact that it "did not explicitly make [the actions] triable by jury." *Galloway*, 319 U.S. at 389 n.18 (citing *Law v. United States*, 266 U.S. 494, 496 (1925)). Congress had then amended the statute to generally require that "the 'procedure in such suits shall . . . be the same as that provided for suits' under the Tucker Act," which "were tried without a jury." *Id.* (quoting World War Veterans' Act, 1924, ch. 320, § 19, 43 Stat. 607, 613 (June 7, 1924)). The following year, however, Congress amended the statute again "with the intention to 'give the claimant the right to a jury trial.'" *Id.* (quoting H.R. Rep. No. 1518, 68th Cong., 2d Sess. 2). But that last amendment did not say a word about jury trials. Rather, it provided that only specific Tucker Act sections, not including its bar on jury trials, would apply to suits under the statute. *See* An Act to Amend the World War Veterans' Act, 1924, ch. 553, § 2, 43 Stat. 1302, 1303 (Mar. 4, 1925). That was enough to express clear congressional intent. *See Galloway*, 319 U.S. at 389 n.18; *see also Hacker v. United States*, 16 F.2d 702, 704 (5th Cir. 1927) (cited in *Galloway*, 319 U.S. at 389 n.18) (holding that "[t]he conclusion is irresistible * * * that by omitting section 2 of [the Tucker Act]" in the 1925 amendment, "Congress intended to give litigants the right of trial by jury as in ordinary cases").

context is necessary to discern whether Congress has authorized jury trials.

2. Under that approach, the conclusion here is straightforward. Every tool of statutory construction shows that Subsection (d) of the CLJA grants plaintiffs the right to a jury trial.

a. **Text**. Subsection (d) states that the vesting of exclusive jurisdiction over CLJA actions in the Eastern District of North Carolina does not deprive any party of the right to trial by jury. That sentence unmistakably reflects Congress's expectation that CLJA plaintiffs could elect to try their cases to juries. It makes no sense to preserve something that doesn't exist.

Subsection (d), moreover, expressly preserves "*the* right" to a jury trial—an unambiguous indication of Congress's intent. CLJA § 804(d) (emphasis added). The "use of the definite article" connotes that the noun that follows—here, "right"—is "specifically provided for." *Nielsen v. Preap*, 586 U.S. 392, 408 (2019) (quoting *Work v. United States ex rel. McAlester-Edwards Co.*, 262 U.S. 200, 208 (1923)). Subsection (d) thus refers to a right that *actually* exists, not merely the abstract possibility that a jury-trial right *might* exist. And it is nothing like the statutes that *Lehman* classified as insufficiently clear, all of which either barred jury trials or did not mention jury trials at all.

Further, the sentence's syntax—providing that "[n]othing in this subsection shall impair" the jury-trial right—parallels the Seventh Amendment and other provisions of the Bill of Rights insofar as it preserves, rather than self-consciously creates, the right. The Seventh Amendment, for example, states that

"[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury *shall be preserved*." U.S. Const. amend. VII (emphasis added); *see* U.S. Const. amends. II, IV. Congress likely drew on this traditional formulation in drafting Subsection (d)'s jury-trial sentence addressing the same subject matter.

It is conceivable that Congress operated under the misimpression that courts presumptively construe statutes like the CLJA to authorize jury trials against the United States and sought to clarify that vesting exclusive jurisdiction in the Eastern District of North Carolina did not override that presumption. But so what? Although courts ordinarily assume that Congress is aware of judicial presumptions, that rule is not absolute, *cf. Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010), and the ultimate objective of this Court's framework for analyzing sovereign-immunity waivers is to discern clear congressional intent. Even if Subsection (d) of the CLJA "is far from a *chef d'oeuvre* of legislative draftsmanship," *Util. Air Regul. Gr. v. EPA*, 573 U.S. 302, 320 (2014), it is obvious what Congress intended.

b. **Canons**. Courts "construe Congress's work so that effect is given to all provisions." *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698-99 (2022) (quotation omitted). It is thus "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotation omitted).

The district court disregarded that bedrock principle by leaving the second sentence of Subsection (d) with no effect—essentially smearing white-out across a line of the Statutes at Large. The problem is not mere surplusage, *i.e.*, reading two provisions to do the same thing, as the district court seemed to think. Rather, the court read an entire sentence out of the statute—rendering it "void" or "inoperative," *Corley v. United States*, 556 U.S. 303, 314 (2009) (quotation omitted), which courts go to extraordinary lengths to prevent, *see* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 175 (2012).

The district court sought to ascribe some function to Subsection (d) by hypothesizing that Congress might have intended to preserve the right to a jury trial for a fraud counterclaim asserted by the government against a CLJA plaintiff or a third-party complaint that the government might bring against another party responsible for the contaminated water. App. 30a-34a. But for a number of reasons, those alleged functions are too implausible to salvage the district court's interpretation.

For one, nothing about Subsection (d)'s first sentence granting exclusive jurisdiction to the Eastern District of North Carolina could remotely "impair" any preexisting *constitutional* right to jury trials that CLJA plaintiffs or third parties would have as *defendants* for claims that the government might bring against them.[6] It is not credible, therefore, that

[6] Of course, for any hypothetical action by the government in which the private defendant would lack the right to trial by jury,

Congress would have included the second sentence of Subsection (d) to guard against that interpretation of the first sentence. Indeed, the FTCA has long barred jury trials, 28 U.S.C. § 2402, yet Congress has never seen the need to clarify that the bar does not apply to claims by the government against private parties under different statutes or common-law doctrines.

In addition, the notion that Congress might have had in mind third-party complaints by the United States against other entities or persons responsible for the water contamination is fanciful. The statutes of limitations and repose on such claims expired decades ago. Although the district court speculated that a third party might forfeit such a defense by failing to assert it, App. 30a-31a, the remote possibility of egregious attorney malpractice does not provide a realistic account of congressional intent. At best, that interpretation would render the jury-trial provision "insignificant" in the extreme. *TRW*, 534 U.S. at 31 (quotation omitted).

The district court also posited that Congress might in the future amend the law to extend applicable statutes of limitations. App. 31a. But no principle of statutory interpretation allows a court to assign meaning to a provision based on theoretical statutory *amendments*.

The district court relied on this Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), *see* App. 25a-27a, but if anything, that decision shows why the court erred. There, this

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the district court's interpretation also would leave the second sentence with no practical effect.

Court held that a statutory provision stating that "'[n]othing in this subsection shall diminish the right of any person to bring an action for contribution' * * * does not itself establish a cause of action" for contribution. *Cooper Indus.*, 543 U.S. at 166-67 (quoting 42 U.S.C. § 9613(f)(1)). But the Court's reasoning was that construing the provision to create a right to contribution would "violate the settled rule that [courts] must, if possible, construe a statute to give every word some operative effect" because it would render meaningless a sentence in the same statute that already established a federal cause of action for contribution in certain circumstances. *Ibid.* Here, the opposite is true: The second sentence of Subsection (d) is meaningless if it is *not* construed to guarantee jury trials. In addition, a right to contribution differs materially from a right to a jury trial. Independent actions for contribution exist under state common law, whereas there is no common-law or constitutional right to a jury trial in suits against the United States under existing precedent. *Lehman*, 453 U.S. at 160.

Finally, to support the function that it assigned to Subsection (d)'s second sentence, the district court adverted to the CLJA's incorporation of the FTCA's administrative-exhaustion requirement, 28 U.S.C. § 2675. *See* App. 33a. The last sentence of Section 2675(a) says that the exhaustion requirement does "not apply" to third-party complaints, cross-claims, or counterclaims. That language, the district court believed, showed that "the CLJA textually contemplates third-party complaints and counterclaims." App. 33a.

The court's belief, however, reflected a misreading of Section 2675(a)'s exception, which addresses third-party complaints, cross-claims, and counterclaims

against the government by private plaintiffs otherwise subject to the exhaustion requirement. *See Kodar, LLC v. United States (FAA)*, 879 F. Supp. 2d 218, 225-26 (D.R.I. 2012). The exception could not refer to claims that the government might file against a plaintiff or a third party, because the government is never required to administratively exhaust its own claims. *See* 28 U.S.C. § 2675(a) (imposing exhaustion requirement only for "a claim against the United States").

c. **Structure**. Two features of the CLJA's structure confirm its plain meaning.

The first is the CLJA's relationship to the FTCA. Congress could have revived the Camp Lejeune FTCA suits simply by abrogating the defenses that the government had asserted in the earlier litigation. *See In re Camp Lejeune*, 774 F. App'x at 566. But Congress chose a different approach. It created a new cause of action with less demanding substantive standards and different procedural requirements. When Congress wanted to incorporate provisions of the FTCA, such as the bar on punitive damages and the exhaustion requirement, it did so expressly. *See* CLJA § 804(g) and (h).

But while the FTCA contains a bar on jury trials, 28 U.S.C. § 2402, Congress did not incorporate that provision into the CLJA. Given that choice, the *expressio unius* canon (and common sense) counsel that Congress did not intend to bar jury trials. And combined with Subsection (d)'s preservation of "the right of any party to a trial by jury," Congress's intent is unequivocal. It is not plausible that Congress both expressly preserved the right to trial by jury *and*

declined to incorporate the FTCA's bar on jury trials, yet somehow intended to permit only bench trials.

The second structural feature is Congress's decision to house the jury-trial provision in Subsection (d). That subsection's first sentence establishes exclusive jurisdiction and venue in the Eastern District of North Carolina. Its second sentence, however, explains that the exclusive jurisdiction of the Eastern District does not authorize the district court to resolve questions of *fact*, despite the presumption that the vesting of jurisdiction in a district court over claims against the United States permits only bench trials. *Lehman*, 453 U.S. at 164-65 & n.13 (holding that, in light of Federal Rule of Civil Procedure 38(a), a statute vesting jurisdiction in federal district courts for claims against the United States presumptively permits only bench trials). The phrasing of the second sentence as a caveat to that grant of exclusive jurisdiction thus acknowledges that the jury-trial authorization in the second sentence alters how courts would otherwise construe the first sentence. The district court's interpretation of the second sentence, by contrast, leaves no explanation for why it is phrased as a caveat to the first.

d. **Legislative Record**. If deemed relevant, the legislative record here is unusually persuasive. During the legislative process, the Department of Justice acknowledged that the bill's text "*permits jury trials* that would not be available under the FTCA." App. 114a (emphasis added). It then objected to the bill because it "would result in differing recoveries * * * [e]specially if damages awards are to be decided by a jury*, as the statute contemplates*." App. 116a (emphasis added). Yet despite that objection, Congress stood its ground, enacting the CLJA without removing or

altering the jury-trial provision. That is strong evidence that Congress intended to authorize jury trials.

Notably, the members of Congress who sponsored the CLJA agree with the Department's original assessment. After learning of the Department's about-face, Representative Matt Cartwright, the co-sponsor and principal drafter of the CLJA, was baffled: "When writing the Camp Lejeune Justice Act," he stated, "we understood that the only way the veterans, their families and others could get fair and just compensation was through a jury trial." App. 55a. "The Department of Justice," Representative Cartwright protested, "is inexplicably reading this provision out of the statute." *Ibid.*

e. **Common Sense.** As this Court taught a century ago, "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 337, 339 (1929) (Holmes, J.); *see, e.g.*, *West Virginia v. EPA*, 597 U.S. 697, 722-23 (2022). Congress drafted and enacted an entire sentence preserving the right to a trial by jury for CLJA plaintiffs. Why on earth would Congress do that if it intended to permit only bench trials? Neither the government nor the lower courts offered any sensible explanation. This Court should grant review to restore what the CLJA "obviously mean[s]." *See Roschen*, 279 U.S. at 339.

B. The District Court's Construction Of The CLJA Conflicts With This Court's Precedents

In concluding that the CLJA's jury-trial provision does not authorize jury trials for claims under the statute, the district court misread this Court's

precedents to impose an unduly high standard for construing a statute to authorize jury trials.

Lehman makes clear that because the United States' authorization of jury trials is a condition of its waiver of sovereign immunity, determining whether it has agreed to that condition is subject to the same standard as discerning sovereign-immunity waivers. 453 U.S. at 160-61. Under that standard, this Court has rejected a "magic words" test and instead instructed lower courts to employ all of the tools of statutory interpretation. *Kirtz*, 601 U.S. at 48; *see Lac du Flambeau*, 599 U.S. at 387; *FAA v. Cooper*, 566 U.S. 284, 291 (2012).

But despite professing that it was not applying a "magic words" test, App. 44a, the district court did exactly that. The court stated that "Congress did not provide" sufficient "clarity in the CLJA" because it did not enact a "variant" of an existing statute authorizing jury trials by providing: "Any action against the United States under [the CLJA] shall, at the request of either party to such action, be tried by the court with a jury." App. 43a-44a. If that is not a forbidden "magic words" standard, nothing is.

Moreover, in direct contradiction to the district court's insistence for a "variant" of another jury-trial provision, this Court explained just last year in the context of sovereign-immunity waivers that Congress can "us[e] different language to accomplish [the] same goal in other statutory contexts." *Lac du Flambeau*, 599 U.S. at 395. For that reason, the fact that Congress could have worded the CLJA differently is not relevant. Congress need not state "its intent in the *most* straightforward way." *Id.* at 394.

The district court's errors appeared to have stemmed from an overreading of *Lehman* to require that congressional intent be expressed more "affirmatively" than is required under the ordinary standard for sovereign-immunity waivers. App. 44a. It is true that *Lehman* variously described the standard as whether the statute "clearly and unequivocally * * * granted a right to trial by jury" and whether "Congress has affirmatively and unambiguously granted that right by statute." 453 U.S. at 162, 168. Those formulations, however, must be read in light of the opinion as a whole, which makes clear that a particular declarative formulation is not required so long as congressional intent is clear from text, structure, history, and context. *See* pp. 14-17, *supra*.

This would not be the first time that this Court has granted review to instruct lower courts that they should not place undue weight on a particular sentence in an opinion of this Court in a manner that diverges from the opinion's broader analysis and holding. For example, last year in *Groff v. DeJoy*, 600 U.S. 447 (2023), the Court explained that lower courts had widely misconstrued the religious-accommodation provision of Title VII, 42 U.S.C. § 2000e(j), based on an overreading of "a single, but oft-quoted, sentence in the opinion of the Court" in a prior case. *Id.* at 464. Here, too, the lower courts have overlooked this Court's admonition that "the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute." *Brown v. Davenport*, 596 U.S. 118, 141 (2022) (citation omitted).

Should the Court conclude, however, that the district court properly understood *Lehman*, it should

limit that decision to its specific holding on the ADEA. Once the government waives sovereign immunity, there is no justification for courts to put a thumb on the scale against construing the statute to authorize jury trials—let alone the fist that the district court applied here.

Finally, to the extent that the Court concludes that the CLJA does not authorize jury trials with sufficient clarity even under the correct standard, it should reconsider its holding in *McElrath*, *supra*, that the Seventh Amendment does not require jury trials in actions against the government because they do not qualify as "Suits at common law." 102 U.S. at 440. This Court has construed that phrase to cover "statutory claims unknown to the common law, so long as the claims can be said to soun[d] basically in tort, and seek legal relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (quotation omitted). No principled basis exists to exclude from the amendment's coverage tort-like damages actions against the government, such as CLJA actions, where the government has clearly waived sovereign immunity. Indeed, it is unlikely that the Founding generation would have tolerated such a substantial exception to a right that was considered "the glory of the English law." *Jarkesy*, 144 S. Ct. at 2128 (quoting 3 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 379 (8th ed. 1778)).

C. It Is Exceptionally Important That This Court Resolve The Jury-Trial Question Now

The question of whether the CLJA authorizes jury trials is critically important for hundreds of

thousands of victims, the judicial system, and the government itself.

Few questions of statutory construction have such an immediate and overwhelming practical impact on so many cases and individuals. The federal government covered up the poisoning of Camp Lejeune's water for decades. During that time, as many as one million people lived or worked at the base. App. 58a. In the CLJA, Congress has authorized anyone who was exposed to the water for at least 30 days between 1953 and 1987 to bring an action against the federal government.

As Congress surely anticipated when it enacted the CLJA, numerous plaintiffs have filed claims under the statute. Over a *half million* claims are pending before the Navy, and thousands of plaintiffs have already filed suit. The question of whether those claims should be tried to juries or judges therefore has immense importance.

It is imperative that this Court issue an authoritative answer on the jury-trial question now, not years in the future. The district court has stated that it intends to try "countless" cases to the bench before the question can be resolved on direct review. App. 7a. Those cases may all have to be retried if an authoritative construction of the jury-trial provision does not occur for years. The cost of those do-overs would be substantial. CLJA trials demand an enormous expenditure of judicial resources from four district-court chambers, executive-branch resources drawn from taxpayers, and private-party resources deployed to secure justice for Camp Lejeune victims.

If this Court grants review now, however, those potentially wasted costs will likely be avoided. Although it appears probable at this point that the first slate of trials will occur before this Court would issue a decision on the merits, a grant of certiorari would give the district court a strong reason to empanel advisory juries. *See* Fed. R. Civ. P. 39(c)(1). That would ensure that if this Court were to ultimately hold that CLJA plaintiffs have the right to trial by jury, no trial would have to be redone. And at any rate, resolving the question as soon as possible will minimize the number of trials to be conducted without the benefit of this Court's resolution of the jury-trial question.

The question presented also has a more transcendent importance. As the Court explained last Term, the right to trial by jury holds a preeminent position in the traditions of our legal system. *Jarkesy*, 144 S. Ct. at 2128. This Court has repeatedly reviewed decisions curtailing the right to a civil jury trial, whether based in the Constitution, *see, e.g.*, *Jarkesy*, 144 S. Ct. at 2127-28; *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 333 (2018); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998), or a federal statute, *see, e.g.*, *Lehman*, 453 U.S. at 159-60; *Lorillard*, 434 U.S. at 576-77; *Galloway*, 319 U.S. at 388-89.

Moreover, many CLJA plaintiffs are elderly people suffering from serious medical conditions. The years that would elapse between a bench trial, subsequent appeal, and eventual retrial would almost assuredly deny some victims justice in their lifetimes. *See* Brianna Keilar & Margaret Given, *Camp Lejeune Water Contamination Cases Increasingly Becoming Wrongful Death Claims as Lawsuits Proceed at a Crawl*,

CNN (Aug. 23, 2023).[7] Resolving this issue today would thus ensure that as many Camp Lejeune victims as possible will be able to tell their stories to a jury of fellow citizens.

Two other considerations bear mention.

First, no other court of appeals will address the first question presented given the CLJA's exclusive-venue provision. In an analogous context, this Court often grants review to consider decisions of the United States Court of Appeals for the Federal Circuit involving the interpretation of statutes in cases appealed exclusively to that court. *See, e.g.*, *Bufkin v. McDonough*, 144 S. Ct. 1455 (2024) (Mem.); *Amgen Inc. v. Sanofi*, 598 U.S. 594 (2023).

Second, the lack of an appellate opinion below is no barrier to relief, particularly given the district court's comprehensive (if flawed) opinion joined by four judges. For instance, in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), the Court granted certiorari and reversed an unreasoned denial of mandamus relief in order to protect the right to trial by jury. *Id.* at 470. It should follow the same course here.

II. THE QUESTION OF WHETHER MANDAMUS RELIEF IS APPROPRIATE TO REMEDY THE DENIAL OF A STATUTORY JURY-TRIAL RIGHT WARRANTS REVIEW

In the court of appeals, the government argued, as an alternative ground for denying petitioners' mandamus petition, that mandamus relief is not categorically available to remedy the denial of a statutory

[7] https://tinyurl.com/dhsne4g.

jury-trial right. Gov't Resp. 21-23. That position conflicts with this Court's decision in *Beacon Theatres*, *supra*. Moreover, to the extent that the court of appeals' summary denial of the mandamus petition rested on that ground, the decision deepened a longstanding (though lopsided) circuit conflict, which would now stand at 7-1-1. Resolving that conflict and bringing the outlier circuits into conformity with this Court's precedent independently justifies immediate review in this case, especially given that petitioners could not raise the issue in a later direct appeal.

A. *Beacon Theatres* Holds That Mandamus Relief Is Categorically Available To Vindicate A Jury-Trial Right

Because of its unique importance, the right to trial by jury has "occupied an exceptional place in the history of the law of federal mandamus." *Wilmington Tr. v. U.S. Dist. Ct.*, 934 F.2d 1026, 1028 (9th Cir. 1991) (listing decisions of this Court stretching back to 1918). Under this Court's precedent, "the right to grant mandamus to require [a] jury trial where it has been improperly denied is *settled*." *Beacon Theatres*, 359 U.S. at 511 (emphasis added).

Indeed, for over a century, the Court has held that if a lower court's ruling "would deprive [a mandamus] petitioner of his right to a trial by jury, the order should * * * be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a proceeding that ultimately must be held to have been required under a mistake." *In re Peterson*, 253 U.S. 300, 305-06 (1920) (quotation omitted). As Chief Justice Taft wrote for the Court, the deprivation of a right to a jury trial "has

been regarded as furnishing a substantial ground for the extraordinary process of the writ" of mandamus. *In re Skinner & Eddy Corp.*, 265 U.S. 86, 96 (1924).

For that reason, a party need not satisfy the ordinary criteria for mandamus relief, such as the unavailability of an appellate remedy, to obtain an order directing the district court to honor the party's right to a jury trial. *Dairy Queen*, 369 U.S. at 470; *see* 16 Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3935.1 (3d ed. June 2024).

In the court of appeals, the government acknowledged that mandamus may issue to correct the denial of a *constitutional* right to a jury trial without considering the typical mandamus factors. Gov't Resp. 22-23. But the government claimed that this settled rule does not apply to a *statutory* jury-trial right, distinguishing *In re Lockheed Martin Corp.*, 503 F.3d 351 (4th Cir. 2007), on the ground that it concerned the Seventh Amendment right. Gov't Resp. 23.

That arbitrary distinction conflicts with this Court's decision in *Beacon Theatres*. There, this Court rejected the position that "mandamus is not available" to vindicate the right to a jury trial and explained without qualification that "the right to grant mandamus to require [a] jury trial where it has been improperly denied is settled." 359 U.S. at 511. The Court drew no distinction between statutory and constitutional jury-trial rights. Indeed, the first sentence of Justice Stewart's dissent (joined by Justices Harlan and Whittaker) agreed with the majority on the availability of mandamus and explicitly included statutory jury-trial rights within the rule: "There can be no doubt that a litigant is entitled to a writ of mandamus

to protect a clear constitutional *or statutory* right to a jury trial." *Id.* (emphasis added). And while the Court noted in *Dairy Queen*, *supra*, that mandamus relief can be "necessary to protect the constitutional right to trial by jury," 369 U.S. at 472, it did not suggest that mandamus is unavailable to protect statutory rights as well.

No principle of mandamus review gives primacy to constitutional over statutory rights. *See, e.g.*, *Atl. Marine Const. Co. v. U.S. Dist. Ct.*, 571 U.S. 49 (2013) (reversing denial of mandamus to secure the petitioner's statutory venue rights); *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 581 U.S. 258 (2017) (same). And the government's artificial distinction primarily serves to benefit the government itself in defending claims brought by citizens, because under existing precedent only a statute can provide a jury-trial right in damages suits against the government. *Lehman*, 453 U.S. at 160.

B. Granting Review Would Allow This Court To Resolve A Three-Way Circuit Split

To the extent that the Fourth Circuit embraced the government's argument that mandamus relief is not available, it deepened a preexisting circuit conflict. Seven circuits have followed *Beacon Theatres* in holding that mandamus is appropriate to remedy the denial of a jury-trial right without analysis of the traditional factors. *See Maldonado v. Flynn*, 671 F.2d 729, 732 (2d Cir. 1982) (per curiam); *Eldredge v. Gourley*, 505 F.2d 769, 770 (3d Cir. 1974) (per curiam); *United States v. Denson*, 603 F.2d 1143, 1146-47 (5th Cir. 1979) (en banc); *In re Vorpahl*, 695 F.2d 318, 319-22 (8th Cir. 1982); *Wilmington Tr. v. U.S. Dist. Ct. for*

Dist. of Hawaii, 934 F.2d 1026, 1028 (9th Cir. 1991); *Nissan Motor Corp. in USA v. Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992) (per curiam); *In re Zweibon*, 565 F.2d 742, 745 (D.C. Cir. 1977) (per curiam). Like this Court, none of those courts distinguished between statutory and constitutional jury-trial rights on this question.

In fact, one circuit has specifically applied the rule to the denial of a statutory jury-trial right. In *Vorpahl*, the Eighth Circuit addressed in a mandamus posture whether a federal statute granted litigants the right to a jury trial. 695 F.2d at 320-22. Before answering no, it affirmed that "the remedy of mandamus in determining the right to a jury trial is firmly settled." *Id.* at 319.

