CASE NOTES

Atlantic Richfield Co. v. Christian: The Supreme Court Holds that CERCLA Does Not Strip State Courts of Jurisdiction over Common Law Claims and that Residential Landowners Are Potentially Responsible Parties

I. OVERVIEW

"Between 1884 and 1902, the Anaconda Copper Mining Company built three copper smelters 26 miles west of the mining town of Butte, Montana. The largest one, the Washoe smelter, featured a 585-foot smokestack, taller than the Washington Monument."[1] In its near century of use, the Washoe smelter refined tens of millions of pounds of copper ore, feeding the demand for telephone and power lines in an industrializing nation.[2] Between 1912 and 1973, the Anaconda Company payroll in Montana totaled $2.5 billion, accounting for three-fourths of the state's workforce.[3] The work of refining copper and the myriad other jobs at the Anaconda operation was hot, dirty, and dangerous.[4] For nearly a century, the mining and smelting operations west of Butte provided thousands of good paying union jobs to locals and immigrants to the region.[5] The

1. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1346 (2020).
2. *Id.*
3. *Id.*
4. Susan Dunlap, *A dangerous Job that Gave Life to a Town: A Look Back at the Anaconda Smelter,* MONT. STANDARD, (Aug. 8, 2018; updated Jan. 22, 2019) https://mtstandard.com/news/local/a-dangerous-job-that-gave-life-to-a-town-a-look-back-at-the-anaconda/article_f6609892-9e8b-5bcf-8f63-5b60200b4df0.html [https://perma.cc/V8K6-WBBD?type=image].
5. *Id.*

economic prosperity, however, came at a price. The Anaconda Stack released up to 75 tons of arsenic into the air per day.[6] Further, the economic benefit was not to last as, by the 1970s, however, plummeting copper prices, the energy crisis, and the nationalization of copper mines in Chile and Mexico forced the Anaconda company into a merger with Atlantic Richfield.[7] Intending to reverse the fortune of the Anaconda operation, Atlantic Richfield bought the company for $700 million, but, by 1980, due to further reductions in copper prices, Atlantic Richfield was forced to close its newly acquired smelter and adjoining mines.[8]

Atlantic Richfield's closure of the operation turned out to be only the start of the trials and tribulations the company would face due to its acquisition of the Anaconda smelter. With the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Act) in 1980, Atlantic Richfield became strictly and retroactively liable for the millions of tons of arsenic, lead, and other heavy metals that Anaconda released across the area throughout the previous century.[9] In July 1983, the EPA designated the smelter and more than 300 square miles around the facility as an inaugural Superfund site.[10]

In the nearly forty years since the site's designation, Atlantic Richfield has worked under EPA management "to remediate over 800 residential and commercial properties; remove 10 million cubic yards of tailings, mine waste, and contaminated soil; cap in place 500 million cubic yards of waste over 5,000 acres; and reclaim 12,500 acres of land."[11] Since remediation began, Atlantic Richfield estimates it has spent about $450 million dollars carrying out the EPA's orders.[12] Yet, as of 2015, the EPA's plan still called for the cleanup of 1,000 more residences, revegetation of 7,000 acres, removal of several areas of tailings and mine waste, and the closure of several contaminated stream banks and rail beds.[13] The remaining work will likely take until at least 2025.[14]

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6 *Id.*

7. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1346 (2020).

8. *Id.* at 1346-47.

9. *Id.* at 1347; *see also* 42 U.S.C. 9601 *et seq*.

10. *Atl. Richfield Co.*, 140 S. Ct. at 1347 (citing 48 Fed. Reg. 40667).

11. *Id.* (citing EPA, SUPERFUND PRIORITY "ANACONDA" 9 (Apr. 2018), https://semspub.epa.gov/work/08/100003986.pdf [https://perma.cc/UYP2-DFPY?type=image]).