On the other side of the ledger, the Seventh Circuit has held that mandamus relief is not categorically available to remedy the denial of either the constitutional or the statutory right to a jury trial. *See First Nat'l Bank of Waukesha v. Warren*, 796 F.2d 999, 1001-06 (7th Cir. 1986).

Accordingly, insofar as the Fourth Circuit adopted the government's view that mandamus relief is not categorically available to remedy the denial of a statutory jury-trial right, it has created a three-way circuit conflict, with seven circuits holding that mandamus relief is categorically available to challenge the denial of a jury-trial right, the Seventh Circuit holding that it is not categorically available, and the Fourth Circuit holding that it is categorically available only for a constitutional jury-trial right.

A conflict on such a basic question of procedure—in which two circuits have adopted rules that conflict

with a seminal precedent of this Court—merits resolution. Importantly, this Court could not review that question in a later direct appeal. Especially given the overwhelming practical importance of resolving the CLJA jury-trial issue now, this Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 23, 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: August 23, 2024]

No. 24-1542
(7:23-cv-00897-RJ)
(7:23-cv-00532-M-RJ)
(7:23-cv-00202-D-BM)

In re: SUSAN MCBRINE; DAVID L. PETRIE

Petitioners

ORDER

Upon consideration of the petition for writ of mandamus, the court denies the petition.

Entered at the direction of Judge Benjamin with the concurrence of Judge Wynn and Senior Judge Motz.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA SOUTHERN DIVISION

No. 7:23-CV-897

IN RE: CAMP LEJEUNE WATER LITIGATION

THIS DOCUMENT RELATES TO: ALL CASES

ORDER

On February 6, 2024, this court granted the United States of America's ("United States" or "defendant") motion to strike plaintiffs' jury trial demand. See [D.E. 133]. On February 14, 2024, Plaintiffs' Leadership Group ("PLG") on behalf of plaintiffs Susan McBrine and David L. Petrie ("plaintiffs") moved to certify for immediate appellate review this court's order granting defendant's motion to strike plaintiffs' jury trial demand [D.E. 137] and filed a memorandum in support [D.E. 138]. See 28 U.S.C. § 1292(b). On March 4, 2024, the United States responded in opposition [D.E. 153]. On March 11, 2024, plaintiffs replied [D.E. 158]. As explained below, the court denies plaintiffs' motion to certify.

I.

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). Since 1958, however, a district court may certify an order for

interlocutory appeal if the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Section 1292(b) requires a movant to show: (1) a controlling question of law where there is substantial ground for difference of opinion, (2) that the order may materially advance the ultimate termination of the litigation, and (3) "that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (quotation omitted), *superseded* in part on other *grounds* by Fed. R. Civ. P. 23(f); see 28 U.S.C. § 1292(b); *Caterpillar v. Lewis*, 519 U.S. 61, 74 (1996) ("Routine resort to § 1292(b) requests would hardly comport with Congress' [s] design to reserve interlocutory review for 'exceptional' cases while generally retaining for the federal courts a firm final judgment rule." (quotation omitted)); *Hogans v. Charter Commc'ns, Inc.*, No. 5:20-CV-566, 2022 WL 1500859, at *1-2 (E.D.N.C. May 12, 2022) (unpublished); *Eshelman v. Puma Biotechnology, Inc.*, No. 7:16-CV-18, 2017 WL 9440363, at *1-2 (E.D.N.C. May 24, 2017) (unpublished); *Stillwagon v. Innsbrook Golf & Marina. LLC*, No. 2:13-CV-18, 2014 WL 5871188, at *9 (E.D.N.C. Nov. 12, 2014) (unpublished).

Certification under section 1292(b) is the exception, not the rule. *See*, *e.g.*, *Caterpillar*, 519 U.S. at 74; *Hill v. Robeson Cnty.*, No. 7:09-CV-5, 2010 WL 2680555, at *1 (E.D.N.C. July 6, 2010) (unpublished). Section "1292(b) should be used sparingly and thus . . . its requirements must be strictly construed." *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989). Unless the movant satisfies the three statutory criteria under section 1292(b), "the district court may not and should

not certify its order for an immediate appeal under section 1292(b)." *Butler v. DirectSAT USA, LLC*, 307 F.R.D. 445, 452 (D. Md. 2015) (cleaned up); see *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 676-77 (7th Cir. 2000). If the movant satisfies the three statutory criteria, then the "decision to certify an interlocutory appeal is firmly in the district court's discretion." *Goodman v. Archbishop Curley High Sch.*, 195 F. Supp. 3d 767, 772 (D. Md. 2016) (quotation omitted); see *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995) (Congress "chose to confer on district courts first line discretion to allow interlocutory appeals"); *Manion v. Spectrum Healthcare Res.*, 966 F. Supp. 2d 561, 567 (E.D.N.C. 2013).

As for the first factor, the "movant must state 'the precise nature of the controlling question of law involved.'" *Stillwagon*, 2014 WL 5871188, at *9 (quoting *Fannin v. CSX Transp., Inc.*, 873 F.2d 1438, 1989 WL 42583, at *2 (4th Cir. 1989) (per curiam) (unpublished table decision)); see *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 340-41 (4th Cir. 2017); *Eshelman*, 2017 WL 9440363, at *1. A "controlling question of law" well-adapted to discretionary interlocutory review is "a narrow question of pure law whose resolution will be completely diapositive of the litigation, either as a legal or practical matter, whichever way it goes." *Fannin*, 1989 WL 42583, at *5; see *Univ. of Va. Pat. Found. v. Gen. Elec. Co.*, 792 F. Supp. 2d 904, 910 (W.D. Va. 2011). A controlling issue of law must dispose of the litigation no matter how it is resolved, and "a question of law would not be controlling if the litigation would necessarily continue regardless of how that question were decided." *Wyeth v. Sandoz, Inc.*, 703 F. Supp. 2d 508, 525 (E.D.N.C. 2010) (quotation omitted); see *Fannin*, 1989 WL 42583, at *5; *Feinberg v. T. Rowe Price Grp., Inc.*, Civ. No. 17-

0427, 2021 WL 2784614, at *2 (D. Md. July 2, 2021) (unpublished); *Long v. CPI Sec. Sys., Inc.*, No. 3:12-CV-396, 2013 WL 3761078, at *2 (W.D.N.C. July 16, 2013) (unpublished).

A "substantial ground for a difference of opinion must arise out of a genuine doubt as to whether the district court applied the correct legal standard in its order." *Wyeth*, 703 F. Supp. 2d at 527 (quotation omitted). A substantial ground for difference of opinion does not occur when a party merely believes that the district court wrongly decided the issue or incorrectly applied the governing legal standard. See *Ahrenholz*, 219 F.3d at 676-77; *Nat'l Interstate Ins. Co. v. Morgan & Sons Weekend Tours, Inc.*, No. 1:11CV1074, 2016 WL 1228622, at *2 (M.D.N.C. Mar. 28, 2016) (unpublished); *Butler*, 307 F.R.D. at 454-55; *McDaniel v. Mehfoud*, 708 F. Supp. 754, 756 (E.D. Va. 1989). Merely because two courts may have "appl[ied] the same straightforward legal standard to similar facts and reach[ed] different results . . . does not mean that the standard itself (or the analysis courts must undertake in applying the standard) is in any way unclear." *Hall v. Greystar Mgmt. Servs., L.P.*, 193 F. Supp. 3d 522, 527 (D. Md. 2016). A substantial ground for disagreement may also exist "if there is a novel and difficult issue of first impression." *Adams v. S. Produce Distribs., Inc.*, No. 7:20-CV-53, 2021 WL 394842, at *3 (E.D.N.C. Feb. 4, 2021) (unpublished) (quotation omitted); see *Karanik v. Cape Fear Acad., Inc.*, No. 7:21-CV-169, 2022 WL 16556774, at *5 (E.D.N.C. Oct. 31, 2022) (unpublished); *United States ex rel. Al Procurement, LLC v. Thermcor, Inc.*, 173 F. Supp. 3d 320, 323 (E.D. Va. 2016).

As for the second factor, resolving the controlling legal question must materially advance the ultimate termination of the litigation. See *Coopers & Lybrand*,

437 U.S. at 466 n.5. This factor focuses on whether resolving the controlling legal question would avoid a trial or otherwise substantially shorten the litigation. See, *e.g.*, *Agape Senior Cmty., Inc.*, 848 F.3d at 340-41. "[P]iecemeal review of decisions that are but steps toward final judgment[] on the merits are to be avoided, because they can be effectively and more efficiently reviewed together in one appeal from the final judgment[]." *James v. Jacobson*, 6 F.3d 233, 237 (4th Cir. 1993); see *Caterpillar*, 519 U.S. at 74; cf. *Switz. Cheese Ass'n v. Home's Mkt., Inc.*, 385 U.S. 23, 25 (1966) ("Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not . . . 'interlocutory' within the meaning of § 1292(a)(1).").

As for the third factor, exceptional circumstances exist when an interlocutory appeal "would avoid protracted and expensive litigation." *Fannin*, 1989 WL 42583, at *2 (quotation omitted); see *Medomsley Steam Shipping Co. v. Elizabeth River Terminals, Inc.*, 317 F.2d 741, 743 (4th Cir. 1963).

Plaintiffs argue that the jury-trial issue is a "novel and difficult" question of "first impression." [D.E. 138] 4. Although the jury-trial issue is one of first impression because Congress recently enacted the Camp Lejeune Justice Act ("CLJA"), that an issue is one of first impression does not alone warrant interlocutory appeal under section 1292(b). See, *e.g.*, *Flor v. BOT Fin. Corp. (In re Flor)*, 79 F.3d 281, 284 (2d Cir. 1996) (per curiam); *Wyeth*, 703 F. Supp. 2d at 527. Moreover, the court disagrees that the jury-trial issue is novel and difficult. Furthermore, the "substantial ground for a difference of opinion must arise out of a genuine doubt as to whether the district court applied the correct legal standard in its order." *Wyeth*, 703 F. Supp. 2d at 527 (quotations omitted). Here, the court applied the

correct legal standard under *Lehman v. Nakshian*, 453 U.S. 156, 161-62, 168 (1981), and other applicable precedent and canons of construction. See [D.E. 133] 7-34.

Plaintiffs also argue that the jury-trial issue is a "new legal question" and has "special consequence." [D.E. 138] 5. The court agrees that the question is "new" because the CLJA is new, but disagrees that the question has "special consequence." This court is prepared to proceed expeditiously with bench trials. If a party is unhappy with the result of the bench trial, the party may appeal once the court enters final judgment. As part of any such appeal, the party can challenge this court's ruling concerning jury trials. If the court incorrectly held that plaintiffs are not entitled to a jury trial under the CLJA, the court then can hold jury trials. In the meantime, however, this court will resolve countless cases under the CLJA.

Next, plaintiffs argue that the jury-trial issue presents a "closer question" than decisions interpreting other statutes. *Id.* The court disagrees and believes that it properly analyzed the CLJA, *Lehman*, and other relevant precedent.

Finally, plaintiffs cite *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42 (2024), and argue that *Kirtz* supports the conclusion that the CLJA permits a jury trial against the United States. *See* [D.E. 138] 6; [D.E. 158] 6. In *Kirtz*, the Supreme Court reaffirmed that "a waiver of sovereign immunity must be unmistakably clear in the language of the statute." *Kirtz*, 601 U.S. at 49 (quotation omitted); *see Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000). The Supreme Court observed that in order to determine whether Congress waived sovereign immunity, a court must focus on "statutory text rather

than legislative history." *Kirtz*, 601 U.S. at 49. "[N]o amount of legislative history can supply a waiver that is not clearly evident from the language of the statute." *Id.* (quotation omitted). Likewise, "when an unmistakably clear waiver of sovereign immunity appears in a statute, no amount of legislative history can dislodge it." *Id*. (quotations omitted). Applying these principles, the Supreme Court held that the Fair Credit Reporting Act of 1996 ("FCRA") unmistakably abrogated sovereign immunity against a federal agency because the FCRA "authorize[d] consumer suits for money damages against '[a]ny person' who willfully or negligently fails to comply with" the FCRA and defined 'person' to include 'any . . . governmental . . . agency.' *Kirtz*, 601 U.S. at 51 (quoting 15 U.S.C. §§ 1681n(a), 1681o(a), 1681a(b)).

This court's February 6, 2024 analysis comports with *Kirtz*. See [D.E. 133] 7-34. Moreover, this court's analysis rejecting plaintiffs' reliance on the CLJA's legislative history and cases such as *Galloway v. United States*, 319 U.S. 372 (1943), and *Pence v. United States*, 316 U.S. 332 (1942), comports with *Kirtz*. *See Kirtz*, 601 11.S. at 49, 52-58: cf. [D.E. 158] 2, 5. Thus, *Kirtz* supports this court's decision striking plaintiffs' jury trial demand and does not support plaintiffs' motion to certify.

II.

In sum, the court DENIES plaintiffs' motion to certify for appeal the order granting defendant's motion to strike the demand for a jury trial [D.E. 137].

SO ORDERED. This 13 day of May, 2024.

/s/ Richard E. Myers II
RICHARD E. MYERS II
Chief United States District Judge

/s/ Louise W. Flanagan
LOUISE W. FLANAGAN
United States District Judge

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

/s/ James C. Dever III
JAMES C. DEVER III
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA SOUTHERN DIVISION

No. 7:23-CV-897

IN RE: CAMP LEJEUNE WATER LITIGATION

THIS DOCUMENT RELATES TO: ALL CASES

ORDER

On November 20, 2023, the United States of America ("United States" or "defendant") moved to strike the jury trial demand in plaintiffs' master complaint [D.E. 51] and filed a memorandum in support [D.E. 51-1]. On December 4, 2023, plaintiffs responded in opposition [D.E. 66]. On December 18, 2023, the United States replied [D.E. 84]. As explained below, the Camp Lejeune Justice Act of 2022 ("CLJA") does not unequivocally, affirmatively, and unambiguously provide plaintiffs the right to a jury trial in actions seeking relief under subsection 804(b) of the CLJA. Moreover, in the CLJA, Congress did not clearly and unequivocally depart from its usual practice of not permitting a jury trial against the United States. Thus, the court grants defendant's motion to strike the jury trial demand in plaintiffs' master complaint.

I.

In August 2022, Congress enacted and President Biden signed the CLJA. *See* Pub. L. No. 117-168, § 804,

136 Stat. 1759, 1802-04. On August 10, 2022, the CLJA became effective. The CLJA contains ten subsections. Subsection (a) provides the name of the Act. *See id.* § 804(a). Subsection 804(b) states that "[a]n individual, including a veteran (as defined in section 101 of title 38, United States Code), or the legal representative of such an individual, who resided, worked, or was otherwise exposed (including in utero exposure) for not less than 30 days during the period beginning on August 1, 1953, and ending on December 31, 1987, to water at Camp Lejeune, North Carolina, that *was* supplied by, or on behalf of, the United States may bring an action in the United States District Court for the Eastern District of North Carolina to obtain appropriate relief for harm that was caused by exposure to the water at Camp Lejeune." *Id.* § 804(b).

Subsection 804(c) states that "[t]he burden of proof shall be on the party filing the action to show one or more relationships between the water at Camp Lejeune and the harm." *Id.* § 804(c)(1). "To meet the burden of proof described in paragraph (1), a party shall produce evidence showing that the relationship between exposure to the water at Camp Lejeune and the harm is (A) sufficient to conclude that a causal relationship exists; or (B) sufficient to conclude that a causal relationship is at least as likely as not." *Id.* § 804(c)(2).

Subsection 804(d) is entitled "Exclusive Jurisdiction And Venue." *Id.* § 804(d). The first sentence in subsection 804(d) states: "The United States District Court for the Eastern District of North Carolina shall have exclusive jurisdiction over any action filed under subsection (b), and shall be the exclusive venue for such an action." *Id.* The second sentence in subsection 804(d) states that "[n]othing in this subsection shall impair the right of any party to a trial by jury." *Id.*

Subsection 804(e) is entitled "Exclusive Remedy." *Id* § 804(e). Subsection (e)(1) provides that "[a]n individual, or legal representative of an individual, who brings an action under this section for a harm described in subsection (b), including a latent disease, may not thereafter bring a tort action against the United States for such harm pursuant to any other law." *Id.* § 804(e)(1). Subsection (e)(2) provides that:

> Any award made to an individual, or legal representative of an individual, under this section shall be offset by the amount of any disability award, payment, or benefit provided to the individual, or legal representative—
>
> (A) under–
>
> (i) any program under the laws administered by the Secretary of Veterans Affairs;
>
> (ii) the Medicare program under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.); or
>
> (iii) the Medicaid program under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.); and
>
> (B) in connection with health care or a disability relating to exposure to the water at Camp Lejeune.

Id. § 804(e)(2).

Subsection 804(f) is entitled "Immunity Limitation." *Id.* § 804(f). It states: "The United States may not assert any claim to immunity in an action under this section that would otherwise be available under

section 2680(a) of title 28, United States Code." *Id.* § 804(f).[1]

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[1] 28 U.S.C. § 2680(a) provides: "The provision of this chapter and section 1346(b) of this title shall not apply to —"

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

In turn, 28 U.S.C. § 1346(b) provides:

> (1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Vugin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death 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.
>
> (2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

28 U.S.C. § 1346(b).

Subsection 804(g) states: "Punitive damages may not be awarded in any action under this section." *Id.* § 804(g).

Subsection 804(h) states: "An individual may not bring an action under this section before complying with section 2675 of title 28, United States Code." *Id.* § 804(h). This provision requires a CLJA claimant to exhaust administrative remedies under 28 U.S.C. § 2675 before filing an action in the Eastern District of North Carolina seeking relief under subsection 804(b) of the CLJA. *See Brewer v. United States*, No. 7:22-CV-150, 2023 WL 1999853, at *4 (E.D.N.C. Feb. 14, 2023) (unpublished); *Pugh v. United States*, No. 7:22-CV-124, 2023 WL 1081262, at *6 (E.D.N.C. Jan. 27, 2023) (unpublished); *Girard v. United States*, No. 2:22-CV-22, 2023 WL 115815, at *5 (E.D.N.C. Jan. 5, 2023) (unpublished).[2]

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[2] 28 U.S.C. § 2675 provides:

> (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

Subsection 804(i) states: "This section does not apply to any claim or action arising out of the combatant activities of the Armed Forces." CLJA § 804(i).

Subsection 804(j)(1) states: "This section shall apply only to a claim accruing before the date of enactment of this Act." *Id.* § 804(j)(1). Subsection 804(j)(2) is entitled "Statute Of Limitations." *Id.* § 804(j)(2). It states: "A claim in an action under this section may not be commenced after the later of (A) the date that is two years after the date of enactment of this Act; or (B) the date that is 180 days after the date on which the claim is denied under section 2675 of title 28, United States Code." *Id.* Subsection 804(j)(3) is entitled "Inapplicability Of Other Limitations" and states: "Any applicable statute of repose or statute of limitations, other than under paragraph (2), shall not apply to a claim under this section." *Id*. § 804(j)(3).

Before Congress enacted the CLJA, claimants who were service members or family members filed approximately 4,000 claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, and 17 federal lawsuits. *See In re Camp Lejeune N.C. Water Cont. Litig.*, 263 F. Supp. 3d 1318, 1325 (N.D. Ga. 2016). In

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> (b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.
>
> (c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 U.S.C. § 2675.

these claims and federal lawsuits, the claimants and plaintiffs alleged that they were exposed to toxic substances in the water supply while living at Camp Lejeune. *See id.* They also alleged that they suffered illness or death as a result of actions of the United States and sought relief pursuant to the FTCA. *See id.* The Judicial Panel on Multidistrict Litigation granted MDL status to the 17 federal lawsuits and transferred them to the United States District Court for the Northern District of Georgia. *See id*.; 28 U.S.C. § 1407. On December 5, 2016, that court dismissed plaintiffs' claims and held that: (1) North Carolina's ten-year statute of repose applied to plaintiffs' claims; (2) under North Carolina law, the ten-year limitations period began to run on the date the allegedly contaminated wells were taken out of use; (3) the *Feres* doctrine[3] barred the claims of service members where the injuries arose out of their military service; (4) the discretionary function exception to liability under the FTCA in 28 U.S.C. § 2680(a) applied; and (5) the United States' sovereign immunity barred plaintiffs' Due Process Clause and Equal Protection Clause claims. *See In re Camp Lejeune N.C. Water Cont. Litig.*, 263 F. Supp. 3d at 1336-60. On May 22, 2019, the United States Court of Appeals for the Eleventh Circuit affirmed. *See In re Camp Lejeune*, *N.C. Water Cont. Litig.*, 774 F. App'x 564, 566-68 (11th Cir. 2019) (per curiam) (unpublished). On June 1, 2020, the Supreme Court denied certiorari. *See Douse v. United States*, 140 S. Ct. 2824 (2020).

When Congress enacted the CLJA, the Congressional Budget Office estimated the costs of settlement payouts and legal expenses to be $6.1 billion. *See* Congressional Budget Office, *Estimated Budgetary Effects of Rules*

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[3] *See Feres v. United States*, 340 U.S. 135, 146 (1950); *cf. United States v. Brown*, 348 U.S. 110, 112-13 (1954).

Committee Print 117-33 for H.R. 3967, *Honoring our PACT Act of 2021* (Feb. 18, 2022). After a national legal advertising campaign that some commentators have estimated cost over $100 million, claimants have filed approximately 164,000 administrative claims with the Department of the Navy. *See* [D.E. 128] 1; CLJA § 804(h). Moreover, plaintiffs have filed 1,492 civil actions in the United States District Court for the Eastern District of North Carolina seeking relief under subsection 804(b) of the CLJA. *See* [D.E. 128] 1; CLJA § 804(b). Claimants' demands in the administrative process under subsection 804(h) of the CLJA exceed $3.3 trillion. *See* [D.E. 34] 15; CLJA § 804(h).

II.

Whether to strike plaintiffs' jury trial demand requires the court to examine the ordinary meaning of the CLJA's statutory text, to interpret specific provisions of the CLJA within their broader statutory context, and to apply certain canons of construction, which are presumptions about how courts ordinarily read statutes. *See.*, *e.g.*, *Jones v. Hendrix*, 599 U.S. 465, 472-80, 490-92 (2023); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 387-88 (2023); *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 298-303 (2023); *Sackett v. EPA*, 598 U.S. 651, 679-83 (2023); *Fin. Oversight Mgmt. Bd. for P.R. v. Centro De Periodismo Investigativo, Inc.*, 598 U.S. 339, 346-50 (2023); *Ciminelli v. United States*, 598 U.S. 306, 314-16 (2023); *Santos-Zacaria v. Garland*, 598 U.S. 411, 416-20 (2023); Wilkins *v. United States*, 598 U.S. 152, 157-59 (2023); *West Virginia v. EPA*, 142 S. Ct. 2587, 2607-09 (2022); *Boechler, P.C. v. Comm'r of Internal Rev.*, 596 U.S. 199, 203-08 (2022); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2262-63 (2021); *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S.

Ct. 1959, 1981 (2020); *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1607-10 (2020).

The sovereign immunity clear statement canon provides that if a defendant enjoys sovereign immunity (as the United States does), "abrogation requires an unequivocal declaration from Congress." *Fin. Oversight & Mgmt. Bd. for P.R.*, 598 U.S. at 347 (quotation omitted); *see Dellmuth v. Muth*, 491 U.S. 223, 232 (1989) ("We hold that the statutory language of the [Education of the Handicapped Act] does not evince an unmistakably clear intention to abrogate the States' constitutionally secured immunity from suit."). The Supreme Court has described the "standard for finding a congressional abrogation [as] stringent" and "has found that standard met in only two situations." *Fin. Oversight & Mgmt. Bd. for P.R.*, 598 U.S. at 346-47. First, "when a statute says in so many words that it is stripping immunity from a sovereign entity," by, for example, stating in the statute "that States 'shall not be immune' under any 'doctrine of sovereign immunity, from suit in Federal court' for patent or copyright infringement." *Id.* at 347 (quoting 35 U.S.C. § 296(a); 17 U.S.C. § 511(a)). Second, "when a statute creates a cause of action and authorizes suit against a government on that claim." *Id.*

Subsection 804(b) of the CLJA fits squarely within the Supreme Court's second example. Thus, the United States does not have sovereign immunity for actions under subsection 804(b) of the CLJA. *See id.*; *Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 599 U.S. at 387-88.

A corollary to the sovereign immunity clear statement canon is that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano v. United States*, 352 U.S. 270, 276

(1957); *see United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit. A waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (cleaned up); *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). One such limitation includes whether a plaintiff has the right to a jury trial in a civil action against the United States. *See*, *e.g.*, *Lehman v. Nakshian*, 453 U.S. 156, 160-69 (1981).

In *Lehman*, the Supreme Court held that the 1974 amendments to the Age Discrimination in Employment Act of 1967 ("ADEA") did not create a right to a jury trial against the United States in ADEA actions. *See id.* at 162-69. The statutory text at issue in *Lehman* was "new" sections 15(a)—(c) in the ADEA. *See id.* at 157-58. Section 15(a) prohibited "the Federal Government from discrimination based on age in most of its civilian employment decisions concerning persons over 40 years of age." *Id.* at 157. Section 15(b) provided that "enforcement of § 15(a) in most agencies, including military departments, is the responsibility of the Equal Employment Opportunity Commission." *Id.* at 157-58. Section 15(c) provided: "[a]ny person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act." *Id.* at 158 (quotation omitted).

A 62-year-old civilian employee of the United States Department of the Navy filed a civil action under section 15(c) of the ADEA in the United States District Court for the District of Columbia and requested a jury

trial. *See id.* The United States moved to strike the jury demand. *See id.* Both the district court and the United States Court of Appeals for the District of Columbia Circuit declined to strike the plaintiff's jury demand and interpreted section 15(c) to grant the plaintiff the right to a jury trial. *See id.* at 158-60.

The Supreme Court granted certiorari and reversed. *See id.* at 160-69. In analyzing whether section 15(c) granted the plaintiff the right to a jury trial, the Supreme Court began by noting that "[i]t has long been settled that the Seventh Amendment right to a trial by jury does not apply in actions against the Federal Government." *Id.* at 160. After all, "under the common law in 1791," no person "asserting claims against the sovereign" had the right to a jury trial. *Id.* (quotation omitted).

In *Lehman*, the Supreme Court acknowledged the sovereign immunity clear statement canon and its corollary that "the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." *Id.* (quotation omitted). "Thus, if Congress waives the Government's immunity from suit, as it has in the ADEA, . . . the plaintiff has a right to a trial by jury only where that right is one of the terms of the Government's consent to be sued." *Id.* at 161 (cleaned up). "Like a waiver of immunity itself, which must be *unequivocally expressed*, this Court has long decided that limitations and conditions upon which the Government consents to be sued must be *strictly observed* and exceptions thereto are not to be implied." *Id.* (cleaned up) (emphasis added).

As the Supreme Court explained in *Lehman*, "[w]hen Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a

jury trial." *Id.* "Jury trials, for example, have not been made available in the Court of Claims for the broad range of cases within its jurisdiction under 28 U.S.C. § 1491 . . . ." *Id.* "And there is no jury trial right in this same range of cases when the federal district courts have concurrent jurisdiction. *See* 28 U.S.C. §§ 1346(a)(2) and 2402." *Id.* "Finally, in tort actions against the United States, *see* 28 U.S.C. § 1346(b), Congress has similarly provided that trials shall be to the court without a jury. 28 U.S.C. § 2402." *Id.*

After recounting these governing principles, the *Lehman* Court analyzed the ADEA to determine whether section 15(c) granted the plaintiff the right to a jury trial. *Id.* at 161-65. First, the Supreme Court observed that section 7(c) of the ADEA authorized "civil actions against private employers and state and local governments, and . . . expressly provide[d] for jury trials." *Id.* at 162 (citing 29 U.S.C. § 626(c) (1976 ed., Supp. III)). In contrast, section 15(c) of the ADEA merely stated that any person aggrieved "may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes" of the ADEA. *Id.* Thus, in the ADEA itself, Congress "demonstrated that it knew how to provide a statutory right to a jury trial . . . elsewhere in the very legislation cited." *Id.* (cleaned up). "But in § 15 it failed *explicitly* to do so." *Id.* (emphasis added).

The *Lehman* Court declined to "infer[] statutory intent" to create the right to a jury trial against the United States "from the language in § 15(c) providing for the award of 'legal or equitable relief.'" *Id.* at 163. The *Lehman* Court stated that neither logic nor the legislative history supported this inference. *Id.* at 164. Likewise, Federal Rule of Civil Procedure 38(a) did not

support such an inference given that Rule 38(a) "requires an affirmative statutory grant of the right where, as in this case, the Seventh Amendment does not apply." *Id.* at 165; *see* Fed. R. Civ. P. 38(a).

The *Lehman* Court held that "it is unnecessary to go beyond the language of the statute itself to conclude that Congress did not intend to confer a right to trial by jury on ADEA plaintiffs proceeding against the Federal Government." *Lehman*, 453 U.S. at 165. Nonetheless, the *Lehman* Court examined the legislative history and concluded that Congress did not intend to grant the right to a jury trial in section 15(c). *See id.* at 165-68.

The *Lehman* Court closed by stating that "even if the legislative history were ambiguous, that would not affect the proper resolution of this case, because the plaintiff in an action against the United States has a right to trial by jury only where Congress has *affirmatively* and *unambiguously* granted that right by statute." *Id.* at 168 (emphasis added). "Congress has most obviously not done so here." *Id.* Thus, the "conclusion is inescapable that Congress did not depart from its normal practice of not providing a right to a trial by jury when it waived the sovereign immunity of the United States" in actions against the United States in the ADEA. *Id.* at 168-69.

Here, in order to resolve the parties' dispute about whether to strike plaintiffs' jury trial demand, this court must determine whether Congress "unequivocally expressed" and "affirmatively and unambiguously" granted the right to a trial by jury in the CLJA and "clearly and unequivocally" departed from its usual practice of not permitting a jury trial against the United States. *Id.* at 161-62, 168.

III.

Congress must have unequivocally, affirmatively, and unambiguously provided the right to a trial by jury in the CLJA in order for plaintiffs to have the right to a jury trial. The parties dispute whether Congress unequivocally, affirmatively, and unambiguously granted the right to a trial by jury against the United States in the CLJA. *Compare* [D.E. 51-1] 2-7, and [D.E. 84] 2-6, with [D.E. 66] 1-4, 17-20. The parties also dispute whether Congress in the CLJA clearly and unequivocally departed from its usual practice of permitting only bench trials in civil actions against the United States.

The parties' dispute begins with the second sentence of subsection 804(d), which states "[n]othing in this subsection shall impair the right of any party to a trial by jury." CLJA § 804(d). The dispute then extends to the first sentence of subsection 804(d), which states "[t]he United States District Court for the Eastern District of North Carolina shall have exclusive jurisdiction over any action filed under subsection (b), and shall be the exclusive venue for such an action." *Id.* The dispute then extends to the remaining text of the CLJA, canons of construction, the history of trials in civil actions seeking money damages from the United States as the defendant, and the CLJA's legislative history. *Compare* [D.E. 51-1], and [D.E. 84], with [D.E. 66].

A.

The court begins with the text of subsection 804(d). *See*, *e.g.*, *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 457 (2022); *Facebook, Inc. v. Duguid*, 592 U.S. 395, 402-03 (2021). It provides: "The United States District Court for the Eastern District of North Carolina shall have exclusive jurisdiction over any action filed under

subsection (b), and shall be the exclusive venue for such an action. Nothing in this subsection shall impair the right of any party to a trial by jury." CLJA § 804(d). The United States argues that the second sentence in subsection 804(d) does not "unequivocally express" and "affirmatively and unambiguously" grant a right to a trial by jury for actions under subsection 804(b). *See* [D.E. 51-1] 3-4; *Lehman*, 453 U.S. at 160, 168. In support, the United States cites *Lehman* and contrasts the language in the second sentence of subsection 804(d) with two statutes where Congress unequivocally, affirmatively, and unambiguously granted a jury trial in a civil action against the United States. *See* [D.E. 51-1] 4-5. First, 28 U.S.C. § 2402 states that "any action against the United States [for certain tax refund claims] . . . shall, at the request of either party to such action, be tried by the court with a jury." 28 U.S.C. § 2402. Second, 28 U.S.C. § 3901(b) states that in certain actions by federal employees against their executive agency employers, "any party may demand a jury trial where a jury trial would be available in an action against a private defendant under the relevant law." 28 U.S.C. § 3901(b).

The United States notes the unequivocal, affirmative, and unambiguous grant of the right to a trial by jury in 28 U.S.C. § 2402 and § 3901(b) and contrasts that unequivocal, affirmative, and unambiguous statutory language with the negative statutory language in the second sentence of subsection 804(d). *See* [D.E. 51-1] 4-5; [D.E. 84] 3; CLJA § 804(d) ("Nothing in this subsection shall impair the right of any party to a trial by jury."). The United States argues that when Congress enacted the CLJA, Congress knew that courts presumed that Congress legislates in light of the Supreme Court's canons of construction. *See*, *e.g.*, *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *McNary v.*

Haitian Refugee Ctr., 498 U.S. 479, 496 (1991). The United States then quotes the second sentence of subsection 804(d) and argues that Congress failed to unequivocally, affirmatively, and unambiguously grant plaintiffs the right to a trial by jury in subsection 804(d) for actions under subsection 804(b). *See* [D.E. 84] 3, 6.

As support for its textual analysis of subsection 804(d), the United States cites not only *Lehman* but also *Cooper Industries. Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004). In *Cooper Industries*, the Supreme Court analyzed section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). *Id.* at 165-68. Section 113(f)(1) of CERCLA is codified at 42 U.S.C. § 9613(f)(1) and provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1). The Supreme Court described the first sentence of section 113(f)(1) as "establish[ing] the right of contribution" under CERCLA. *Cooper Indus.,*

Inc., 543 U.S. at 165-66. The Supreme Court held that the "natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action" under CERCLA. *Id.* at 166 (quoting 42 U.S.C. § 9613(f)(1)). The Supreme Court rejected Aviall's argument to read the word "may" in the first sentence of section 113(f)(1) permissively, such that "during or following a civil action is one, but not the exclusive, instance in which a *person may* seek contribution." *Id.* (quotation omitted).

As for the last sentence in section 113(f)(1), the Supreme Court observed that it states: "[n]othing in this subsection shall diminish the right of any person to bring an action . . . under section 9606 of this title or section 9607 of this title." *Id.* at 166 (quoting 42 U.S.C. § 9613(f)(1)). The Supreme Court held that "[t]he sole function of the [last] sentence is to clarify that § 133(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of § 113(f)(1)." *Id.* (quoting 42 U.S.C. § 9613(f)(1)). "In other words, the [last] sentence rebuts any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP." *Id.* at 166-67. The last "sentence, however, does not itself *establish* a cause of action." *Id.* at 167 (emphasis added). Nor "does it expand § 113(f)(1) to authorize contribution actions not brought 'during or following' a § 106 or § 107(a) civil action." *Id.* "[N]or does it specify what causes of action for contribution, if any, exist outside § 113(f)(1)," such as contribution actions under state law. *Id.* (emphasis added).

This court construes subsection 804(d) of the CLJA in the same manner that the Supreme Court construed the first and last sentence of section 113(f)(1) of CERCLA

in *Cooper Industries*. The first sentence of subsection 804(d) establishes that the "United States District Court for the Eastern District of North Carolina" has the "exclusive jurisdiction over any action filed under subsection (b), and [has] the exclusive venue for such an action." CLJA § 804(d). The second sentence, in turn, clarifies that the exclusive jurisdiction and exclusive venue provision in the first sentence of the subsection does "[n]othing . . . [to] impair the right of any party to a trial by jury." *Id.* As in *Cooper Industries*, the second sentence of subsection 804(d) "*does not itself establish*" the right to a trial by jury against the United States for actions under subsection 804(b). *Cooper Indus., Inc.*, 543 U.S. at 167 (emphasis added). Likewise, as in *Cooper Industries*, "nor does [subsection 804(d)] specify" whether the right to a trial by jury might "exist outside" subsection 804(d). *Id.*

For the right to a trial by jury to exist against the United States outside the second sentence of subsection 804(d), the court would have to locate an unequivocal, affirmative, and unambiguous right to a trial by jury in the text of some other part of the CLJA. *See*, *e.g.*, *Lehman*, 453 U.S. at 160-69. The court, however, already has quoted the CLJA's entire text. No part of the CLJA's text contains an unequivocal, affirmative, and unambiguous right to a trial by jury against the United States.

As further support of this textual analysis, the court notes that the title of subsection 804(d) is "Exclusive Jurisdiction And Venue." CLJA § 804(d). A subsection's title can provide textual evidence concerning the subsection's meaning. *See*, *e.g.*, *Yates v. United States*, 574 U.S. 528, 539-40 (2015) (permitting a court to look to a subsection's title to interpret a statute); *Almandarez-Torres v. United States*, 523 U.S. 224, 234

(1998) (same). Subsection 804(d)'s title provides additional evidence that (1) Congress intended the first sentence of subsection 804(d) to establish exclusive jurisdiction and exclusive venue for all actions under subsection 804(b) in the Eastern District of North Carolina; and (2) Congress intended the second sentence to clarify that establishing exclusive jurisdiction and venue in the Eastern District of North Carolina did "[n]othing" to "impair the right of any party to a trial by jury" that may exist outside of subsection 804(d). CLJA § 804(d); *see Yates*, 574 U.S. at 539-40; *Almandarez-Torres*, 523 U.S. at 234. Consistent with the title of subsection 804(d), each sentence in subsection 804(d) concerns the "[e]xclusive [j]urisdiction [a]nd [v]enue" established in subsection 804(d). *See* CLJA § 804(d). Construing the second sentence of subsection 804(d) to constitute an unequivocal, affirmative, and unambiguous right to a trial by jury in an action seeking relief under subsection 804(b) conflicts with the title of subsection 804(d).

The United States argues that Congress sensibly included the second sentence of subsection 804(d) "in a more general excess of caution" to alleviate concerns that establishing exclusive jurisdiction and exclusive venue in the United States District Court for the Eastern District of North Carolina might restrict a party's otherwise-existing right to a jury trial. [D.E. 51-1] 4 n.1 (quoting *Cyan. Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 435 (2018)). The United States also argues that Congress sensibly included the second sentence in subsection 804(d) "as it might relate to a third-party complaint or cross claim." *Id.*

Plaintiffs respond that Congress placed the second sentence in subsection 804(d) in order to accord "with its basic purpose"—to provide a jury trial to plaintiffs asserting claims in actions under subsection 804(b).

[D.E. 66] 10. According to plaintiffs, the first sentence of subsection 804(d)—"The United States District Court for the Eastern District of North Carolina shall have exclusive jurisdiction over any action filed under subsection (b), and shall be the exclusive venue for such an action."—concerns which court will resolve all legal questions under the CLJA (subject to appellate review). *See* [D.E. 66] 10. According to plaintiffs, the second sentence, in turn, clarifies that granting exclusive jurisdiction and venue to the United States District Court for the Eastern District of North Carolina does not authorize the court to resolve factual issues in actions under subsection 804(b). *See id.* Instead, according to plaintiffs, a jury must resolve all factual issues in actions under subsection 804(b). *See id.* Moreover, according to plaintiffs, if this court were to construe the second sentence of subsection 804(d) of the CLJA not to grant plaintiffs the right to a jury trial in actions under subsection 804(b), then that statutory construction "would render [the] entire" second sentence of subsection 804(d) superfluous. *Id.* at 11. And if the court were to adopt such an interpretation of subsection 804(d), plaintiffs argue that the court would violate the canon of construction providing that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quotation omitted); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

Plaintiffs also respond to defendant's contention about a possible third-party complaint. *See* [D.E. 66] 12-13. Plaintiffs argue that the applicable statute of limitations or statute of repose would bar any such third-party complaint; therefore, such a theoretical third-party complaint is not a plausible interpretation of subsection 804(d). *See id.* According to plaintiffs, a

court cannot plausibly interpret the second sentence of subsection 804(d) to mean anything other than that each plaintiff has an unequivocal, affirmative, and unambiguous right to a jury trial in actions under subsection 804(b). *See id.*

The court rejects plaintiffs' arguments. Congress sensibly included the sentence "[n]othing in this subsection shall impair the right of any party to a trial by jury" to clarify that the "[e]xclusive [j]urisdiction [a]nd [v]enue" provision in the first sentence does "[n]othing" to "impair the right of any party to a trial by jury" that may exist outside subsection 804(d), including if a party were to file a third-party complaint in an action under subsection 804(b). CLJA § 804(d); *see Cooper Indus., Inc.*, 543 U.S. at 164, 166-67. Moreover, although the United States has yet to file a third-party complaint, it could learn information during discovery that creates potential third-party liability for putting certain chemicals in the water at Camp Lejeune or potential third-party liability for producing certain chemicals that entered the water at Camp Lejeune. The United States could file a third-party complaint in an action under subsection 804(b) in the Eastern District of North Carolina to recover money from such a potentially responsible third party, and the second sentence of subsection 804(d) clarifies that the "[e]xclusive [j]urisdiction [a]nd [v]enue" provision in the first sentence of subsection 804(d) does "[n]othing" to "impair the right of any party to a trial by jury," including for such a third-party complaint. CLJA § 804(d); *see*, *e.g.*, *Cooper Indus., Inc.*, 543 U.S. at 164, 166-67.

In reaching this conclusion, the court rejects plaintiffs' argument that a statute of limitations or statute of repose would bar any potential third-party complaint. Asserting a statute of limitations or a statute of repose

is an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1). If a third party failed to assert such a defense, the third party would forfeit the defense. *See*, *e.g.*, *Hamer v. Neighborhood Hous. Servs.*, 583 U.S. 17, 20 n.1 (2017) ("Forfeiture is the failure to make the timely assertion of a right.") (cleaned up); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (affirmative defenses such as a statute of limitations or a statute of repose must be asserted or are subject to forfeiture); *Day v. McDonough*, 547 U.S. 198, 214 (2006) (same). Moreover, even if the United States has yet to file a third-party complaint in a CLJA action under subsection 804(b) due to an existing statute of limitations or statute of repose, Congress could alter an applicable statute of limitations or statute of repose in order to permit the United States to seek costs from a potentially responsible third party.[4]

The second sentence of subsection 804(d) also clarifies that if the United States were to assert a counterclaim for fraud under the common law or the False Claims Act against a CLJA plaintiff in an action under subsection 804(b), then the "[e]xclusive [j]urisdiction [a]nd [v]enue"

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[4] Some state legislatures have enacted laws extending statutes of limitations in order to give sexual assault, sexual abuse, and sexual harassment victims more time to file civil actions. *See* Ronald V. Miller, *Statute of Limitations on Sexual Abuse Cases*, Lawsuit Information Center (Sept. 25, 2023), https://www.lawsuit-information-center.com/statute-of-limitations-on-sexual-abuse-cases.html; *see*, *e.g.*, A.R.S. § 13-107(1) (legislation enacted in 2019 in Arizona eliminating the statute of limitations for violent sexual assault); D.C. Code § 12-301(11) (legislation enacted in 2019 in the District of Columbia significantly extending the statute of limitations to permit any victim to file an action to recover for sexual abuse); 12 V.S.A. § 522 (legislation enacted in 2020 in Vermont eliminating the statute of limitations on childhood sexual or physical abuse claims).

provision in the first sentence of subsection 804(d) does "[n]othing" to "impair the right of any party to a trial by jury" on such a counterclaim. Although the court hopes that none of the 164,000 administrative claims that claimants have filed under subsection 804(h) of the CLJA are fraudulent or contain any false claims or false statements, recent history suggests that the United States some day may need to assert a common law fraud counterclaim or a False Claims Act counterclaim against a plaintiff who files an action in the Eastern District of North Carolina seeking relief under subsection 804(b) of the CLJA. *See* Emily R. Siegel & Kaustuv Basu, *Bogus Claims Threaten to Taint Camp Lejeune Toxic Water Payouts*, Bloomberg Law News (Oct. 30, 2023); *see* also In re *Deepwater Horizon*, 643 F. App'x 377, 380-81 (5th Cir. 2016) (per curiam) (unpublished) (discussing the investigation of fishermen who misrepresented how the oil spill affected their business and improperly sought to recover money from the Deepwater Horizon settlement fund); United States Attorney's Office, Northern District of Alabama, *Appeals Court Upholds BP Oil Spill Compensation Fund Fraud Convictions* (Jan. 19, 2018), https://www.justice.gov/usao-ndal/pr/appeals-court-upholds-bp-oil-spill-compensation-fund-fraud-convictions (discussing the criminal prosecution of three family members who schemed to steal $2 million from the Deepwater Horizon Oil settlement fund); Ed Crooks, *More than 100 jailed for fake BP oil spill claims*, Financial Times (Jan. 15, 2017), https://www.ft.com/content/6428c082-dblc-11e6-9d7c-be108flcldce (discussing over 100 people who were convicted and jailed for making fraudulent oil spill claims against BP arising from the Deepwater Horizon settlement fund). The second sentence of subsection 804(d) ensures that "[n]othing" in the "[e]xclusive [j]urisdiction [a]nd [v]enue" provision of the first

sentence of subsection 804(d) shall "impair the right of any party to a trial by jury" on such a counterclaim.

Subsection 804(h)'s reference to 28 U.S.C. § 2675 adds another textual clue to support the conclusion that the second sentence of subsection 804(d) clarifies that the "[e]xclusive [j]urisdiction [a]nd [v]enue" provision in subsection 804(d) does "[n]othing" to "impair the right of any party to a trial by jury" that may exist outside subsection 804(d), including for a third-party complaint or a counterclaim. *See* CLJA § 804(h) ("An individual may not bring an action under this section before complying with section 2675 of title 28, United States Code."). Tellingly, 28 U.S.C. § 2675(a) explicitly states that "[t]he provisions of this subsection [requiring administrative exhaustion] shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim,"[5] and subsection 804(h) incorporates 28 U.S.C. § 2675(a). *See* CLJA § 804(h). Thus, the CLJA textually contemplates third-party complaints and counterclaims.

The second sentence of subsection 804(d) clarifies that the "[e]xclusive [j]urisdiction [a]nd [v]enue" provision in the first sentence of subsection 804(d) does "[n]othing . . . [to] impair the right of any party to a trial by jury" that may exist outside of subsection 804(d), including for a third-party complaint or a counterclaim. This work "may not be very heavy work for the [second sentence of subsection 804(d)] to perform, but a job is a job, and enough to bar the rule against redundancy from disqualifying an otherwise sensible reading." *Polselli v. I.R.S.*, 143 S. Ct. 1231, 1239 (2023) (quoting *Guiterrez v. Ada*, 528 U.S. 250, 258 (2000)); *see Nielsen*

[5] 28 U.S.C. § 2675(a).

v. Preap, 139 S. Ct. 954, 969 (2019) (a clause that "still has work to do" is not superfluous). Thus, the court rejects plaintiffs' argument that its construction of subsection 804(d) renders the second sentence of subsection 804(d) superfluous.

B.

Plaintiffs concede that in order for them to obtain a jury trial in their CLJA actions under subsection 804(b), Congress must have "unequivocally expressed" in the CLJA's "statutory text" their right to a jury trial. *See* [D.E. 66] 3-4, 7. In support of their argument, plaintiffs cite the text of the second sentence in subsection 804(d) and then attempt to distinguish *Lehman*, where the Court held that Congress had not "unequivocally expressed" in the statutory text the right to a trial by jury against the United States when it amended the ADEA in 1974. *See* [D.E. 66] 6-8. Plaintiffs also cite *Galloway v. United States*, 319 U.S. 372 (1943), and argue that the Supreme Court found the right to a trial by jury against the United States "based solely on an inference from a statute's amendment history, without any express textual reference to jury trials at all." [D.E. 66] 4; *see id.* at 5-6. Plaintiffs then argue that, unlike the statute found sufficient in *Galloway*, the plain text of the second sentence in subsection 804(d) unequivocally expresses their right to a trial by jury. *See id.*

The court already described *Lehman* at length. The court recognizes the difference between the text of section 15(c) of the ADEA found insufficient to unequivocally, affirmatively, and unambiguously provide plaintiffs the right to a trial by jury against the United States and the text of the CLJA. Nonetheless, as discussed, the Supreme Court's analysis in *Lehman* provides a

large part of the analytic framework that helps to resolve the parties' dispute.

As for *Galloway*, *Galloway* cannot bear the weight that plaintiffs place on it. In *Galloway*, the Supreme Court affirmed the Ninth Circuit's judgment affirming the district court's decision to grant a directed verdict to the United States pursuant to Federal Rule of Civil Procedure 50. *See Galloway*, 319 U.S. at 373-74. The dispute arose under an insurance policy issued pursuant to the War Risk Insurance Act, as amended. *See id.* at 372 n. 1. Galloway filed an action in district court seeking benefits "for total and permanent disability by reason of insanity he claims existed [since] May 31, 1919." *Id.* at 372. The disability allegedly arose due to Galloway's military service during World War I. *See id.* at 373-82. At the close of all the evidence, the district court granted the government's motion for a directed verdict. *See id.* at 373. The Ninth Circuit affirmed. *See id.*

The Supreme Court in *Galloway* began by exhaustively discussing the evidence. *See id.* at 373-82. It then held that the district court properly directed a verdict under Rule 50 in favor of the government because, even viewing the evidence in the light most favorable to Galloway, no reasonable jury could find that he was totally and permanently disabled as of May 31, 1919. *See id*. at 382-88. Thus, he was not entitled to insurance benefits under the policy. *See id.*

The Supreme Court in *Galloway* could have ended its analysis at that point. It did not. Instead, it stated, "[w]hat has been said disposes of the case as the parties have made it." *Id.* at 388. "For that reason perhaps nothing more need be said." *Id.* Failing to heed its own observation, the Supreme Court then said, "[b]ut objection has been advanced that, in some

manner not wholly clear, the directed verdict practice offends the Seventh Amendment." *Id.* The Supreme Court then explored whether the directed verdict practice in federal court under Rule 50 offended the Seventh Amendment and held that it did not. *See id*. at 388-96.