12. *Id.*

13. *Id.* (citing EPA, FIFTH FIVE-YEAR REVIEW REPORT: ANACONDA SMELTER SUPERFUND SITE, ANACONDA-DEER LODGE COUNTY, MONTANA Table 10-1 (Sept. 25, 2015), https://semspub.epa.gov/work/08/1549381.pdf [https://perma.cc/W9VL-S88D?type=image]).

14. *Id.* (citing EPA, FIFTH FIVE-YEAR REVIEW REPORT, *supra* note 11, Table 10-7).

In 2008, a group of ninety-eight landowners within the Superfund site brought suit against Atlantic Richfield in the Montana Second Judicial District Court alleging trespass, nuisance, and strict liability under state common law, and seeking, among other remedies, restoration damages.[15] The landowners sought to augment the EPA remediation orders in several significant ways:

> For example, the landowners propose[d] a maximum soil contamination level of 15 parts per million of arsenic, rather than the 250 parts per million level set by EPA. And the landowners [sought] to excavate offending soil within residential yards to a depth of two feet rather than EPA's chosen depth of one. The landowners also [sought] to capture and treat shallow groundwater through an 8,000-foot long, 15-foot deep, and 3-foot wide underground permeable barrier, a plan the agency rejected as costly and unnecessary to secure safe drinking water.[16]

At trial, the parties filed competing motions for summary judgment debating whether CERCLA precluded the landowners' state law claim for restoration damages.[17] The court granted the landowners' motion on the issue and allowed the suit for restoration damages to continue.[18] Thereafter, the Montana Supreme Court granted a writ of supervisory control and affirmed the lower court's determination.[19]

The Montana Supreme Court recognized that CERCLA § 113, which regulates civil proceedings, strips federal courts of jurisdiction to review challenges to EPA cleanup plans.[20] However, the court went on to reason that the plan submitted by the landowners did not challenge the EPA cleanup plans because the landowner plan would not "stop, delay, or change the work the EPA is doing."[21] The Montana Supreme Court did not consider the state law claim a challenge to removal or remedial action under CERCLA, and thus did not consider the claim to be barred by § 113.[22] Ultimately, the Montana Supreme Court allowed the landowners' claim seeking the restoration of their land to proceed.[23] The court went on

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15. *Id.*
16. *Id.* at 1347-48.
17. *Id.* at 1348.
18. *Id.*
19. *Id.*
20. Atl. Richfield Co. v. Mont. 2d Jud. Dist. Ct., 2017 MT 324, ¶ 15, 390 Mont. 76, 83, 408 P.3d 515, 519-20. State courts do not have jurisdiction to review EPA cleanup plans either because CERCLA § 113 creates exclusive federal jurisdiction over "all controversies" under CERCLA.
21. *Id.* at 520-21.
22. *Id.*
23. *Id.* at 523.

to reject Atlantic Richfield's argument that the landowners were potentially responsible parties (PRPs) and were therefore prohibited from taking any additional remedial action without the EPA's approval under § 122(e)(6) of the Act, the settlement provision.[24] The court reasoned that the landowners were never treated as PRPs by the EPA or Atlantic Richfield in the more than thirty years since the smelter's designation as a Superfund site.[25] Further, since the landowners were not party to the administrative process and the statute of limitations for a claim against them had run, the court held that the landowners did not need to seek EPA approval for the more exacting remediation of their land.[26] In true Montana fashion, the Montana Supreme Court stated that "the PRP horse left the barn decades ago."[27]

Atlantic Richfield filed a writ of certiorari with the U.S. Supreme Court, claiming first that, based on § 113 of CERCLA, the Montana courts did not have jurisdiction over the claim for restoration damages as evaluation of such claim would essentially amount to a review of an EPA cleanup plan.[28] Atlantic Richfield further claimed that §§ 107(a) and 122(e)(6) of CERLA, when read together, classify the landowners as PRPs, and that, as PRPs, the landowners would need to acquire approval from the EPA before altering or bolstering the cleanup plan administered by the agency.[29] The Supreme Court *held* that CERCLA does not preclude the state courts from jurisdiction over state causes of action arising under the common law, but that the Act classifies the landowners as PRPs, and thus that the landowners must seek approval from the EPA before remediating their land beyond the work already approved by the EPA. *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020).