As part of its ensuing discussion, the Supreme Court in *Galloway* stated that the Seventh Amendment did not provide a right to a jury trial to "enforce a monetary claim against the United States" and "persons asserting claims against the sovereign" lacked the right to a jury trial at common law in 1791. *Id.* at 388. The Supreme Court then stated, "[w]hatever force the [Seventh] Amendment has therefore is derived because Congress in the legislation cited has made it applicable." *Id.* at 388-89 (footnote omitted). The Supreme Court then added footnote 18 to explain "the legislation cited" as the statutory source of Galloway's right to a jury trial. *See id.* at 389 n.18. In footnote 18, the Supreme Court observed that when Congress first enacted legislation to permit "suits on War Risk Insurance policies," Congress "did not explicitly make them triable by jury." *Id.* The Supreme Court then stated that Congress amended the act in 1925 to permit such suits "with the intention to 'give the claimant the right to a jury trial.'" *Id*. (quoting H.R. Rep. No. 1518, 68th Cong., 2d Sess., 2). In support of this conclusion, the Supreme Court cited *Pence v. United States*, 316 U.S. 332, 334 (1942), for the proposition that Congress amended the War Risk Insurance Act in 1925 to permit claimants seeking relief as policy beneficiaries to have the right to a jury trial. *See Galloway*, 319 U.S. at 389 n.18.

In *Pence*, the Supreme Court relied on four federal circuit court decisions[6] and a House Report[7] to conclude that Congress granted the right to a jury trial in 1925 in actions against the United States to recover insurance benefits under War Risk Insurance policies when it amended the World War Veterans' Act to remove a statutory provision expressly incorporating Section 2 of the Tucker Act, which provided for trials in United States District Courts without a jury. *See Pence*, 316 U.S. at 334 n.1; *see also Hacker*, 16 F.2d at 703-04 (tracing the Act's statutory evolution, including Congress's initial silence on the right to a jury trial in the Act in 1914, Congress's continued silence on the right to a jury trial in the Act in a 1917 amendment, Congress's express incorporation in the Act of a trial without a jury requirement in a 1924 amendment, and Congress's 1925 removal from the Act of Congress's express 1924 incorporation of a trial without a jury requirement). After the 1925 amendment, the War Risk Insurance Act, as amended, was silent on whether claimants had the right to a jury trial against the United States, but the Pence Court relied on the statutory evolution and the 1925 House Report to conclude that claimants had the right to a trial by jury against the United States in actions to recover

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[6] *United States v. Green*, 107 F.2d 19, 21 (9th Cir. 1939); *United States v. Salmon*, 42 F.2d 353, 354 (5th Cir. 1930); *Hacker v. United States*, 16 F.2d 702, 703-04 (5th Cir. 1927); *Whitney v. United States*, 8 F.2d 476, 476-78 (9th Cir. 1925).

[7] H.R. Rep. No. 1518, 68th Cong., 2d Sess., p.2 ("Section 4 of the bill amends section 19 of the World War veterans' act relating to suits on contracts of insurance. In effect[,] the amendment will give the claimant the right to a jury trial, thus differing from the ordinary judicial procedure in suits on claims against the United States where the United States district courts have concurrent jurisdiction with the Court of Claims.").

insurance benefits under War Risk Insurance policies. *Pence*, 316 U.S. at 334 n.1; *see Galloway*, 319 U.S. at 389 n.18. The *Galloway* Court relied on *Pence* as binding precedent to conclude that "the legislation cited" included the right to a jury trial. *Galloway*, 319 U.S. at 389 & n.18.

Plaintiffs cite *Galloway* and argue that if the statute at issue in *Pence* and *Galloway* suffices to create the right to a jury trial, then subsection 804(d) suffices to create the right to a jury trial in the CLJA. *See* [D.E. 66] 5-6. The court disagrees. First, the *Galloway* Court provided no statutory interpretation itself concerning the War Risk Insurance Act, as amended. *See Galloway*, 319 U.S. at 389 & n.18. Rather, the *Galloway* Court relied on Pence as binding precedent to conclude that the War Risk Insurance Act, as amended, included the right to a jury trial against the United States. *See id.*

Second, to the extent plaintiffs rely on the statutory interpretation in *Pence*, the statutory evolution of the War Risk Insurance Act, as amended, distinguishes that statute from the CLJA. Unlike the War Risk Insurance Act, as amended, Congress never enacted the CLJA without any right to a jury trial, then amended the CLJA and remained silent on the topic, then amended the CLJA to add an express statutory provision providing for trials in the district courts *without* a *jury*, and then amended the CLJA for a third time to remove the express statutory provision providing for trials without a jury and left the CLJA silent on whether claimants had the right to a trial by jury on claims under subsection 804(b) of the CLJA. Instead, Congress simply enacted the CLJA, including subsection 804(d), with the knowledge that courts presume Congress legislates in light of the Supreme Court's canons of construction. *See*, *e.g.*, *U.S. Dep't of*

Energy, 503 U.S. at 615; *McNary*, 498 U.S. at 496. Thus, *Galloway* is distinguishable.

As explained, under *Lehman*, *Cooper Industries*, and the governing canons of construction, the CLJA (including subsection 804(d)) does not unequivocally, affirmatively, and unambiguously provide plaintiffs the right to a jury trial in actions under subsection 804(b) of the CLJA. Accordingly, the court declines plaintiffs' invitation to use the result in *Galloway* to supplant the CLJA's text and applicable canons of construction.[8]

To the extent that plaintiffs argue that the *Lehman* Court's quotation of *Galloway* about actions to recover benefits under insurance policies issued pursuant to the War Risk Insurance Act, as amended, means that a court can infer the right to a jury trial against the United States without unequivocal, affirmative, and unambiguous statutory text, *Lehman* defeats the argument. *See Lehman*, 453 U.S. at 160-69. Notably, courts have applied *Lehman* (and not *Galloway*) to numerous federal statutes and held that the statutes did not grant plaintiffs the right to a jury trial against the United States. *See*, *e.g.*, *In re Dombrowski*, No. 21-1292, 2021 WL 5562286, at *1 (6th Cir. Sept. 24, 2021) (unpublished) (claim under 28 U.S.C. § 2410(a)(1)); *Greene v. Sec. of HHS*, 841 Fed. App'x 195, 204 (Fed. Cir. 2020) (per curiam) (unpublished) (claim under 42 U.S.C. § 30aa-12); *Brott v. United States*, 858 F.3d 425, 436-37 (6th Cir. 2017) (claim under 28 U.S.C. §§ 174,

[8] Although *Galloway* and Pence remain binding precedent in construing the War Risk Insurance Act, as amended, the *Galloway* Court's and Pence Court's statutory interpretation harkens back to an "ancien *regime*" of statutory interpretation that the Supreme Court no longer uses. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

2402); *Gunter v. Farmers Ins. Co.*, 736 F.3d 768, 773 (8th Cir. 2013) (breach of contract claim under insurance policy issued under the National Flood Insurance Program); *Grissom v. Liberty Mut. Fire Ins. Co.*, 678 F.3d 397, 401-02 (5th Cir. 2012) (same); *Thomas Inv. Partners, Ltd. v. United States*, 444 F. App'x 190, 193 (9th Cir. 2011) (unpublished) (claim under 26 U.S.C. § 6226); *Wilson v. Big Sandy Health Care, Inc.*, 576 F.3d 329, 333 (6th Cir. 2009) (claim under 42 U.S.C. § 233); *Parker v. Astrue*, 298 F. App'x 701, 702-03 (10th Cir. 2008) (unpublished) (claim under 42 U.S.C. § 405(g)); *Wesleyan Corp. v. U.S. Postal Serv.*, 178 F. App'x 342, 343 n.3 (5th Cir. 2006) (per curiam) (unpublished) (breach of contract claim against U.S. Postal Service); *Holmes v. Potter*, 384 F.3d 356, 362 (7th Cir. 2004) (same); *Davis v. Henderson*, 238 F.3d 420, 2000 WL 1828476, at *2 (6th Cir. 2000) (unpublished table decision) (FMLA claim against Postmaster General); *Bowden v. United States*, 176 F.3d 552, 555-56 (D.C. Cir. 1999) (breach of contract claim against United States); *Crawford v. Runyon*, 79 F.3d 743, 744 (8th Cir. 1996) (claim under 29 U.S.C. § 794 against Postmaster General); *KLK. Inc. v. U.S. Dep't of the Interior*, 35 F.3d 454, 456-57 (9th Cir. 1994) (claim under 16 U.S.C. §1910); *Info. Res.. Inc. v. United States*, 996 F.2d 780, 783 (5th Cir. 1993) (claim under 26 U.S.C. §§ 7432-33); *In re Young*, 869 F.3d 158, 159 (2d. Cir. 1989) (per curiam) (claim under 39 U.S.C. § 401(1)); *Washington Intl Ins. Co. v. United States*, 863 F.2d 877, 878-79 (Fed. Cir. 1988) (claim under 28 U.S.C. § 1876); *York v. Russo*, 835 F.2d 876, 1987 WL 24475, at *1 (4th Cir. 1987) (unpublished table decision) (ADEA claim against Defense Logistics Agency).

Plaintiffs concede that the second sentence of subsection 804(d) is phrased in the negative. Plaintiffs argue, however, that the negative structure parallels

certain provisions of the Bill of Rights including the Second Amendment,[9] the Fourth Amendment[10] and the Seventh Amendment[11] and argue that the court should construe subsection 804(d) to affirmatively grant them the right to a jury trial. *See* [D.E. 66] 10.

The text of the Second, Fourth, and Seventh Amendments is materially different than the text of subsection 804(d). Moreover, the Second, Fourth, and Seventh Amendments are not subject to the corollary of the sovereign immunity clear statement canon and the other canons that apply in this case. As *Lehman*, *Cooper Industries*, and this court's textual analysis demonstrate, subsection 804(d) does not unequivocally,

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[9] The Second Amendment states:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const., amend. II.

[10] The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. IV.

[11] The Seventh Amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend. VII.

affirmatively, and unambiguously provide plaintiffs the right to a trial by jury in actions under subsection 804(b).[12]

C.

The parties dispute how the history of tort litigation against the United States since the 1946 enactment of the FTCA should inform this court's analysis. The United States argues that the history of such tort litigation against the United States conflicts with reading the second sentence in subsection 804(d) of the CLJA to create the right to a jury trial for potentially hundreds of thousands of actions under subsection 804(b) of the CLJA in the Eastern District of North Carolina. *See* [D.E. 51-1] 5-6. According to the United States, Congress largely relied on the framework in 28 U.S.C. § 1346(b) in drafting the CLJA. *See id.* Part of that framework recognized that when Congress created "a narrow exception to permit jury trials in tax refund cases . . . under 28 U.S.C. § 1346(a)(1)," Congress did so "[o]nly after much debate, and after the conferees became convinced that there would be no danger of excessive verdicts as a result of jury trials in that unique context—because recoveries would be limited to the amount of taxes illegally or erroneously collected—was the bill passed." *Lehman*, 453 U.S. at 161 n.8 (citation omitted).

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[12] Plaintiffs also cite dicta in Judge Dever's opinion in *Cline v. United States*, No. 7:22-CV-141, 2022 WL 17823926, at *2 (E.D.N.C. Dec. 20, 2022) (unpublished), in support of their argument. *See* [D.E. 66] 19. Judge Dever disclaims that dicta. *Cf. Henslee v. Union Planters Nat'l Bank & Tr. Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.").

Plaintiffs respond that Congress enacted the CLJA aware that the general presumption was that a plaintiff would not get a jury trial against the United States in an action under the FTCA and expressly acted to reverse that presumption by adding the second sentence of subsection 804(d) of the CLJA. *See* [D.E. 66] 13-16; *cf.* 28 U.S.C. § 2402 ("Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury."). Plaintiffs also argue that the United States improperly asks the court to apply a "magic words" test to the CLJA and that the United States' argument ignores that Congress adopted some FTCA provisions in the CLJA but expressly failed to incorporate the express bar on jury trials in 28 U.S.C. § 2402. *See* [D.E. 66] 14-16 (discussing Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 166-67 (2010)).

The parties' arguments about the history of tort litigation against the United States since the 1946 enactment of the FTCA miss the larger point. Congress could have made this dispute easy to resolve. Congress could have added a variant of the first sentence of 28 U.S.C. § 2402 and unequivocally, affirmatively, and unambiguously stated in a subsection of the CLJA entitled "Bench Trials In Actions Against The United States" a sentence: "Any action against the United State under subsection 804(b) shall be tried by the court without a jury." Likewise, Congress could have added a variant of the last clause of 28 U.S.C. § 2402 and unequivocally, affirmatively, and unambiguously stated in a subsection of the CLJA entitled "Jury Trials In Actions Against The United States" a sentence: "Any

action against the United States under subsection 804(b) shall, at the request of either party to such action, be tried by the court with a jury."

Congress did not provide this court with such clarity in the CLJA. As discussed, however, Congress enacted the CLJA with the understanding that courts presume that Congress legislates in light of the Supreme Court's canons of construction. *See*, *e.g.*, *U.S. Dep't of Energy*, 503 U.S. at 615; *McNary*, 498 U.S. at 496. Those canons of construction include the sovereign immunity clear statement canon and its corollary that "the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." *Lehman*, 453 U.S. at 160 (quotation omitted). And the text of the CLJA and those canons of construction provide the answer to the question of whether the CLJA unequivocally, affirmatively, and unambiguously provides plaintiffs the right to a trial by jury in actions under subsection 804(b) of the CLJA. The answer to that question is that the CLJA does not.

As for plaintiffs' argument that the United States improperly seeks to impose a "magic words" test, the court rejects the argument. In the article by then-Professor Barrett that plaintiffs cite, Professor Barrett extensively discussed "The Sovereign Immunity Clear Statement Rules" and observed that Justice Story, federal courts, and American treatise writers identified this "principle of statutory interpretation" from the founding. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. at 145, 148. Professor Barrett also discussed the unbroken Supreme Court precedent holding that it "would only interpret a statute to waive federal sovereign immunity where the express language or necessary implication of the statute evidenced Congress's intent to accomplish

that result." *Id.* at 149-50. Professor Barrett closed by observing that given the age of the rule, "it would be inaccurate to characterize the sovereign immunity clear statement rule as having been fashioned from whole cloth in the twentieth century." *Id.* at 150. It is "better understood as a conscious application of a time-honored rule of sovereign exemption to a new kind of incursion on sovereignty." *Id.* Thus, far from applying a "magic words" test in this case, the United States and this court properly rely on an unbroken sovereign immunity clear statement canon and its corollary that have applied since the founding.

D.

The parties dispute how legislative history should inform the court's analysis. The United States argues that "[g]iven the plain language of [subsection] 804(d) and the applicable legal principles, there is no need to resort to legislative history." [D.E. 51-1] 6. The United States also observes that "'legislative history generally will be irrelevant' in determining whether sovereign immunity has been waived because such a waiver must be 'unmistakably clear in the language of the statute.'" *Id.* (quoting *Dellmuth*, 491 U.S. at 230 (citation omitted)); *see Lehman*, 453 U.S. at 165. Thus, the United States argues that plaintiffs cannot use legislative history to help show whether the CLJA's text unequivocally, affirmatively, and unambiguously grants plaintiffs the right to a jury trial. *See* [D.E. 51-1] 6.

Alternatively, the United States argues that the CLJA's legislative history does not reflect an unequivocal, affirmative, and unambiguous right to a jury trial. *See id.* In support, the United States notes that one of the members of the House of Representatives who wrote and introduced the CLJA stated that the CLJA permits claims against the United States "under the Federal

Tort Claims Act," which does not permit a jury trial. a; *see* [D.E. 34] 10; 28 U.S.C. § 2402. The United States also notes that Representative Cartwright (a co-sponsor of the CLJA in the House) co-sponsored a separate piece of legislation on July 31, 2014, entitled the "Service Members Access to Justice Act of 2014." *See* [D.E. 84] 5; [D.E. 84-1]. In that proposed legislation (unlike in the CLJA), Representative Cartwright unequivocally, affirmatively, and unambiguously provided the right to a trial by jury against sovereign States. *See* [D.E. 84-1] 9 ("A person who commences an action under this section shall be entitled to a trial by jury."); *id.* at 3-4 (creating cause of action against a State and waiving a State's sovereign immunity).

In discussing the CLJA's legislative history, the United States acknowledges that the United States Department of Justice submitted "Technical Assistance" to the Senate Committee on Veterans Affairs before Congress enacted the CLJA. *See* [D.E. 51-1] 6 n.2. In that Technical Assistance, the Department of Justice advocated for an alternative "no-fault compensation scheme" instead of the CLJA and identified several concerns about litigating CLJA action in federal court. [D.E. 51-2] 2-5; *see* [D.E. 84] 10. Those concerns included a statement in one section of the Technical Assistance commenting on the CLJA and initially stating:

> While the bill aims to make recovery more likely by removing certain federal defenses and lowering relevant burdens, the bill still requires those injured . . . to first file administrative claims with the Department of Defense, then file a lawsuit in district court, then prove causation and damages (*potentially*

> *before a jury*), and then withstand a potential appeal.

[D.E. 51-2] 3 (emphasis added). Later, the Technical Assistance stated:

> [W]e worry that Section 706, as currently drafted, would result in differing recoveries to similarly situated plaintiffs. Especially *if damages awards are to be decided by a jury, as the statute contemplates*, it is likely that litigation will produce a broad range of remedial outcomes even among plaintiffs who have suffered similar harms.

Id. (emphasis added). The Technical Assistance then discussed the resource drain that the CLJA would have on plaintiffs, the Department of Justice, and the Eastern District of North Carolina. *See id.* at 4. The Technical Assistance then advocated for a non-adversarial compensation program for those injured at Camp Lejeune. *See id.* at 4-5.

Plaintiffs cite the Technical Assistance and argue that the legislative history "confirm[s]" that Congress intended the second sentence of subsection 804(d) to create the right to a jury trial for actions filed under subsection 804(b) of the CLJA. [D.E. 66] 17-18. Plaintiffs also note that on November 1, 2023, which is over one year after the CLJA became effective, Congressman Cartwright and Congressman Murphy (both House co-sponsors of the CLJA) entered a statement in the Congressional Record that "'it has always been our intent for the [CLJA] to stand separate and apart from the [FTCA] in all respects,' including by providing a right to a jury trial against the United States." [D.E. 51-1] 7 (quoting 169 Cong. Rec. E1036 (daily ed. Nov. 1, 2023)); *see* [D.E. 66] 16, 19-20.

The United States responds that its "preliminary" and "imprecise[]" assumptions in the Technical Assistance conflicted with "pre-enactment statements from [House] Members that the CLJA permits claims against the United States" under the FTCA. [D.E. 51-1] 6 n.2 (citing [D.E. 34] 10); *cf.* 28 U.S.C. § 2402. The United States also argues that "absent unambiguous text, 'recourse to legislative history is futile.'" *Id.* (quoting *Dellmuth*, 491 U.S. at 240). Finally, the United States argues that the court should not consider Congressman Cartwright and Congressman Murphy's "post-enactment legislative history," because "by definition, [it] 'could have had no effect on the congressional vote.'" [D.E. 51-1] 7 (emphasis omitted) (quoting *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011)).

The court has considered the parties' arguments about legislative history. As in *Lehman*, the court need not "go beyond the language of the statute itself to conclude that Congress did not intend to confer a right to trial by jury on [CLJA] plaintiffs proceeding against the Federal Government." *Lehman*, 453 U.S. at 165. Alternatively, even if the court considers the legislative history, the court finds it ambiguous. Moreover, the court declines to rely on the CLJA's ambiguous legislative history to determine whether the CLJA's text unequivocally, affirmatively, and unambiguously provides plaintiffs the right to a jury trial in actions seeking relief under subsection 804(b). *Cf. Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (observing that the reliance on legislative history resembles a person who enters "a crowded cocktail party" and looks for friends). Likewise, the post-enactment legislative statements of Congressman Cartwright and Congressman Murphy are "not a legitimate tool of statutory interpretation," and the court declines to rely on them. *United States v. Woods*,

571 U.S. 31, 48 (2013) (quotation omitted); *see Bruesewitz*, 562 U.S. at 242.

IV.

In sum, the court GRANTS defendant's motion to strike the jury trial demand in plaintiffs' master complaint [D.E. 51].

SO ORDERED. This 6 day of February 2024.

/s/ Richard E. Myers II
RICHARD E. MYERS II
Chief United States District Judge

/s/ Louise W. Flanagan
LOUISE W. FLANAGAN
United States District Judge

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

/s/ James C. Dever III
JAMES C. DEVER III
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: October 4, 2024]

No. 24-1542
(7:23-cv-00897-RJ)
(7:23-cv-00532-M-RJ)
(7:23-cv-00202-D-BM)

In re: SUSAN MCBRINE; DAVID L. PETRIE

Petitioners

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn and Judge Benjamin acting as a quorum pursuant to 28 U.S.C. § 46(d).

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX E

SEC. 804. FEDERAL CAUSE OF ACTION RELATING TO WATER AT CAMP LEJEUNE, NORTH CAROLINA.

(a) SHORT TITLE.—This section may be cited as the "Camp Lejeune Justice Act of 2022".

(b) IN GENERAL.—An individual, including a veteran (as defined in section 101 of title 38, United States Code), or the legal representative of such an individual, who resided, worked, or was otherwise exposed (including in utero exposure) for not less than 30 days during the period beginning on August 1, 1953, and ending on December 31, 1987, to water at Camp Lejeune, North Carolina, that was supplied by, or on behalf of, the United States may bring an action in the United States District Court for the Eastern District of North Carolina to obtain appropriate relief for harm that was caused by exposure to the water at Camp Lejeune.

(c) BURDENS AND STANDARD OF PROOF.—

(1) IN GENERAL.—The burden of proof shall be on the party filing the action to show one or more relationships between the water at Camp Lejeune and the harm.

(2) STANDARDS.—To meet the burden of proof described in paragraph (1), a party shall produce evidence showing that the relationship between exposure to the water at Camp Lejeune and the harm is—

(A) sufficient to conclude that a causal relationship exists; or

(B) sufficient to conclude that a causal relationship is at least as likely as not.

(d) EXCLUSIVE JURISDICTION AND VENUE.—The United States District Court for the Eastern District of North Carolina shall have exclusive jurisdiction over any action filed under subsection (b), and shall be the exclusive venue for such an action. Nothing in this subsection shall impair the right of any party to a trial by jury.

(e) EXCLUSIVE REMEDY.—

(1) IN GENERAL.—An individual, or legal representative of an individual, who brings an action under this section for a harm described in subsection (b), including a latent disease, may not thereafter bring a tort action against the United States for such harm pursuant to any other law.

(2) HEALTH AND DISABILITY BENEFITS RELATING TO WATER EXPOSURE.—Any award made to an individual, or legal representative of an individual, under this section shall be offset by the amount of any disability award, payment, or benefit provided to the individual, or legal representative—

(A) under—

(i) any program under the laws administered by the Secretary of Veterans Affairs;

(ii) the Medicare program under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.); or

(iii) the Medicaid program under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.); and

(B) in connection with health care or a disability relating to exposure to the water at Camp Lejeune.

(f) IMMUNITY LIMITATION.—The United States may not assert any claim to immunity in an action under

this section that would otherwise be available under section 2680(a) of title 28, United States Code.

(g) NO PUNITIVE DAMAGES.—Punitive damages may not be awarded in any action under this section.

(h) DISPOSITION BY FEDERAL AGENCY REQUIRED.—An individual may not bring an action under this section before complying with section 2675 of title 28, United States Code.

(i) EXCEPTION FOR COMBATANT ACTIVITIES.—This section does not apply to any claim or action arising out of the combatant activities of the Armed Forces.

(j) APPLICABILITY; PERIOD FOR FILING.—

(1) APPLICABILITY.—This section shall apply only to a claim accruing before the date of enactment of this Act.

(2) STATUTE OF LIMITATIONS.—A claim in an action under this section may not be commenced after the later of—

(A) the date that is two years after the date of enactment of this Act; or

(B) the date that is 180 days after the date on which the claim is denied under section 2675 of title 28, United States Code.

(3) INAPPLICABILITY OF OTHER LIMITATIONS.—Any applicable statute of repose or statute of limitations, other than under paragraph (2), shall not apply to a claim under this section.

APPENDIX F

1. 28 U.S.C. § 1346(b) provides in pertinent part:

(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death 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.

2. 28 U.S.C. § 2402 provides:

Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

APPENDIX G

RECOGNIZING THE RIGHTS OF AMERICANS EXPOSED TO TOXIC WATER AT CAMP LEJEUNE

CONGRESSIONAL RECORD —
EXTENSION OF REMARKS [E1036]

HON. MATT CARTWRIGHT
OF PENNSYLVANIA
IN THE HOUSE OF REPRESENTATIVES

Wednesday, November 1, 2023

Mr. CARTWRIGHT. Mr. Speaker, I rise today, along with my colleague, Rep. GREGORY MURPHY, to speak on behalf of all those Americans who were exposed to the toxic water at Camp Lejeune, North Carolina. When writing the Camp Lejeune Justice Act, we understood that the only way the veterans, their families and others could get fair and just compensation was through a jury trial. Let there be no ambiguity. Let this be understood to be our unequivocal expression our intent, from the inception of the bill through final passage and into enactment: the claimants who have suffered so intensely as a result of the toxic water at Camp Lejeune have the right to a trial by jury.

We were aware of how the Federal Tort Claims Act worked, through a bench trial, and we specifically rejected that model when we wrote the Act. Indeed, it has always been our intent for the Act to stand separate and apart from the Federal Tort Claims Act in all respects. For these reasons, we expressly included a provision in subsection (d) of the Act confirming every plaintiffs right to a jury trial. The Department of Justice is inexplicably reading this provision out of the statute.

Specifically, the United States Department of Justice has recently filed a Motion in the Camp Lejeune Water

Litigation proceeding pending before the United States District Court for the Eastern District of North Carolina in which the Department asserts that those harmed by the toxic water at Camp Lejeune between 1953 and 1987 are not entitled to a jury trial. This argument is inexplicable.

We fundamentally disagree with the Department's position. When we drafted the Act, it was our clear, unambiguous, and unequivocal express intent to provide all those covered by the Act with the right to a trial by jury against the United States of America for the harm they suffered at Camp Lejeune. We thought it was critically important that people who had been betrayed and misled by the government for decades would have a right to have their claims decided by a jury of their peers.

We want to cite the law as written in "Public Law 177–168 Section 804. Federal Cause of Action Relating to Water at Camp Lejeune, North Carolina subsection (d) Exclusive Jurisdiction and Venue—The United States District Court for the Eastern District of North Carolina shall have exclusive jurisdiction over any action filed under subsection (b), and shall be the exclusive venue for such action. Nothing in this subsection shall impair the right of any party to a trial by jury."

We want to take this opportunity to again restate what we have always intended and what is clearly written in Public Law 177–168. We are dismayed that the Department of Justice has taken this wrongheaded position, which flies in the face of everything Congress intended for those harmed by the toxic water at Camp Lejeune. Those who have steadfastly defended our country rate no less than the rights they deserve as American citizens.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA SOUTHERN DIVISION

No. 7:23-CV-897

IN RE: CAMP LEJEUNE WATER LITIGATION

This Document Relates to: ALL CASES

PLAINTIFFS' MASTER COMPLAINT

Jury Trial Demanded

I. INTRODUCTION

1. This Complaint arises under the Camp Lejeune Justice Act of 2022 ("CLJA")[1] and is filed pursuant to the provisions of Section VI of the September 26, 2023, Case Management Order No. 2 (ECF No. 23), for adoption by reference to individual CLJA actions and in conjunction with the Court-approved Short Form Complaint.

2. Marine Corps Base Camp Lejeune ("Camp Lejeune") is a military base operated by the United States, located outside of Jacksonville, in Onslow County, North Carolina. The base is located on the coast of the Atlantic Ocean, with approximately 11 miles of usable shoreline, and occupying approximately 156,000 acres

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[1] Pub. L. No. 117–168, title VIII, § 804 (2022) (one section under the broader "Honoring our PACT Act of 2022").

(244 square miles) in total. Camp Lejeune supports a current population of approximately 170,000 people.

3. The story of Camp Lejeune has been described by scientists as the worst public drinking water contamination crisis in our nation's history.

4. At this point in time, it is undisputed and well-documented that, between at least 1953 and 1987, Camp Lejeune provided contaminated water to those on base. It is estimated that as many as one million people may have been exposed to this water, including service members, civilian staff, and their respective families and dependents.

5. During this timeframe, contaminant levels in finished water—such as the water coming out of taps in housing, buildings, elementary schools, and hospital wards—reached at least 280 times higher than what the Environmental Protection Agency ("EPA") today considers safe.[2]

6. The list of diseases, illnesses, injuries, and conditions connected to the contaminants in Camp Lejeune's water supply is long and grave, including but not limited to: leukemia, non-Hodgkin's lymphoma, bladder cancer, kidney cancer, lung cancer, esophageal cancer, breast cancer, Parkinson's Disease, female infertility, miscarriages, and more. Many of these diseases, illnesses, injuries, and conditions have been acknowledged by the United States as causally connected to the contaminants at Camp Lejeune.[3]

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[2] *See* William R. Levesque, Veterans Dep't, St. Lawrence Cnty., *Camp Lejeune Water Contamination History* (Oct. 18, 2009), https://stlawco.org/Departments/Veterans/CampLejeuneWaterContaminationHistory (last visited Jun. 27, 2023).

[3] *See, e.g.*, Agency for Toxic Substances and Disease Registry (ATSDR), Ctrs. for Disease Control and Prevention, Dep't of

7. The handling of this issue by the United States reveals a disregard for internal military water quality standards, a failure to respond to the contamination, the ignoring of warnings of the risk of contamination coupled with repeated test results showing that contamination was present, and the withholding of information from even Defendant's own scientists initially investigating the crisis.

8. As a result, scientists attempting to identify the true scale of contamination were misled for decades, resulting in a loss of contemporaneous investigatory ability, and requiring water modeling to retroactively calculate contamination levels.

9. On August 10, 2022, the CLJA was signed into law. After many years of having no legal recourse, the thousands of people seeking justice for their injuries and for deaths caused by the contaminated water at or from Camp Lejeune were now able to file administrative claims seeking compensation.

10. Importantly, the requirements to prevail on an action under the CLJA exclude any obligation that the claimants prove negligence or fault. The CLJA specifies the requirements claimants must satisfy as showing harm and a sufficient causal connection between that harm and the contaminants at Camp Lejeune, waiving any obligation to prove that the United States owed or breached a duty to those affected.

Health and Hum. Servs., *ATSDR Assessment of the Evidence for the Drinking Water Contaminants at Camp Lejeune and Specific Cancers and Other Diseases* 13 (Jan. 13, 2017) ("ATSDR Evidence Assessment"), available at https://www.atsdr.cdc.gov/sites/lejeune/docs/ATSDR_summary_of_the_evidence_for_causality_TCE_PCE_508.pdf (last visited Jun. 27, 2023).

11. Moreover, as to causation, claimants need only satisfy an equipoise standard, showing that such a causal relationship is at least as likely as not.

12. Upon information and belief, as of the date of filing, the vast majority of the administrative claims submitted under the CLJA have not received a response.

13. This is the position from which Plaintiffs bring their actions. After being exposed to contaminated water at or from Camp Lejeune, Plaintiffs suffered severe diseases, illnesses, injuries, and conditions, leading to death in many cases. Those who had been injured or died were misled for decades to believe that these injuries were not connected to the contaminated water at or from Camp Lejeune. Then, after this connection was later admitted, Plaintiffs were told that they were barred from any legal recourse, even as more and more details came to light about the ongoing disregard for water safety that led to the problem. Those who had been exposed were left abandoned until the CLJA was passed. Now, after seeking compensation through an administrative claim, Plaintiffs have not had their claims resolved through the administrative claims process and thus seek recourse through the instant lawsuits under the CLJA.

II. NATURE OF THIS MASTER COMPLAINT

14. Each individual Plaintiff brings or will bring their own individual action through an individual complaint, including Short Form Complaints. This Master Complaint sets forth common allegations of fact and law applicable to all Plaintiffs who adopt these allegations by filing individual Short Form Complaints by the relevant deadlines set by the CLJA and this Court. This Master Complaint is meant to be read in concert with the individual Short Form Complaints and does not include individualized

allegations about each Plaintiff's experiences. For any given Plaintiff who adopts the Master Complaint's allegations, the totality of that Plaintiff's allegations includes both the common allegations of the Master Complaint plus the individual allegations in that Plaintiff's Short Form Complaint.

15. This Master Complaint does not constitute a waiver or dismissal of any actions or claims asserted in any individual complaints, nor does it waive any Plaintiff's rights, including their right to amend their individual complaints.

III. JURISDICTION, VENUE, AND CONDITIONS PRECEDENT

16. The CLJA creates a "federal cause of action relating to water at Camp Lejeune, North Carolina." Thus, pursuant to the CLJA, the United States has waived its sovereign immunity and has authorized the instant lawsuit.

17. CLJA Section 804(d) provides that the "United States District Court for the Eastern District of North Carolina shall have exclusive jurisdiction over any [CLJA action] and shall be the exclusive venue for such an action." Thus, both jurisdiction and venue are proper before this Court.

18. Plaintiffs have each filed administrative claims with the Department of the Navy addressing the issues raised in this Master Complaint no less than six months prior to their filing of an individual complaint. Plaintiffs' claim numbers are unavailable because the Department of the Navy has not yet assigned claim numbers. Plaintiffs' administrative claims have either (a) received a final denial or (b) been deemed a final denial because six months have passed since the claims were filed with the Department of the Navy and

they remain without a final disposition. The conditions precedent required by 28 U.S.C. § 2675 and CLJA § 804(h) are satisfied.

IV. PARTIES

19. Plaintiffs are individuals—including present and former Marines and other military service members, civilian employees, and family members or guests of former service members or civilian employees—who resided, worked, or were otherwise exposed to water contamination at or from Camp Lejeune for not less than 30 days during the period between August 1, 1953, and December 31, 1987. At all times Plaintiffs resided, worked, or were otherwise exposed to water contamination at or from Camp Lejeune. Plaintiffs' claims may in certain instances be brought by authorized legal representatives on their behalf.

20. Defendant, United States of America ("United States"), owned, operated, and managed Camp Lejeune at all relevant times, by and through its Department of the Navy ("Navy") and the Navy's component, the United States Marine Corps ("Marine Corps"). Congress, through the CLJA, has recognized that Defendant United States should provide compensation for those who were harmed by exposure to the contaminated water at Camp Lejeune.

21. The Navy and the Marine Corps are branches of the United States military. The United States is responsible for both branches and all related facilities, including Camp Lejeune.

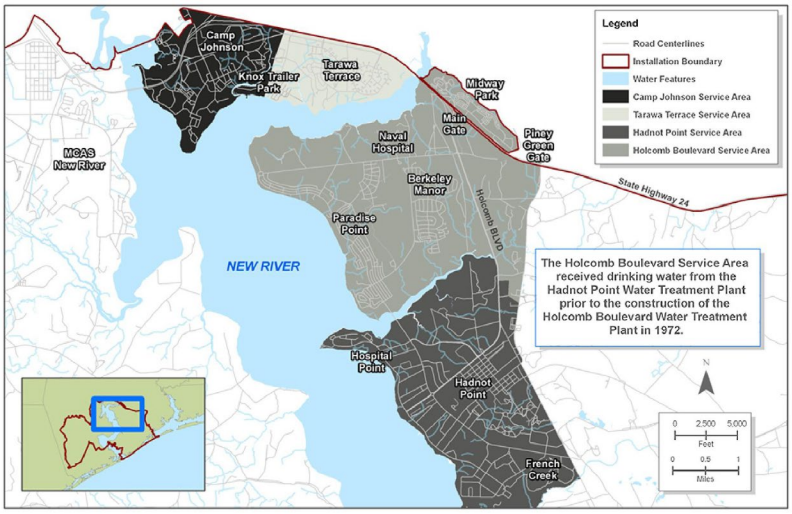
V. FACTUAL ALLEGATIONS

22. In 1941, Congress authorized funding for the project and construction of the base began. Between 1941 and 1943, Camp Lejeune underwent massive construction and expansion. In 1942, the base was

named Marine Barracks Camp Lejeune, and renamed Marine Corps Base Camp Lejeune in 1944. It has played a significant role in United States military operations ever since. Yet, despite its immeasurable contributions, the United States allowed these Marines and service members—along with their families and others who lived or worked at or near Camp Lejeune—to be poisoned for decades through the water provided on base.

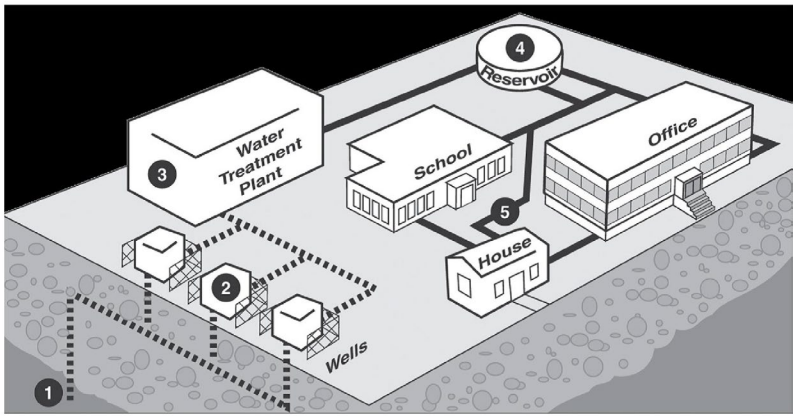
A. BACKGROUND INFORMATION

23. At all relevant times, Camp Lejeune was divided into various water distribution systems. It is important to distinguish these areas to understand where the contamination and exposure occurred. The relevant water distribution systems included Hadnot Point, Holcomb Boulevard, and Tarawa Terrace. These water distribution systems are identified on the map below ("Area Map").[4]



[4] U.S. Marine Corps, *Camp Lejeune Drinking Water System Service Areas*, https://clnr.hqi.usmc.mil/clwater/pages/map.aspx (last visited Jun. 26, 2023).

24. Each of these water distribution systems received water from its individual water treatment plant. A conceptual representation of the flow of water within each water distribution system is provided below.[5] Untreated water flows from a number of wells in each water distribution system to that area's water treatment plant, where the water is filtered and treated. Water that has undergone filtration and treatment at the treatment station ("finished water") then flows to a reservoir, where it waits until it is needed, at which point it flows to the base facility for delivery.



25. The water treatment plants employed "a lime softening process, using a catalytic precipitation lime contact tank and pressure filters."[6] This process is ineffective for removing volatile organic compounds ("VOCs")—a category which includes each of the primary contaminants detected in Camp Lejeune

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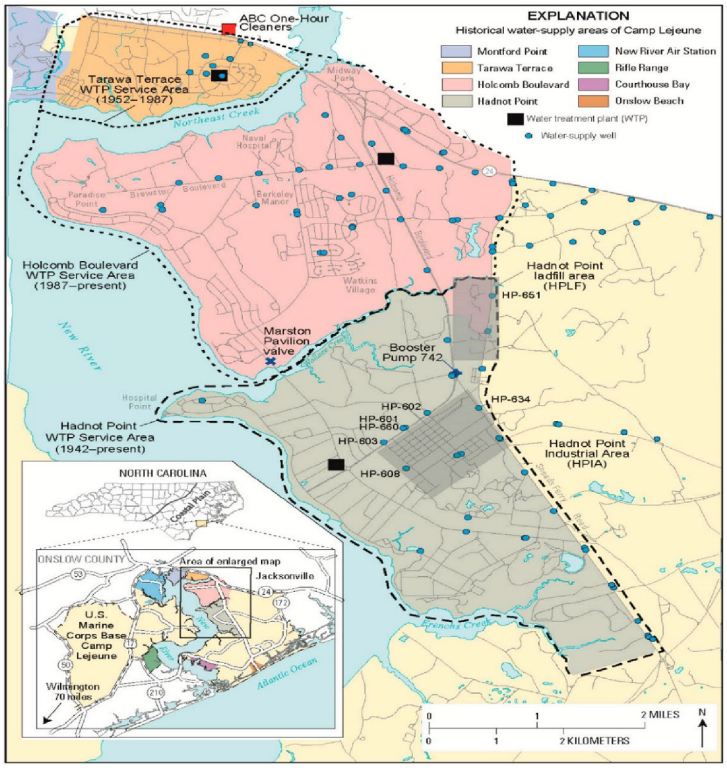
[5] U.S. Marine Corps, *Camp Lejeune Water System*, https://clnr.hqi.usmc.mil/clwater/pages/WaterSystem.aspx (last visited Jun. 27, 2023).

[6] *Study of Two Water Plants, Tarawa Terrace – Montford Point* (April 1979), at 1, available at https://tftptf.com/CLW_Docs/CLW0188.pdf (last visited Jun. 27, 2023).

water—allowing them to pass through the water treatment plant into the reservoir, and flow through the system to the point of delivery.

26. The following map ("Well Map") shows the locations of certain supply wells within the Hadnot Point, Holcomb Boulevard, and Tarawa Terrace water distribution systems.[7] It also highlights three of the primary contamination sources: the Hadnot Point Industrial Area, the Hadnot Point Landfill Area, and ABC One-Hour Cleaners.



[7] Morris L. Maslia et al., *Reconstructing Historical VOC Concentrations in Drinking Water for Epidemiological Studies at a U.S. Military Base: Summary of Results*, 8 Water 449 (2016), available at https://pubmed.ncbi.nlm.nih.gov/28868161/#&gid=article-figures&pid=figure-1-uid-0 (last visited Jun. 27, 2023).

27. There were times when the demand in one water distribution system exceeded the supply from its wells. During these times, water from one water distribution system's reservoir would be pumped to another water distribution system to fill the need.

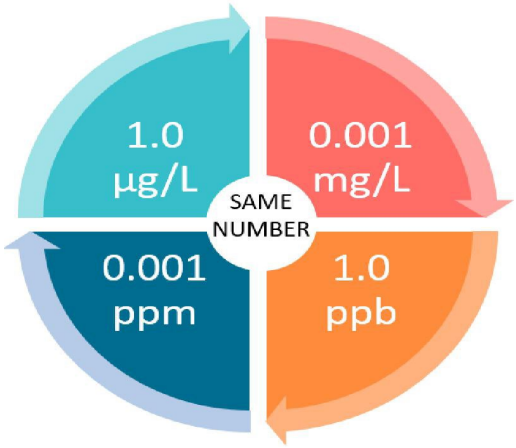
28. Base facilities could receive contaminated water in one of two ways. First, if a source well in its water distribution system was contaminated, that water would be mixed with the water from all other wells in its water distribution system whenever it was in use, leading to all finished water in the system's reservoir being contaminated. Second, even if no source wells within the immediate water distribution system were contaminated, if the water distribution system drew supplemental finished water from a water distribution system that did have contaminated wells, that contaminated finished water would also be delivered in the supplemented water distribution system.

29. A number of contaminants have been detected in the Camp Lejeune water supply. The five that have been identified to date as the most harmful and widespread are all classified as volatile organic compounds: tetrachloroethylene ("PCE"), trichloroethylene ("TCE"), dichloroethylene ("DCE"), vinyl chloride, and benzene.

30. Today, the EPA regulates the maximum contaminant levels ("MCL") for each of these five contaminants. The MCL indicates the level of exposure at which there are no known or anticipated adverse health effects. When individuals are exposed to these contaminants at levels that exceed these MCLs, it is understood that there is a risk of adverse health effects.

31. Units of parts-per-billion ("ppb") are used in measuring water contamination. A measurement of 1 ppb means that among a sample of 1 billion particles,

1 particle of the measured substance is present. 1 ppb is equal to 1 microgram-per-liter ("µg/L"). 1,000 ppb (or 1,000 µg/L) is equal to 1 part-per-million ("ppm") or 1 milligram-per-liter ("mg/L").[8]



32. The current EPA MCL for PCE is 5 ppb. Finished water at Camp Lejeune reached at least 215 ppb of PCE.

33. The current EPA MCL for TCE is 5 ppb. Finished water at Camp Lejeune reached at least 1,400 ppb of TCE.

34. The current EPA MCL for DCE is 7 ppb. Finished water at Camp Lejeune reached at least 406 ppb of DCE.

35. The current EPA MCL for vinyl chloride is 2 ppb. Finished water at Camp Lejeune reached at least 2.9 ppb of vinyl chloride.

36. The current EPA MCL for benzene is 5 ppb. Finished water at Camp Lejeune reached at least 2,500 ppb of benzene.

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[8] Okla. Dep't Env't Quality, *Test Result Interpretation*, https://www.deq.ok.gov/state-environmental-laboratory-services/technical-assistance/test-result-interpretation/ (last visited Jun. 27, 2023).

1. HADNOT POINT

37. Hadnot Point is the southernmost highlighted area on both the Area Map and the Well Map, located below Holcomb Boulevard, and Tarawa Terrace.

38. Much of the infrastructure of Hadnot Point was built during the early construction of Camp Lejeune in 1941. This included the Hadnot Point Water Treatment Plant, as well as many of the source wells.

39. The Hadnot Point Fuel Farm was also constructed in 1941, comprised of one 600,000-gallon aboveground tank, six 12,000-gallon underground tanks, and eight 15,000-gallon underground tanks. In total, these tanks held up to 792,000 gallons of fuel.

40. The Hadnot Point Fuel Farm was built in close proximity to important supply wells which provided water to the Hadnot Point Water Treatment Plant. In particular, the fuel farm was a mere 1,200 feet from supply well HP-602.

41. In 1972, supply well HP-651 was installed adjacent to the defense property disposal compound (labeled "Hadnot Point Landfill Area" in the Well Map above), which had been functioning as a junkyard and solvent disposal area for decades.

42. At all relevant times, Hadnot Point has been one of the primary housing areas on base, containing a majority of the barracks for unmarried military personnel. The Hadnot Point water distribution system includes Hospital Point housing, French Creek barracks, and Hadnot Point barracks.

43. In addition, Hadnot Point provided water to all of Holcomb Boulevard until the Holcomb Boulevard water distribution system was established in or about June of 1972. This included Midway Park housing,

Paradise Point general officer housing, Paradise Point two-story housing, Paradise Point cracker box housing, Paradise Point Cape Cod housing, Paradise Point Capehart housing, Watkins Village housing, and Berkeley Manor housing.

44. Hadnot Point also contained the Hadnot Point Industrial Area, which included the Hadnot Point Fuel Farm and major maintenance facilities. When Camp Lejeune first came under scrutiny, the United States disclosed a fuel leak here of 20,000 to 30,000 gallons in 1979. It was later revealed that upwards of approximately 1.1 million gallons of fuel were lost into the soil at Hadnot Point Fuel Farm, with an average of more than 20,000 gallons per year.

45. Hadnot Point also included a number of other areas believed to have contributed to groundwater contamination, such as the base dump, which included a dump for chemical drums, a liquid-disposal dumping area, a former burn dump, a fuel tank sludge dumping area, an industrial fly-ash dump, a transformer storage lot, an open storage pit, and a junkyard. Also, Hadnot Point had a former fire training area and a former on-base dry-cleaning service.

46. Hadnot Point was also one of many locations on the base where marines used TCE (at the instruction of the United States) as a degreaser to remove grease, oils, and waxes from all variety of metal equipment and vehicles.

47. In 1980, a U.S. Army Lab conducted testing on water samples from Hadnot Point. The Laboratory Services Chief included a handwritten note on the

report stating "[w]ater is highly contaminated with low molecular weight halogenated hydrocarbons."[9]

48. In 1981, the same U.S. Army Lab sent a subsequent communication, with the Laboratory Services Chief emphasizing in another handwritten note that "[w]ater is highly contaminated with other chlorinated hydrocarbons (solvents)!"[10]

49. In 1982, the United States retained Grainger Laboratories ("Grainger") as a consultant to study the water supply at Camp Lejeune. Grainger was not informed of the previous testing and the elevated levels that had been detected.

50. In May of 1982, Grainger detected elevated levels of PCE and TCE in the water supply at Hadnot Point.[11] In particular, a sample taken from the Naval Hospital was found to contain 1,400 ppb of TCE.

51. In at least July of 1982, December of 1982, and March of 1983, Grainger warned relevant personnel that these contaminants required attention.

52. In July 1984, supply well HP-602 was sampled and found to contain 380 ppb of benzene.

53. On November 30, 1984, supply well HP-602 was closed. A few days later, it was sampled again and found to contain 121 ppb of benzene, 24 ppb of PCE, and 1,600 ppb of TCE.

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[9] *TTHM Surveillance Report Form* (Collected Oct. 21, 1980), available at https://tftptf.com/CLW_Docs/CLW0436.pdf (last visited Jun. 27, 2023).