II. BACKGROUND

CERCLA was passed in 1980 with the purpose of creating a comprehensive scheme to respond to the release or threatened release of hazardous substances, to determine liability for such releases, and to establish means of compensation for harm resulting from such releases.[30]

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24. *Id.* at 522-23.
25. *Id.* at 522.
26. *Id.*
27. *Id.*
28. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1349-1351 (2020).
29. *Id.* at 1352-57.
30. New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985) (citing F. ANDERSON, D. MANDELKER, & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984)).

The intricate and complex statute has since precipitated a great deal of litigation parsing its language and the intent of its drafters. One line of cases concerns the jurisdictional restrictions imposed upon federal courts when a cleanup plan under the Act has been proposed or is underway.[31] Another line of cases concerns the PRP analysis.[32] Questions raised in such an analysis include, who is properly classified as a PRP, and what are the implications of such a classification?

A. Jurisdictional Restrictions to Challenges of EPA Cleanup Plans

Section 113(h) of CERCLA states that no federal court shall have jurisdiction (except as relating to diversity of citizenship) to review any challenges to removal or remedial action.[33] Several federal courts of appeals have reiterated that language, holding that Congress intended to completely bar jurisdiction to federal district courts to hear complaints challenging EPA cleanup plans,[34] such that "[n]o challenge to the cleanup may occur prior to completion of the remedy."[35] In *Boarhead Corp. v. Erickson*, the Third Circuit held that the limitations on jurisdiction imposed by § 113(h) are a crucial check on bogging down a given cleanup plan with time-consuming and costly litigation before it can be completed.[36] The Third Circuit reasoned that the complete jurisdictional bar reflects congressional intent to give the EPA a great deal of leeway and discretion to remediate sites as the agency sees fit without interference from states or private citizens while such a project is ongoing.[37] In *Boarhead*, even where the jurisdictional bar threatened the destruction of archaeological and historical remains potentially protected by the National Historic Preservation Act, based on the clear language of CERCLA, the Third Circuit refused to bend the language of § 113(h) to allow for review of the EPA cleanup plan.[38]

Likewise, in *New Mexico v. General Electric Co.*, the Tenth Circuit refused to extend district court jurisdiction where the state brought claims

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31. *See, e.g.,* Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d Cir. 1991); Schalk v. Reilly, 900 F.2d 1091 (7th Cir. 1990); New Mexico v. Gen. Elec. Co., 467 F.3d 1223 (10th Cir. 2006).

32. *See, e.g., Shore Realty Corp.*, 759 F.2d 1032; Cooper Indus., Inc. v. Aviall Servs. Inc., 543 U.S. 157 (2004); United States v. Atl. Rsch. Corp., 551 U.S. 128 (2007); Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009).

33. 42 U.S.C. § 9613(h).

34. *See Boarhead*, 923 F.2d at 1019; *Schalk*, 900 F.2d at 1095; *New Mexico*, 467 F.3d at 1249.

35. *New Mexico*, 467 F.3d at 1249.

36. *Boarhead*, 923 F.2d at 1019.

37. *Id.*

38. *Id.* at 1014, 1019-23.

of public nuisance and negligence arising under state law, holding that such a claim amounted to a challenge or review of an EPA cleanup plan based on § 113(h).[39] The court barred federal jurisdiction over the claim for remediation damages where the state argued that the EPA plan did not go far enough in remediating contamination to groundwater.[40] Ultimately, the court held that once a remediation plan has been selected, no challenge at all can be brought in federal court before the completion of the remedy chosen by the EPA.[41]

B. Classification as a "Potentially Responsible Party" Under CERCLA

In light of CERCLA's stated goal to be comprehensive when addressing the cleanup of sites where hazardous substances have been released or are threatened to be released, Congress expansively defined the categories of people who might be held responsible for environmental contamination.[42] CERCLA imposes strict liability for environmental hazards on four classes of PRPs,[43] the first of which includes "the owner [or] operator of a vessel or facility[.]"[44] CERCLA defines a facility broadly as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located[.]"[45] Under this definition, almost any owner[46] of contaminated land in a Superfund site can be held strictly liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release."[47]