[10] *TTHM Surveillance Report Form* (Collected Feb. 26, 1981), available at https://tftptf.com/CLW_Docs/CLW0443.pdf (last visited Jun. 27, 2023).

[11] *See* May 6, 1982, Call Notes, available at https://tftptf.com/CLW_Docs/CLW0542.pdf (last visited Jun. 27, 2023).

54. In December of 1984, multiple wells in Hadnot Point were sampled again, and wells 601, 608, 634, and 637 were closed due to contamination.

55. On January 8, 1985, a communication noted that benzene is a highly volatile compound which may not be detected in tests if there is a delay in analysis.[12]

56. On January 16, 1985, additional samples were taken of Hadnot Point wells.

57. In late January of 1985, Hadnot Point supplied water to the Holcomb Boulevard water distribution system while the Holcomb Boulevard water treatment plant was offline.

58. On January 31, 1985, water samples were collected from locations throughout Holcomb Boulevard, which was receiving water from Hadnot Point at the time. These samples contained high levels of TCE, revealing that Hadnot Point water was still contaminated. The highest known reading, in a sample taken from an elementary school, was at 1,148.4 ppb.

59. On February 4, 1985, the Holcomb Boulevard water treatment plant was reactivated, both the Holcomb Boulevard and Hadnot Point systems were flushed, and the results of the January 16, 1985, samples were received. Hadnot Point supply well HP-651 was revealed to contain 3,200 ppb of TCE. HP-651 was closed at this time and resampled.[13]

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[12] *See Volatile Organic Chemical Analysis Reports*, at *2, available at https://tftptf.com/CLW_Docs/CLW5237.pdf (last visited Aug. 28, 2023).

[13] Feb. 26, 1985, Chronology prepared by Elizabeth Betz, available at https://tftptf.com/CLW_Docs/CLW4546.pdf (last visited Aug. 27, 2023).

60. The results of this resampling were even higher: 18,900 ppb of TCE, 8,070 ppb of DCE, 400 ppb of PCE, and 179 ppb of vinyl chloride.[14]

61. In the same series of samples, a February 5, 1985, sample from the Hadnot Point water treatment plant was found to still contain 429 ppb of TCE, even though wells HP-602 and HP-651 were both closed.[15]

62. On November 19, 1985, a water sample from the Hadnot Point water treatment plant tested at 2,500 ppb of benzene.

63. Another water sample, on December 10, 1985, tested at 38 ppb of benzene.

64. A January 24, 1986, memorandum analyzing these results stated that "[w]hile the periodic readings for Benzene are felt to be a quality control problem in sampling and/or laboratory analysis, samples of each active raw water well for Hadnot Point was [sic] taken ... last week. Results are anticipated in early February."[16] Upon information and belief, these results are missing.

65. On January 13, supply well HP-645 was closed due to benzene contamination.[17]

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[14] *Id*.

[15] *See Volatile Organic Chemical Analysis Reports*, at *30, available at https://tftptf.com/CLW_Docs/CLW5237.pdf (last visited Aug. 28, 2023).

[16] *Analysis of Drinking Water Systems Aboard Camp Lejeune/MCAS, New River* (Jan. 24, 1986), available at https://tftptf.com/CLW_Docs/CLW1406.pdf (last visited Jun. 27, 2023).

[17] *See Review of N.A.C.I.P. Program, Marine Corps Base, Camp Lejeune* (Jan. 21, 1987), at *6, available at https://tftptf.com/CLW_Docs/CLW4963.pdf (last visited Jun. 27, 2023).

66. On February 5, 1987, a project was proposed to replace and relocate the leaking Hadnot Point Fuel Farm, including a plan for temporary measures to be used while the project was underway that would avoid continued use of the Hadnot Point Fuel Farm.[18] As of May 18, 1988, that project was still pending funding.

67. On March 29, 1988, a letter from a Marine Corps attorney urged the immediate replacement of the fuel tanks at the Hadnot Point Fuel Farm, which were estimated to be leaking approximately 1,500 gallons of fuel per month. This letter stated in part: "From an attorney's perspective, concerned with responding to potential litigation, it appears patently unreasonable to wait until out-years to replace the tanks. Such delay will result in an indefensible waste of money, and a continuing potential threat to human health and the environment."[19]

68. A December 1988 study of the groundwater near the Hadnot Point Fuel Farm noted several points of concern. In particular, it found a plume of contamination of up to 15 feet in thickness and that the local geology consisted primarily of silty sand, meaning the contamination was not confined to the local area.[20]

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[18] *See Response to Documented Groundwater Contamination at Hadnot Point Fuel Farm* (May 18, 1988), available at https://tftptf.com/CLW_Docs/CLW1737.pdf (last visited Jun. 27, 2023).

[19] *Construction Contract 89-B-2611, Temporary Fuel Farm* (Aug. 9, 1989), at 33-34, available at https://www.tftptf.com/CERCLA/00096.pdf (last visited Jun. 27, 2023).

[20] *See Contaminated Ground Water Study, Marine Corps Base Camp Lejeune, N.C., Hadnot Point Area* (December 1988), at 11, 14, available at https://www.tftptf.com/CERCLA/00417.pdf (last visited Jun. 27, 2023).

69. In or about 1990-91, the Hadnot Point Fuel Farm was replaced and closed.

70. The United States has since conceded that benzene levels in drinking water exceeded safe levels for both children and adults from at least 1979 until 1984.[21] However, the later disclosure of the hidden information contained in the Navy's UST archive, showing that an average of more than 21,000 gallons of fuel were lost into the soil each year, suggests that benzene contamination began much earlier.[22]

71. The United States has further conceded that, within the Hadnot Point water distribution system, at least one volatile organic compound has exceeded its current EPA MCL at all times between at least August 1953 and January 1985.[23]

2. HOLCOMB BOULEVARD

72. Holcomb Boulevard is the middle-highlighted area on both the Area Map and the Well Map, located north of Hadnot Point and south of Tarawa Terrace.

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[21] *See* Agency for Toxic Substances and Disease Registry (ATSDR), Ctrs. for Disease Control and Prevention, Dep't of Health and Hum. Servs., *Public Health Assessment for Camp Lejeune Drinking Water* 9 (Jan. 20, 2017) ("ATSDR 2017 PHA"), available at https://www.atsdr.cdc.gov/HAC/pha/MarineCorpsBaseCampLejeune/Camp_Lejeune_Drinking_Water_PHA(final)_%201-20-2017_508.pdf (last visited Jun. 27, 2023).

[22] H.R. Rep. No. 111-108 (Sept. 16, 2010), at 6, available at https://www.govinfo.gov/content/pkg/CHRG111hhrg58485/pdf/CHRG-111hhrg58485.pdf (last visited Jun. 27, 2023).

[23] *See* Agency for Toxic Substances and Disease Registry (ATSDR), Ctrs. for Disease Control and Prevention, Dep't of Health and Hum. Servs., *Camp Lejeune, Background* (page last reviewed Jan. 16, 2014), https://www.atsdr.cdc.gov/sites/lejeune/background.html (last visited Jun. 27, 2023).

73. During the relevant time period, finished water at Holcomb Boulevard had high levels of contamination through 1972 by way of being served by the Hadnot Point water treatment plant.

74. In 1972, the Holcomb Boulevard water distribution system was established. This included the drilling of a number of new supply wells, as well as the construction of a new water treatment plant and reservoirs for this water distribution system. However, from 1972 to 1987, the Holcomb Boulevard water distribution system received supplemental water from Hadnot Point, leading to continued contamination in Holcomb Boulevard finished water.

75. At all relevant times, Holcomb Boulevard has been one of the primary housing areas on base. The Holcomb Boulevard water distribution system includes Midway Park housing, Paradise Point general officer housing, Paradise Point two-story housing, Paradise Point cracker box housing, Paradise Point Cape Cod housing, Paradise Point Capehart housing, Watkins Village, and Berkeley Manor housing.

76. Although the Holcomb Boulevard water distribution system (once opened) did not have the significant sources of contamination that the Hadnot Point water distribution system did, the Holcomb Boulevard water distribution system remained interconnected with the Hadnot Point water distribution system, and raw or finished water could be and indeed was pumped from one water distribution system to the other. This exchange was controlled by two isolation valves, referred to as Booster Pump 742 and the Marston Pavilion Valve.

77. The United States has conceded that, during times when Hadnot Point water was transferred to Holcomb Boulevard, TCE levels in Holcomb Boulevard

finished water were anywhere from two to twelve times the levels permitted by current EPA MCLs.[24]

78. In January of 1985, a gas line feeding a generator at the Holcomb Boulevard water treatment plant leaked gasoline into the Holcomb Boulevard water system. As a result, the Holcomb Boulevard water treatment plant was offline for nine days, during which time water from Hadnot Point was pumped to the Holcomb Boulevard water distribution system. During this period, finished water in housing areas throughout Holcomb Boulevard exceeded 50 ppb of TCE.[25] This recorded instance is illustrative of the effect of distributing Hadnot Point water to Holcomb Boulevard.

79. The official position of the United States is that occasions where Hadnot Point water was pumped to Holcomb Boulevard were infrequent.[26] The estimates put forth by the United States as to the frequency of this exchange, as well as the derivative reconstructed estimates of contamination levels at Holcomb Boulevard, are based upon review of incomplete water utility logbooks from Booster Pump 742 and Marston

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[24] *See* Agency for Toxic Substances and Disease Registry (ATSDR), Ctrs. for Disease Control and Prevention, Dep't of Health and Hum. Servs., *Analyses and Historical Reconstruction of Groundwater Flow, Contaminant Fate Transport, and Distribution of Drinking Water Within the Service Areas of the Hadnot Point and Holcomb Boulevard Water Treatment Plants and Vicinities, U.S. Marine Corps Base Camp Lejeune, North Carolina, Chapter A: Summary and Findings* (March 2013) ("ATSDR Reconstruction"), at A67, available at https://www.atsdr.cdc.gov/sites/lejeune/docs/chapter_A_hadnotpoint.pdf (last visited Jun. 27, 2023).

[25] ATSDR Reconstruction at A68.

[26] ATSDR Reconstruction at A13.

Pavilion. The United States concedes that the "valve openings are only partially documented."[27]

80. The treated water from the Holcomb Boulevard water treatment plant was used to water the greenery on two base golf courses, routinely drawing 300,000 to 500,000 gallons of water per day. This resulted in frequent shortages of treated water in the Holcomb Boulevard water distribution system, requiring supplemental treated water from Hadnot Point.

81. Upon information and belief, the Marston Pavilion valve was regularly activated.

82. Some or all of the relevant logbooks and documents related to the operation of the control valves at Marston Pavilion and Booster Pump 742 are missing.

83. As demonstrated by the 1,148.4 ppb TCE reading at the Berkley Manor Elementary school on February 7, 1985, at the times when this exchange was activated and Hadnot Point water was provided to Holcomb Boulevard, Holcomb Boulevard residents were exposed to high levels of contamination.

3. TARAWA TERRACE

84. Tarawa Terrace is the northeastern region on the Area Map, and the northern region on the Well Map, north of Holcomb Boulevard, and east of Camp Johnson.

85. In 1952, construction was completed on a new Camp Lejeune subdivision named Tarawa Terrace. This subdivision included its own water treatment plant and water distribution system.

86. Three of the initial supply wells providing water to Tarawa Terrace were constructed down gradient

[27] ATSDR Reconstruction at A64.

from dry cleaning businesses, car repair shops, and gas stations.

87. In 1952, supply well TT-26 was constructed at the very edge of the Camp Lejeune property line, along Lejeune Boulevard. At the time of construction, this was already down-gradient from Glamorama dry cleaners, car repair shops, and gas stations. Nevertheless, the well was drilled to a depth of only 95 feet. It is unknown why this well was not drilled deeper, despite the average well on Camp Lejeune being approximately 180 feet.

88. In 1953, ABC One Hour Dry Cleaner ("ABC") began operating across Lejeune Boulevard from well TT-26, only 900 feet away. Once it began operating, ABC used approximately 110-165 gallons of PCE per month. The PCE used by ABC generated two types of waste: solid and liquid.

89. The liquid PCE waste, contained in wastewater, was disposed of through a soil absorption septic tank. In other words, it was dumped into the ground approximately 900 feet from well TT-26.

90. The solid PCE waste was used to fill potholes, or otherwise disposed of in the ground behind the building of ABC, where rainwater caused additional PCE to leach into the soil, approximately 900 feet from well TT-26.

91. The United States has conceded that estimated PCE levels were above current MCLs from at least November of 1957 until January of 1985.[28]

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[28] ATSDR Reconstruction App'x A2 at A83-A93, available at https://www.atsdr.cdc.gov/sites/lejeune/docs/Reconstructed%20TTWTP%20Concentrations_ATSDR_Chapter%20A%20Report_Camp%20Lejeune.pdf (last visited Jun. 27, 2023).

92. Following the January 1985 generator fuel line leak at the Holcomb Boulevard water treatment plant, additional testing was also conducted at Tarawa Terrace. Supply well TT-26 was found to contain 1,580 ppb of PCE, as well as 57 ppb of TCE, 92 ppb of DCE, and 27 ppb of vinyl chloride. In addition, supply well TT-23 was found to contain 132 ppb of PCE, 5.8 ppb of TCE, and 11 ppb of DCE.

93. Both wells were shut off on February 8, 1985.

94. Yet, one or more of these contaminated wells were reactivated in times of water supply shortage until the Tarawa Terrace water treatment plant was closed in March of 1987. A memorandum discussing this decision noted that "the potential health hazards must be weighed against the need and cost of providing water from other sources."[29]

95. The United States has conceded that estimated PCE levels remained elevated until the Tarawa Terrace water treatment plant was closed in March of 1987, exceeding current MCLs in all but two months.[30]

96. The Tarawa Terrace water distribution system and the Camp Johnson water distribution system were "joined together" and capable of exchanging water.[31]

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[29] *Alternatives for Providing Water to the Tarawa Terrace Area* (Mar. 1, 1985), available at https://tftptf.com/CLW_Docs/CLW1129.pdf (last visited Jun. 27, 2023).

[30] ATSDR Reconstruction App'x A2 at A93, available at https://www.atsdr.cdc.gov/sites/lejeune/docs/Reconstructed%20TTWTP%20Concentrations_ATSDR_Chapter%20A%20Report_Camp%20Lejeune.pdf (last visited Jun. 27, 2023).

[31] *Inadequate Raw Water Supply at Tarawa Terrace and Camp Johnson* (Mar. 30, 1983), available at https://tftptf.com/CLW_Docs/CLW0707.pdf (last visited Jun. 27, 2023).

97. The Tarawa Terrace water distribution system and Camp Johnson water distribution system were interconnected enough to jointly supply water to the Knox Trailer Park.

98. Upon information and belief, contaminated water may have also been present within the Camp Johnson water distribution system during the relevant time period.

4. WATER BUFFALOES

99. In the military context, a water buffalo refers to a portable water tank, typically a 400-gallon tank mounted on a towable trailer, used for storing and transporting water.

100. Upon information and belief, during field training exercises, the Marine Corps routinely uses water buffaloes, including during all relevant times at Camp Lejeune. By using water buffaloes, service members at Camp Lejeune were able to leave the main areas of the base to conduct field training exercises away from water supplies, relying on the water buffaloes to supply water throughout the training.

101. Upon information and belief, service members at Camp Lejeune were typically spending an average of three days per week engaged in such field training exercises.[32]

102. Upon information and belief, these trainings were often for extended periods of time, lasting for

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[32] Agency for Toxic Substances and Disease Registry (ATSDR), Ctrs. for Disease Control and Prevention, Dep't of Health and Hum. Servs., *Twenty-Seventh Meeting of Camp Lejeune Community Assistance Panel (CAP) Meeting Transcript* (Apr. 4, 2014), at 64, available at https://www.atsdr.cdc.gov/sites/lejeune/docs/transcript-4_14.pdf (last visited Jun. 27, 2023).

several hours or more. Throughout the duration of these trainings, the water buffaloes were the primary source of drinking water for all participants.

103. The United States has conceded that water buffaloes filled with Hadnot Point water provided contaminated drinking water to service members during trainings.[33]

104. Upon information and belief, at all relevant times, contaminated water from the Hadnot Point water distribution system and/or other contaminated sources was used to fill water buffaloes routinely used for field training exercises conducted throughout the base.[34] This included at least all regions on the east side of the New River, including Camp Johnson, Tarawa Terrace, Paradise Point, Holcomb Boulevard, Hadnot Point, Courthouse Bay, Onslow Beach, and the broader Camp Lejeune Military Reservation. Moreover, this potentially included regions on the west side of the New River, including Camp Geiger, Stone Bay, and Marine Corps Air Station New River.

105. Further, upon information and belief, water buffaloes filled with contaminated water from the Hadnot Point water distribution system and/or other

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[33] Agency for Toxic Substances and Disease Registry (ATSDR), Ctrs. for Disease Control and Prevention, Dep't of Health and Hum. Servs., *Camp Lejeune Public Meeting (9-19-2020) – Q&A*, at *42, available at https://www.atsdr.cdc.gov/sites/lejeune/docs/transcripts/CAP-Public-meeting-QA-Sept-2020-508.pdf (last visited Jun. 27, 2023).

[34] *See id*.; *see also* Agency for Toxic Substances and Disease Registry (ATSDR), Ctrs. for Disease Control and Prevention, Dep't of Health and Hum. Servs., *Twenty-Sixth Meeting of Camp Lejeune Community Assistance Panel (CAP) Meeting Transcript* (Sep. 6, 2013), at 101, available at https://www.atsdr.cdc.gov/sites/lejeune/docs/CAPtranscript_9_13.pdf (last visited Jun. 27, 2023).

contaminated sources were also used for extended field training exercises conducted outside of Camp Lejeune, including at Marine Corps Auxiliary Field Bogue, also known as Bogue Field.

106. Upon information and belief, water from Hadnot Point contaminated with PCE, TCE, DCE, vinyl chloride, and benzene was provided to Marines and other service members from all over the base who conducted field training exercises at any of the above-referenced locations.

107. Upon information and belief, virtually all Marines and other service members who engaged in field training at Camp Lejeune did so at least in part on the east side of the New River, including those attending recruit training or infantry training at Camp Geiger.

108. Upon information and belief, during warm weather, water buffaloes were also placed in many locations around the base to provide easy access to water and encourage hydration, many or all of which were filled using contaminated water from the Hadnot Point water distribution system and/or other contaminated sources.

109. The United States has conceded that "we assume that everybody at [Camp] Lejeune had some exposure because even if you didn't live in a residence on base that received contaminated water, you did visit the main side, you did train, you drank [from] the water buffaloes that were served – provided by Hadnot Point water, so on and so forth. So everyone was exposed[.]"[35]

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[35] Agency for Toxic Substances and Disease Registry (ATSDR), Ctrs. for Disease Control and Prevention, Dep't of Health and

110. During the relevant time period, people living or working at Camp Lejeune were exposed to the contaminated water through a number of cumulative exposure pathways. These included drinking, showering, bathing, toiletry, swimming, food preparation, dish-washing, laundry, inhalation from volatilization (i.e., one or more of the chemicals can turn into a gas at room temperature), inhalation from vapor intrusion from groundwater through soil, and more. Harmful exposure could and did occur through ingestion, inhalation, and dermal contact.

111. Moreover, marines in training drink water and shower more than most people. The United States has recognized that "[a] marine in training at Camp Lejeune consumes an estimated 6 liters of water per day for three days per week and 3 liters per day the rest of the week. Under warm weather conditions, a marine may consume between 1 and 2 quarts of water per hour and shower twice a day. It is likely that during training, the water supplied in the field came from the Hadnot Point water system with both measured and estimated levels of TCE and PCE substantially higher than their MCLs."[36]

5. ADDITIONAL WATER CONTAMINATION FACTS

112. The United States played a significant role in causing and allowing the continuance of the water contamination at Camp Lejeune, including its efforts to conceal the presence and extent of the contamination.

Hum. Servs., *Forty-Second Meeting of Camp Lejeune Community Assistance Panel (CAP) Meeting Transcript* (Apr. 24, 2019), available at https://www.atsdr.cdc.gov/sites/lejeune/docs/transcripts/cap_april_2019_508.pdf (last visited Jun. 27, 2023).

[36] ATSDR Evidence Assessment at 3.

113. In 1948, a study conducted by the American Petroleum Institute concluded that the only safe concentration for benzene is zero.[37]

114. Placing and operating a major supply well (HP-602) only 1,200 ft—less than a quarter mile—from the base's primary fuel depot risked contaminating the water supply.

115. Placing and operating a major supply well (TT-26) only 900 ft—just over an eighth of a mile—down-gradient from a business which dumped chemicals into the ground risked contaminating the water supply.

116. Placing and operating a major supply well (HP-651) adjacent to a base dump, including a junkyard, both of which housed metal waste exposed to metal degreasers containing TCE, risked contaminating the water supply.

117. A 1958 study conducted by a government contractor (Legrand) concluded that the wells used at Camp Lejeune would require frequent maintenance inspections and repairs. These inspections and repairs were not completed.

118. A 1959 study by Legrand found that the aquifer beneath Camp Lejeune was not well-protected from surface contamination because the layers of clay, which can serve as a barrier to restrict the movement of contaminants, were thin and not continuous. No changes were made to reduce this risk or monitor for the predicted contamination.

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[37] *See* Am. Petroleum Inst., *API Toxicological Review, Benzene* 4 (Sept. 1948), available at https://fixourfuel.com/wp-content/uploads/2016/05/API-Benzene-Toxicology-Review-2.pdf (last visited Jun. 27, 2023).

119. Also in 1959, the Navy's Bureau of Medicine and Surgery ("BUMED") issued instruction 6240.3A, regarding Navy standards for potable water. Among other things, instruction 6240.3A recognized that "irregularity in quality is an indication of potential danger."[38] Thus, by at least 1959, the United States understood that water samples showing contamination cannot be disregarded because the contamination levels are irregular.

120. In 1963, BUMED issued NAVMED P-5010-5, governing potable water at onshore Navy facilities such as Camp Lejeune. It was recognized in the document that "well waters obtained from aquifers beneath impervious strata . . . are usually considered sufficiently protected to preclude need for purification," highlighting by contrast that the Camp Lejeune aquifer's thin and discontinuous clay layers left the water supply under-protected. This document recognized that carbon chloroform extract ("CCE") tests were a practical measure of water quality at the time, and that "water supplies containing over 200 micrograms CCE/1 of water represent an exceptional and unwarranted dosage of the water consumer with ill-defined chemicals." Moreover, it further directed that water sampling be conducted once per year on finished water, the primary supply of raw water, and raw water from each supply well[39] during the relevant time period.

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[38] Bureau of Med. & Surgery, Dep't of the Navy, *BUMED Instruction 6240.3A* (Dec. 24, 1959), at 2, available at https://tftptf.com/CLW_Docs/BUMED62403A.pdf (last visited Aug. 9, 2023).

[39] Bureau of Med. & Surgery, Dep't of the Navy, *Manual of Naval Preventive Med., Chapter 5: Water Supply Ashore* (Aug. 1963), at 14, 32, 40, available at https://www.tftptf.com/New_ATSDR1/NAVMED_P-5010-5_1963.pdf (last visited Aug. 9, 2023).

121. Later in 1963, BUMED issued instruction 6240.3B. This new regulation prohibited not only substances known to be toxic, but also substances for which the physiological effects were unknown, from being permitted to reach the water consumers.[40]

122. In 1972, BUMED issued instruction 6240.3C. This document reduced the total allowable detection under a CCE test from 200 ppb to 150 ppb. It also provided that a detection of only 3 to 100 ppb of chlorinated hydrocarbons constituted grounds for rejection of the water supply. During the relevant time, contaminants of concern at Camp Lejeune included chlorinated hydrocarbons, which were often found in concentrations exceeding the established range.

123. In 1977, a government contractor (SCS Engineers) prepared a report for the Atlantic Division Naval Facilities Engineering Command ("LantNavFacEngCom") on an oil pollution survey at Camp Lejeune conducted in 1976. Upon information and belief, the United States has refused to release the uncensored version of this report to this day.

124. Also in 1977, a government contractor (Southern Testing and Research Laboratories) was retained by Camp Lejeune to test water for four chlorinated hydrocarbons and two herbicides.

125. On February 28, 1978, in a letter to Charles Rundgren of the North Carolina Division of Health Services, the United States committed to submit all monitoring data, operational logs, and special analyses

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[40] Bureau of Med. & Surgery, Dep't of the Navy, *BUMED Instruction 6240.3B* (Sept. 30, 1963), at 3, available at https://tftptf.com/CLW_Docs/BUMED62403B.pdf (last visited Aug. 9, 2023).

concerning Marine Corps activities within the state. This commitment was not maintained.[41]

126. In 1979, a government contractor (Henry Von Oesen and Associates) conducted a study of the Tarawa Terrace water treatment plant. Observations included that "[s]erious operating problems have been experienced at Tawara Terrace due to inability to properly control the process, including cementing of filter sands, structural damage to the filter bed supports, and short filter runs."[42] In addition, the report findings confirmed that "filter backwash [was] discharged into the storm drainage system without treatment."[43]

127. In March of 1980, the State of North Carolina assumed primary enforcement responsibilities under the Safe Drinking Water Act for all public water systems in the state.

128. In October of 1980, concerned that the State of North Carolina might find problems with Camp Lejeune's potable water, LantNavFacEngCom initiated a surveillance program at Camp Lejeune, intended to detect total trihalomethanes ("TTHMs") in the water supply. LantNavFacEngCom indicated that it would take a composite sample of all potable water supplies and run a full spectrum analysis, with the understanding that if any potential problems were identified, further testing would be conducted to locate the

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[41] *Letter from J.G. Leech to Charles E. Rundgren* (Feb. 28, 1978), available at https://tftptf.com/CLW_Docs/CLW0176.pdf (last visited Aug. 9, 2023).

[42] *Study of Two Water Plants, Tarawa Terrace – Montford Point* (April 1979), at 2, available at https://tftptf.com/CLW_Docs/CLW0188.pdf (last visited Jun. 27, 2023).

[43] *Id.*

source. Both Jennings Laboratories and the U.S. Army Environmental Hygiene Agency ("USAEHA") were to conduct these tests.

129. On October 30, 1980, the United States received the results of this test from Jennings Laboratories, showing the presence of TCE, DCE, and vinyl chloride.[44]

130. On the same date, the United States received the USAEHA test results. The results included a handwritten warning: "Water is highly contaminated with low molecular weight halogenated hydrocarbons. Strong interference in the region of ChCl2BR. Cannot determine the value of that compound."[45]

131. On December 18, 1980, additional samples were taken from the Hadnot Point area. In a January 1981 analysis of these samples, the USAEHA laboratory services chief issued another warning, reading: "Heavy Organic interference at CHCL2BR. You need to analyze for chlorinated organics by GC/MS."[46]

132. On February 26, 1981, more samples were taken. In the results analyzed on March 9, 1981, the USAEHA laboratory services chief again warns:

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[44] Jennings Lab'ys, Inc., *Certificate of Analysis* (Oct. 31, 1980), available at https://tftptf.com/CLW_Docs/CLW0430.pdf (last visited Aug. 9, 2023).

[45] *TTHM Surveillance Report Form* (Collected Oct. 21, 1980), available at https://tftptf.com/CLW_Docs/CLW0436.pdf (last visited Aug. 9, 2023).

[46] *TTHM Surveillance Report Form* (Collected Dec. 29, 1980), available at https://tftptf.com/CLW_Docs/CLW0438.pdf (last visited Aug. 9, 2023).

"Water is highly contaminated with other chlorinated hydrocarbons (solvents)!"[47]

133. On August 27, 1981, the Commanding General of Camp Lejeune sent a letter to the North Carolina state official, Mr. Rundgren. The letter discussed the analysis of the Rifle Range water distribution system, as well as the upcoming Naval Assessment and Control of Installation Pollutants ("NACIP") Initial Assessment Study but withheld all information about the broader TTHM testing and the multiple warnings of contamination.[48]

134. On January 14, 1982, in response to a memo from the Department of Defense, the United States launched the NACIP Initial Assessment Study at Camp Lejeune. The objective of this study was to identify, assess, and control contamination at military installations such as Camp Lejeune.[49]

135. On April 19, 1982, the base began collecting water samples from each of the eight water distribution systems, to be analyzed by Grainger. All information about prior detection of contamination by

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[47] *TTHM Surveillance Report Form* (Collected Feb. 26, 1981), available at https://tftptf.com/CLW_Docs/CLW0443.pdf (last visited Aug. 9, 2023).

[48] *Letter from C.G. Cooper, Major Gen. U.S. Marine Corps, to Charles E. Rundgren (*Aug. 27, 1981), available at https://tftptf.com/CLW_Docs/CLW6124.pdf (last visited Aug. 9, 2023).

[49] *Memorandum from Officer in Charge, Dept. of the Navy, to Distribution* (Jan. 14, 1982), available at https://tftptf.com/CLW_Docs/CLW0455.pdf (last visited Aug. 9, 2023).

Jennings Laboratories and ESAEHA was withheld from Grainger.[50]

136. On May 6, 1982, Grainger informed the United States that it had detected chlorinated hydrocarbons in the samples from Hadnot Point and Tarawa Terrace.[51]

137. On July 28, 1982, additional samples were taken from Hadnot Point and Tarawa Terrace and sent to Grainger. In the results analyzed on August 10, 1982, Grainger reported that the chlorinated hydrocarbons were still detected, including identifying two specific contaminants: TCE at 1,400 ppb and PCE at 104 ppb. This report indicated that these contaminants were at high levels, such that they were "more important from a health standpoint than the total Trihalomethane content."[52]

138. On July 29, 1982, the supervisory base chemist, Elizabeth Betz, had a phone call with the State of North Carolina. The two discussed reporting requirements as to total trihalomethanes. Ms. Betz inquired about reporting requirements pertaining to secondary contaminants, other than trihalomethanes, but did not mention that the United States had already detected multiple contaminants at Camp

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[50] *Memorandum from Ms. Betz, Quality Control Lab, Envt'l. Section* (Apr. 26, 1982), available at https://tftptf.com/CLW_Docs/CLW0537.pdf (last visited Aug 9, 2023).

[51] *Memorandum of Grainger Lab Call* (May 6, 1982), available at https://tftptf.com/CLW_Docs/CLW0542.pdf (last visited Aug 9, 2023).

[52] *Letter from Bruce A. Babson, Chemist to Commanding Gen. Marine Corps* (Aug. 10, 1982), available at https://tftptf.com/CLW_Docs/CLW0592.pdf (last visited Aug 9, 2023).

Lejeune or inquire about the state's view on any of these specific contaminants.[53]

139. The United States has claimed that the Marine Corps shared information about the contamination detected at Camp Lejeune with North Carolina state officials in August of 1982. However, this position was later contradicted by documentary evidence and retracted. The United States in fact withheld this information from the state for years.

140. In contrast, on August 18, 1982, the United States issued a memorandum purporting to note that there were no problems detected in the Hadnot Point, Tarawa Terrace, or Holcomb Boulevard water distribution systems, and reduced sampling in these areas from monthly to quarterly.[54]

141. On August 25, 1982, the Commanding General of Camp Lejeune sent a letter via his representative to the officer in charge of the NACIP Initial Assessment Study, recommending obscuring evidence of contamination. His letter reads: "Discussion of Trihalomethane content of Rifle Range on page 2-18 and extensive data shown on pages 6-12 through 6-18 overly stresses relationship with hazardous materials/waste disposal. It is important to note that accuracy of data provided by U.S. Army laboratory is questionable. It is recom-

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[53] *Memorandum from Ms. Betz, Quality Control Lab, Envt'l. Section* (July 29, 1982), available at https://tftptf.com/CLW_Docs/CLW0587.pdf (last visited Aug 9, 2023).

[54] *Memorandum from Ms. Betz, Quality Control Lab, Envt'l. Section* (Aug. 18, 1982), available at https://tftptf.com/CLW_Docs/CLW0605.pdf (last visited Aug 9, 2023).

mended that TTHM information be de-emphasized throughout the report."[55]

142. A few weeks later, taking effect on October 1, 1982, the Natural Resources and Environmental Affairs Branch—which had worked in conjunction with the NACIP scientists to complete the Initial Assessment Study—was reassigned to report to the base Facilities Assistant Chief of Staff, rather than operating within the Base Maintenance Division.[56] This placed the scientists studying contamination at Camp Lejeune under the control of base leadership.

143. On November 29, 1982, additional samples were taken from all eight water distribution systems and sent to Grainger.[57] In the results analyzed on December 9, 1982, Grainger noted continued elevated levels of contamination.[58] A Grainger scientist expressed concern over these levels on a subsequent call discussing these results on December 21, 1982.[59]

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[55] *Letter from Commanding Gen. to Officer-in-Charge, Naval Energy and Envt'l. Support Activity* (Aug. 25, 1982), available at https://tftptf.com/CLW_Docs/CLW6332.pdf (last visited Aug 9, 2023).

[56] *Letter from Assistant Chief of Staff, Facilities to Base Maintenance Officer* (Oct. 1, 1982), available at https://tftptf.com/CLW_Docs/CLW3882.pdf (last visited Aug 9, 2023).

[57] *Trihalomethane Sampling Form* (Collected Nov. 29, 1982), available at https://tftptf.com/CLW_Docs/CLW0688.pdf (last visited Aug 9, 2023).

[58] *Letter from Bruce A. Babson, Chemist, Grainger Laboratories, to Commanding General, Marine Corps Base* (Dec. 9, 1982), available at https://tftptf.com/CLW_Docs/CLW0691.pdf (last visited Aug 9, 2023).

[59] *Memorandum from Ms. Betz, Quality Control Lab, Envt'l. Section, to Mr. Sharpe, Supervisory Ecologist, Envt'l. Section* (Dec. 21, 1982), available at https://tftptf.com/CLW_Docs/CLW0698.pdf (last visited Aug 9, 2023).

144. On December 13, 1982, the North Carolina Division of Health Services sent a letter to Camp Lejeune, reminding of and requesting compliance with an earlier agreement as to annual water testing, including for Total Organic Halogens.[60]

145. On February 24-25, 1983, additional samples were taken from all eight water distribution systems and sent to Grainger.[61] In the results analyzed on March 16, 1983, Grainger noted continued elevated levels of contamination.[62]

146. On April 14, 1983, LantNavFacEngCom completed an Environmental Engineering Survey for Camp Lejeune. Despite discussing the total trihalomethane testing which led to the discovery of the elevated PCE and TCE levels, all mention of these detected contaminants was omitted from the Survey.[63]

147. Also in April of 1983, the final draft of the NACIP Initial Assessment Study for Camp Lejeune was published. The Study omitted discussion of any of the dangerous contamination that had already been detected at Hadnot Point and Tarawa Terrace, with

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[60] *Letter from Gary D. Babb, Geologist, State of N. Carolina to Commanding General, U.S. Marine Corps* (Dec. 13, 1982), available at https://tftptf.com/CLW_Docs/CLW3993.pdf (last visited Aug 9, 2023).

[61] *Trihalomethane Sampling Form* (Collected Feb. 24, 1983), available at https://tftptf.com/CLW_Docs/CLW 6393.pdf (last visited Aug 9, 2023).

[62] *Letter from Bruce A. Babson, Chemist, Grainger Laboratories, to Commanding General, Marine Corps Base* (March 16, 1983), available at https://tftptf.com/CLW_Docs/CLW6393.pdf (last visited Aug 9, 2023).

[63] *Memorandum from Commander, Atlantic Div. to Commander General Marine Corps Base* (Apr. 14, 1983), available at https://tftptf.com/CLW_Docs/CLW6141.pdf (last visited Aug 9, 2023).

the only discussion of TTHM and organic solvent contamination detection being in reference to the Rifle Range water distribution system.

148. On May 31, 1983, additional samples were taken from all eight water distribution systems and sent to Grainger. In the results analyzed on June 15, 1983, Grainger noted continued elevated levels of contamination.[64]

149. On June 1, 1983, the Facilities Assistant Chief of Staff sent a letter to the North Carolina Division of Health Services containing information about the water sampling conducted at Camp Lejeune. Instead of including copies of the original lab reports from Grainger, which contained repeated warnings about contamination, the letter included only a compiled table of the data contained in these reports.[65]

150. On June 21, 1983, the North Carolina Division of Health Services sent a response letter to the Facilities Assistant Chief of Staff, indicating that the state required the original analytical data received from Grainger.[66] Upon information and belief, this push was because officials at the North Carolina

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[64] *Letter from Bruce A. Babson, Laboratory Supervisor, Grainger Laboratories, to Commanding General, Marine Corps Base* (June 15, 1983), available at https://tftptf.com/CLW_Docs/CLW6380.pdf (last visited Aug 9, 2023).

[65] *Letter from J.T. Marshall, Colonel, U.S. Marine Corps, to Charles E. Rundgren, Head, Div. of Health Services* (June 1, 1983), available at https://tftptf.com/CLW_Docs/CLW0934.pdf (last visited Aug 9, 2023).

[66] *Letter from Wm. Larry Elmore, Envt'l. Eng'r, Div. of Health Services, to J.T. Marshall, Colonel, U.S. Marine* (June 21, 1982), available at https://tftptf.com/CLW_Docs/CLW0940.pdf (last visited Aug 9, 2023).

Division of Health Services had received a tip that the results were concerning.

151. On July 27, 1983, additional samples were taken from all eight water distribution systems and sent to Grainger.[67] These samples were said to be lost in the mail.[68] Upon information and belief, these samples were not in the typical postal mail, but rather under special shipment, as they were required to be transported on ice.

152. On August 25, 1983, additional samples were taken from all eight water distribution systems and sent to Grainger.[69] In the results analyzed on August 29, 1983, Grainger noted continued elevated levels of contamination.[70]

153. On December 12, 1983, the Facilities Assistant Chief of Staff sent a response letter to the North Carolina Division of Health Services, including two additional tables explaining the compiled results previously provided, but noting that the original analytical data from Grainger was not included.[71]

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[67] *Trihalomethane Sampling Form* (Collected July 27, 1983), available at https://tftptf.com/CLW_Docs/CLW6377.pdf (last visited Aug 9, 2023).

[68] *Id.*

[69] *Trihalomethane Info Form* (Aug. 25, 1983), available at https://tftptf.com/CLW_Docs/CLW0949.pdf (last visited Aug 9, 2023).

[70] *Letter from Bruce A. Babson, Laboratory Supervisor, Grainger Laboratories, to Commanding General, Marine Corps Base* (Aug. 29, 1983), available at https://tftptf.com/CLW_Docs/CLW0952.pdf (last visited Aug 9, 2023).

[71] *Letter from M.G. Lilley, Colonel, U.S. Marine Corps, to Charles E. Rundgren, Div. of Health* Services (Dec. 12, 1983), available at https://tftptf.com/CLW_Docs/CLW6348.pdf (last visited Aug 9, 2023).

Moreover, this letter stated that voluntary monitoring of most water distribution systems had been discontinued and requested to reduce sampling at Hadnot Point to once per year.[72]

154. On December 30, 1983, additional samples were taken from the Hadnot Point water distribution system and sent to Grainger. In the results analyzed on January 18, 1984, Grainger noted continued elevated levels of contamination.

155. On January 20, 1984, the North Carolina Division of Health Services sent a response letter to the Facilities Assistant Chief of Staff, granting permission to reduce sampling at Hadnot Point to one sample, once per quarter.[73]

156. On or about April 1, 1984, one sample was collected from the Hadnot Point water distribution system and sent to Grainger. In the results analyzed on April 9, 1984, Grainger noted continued elevated levels of contamination.

157. In July of 1984, the United States collected samples from the Hadnot Point Industrial Area, including nearby supply well HP-602. Benzene was detected at 380 ppb and DCE was detected at 46 ppb.

158. Also in July of 1984, the United States collected samples from eight wells in the Tawara Terrace water distribution system. Three of these wells were found to contain contamination, including TCE.

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[72] *Id.*

[73] *Letter from Charles E. Rundgren, Head, Div. of Health Services, to Colonel M.G. Lilley, U.S. Marine Corps* (Jan. 20, 1984), available at https://tftptf.com/CLW_Docs/CLW0977.pdf (last visited Aug 9, 2023).

159. On or about July 1, 1984, one sample was collected from the Hadnot Point water distribution system and sent to Grainger. In the results analyzed on July 10, 1984, Grainger noted continued elevated levels of contamination.

160. On November 30, 1984, supply well HP-602 was shut down.[74] Despite the numerous and widespread detections of contamination over more than four years, this was the first action taken to address the contaminated water supply at Camp Lejeune.

161. On December 3, 1984, supply well HP-602 was sampled again.[75] Detected contaminants included PCE at 24 ppb, TCE at 1,600 ppb, DCE at 630 ppb, and benzene at 121 ppb.[76] For decades, the United States insisted that this sample was the reason supply well HP-602 was shut down, but it was later revealed that this sample wasn't collected until days after HP-602 was shut down on November 30, 1984.

162. Other wells in the Hadnot Point water distribution system were also sampled on the same day. In the results analyzed on December 6, 1984, TCE contamination was detected in wells HP-601, HP-603, and HP-608, as well as in the finished water at the

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[74] *Memorandum from Utilities Systems General Forman to Director, Utilities Branch* (July 27, 1987), available at https://tftptf.com/CLW_Docs/CLW4971.pdf (last visited Aug 9, 2023).

[75] *Telephone Conversation Record* (Dec. 6, 1984), available at https://www.tftptf.com/CERCLA/00250.pdf (last visited Aug 9, 2023).

[76] *Hadnot Point Water Treatment Plant Results* (Dec. 4, 1984), available at https://tftptf.com/CLW_Docs/CLW1054.pdf (last visited Aug 9, 2023).

Hadnot Point water treatment plant.[77] Supply wells HP-601 and HP-608 were closed at this time.[78]

163. On December 4, 1984, even more samples were collected from supply wells in the Hadnot Point water distribution system. In the results analyzed on December 10, 1984, contamination was again confirmed in supply wells HP-601, HP-602, HP-603, and HP-608, and detected in HP-634, HP-637, and HP-642.

164. On December 10, 1984, Camp Lejeune Base Environmental Engineer Robert Alexander contacted the State of North Carolina and admitted that volatile organic compounds had been detected in the Camp Lejeune water supply.[79]

165. Two days later, on December 12, 1984, Mr. Alexander was quoted in a news article saying that "every effort will be made to maintain the excellent quality water supply traditionally provided to residents of Camp Lejeune."[80]

166. On December 14, 1984, supply wells HP-634 and HP-637 were shut down.[81]

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[77] *Id.*

[78] *Memorandum from M.P. Bell, Regional Eng'r, Div. of Health Services, to Charles E. Rundgren, Head, Div. of Health Services* (Dec. 11, 1984), available at https://tftptf.com/CLW_Docs/CLW1051.pdf (last visited Aug 9, 2023).

[79] *Id.*

[80] Globe Staff, *Camp Lejeune water testing underway,* The Globe (Dec. 12, 1984), available at https://www.tftptf.com/CERCLA/00523.pdf (last visited Aug 9, 2023).

[81] *Summary of VOC, Chloride, and Flouride Analysis for Hadnot Point and Holcomb Blvd.*, available at https://tftptf.com/CLW_Docs/CLW1647.pdf (last visited Aug 9, 2023).

167. On January 14, 1985, Environmental Science and Engineering released a NACIP-related report on the contamination observed at Camp Lejeune.[82] However, a number of important documents contemplated in the schedule appear to be now missing, including the monthly NACIP progress reports for August through November of 1984, an evaluation of data, and a draft report.

168. On January 25, 1985, samples were collected from Tarawa Terrace supply wells TT-23 and TT-26. In the results analyzed on February 5, 1985, levels of PCE at 132 ppb, TCE at 5.8 ppb, and DCE at 11 ppb were detected in TT-23, and levels of PCE at 1580 ppb, TCE at 57 ppb, DCE at 92 ppb, and vinyl chloride at 27 ppb were detected in TT-26. Supply well TT-26 was closed at this time. Supply well TT-23 was also closed at this time, but only temporarily. Due to a recurring water supply shortage in the Tarawa Terrace water distribution system, TT-23 was reactivated on a number of occasions.

169. On January 27, 1985, a fuel leak was detected at the Holcomb Boulevard water treatment plant.[83] The plant was taken offline, the reservoir was drained, and the bypass valves between the Hadnot Point and Holcomb Boulevard water distribution systems were activated.[84] The Hadnot Point water distribution system

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[82] Environmental Science and Engineering, Inc., *Evaluation of Data from First Round of Verification of Sample Collection and Analysis* (Jan. 14, 1985), available at https://tftptf.com/Misc/Timeline_Linked_March_2012.pdf (last visited Aug 9, 2023).

[83] *Operator Log* (Jan. 27, 1985), available at https://tftptf.com/CLW_Docs/CLW4514.pdf (last visited Aug 9, 2023).

[84] *Chronology* (Feb. 26, 1985), available at https://tftptf.com/CLW_Docs/CLW4546.pdf (last visited Aug 9, 2023).

provided all water needed for the Holcomb Boulevard water distribution system until February 4, 1985.[85]

170. On January 31, 1985, the State of North Carolina collected water samples from the Holcomb Boulevard water treatment plant to determine whether the fuel leak had been resolved.[86] In the results analyzed on February 4, 1985, no fuel product was found, but TCE was detected throughout the Holcomb Boulevard water distribution system.

171. On February 4, 1985, the Holcomb Boulevard water distribution system was reactivated, and both the Holcomb Boulevard and Hadnot Point water distribution systems were flushed.[87]

172. On the same date, results were received from a January 16, 1985, sample of Hadnot Point supply wells.[88] HP-651 was identified as having high levels of contaminants, including PCE at 386 ppb, TCE at 3,200 ppb, DCE at 3,400 ppb, and vinyl chloride at 655 ppb.[89] Supply well HP-651 was closed at this time.[90] Supply wells HP-652 and HP-653 also showed contamination

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[85] *Id.*

[86] *Operator Log* (Jan. 27, 1985), available at https://tftptf.com/CLW_Docs/CLW4514.pdf (last visited Aug 9, 2023).

[87] *Chronology* (Feb. 26, 1985), available at https://tftptf.com/CLW_Docs/CLW4546.pdf (last visited Aug 9, 2023).

[88] *Report #17 Laboratory Analysis on Naval Samples* (Feb. 6, 1985), available at https://tftptf.com/CLW_Docs/CLW5594.pdf (last visited Aug 9, 2023).

[89] *Id.*

[90] *Chronology* (Feb. 26, 1985), available at https://tftptf.com/CLW_Docs/CLW4546.pdf (last visited Aug 9, 2023).

in these results, although at much lower levels, and were closed on February 8, 1985.[91]

173. On February 7, 1985, finished water at the Berkeley Manor Elementary School, serviced by the Holcomb Boulevard water distribution system, continued to test at 135.1 ppb of TCE.[92]

174. On February 8, 1985, supply wells HP-652 and HP-653 were shut down.[93]

175. On February 22, 1985, after closing all of the supply wells noted above, finished water from the Hadnot Point water treatment plant tested at 1 ppb of TCE.[94]

176. On March 1, 1985, the Facilities Assistant Chief of Staff provided an action brief discussing potential solutions to an anticipated water shortage at Tarawa Terrace, due to the closure of supply wells TT-23 and TT-26. One option presented was to build a water line to draw water from another water distribution system; this option was selected but was not implemented until years later. Another option was to re-activate wells known to be contaminated when needed to maintain supply, because "the potential health hazards must be weighed against the need and cost of providing water from other sources."[95]

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[91] *Id.*

[92] *Analysis Report* (Feb. 7, 1985), available at https://tftptf.com/CLW_Docs/CLW5369.pdf (last visited Aug 9, 2023).

[93] *Well History* (Feb. 8, 1985), available at https://tftptf.com/CLW_Docs/CLW5095.pdf (last visited Aug 9, 2023).

[94] *G C Report Sheet* (Feb. 22, 1985), available at https://tftptf.com/CLW_Docs/CLW4533.pdf (last visited Aug 9, 2023).

[95] *Action Brief from M.G. Lilley* (Mar. 1, 1985), available at https://tftptf.com/CLW_Docs/CLW1129.pdf (last visited Aug 9, 2023).

177. On March 8, 1985, supply well HP-651 was retested, yielding high contamination levels, including 400 ppb of PCE, 18,900 ppb of TCE, 7,580 ppb of DCE, and 168 ppb of vinyl chloride.[96]

178. On March 21, 1985, a meeting was held to discuss the options to address the water shortage at Tarawa Terrace. Because the use of water from the contaminated wells was deemed to not pose an "extreme health threat" to recipients of the contaminated water, as-needed use of the contaminated water was approved.[97]

179. In September of 1985, supply well TT-25 was found to be contaminated with PCE.

180. On November 19, 1985, the water at the Hadnot Point water treatment plant was found to contain 2,500 ppb of benzene.[98] This is 500 times the level of benzene exposure permitted by the EPA's current MCLs. In the results summary of this sample, a handwritten note dismissed this finding as "not representative".[99]

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[96] *Volatile Organic Chemical Analysis Reports* (Mar. 8, 1985), available at https://tftptf.com/Misc/Timeline_Linked_March_2012.pdf (last visited Aug 9, 2023).

[97] *Meeting Notes: Volatile Organic Chemicals (VOC) in the Camp Lejeune Water Supply* (Mar. 21, 1985), available at https://tftptf.com/CLW_Docs/CLW6596.pdf (last visited Aug 9, 2023).

[98] *Memorandum from Director, Natural Resources and Environmental Affairs Division, to Environmental Engineer, Facilities Department* (Jan. 24, 1986), available at https://tftptf.com/CLW_Docs/CLW1406.pdf (last visited Aug 9, 2023).

[99] *Id.*

181. On December 10, 1985, the water at the Hadnot Point water treatment plant was still found to contain 38 ppb of benzene.[100]

182. On January 13, 1987, Hadnot Point supply well HP-645 was shut down due to benzene contamination. Despite the numerous detections of benzene, benzene contamination was dismissed on the grounds of quality control errors. This contamination was discounted and not properly investigated, despite later revelations that there was a significant fuel leakage at the fuel farm.

183. On January 14, 1987, Tarawa Terrace supply well TT-25 was closed.

184. After the first detection of water contamination in October of 1980, it took more than six years for the United States to identify, acknowledge, and address the poisonous water supply at Camp Lejeune.

185. Over the years and decades that followed, there have been a number of significant studies conducted to identify the massive, life-changing, and widespread harm caused by this contaminated water. These studies were hindered for years by the United States withholding information.

186. By 1994, the ATSDR was writing letters to the Marine Corps complaining of a lack of cooperation and access to important records for researching the extent of contamination and health impacts.

187. In 1997, on behalf of the United States, the ATSDR published a public health assessment on the water contamination at Camp Lejeune. In 2009, the ATSDR retracted this public health assessment, due

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[100] *Id.*

in large part to hidden information coming to light. This was the first time in the history of the ATSDR that a public health assessment was retracted.

188. In 2007, the Government Accountability Office issued a report reviewing the ATSDR's attempt to study the contamination. This report is recognized to be flawed because it evaluated the 1997 ATSDR public health assessment which was later retracted, and thus did not include the new information leading to the retraction.

189. In 2009, the National Research Council published a report on the water contamination at Camp Lejeune. This report was structured by the Navy and has been widely criticized as overlooking key data and having significant gaps in reasoning.

190. Also in 2009, ATSDR staff gained access to a previously undisclosed electronic database containing more than 700,000 pages of Navy and Marine Corps documents about contamination at Camp Lejeune. Among these documents, the ATSDR found information documenting that as much as 1.1 million gallons of fuel were lost into the ground at Hadnot Point. Prior to this information being learned, the United States had insisted that no more than 50,000 gallons had been lost. This newly found data was a major factor leading to the retraction of the ATSDR's 1997 public health assessment.

191. The U.S. House of Representatives Committee on Science and Technology, Subcommittee on Investigations and Oversight, recognized that "[i]t is difficult to provide clear scientific analyses when you cannot be

certain that the records you are relying on for that analysis are complete."[101]

192. For at least three of the contaminants at issue, there are actual measurements of contamination levels that are even more elevated than the highest projected measurements of the reconstructed models contained in ATSDR reports.[102]

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[101] H.R. Rep. No. 111-108 (2010), at 6, available at https://www.govinfo.gov/content/pkg/CHRG-111hhrg58485/pdf/CHRG-111hhrg58485.pdf (last visited Aug. 9, 2023).

[102] *Compare* Agency for Toxic Substances and Disease Registry (ATSDR), Ctrs. for Disease Control and Prevention, Dep't of Health and Hum. Servs., *Chemicals at Camp Lejeune (FAQs)*, https://www.atsdr.cdc.gov/sites/lejeune/faq_chemicals.html (last visited Jun. 27, 2023) ("The maximum level [of PCE] detected in drinking water was 215 parts per billion...") *with* ATSDR Reconstruction App'x A2 at A92, available at https://www.atsdr.cdc.gov/sites/lejeune/docs/Reconstructed%20TTWTP%20Concentrations_ATSDR_Chapter%20A%20Report_Camp%20Lejeune.pdf (last visited Jun. 27, 2023) (highest simulated PCE level in Tarawa Terrace finished water was 182.13 ppb); *compare* Agency for Toxic Substances and Disease Registry (ATSDR), Ctrs. for Disease Control and Prevention, Dep't of Health and Hum. Servs., *Chemicals at Camp Lejeune (FAQs)*, https://www.atsdr.cdc.gov/sites/lejeune/faq_chemicals.html (last visited Jun. 27, 2023) ("The maximum level [of TCE] detected in drinking water was 1,400 [ppb]...") *with* ATSDR Reconstruction App'x A7 at A168, available at https://www.atsdr.cdc.gov/sites/lejeune/docs/Reconstructed%20HPWTP%20Concentrations_ATSDR_Chapter%20A%20Report_Camp%20Lejeune.pdf (last visited Jun. 27, 2023) (highest simulated TCE level in Hadnot Point finished water was 783 ppb); *compare* H.R. Rep. No. 111-108 (Sept. 16, 2010), at 35, available at https://www.govinfo.gov/content/pkg/CHRG-111hhrg58485/pdf/CHRG-111hhrg58485.pdf (last visited Jun. 27, 2023). ("...the treated water at the Hadnot Point [water treatment plant] was sampled and found to contain benzene in the extreme amount of 2,500 ppb.") *with* ATSDR Reconstruction App'x A7 at A168, available at https://www.atsdr.cdc.gov/sites/lejeune/docs/Reconst

193. Because key information was withheld from early investigators, which led to crucial delays, or was otherwise withheld, lost, or destroyed over time, the full extent of contamination at Camp Lejeune may be even greater than what studies to date have identified.

194. Plaintiffs reserve the right to seek a spoliation instruction.

B. PLAINTIFFS' INJURIES

195. During the relevant time period, Plaintiffs used water from the Hadnot Point water distribution system, the Holcomb Boulevard water distribution system, the Tarawa Terrace water distribution system, and/or the Camp Johnson water distribution system, exposing Plaintiffs to unsafe amounts of contaminated water.

196. During the relevant time period, many Plaintiffs used water from water buffaloes which were filled with water from the Hadnot Point water distribution system and/or other contaminated sources, exposing Plaintiffs to unsafe amounts of contaminated water.

197. The above conduct caused the Plaintiffs to sustain personal injuries or death, as more particularly alleged in Plaintiffs' Short Form Complaints.

198. At the current time, the Unites States has conceded that exposure to the contaminated water at Camp Lejeune meets an equipoise or greater standard for certain diseases, including but not limited to kidney cancer, liver cancer, bladder cancer, non-Hodgkin's lymphoma, multiple myeloma, acute lymphocytic

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ructed%20HPWTP%20Concentrations_ATSDR_Chapter%20A%20Report_Camp%20Lejeune.pdf (last visited Jun. 27, 2023) (highest simulated benzene level in Hadnot Point finished water was 12 ppb).

leukemia, chronic lymphocytic leukemia, chronic myeloid leukemia, other forms of leukemia, Parkinson's disease, end-stage renal disease, scleroderma, systemic sclerosis, cardiac birth defect, aplastic anemia, and myelodysplastic syndrome.[103]

199. Upon information and belief, during the relevant time period, in addition to the specific contaminants alleged above, there have been one or more additional contaminants in the water at Camp Lejeune that have not yet been studied, are being studied, or have not yet been made publicly available but that are believed to be the cause of additional medical and/or psychological conditions and/or diseases of Plaintiffs.

200. Moreover, there is ample scientific evidence as of today demonstrating that exposure to the contaminated water at Camp Lejeune meets an equipoise or greater standard of causation for other cancers and non-cancer diseases. Upon information and belief, additional studies are also underway that are reviewing the causal link between the contaminants at Camp Lejeune and other conditions and/or diseases.

201. There is a sufficient causal link between Plaintiffs' injuries and the toxic water Plaintiffs were exposed to at or from Camp Lejeune.

202. As a direct and proximate result of Plaintiffs' exposure to toxic water at or from Camp Lejeune, Plaintiffs have been forced to endure significant physical and mental pain and suffering and to undergo significant and extensive medical treatment, and in some instances caused their death.

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[103] *See generally* ATSDR Evidence Assessment.

203. Further, as a result of Plaintiffs' exposure to toxic water at or from Camp Lejeune, Plaintiffs have suffered other damages. These damages include, but are not limited to: medical expenses, medication expenses, medical supply expenses, transportation expenses related to medical treatment, food expenses related to medical treatment, lost income, and other damages as further detailed in each Plaintiff's Short Form Complaint.

VI. COUNT 1: RELIEF UNDER THE CAMP LEJEUNE JUSTICE ACT

204. Plaintiffs incorporate by reference each of the allegations 1 through 203 above.

205. The CLJA provides that:

> An individual, including a veteran (as defined in section 101 of title 38, United States Code), or the legal representative of such an individual, who resided, worked, or was otherwise exposed (including in utero exposure) for not less than 30 days during the period beginning on August 1, 1953, and ending on December 31, 1987, to water at Camp Lejeune, North Carolina, that was supplied by, or on behalf of, the United States may bring an action in the United States District Court for the Eastern District of North Carolina to obtain appropriate relief for harm that was caused by exposure to the water at Camp Lejeune.

206. Plaintiffs were on the Marine Corps base at Camp Lejeune sometime during the period between August 1, 1953, and December 31, 1987, and were exposed to the contaminated water at or from Camp Lejeune.

207. Each Plaintiff's exposure to water at or from Camp Lejeune totaled not less than 30 days between August 1, 1953, and December 31, 1987.

208. The water Plaintiffs were exposed to at or from Camp Lejeune during this time was supplied by, or on behalf of, Defendant United States.

209. The water Plaintiffs were exposed to at or from Camp Lejeune was polluted and contaminated with chemicals and volatile organic compounds including but not limited to PCE, TCE, DCE, vinyl chloride, and benzene.

210. As a result of Plaintiffs' exposure to polluted and contaminated water at or from Camp Lejeune, Plaintiffs suffered and will continue to suffer serious harm or Plaintiffs have died.

211. This harm was caused by exposure to the water at or from Camp Lejeune.

212. There is ample scientific evidence demonstrating that exposure to the contaminated water at or from Camp Lejeune meets an equipoise or greater standard of causation for Plaintiffs' injuries or death.

213. Plaintiffs have filed administrative claims with the Navy addressing the issues raised in their Short Form Complaints. Plaintiffs' administrative claims have either (a) received a final denial or (b) been deemed a final denial because six months have passed since the claims were filed with the Navy and they remain without a final disposition.

214. Under the CLJA, Plaintiffs suffered harm or death as a result of exposure to the water at or from Camp Lejeune and are entitled to appropriate relief.

VII. CLAIM FOR RELIEF

Plaintiffs respectfully request that the Court enter judgment against the United States under the CLJA and award damages and all other appropriate relief for the harm that they have endured as a result of exposure to contaminated and unsafe water at or from Camp Lejeune, including but not limited to personal injuries or death, along with all related costs and damages.

VIII. JURY TRIAL DEMAND

Pursuant to Fed. R. Civ. P. 38 and CLJA § 804(d), Plaintiffs demand a trial by jury.

Dated: October 6, 2023

Respectfully submitted,

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APPENDIX I

Department of Justice Technical Assistance on Section 706 of HR 3967

PACT ACT Section 706 Camp Lejeune

Department of Justice Technical Assistance and Proposed Alternative

May 2, 2022

Thank you for the opportunity to share our views on Section 706 of the Honoring Our Promise to Address Comprehensive Toxics Act (PACT Act). The Department of Justice strongly supports expanding Veterans' access to health care and benefits to address the health effects of harmful environmental exposures that occurred during military service. A no-fault compensation program is preferable to litigation because it would allow Veterans to recover more quickly and without the need for expensive litigation. But we are concerned that the current proposal in Section 706 related to Camp LeJeune is inefficient and will be costly for service members and other individuals, as well as the federal government. Rather than create a system for swift and efficient payment of worthy claims, Section 706 will reset decades-old litigation, at great time and expense for all involved. We therefore recommend that Congress consider an alternative solution that would replace individual litigation of these matters with a no-fault compensation scheme of the type that has worked well in similar contexts.

Background

Section 706 of the PACT Act aims to compensate service members and others who were exposed to contaminants in drinking water at Camp Lejeune, North Carolina, between 1953 and 1987. Service members and others who were stationed at or worked

at Camp Lejeune during that time have developed cancer and other diseases that may be related to water contamination. The Agency for Toxic Substances and Disease Registry estimates that as many as one million people were stationed at Camp Lejeune during that timeframe.

For nearly twenty years, the Department has been litigating Federal Tort Claims Act (FTCA) cases seeking compensation for harm alleged to have resulted from exposure to contaminated water at Camp Lejeune. The Department has obtained dismissals of these cases, primarily under three legal defenses provided by the FTCA.

As currently drafted, Section 706 of the PACT Act would facilitate recoveries for Camp Lejeune claimants that are not otherwise possible under the FTCA. Section 706 accomplishes this by allowing causes of action in federal court while prohibiting the assertion of the legal defenses. Section 706 explicitly precludes the Government from raising immunity defenses under the FTCA, which would include the *Feres* doctrine (where the Supreme Court in *Feres v. United States* precluded claims for injuries incident to military service), the discretionary function exception, or any state statute of repose. Section 706 also restarts the statute of limitations for Camp Lejeune suits, lowers the standard of proof on causation, and permits jury trials that would not be available under the FTCA. Finally, Section 706 permits a service member to recover without showing that the federal government acted negligently or otherwise wrongfully, essentially creating a strict-liability theory of recovery.

While Section 706 seeks to make recovery easier for claimants, it would nonetheless require litigation of individual claims, because each plaintiff would still need to establish causation under the new cause of

action, and they would each need to litigate their individual claim for damages.

Significant Concerns Raised by Section 706

The Department supports providing an appropriate mechanism to compensate service members for harms suffered at Camp Lejeune. But we have significant concerns about how the current bill would accomplish this goal. We believe that the approach proposed in the current Section 706 will be inefficient for all parties, especially those harmed by contamination at Camp Lejeune, create adverse precedent for future mass-tort incidents, and necessitate numerous resources from both the Department and the federal district court.

First, case-by-case district court litigation of potentially hundreds of thousands of claims will be extremely burdensome for the plaintiffs, the government, and the courts. Plaintiffs will likely have to go through many years of discovery before recovering anything. While the bill aims to make recovery more likely by removing certain federal defenses and lowering relevant burdens, the bill still requires those injured to pursue the lengthy path of litigation—requiring individuals to first file administrative claims with the Department of Defense, then file a lawsuit in district court, then prove causation and damages (potentially before a jury), and then withstand a potential appeal. All of these steps will be expensive and time-consuming, given that the bill would allow the filing of old claims from decades ago. Moreover, the cases are likely to be delayed, particularly if (as expected) there is an influx of cases in the single district court—the Eastern District of North Carolina—that will have exclusive jurisdiction under the proposed bill. The litigation-oriented remedy that Section 706 creates is therefore unlikely

to meet its goal of offering an easy or quick path to recovery for the thousands of affected service members.

Second, we have serious institutional concerns about the precedent that would be set by creating a separate federal tort action against the government for a particular class of plaintiffs, as a carve-out to the FTCA. Enacting this bill could encourage other plaintiffs who have lost under the FTCA to come to Congress and ask for a similar legislative exception, rather than providing a uniform set of rules under the FTCA for all individuals as exists under current law. The contemplated carve-out from generally applicable FTCA litigation standards is unprecedented. In the past, when Congress wanted to provide remedies for a particular group of claimants who had been unsuccessful in litigation, Congress created a unique remedial program, similar to that proposed below, rather than creating a separate federal tort cause of action.

Third, we worry that Section 706, as currently drafted, would result in differing recoveries to similarly situated plaintiffs. Especially if damages awards are to be decided by a jury, as the statute contemplates, it is likely that litigation will produce a broad range of remedial outcomes even among plaintiffs who have suffered similar harms. The potential unfairness of those outcomes may undermine the statute's goal of providing redress for those affected by contamination at Camp Lejeune.

Finally, the bill would lead to an influx of federal-court litigation that would be extremely resource-intensive for both the Department, DoD, and the federal district court in the Eastern District of North Carolina. For its part, the Department's Civil Division estimates that 75 additional attorneys and 15 paralegals would be required to handle the thousands of

expected claims. That would more than quadruple the size of the Division's Environmental Torts Section—the office which now handles the Camp Lejeune litigation as well as all the other toxic tort cases brought against the United States. The expected resource drain on the Eastern District of North Carolina stemming from the influx of litigation, as noted above, might further impede the Act's goal of ensuring Veterans and others have a swift path to recovery.

Proposed Alternative

For these reasons, the Department feels strongly that it would better serve all the parties to establish a non-adversarial compensation program for those injured at Camp Lejeune, rather than creating a new cause of action. The Department has substantial experience with administering compensation programs, including the program established through the Radiation Exposure Compensation Act (RECA). The RECA program, for example, was enacted as a non-adversarial alternative to litigation for individuals who contracted illnesses following exposure to radiation as a result of the United States' atmospheric nuclear testing program and uranium ore processing operations during the Cold War. Under this program, the Department has approved over 39,000 claims, awarding over $2.5 billion. Similarly, the September 11th Victim Compensation Fund is another non-adversarial compensation program, which has awarded over $9.8 billion to over 44,000 individuals suffering as a result of the September 11th attacks.

If the goal of the PACT Act is to allow Veterans and others to recover more quickly and without the need for expensive court proceedings, a non-adversarial program of this sort would be preferable to litigation. And creating a no-fault compensation program avoids

creating the precedent of a separate federal tort cause of action for future cases where compensation is unavailable under the FTCA. We think that such an alternative would provide the most straightforward path to fulfilling our country's commitment to Veterans and their families.

The proposed revised Section 706 of the PACT Act, appended to this memorandum, would create an administrative compensation scheme similar to the program established by RECA. It would provide appropriate relief for harm that was caused by exposure to the water at Camp Lejeune, and it would require the Attorney General to establish procedures for individuals to submit claims for payments under the Act. It would further require that the Attorney General consult with the Secretary of Health and Human Services on establishing guidelines for determining the documentation necessary to establish a basis for eligibility for compensation for an injury or condition based on exposure to water at Camp Lejeune. It would also establish a trust fund for payment of meritorious claims.

Importantly, the proposed revised Section 706 would contain provisions to ensure that the process moves quickly to compensate Veterans. It would require the Attorney General to complete the determination on each claim within 12 months of the filing of the claim, make a final determination within 90 days after receiving a request for review of a denial, and pay the claim no later than six weeks after approval. Revised Section 706 allows judicial review within 180 days of denial in the United States District Court for the Eastern District of North Carolina, where the court will review the denial on the administrative record and set aside denials that are arbitrary, capricious, an

abuse of discretion, or not in accordance with law. We understand that such litigation is extremely rare in RECA cases, however, and that out of the tens of thousands of administrative adjudications, only 16 administrative decisions were appealed to district court.

Thus, under a compensation program like RECA, many Veterans would receive compensation within roughly a year of filing a claim; we think that the current proposal, by contrast, would lead to significantly longer recovery times. And because the program would prioritize speedy recovery, it would not require the significant resources that would be required to fund protracted litigation under the current proposal.

In addition, the proposed revised Section 706 would ensure consistency in resolving service members' claims. Because all claims would be resolved under the same procedures established by the Attorney General, there is no risk—as there is under the current proposal—that different district court or magistrate judges would take markedly different approaches to the relevant issues. Moreover, the proposed revised Section 706 contains a provision limiting attorney's fees, ensuring that the bulk of recovery in each case will go to the Veterans themselves and not to their lawyers.

Conclusion

In conclusion, the Department strongly supports providing Veterans exposed to contaminants in drinking water at Camp Lejeune necessary benefits and services for any harms they may have suffered as a result of exposure. The administrative compensation program proposed in the Department's revised Section 706 would provide the most effective and efficient way to compensate Veterans, and the Department therefore recommends that legislators consider this alternative to the current proposal.

APPENDIX: PROPOSED REVISED SECTION 706 FOR DISCUSSION

SEC. 706. CAMP LEJEUNE, NORTH CAROLINA CONTAMINATED WATER EXPOSURE COMPENSATION.

(a) IN GENERAL.—An individual, including a veteran (as defined in section 101 of title 38, United States Code), who resided, worked, or was otherwise exposed (including in utero exposure) for not less than 30 days during the period beginning on August 1, 1953, and ending on December 31, 1987, to water at Camp Lejeune, North Carolina, that was supplied by, or on behalf of, the United States, or the legal representative of such an individual, may file a claim for payment with the Attorney General to obtain appropriate relief for harm that was caused by exposure to the water at Camp Lejeune.

(b) DETERMINATION AND PAYMENT OF CLAIMS.—

(1) ESTABLISHMENT OF FILING PROCEDURES.—The Attorney General shall establish procedures for submission of claims for payments under this Act. The burden of proof shall be on the party submitting the claim to show a causal connection between the water at Camp Lejeune and the harm.

(2) DETERMINATION OF CLAIMS.—

(A) IN GENERAL.—The Attorney General shall, in accordance with this section, determine whether each claim filed under this Act meets the requirements of this Act. All reasonable doubt with regard to whether a claim meets the requirements of this Act shall be resolved in favor of the claimant.

(B) CONSULTATION.—The Attorney General shall, in consultation with the Secretary of Health and Human Services, establish guidelines for determining what documentation is necessary to establish a basis for eligibility for compensation for an injury or condition based on exposure to water at Camp Lejeune.

(C) PAYMENT OF CLAIMS.—The Attorney General shall establish guidelines for determining amounts of compensation for injuries or conditions, including reasonable compensation for medical expenses, lost wages, and pain and suffering.

(i) IN GENERAL.—The Attorney General shall pay, from amounts available in the Camp Lejeune Fund, claims filed under this Act that the Attorney General determines meet the requirements of this Act. [NOTE: A different section would need to establish a Fund.]

(ii) HEALTH AND DISABILITY BENEFITS RELATING TO WATER EXPOSURE.— Any award made under this section shall be offset by the amount of any disability award, payment, or benefit provided to the claimant—

(I) under—

(A) any program under the laws administered by the Secretary of Veterans Affairs; [NOTE: We will propose revised language to account for the circumstances where an award under this program is made prior to any award under a VA disability benefits program or other applicable benefits]

(B) the Medicare program under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.); or

(C) the Medicaid program under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.); and

(II) in connection with health care or a disability relating to exposure to the water at Camp Lejeune.

(iii) RIGHT OF SUBROGATION.— Upon payment of a claim under this section, the United States Government is subrogated for the amount of the payment to a right or claim that the individual to whom the payment was made may have against any person on account of injuries referred to in subsection (a).

(D) ACTION ON CLAIMS.—

(i) IN GENERAL.—The Attorney General shall complete the determination on each claim filed in accordance with the procedures established under subsection (b)(1) not later than 12 months after the claim is filed. For purposes of determining when the 12-month period ends, a claim under this Act shall be deemed filed as of the date of its receipt by the Attorney General. In the event of the denial of a claim, the claimant shall be permitted a reasonable period in which to seek administrative review of the denial by the Attorney General. The Attorney General shall make a final determination with respect to any administrative review within 90 days after the receipt of the claimant's request for such review. In the event the Attorney General fails to render a determination within 12 months

after the date of the receipt of such request, the claim shall be deemed awarded as a matter of law and paid.

(ii) ADDITIONAL INFORMATION.— The Attorney General may request from any claimant under this Act any reasonable additional information or documentation necessary to complete the determination on the claim in accordance with the procedures established under subsection (b)(1).

(iii) PAYMENT WITHIN 6 WEEKS.— The Attorney General shall ensure that an approved claim is paid not later than 6 weeks after the date on which such claim is approved.

(E) PAYMENT IN FULL SETTLEMENT OF CLAIMS AGAINST THE UNITED STATES.— Except as otherwise authorized by law, the acceptance of payment by an individual under this section shall be in full satisfaction of all claims of or on behalf of that individual against the United States that arise out of exposure to water contamination at Camp Lejeune under subsection (a).

(F) JUDICIAL REVIEW.—An individual whose claim for compensation under this Act is denied may seek judicial review within 180 days of denial solely in a district court of the United States. The court shall have jurisdiction to review the denial on the administrative record and shall hold unlawful and set aside the denial if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(c) ATTORNEY FEES.—

(1) GENERAL RULE.—Notwithstanding any contract, the representative of an individual may not receive, for services rendered in connection with the claim of an individual under this Act, more than that percentage specified in subsection (2) of a payment made under this Act on such claim.

(2) APPLICABLE PERCENTAGE LIMITATIONS.—The percentage referred to in subsection (1) is—

(i) 2 percent for the filing of an initial claim; and

(ii) 10 percent with respect to—

(I) any claim with respect to which a representative has made a contract for services before the date of the enactment of the Camp Lejeune Contaminated Water Exposure Compensation Act; or

(II) a resubmission of a denied claim.

(3) PENALTY.—Any such representative who violates this section shall be fined not more than $5,000.

(d) EXCEPTION FOR COMBATANT ACTIVITIES.—This section does not apply to any claim for harm arising out of the combatant activities of the Armed Forces.