In *New York v. Shore Realty Corp.*, the Second Circuit refused to read a causation requirement into the liability section of the statute.[48] In that case, the defendant company acquired a contaminated site for

39. New Mexico, 467 F.3d at 1248-50.
40. *Id.* at 1247-48.
41. *Id.* at 1249 (citing Schalk v. Reilly, 900 F.2d 1091, 1095 (7th Cir. 1990)).
42. *See* Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599, 602 (2009).
43. *Id.* at 608.
44. *Id.*
45. *See* 42 U.S.C. § 9601(9).
46. 42 U.S.C. § 9607(b) provides for three defenses from liability where a release or threatened release of hazardous substances is due to an act of God, an act of war, or the act or omission of a third party. The Superfund Amendments and Reauthorization Act of 1986 expanded on the third-party defense by providing for the innocent landowner defense. 42 U.S.C. § 9607(q) provides for the contiguous property defense.
47. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (citing 42 U.S.C. § 9607(a)(4)(C)).
48. *Id.* at 1043-44.

development, and though it did not take part in the site's contamination, the company was nevertheless was held liable under § 107(a) of the Act for the site's remediation as the current facility owner.[49] Based on the text of § 107(a) and legislative history, the court held that CERCLA imposes liability on PRPs "without reference to whether they caused or contributed to the release or threat of release."[50] The court pointed out that absolving new owners of prior contamination would result in an absurd outcome; current owners could avoid liability simply by having purchased the site after dumping had ceased, and polluters would simply sell on their contaminated land when the contaminating operations were complete.[51]

Despite the strict liability imposed by § 107(a), in practice, the EPA has historically exercised discretion in its enforcement and has declined to pursue residential homeowner liability.[52] The agency has determined that it would not be necessary to force any private residential property owner to perform response actions or contribute to remediation costs so long as the property owner's actions were consistent with EPA cleanup plans.[53] In other words, where the owner of a residential property cooperates with the EPA mandated cleanup and does not engage in activity that releases or threatens to release hazardous substances, the residential landowner will be spared from liability under CERCLA.[54]

Further, although CERCLA imposes a strict liability standard, it does not mandate a joint and several liability scheme for each PRP in every case.[55] "Rather, Congress intended the scope of liability to 'be determined from traditional and evolving principles of common law.'"[56] Courts of appeals, in following the call to apply an evolving principle of common law, have used § 433A of the Restatement (Second) of Torts to determine when apportionment of harm is appropriate.[57] Despite not being the cause of the harm, a literal reading of the text of CERCLA would hold any owner of a broadly defined "facility" jointly and severally liable as a PRP. But liable for what? Based on the Restatement, "[d]amages for harm are to be

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49. *See id.* at 1037.

50. *Id.* at 1044-45 (citing 126 Cong. Rec. 31,981-82, *reprinted in* Frank P. Grad, LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 (SUPERFUND), 8 COLUM. J. ENV'T L. 1 at 821-24 (1983).

51. *Id.* at 1045.

52. EPA, OSWER DIRECTIVE NO. 9834.6, POLICY TOWARDS OWNERS OF RESIDENTIAL PROPERTY AT SUPERFUND SITES (1991) [https://perma.cc/28B3-DUE3].

53. *Id.* at 3-5.

54. *Id.* at 4.

55. Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599, 613 (2009).

56. *Id.* (citing United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983)).

57. *Id.* at 614 (citing Restatement (Second) of Torts § 433A (1965)).

apportioned among two or more causes where . . . there is a reasonable basis for determining the contribution of each to a single harm."[58] The PRP seeking apportionment bears the burden of proving that a reasonable basis for apportionment exists.[59] So, a residential landowner might be able to escape liability if they are able to demonstrate that, despite their classification as a PRP, because they are not a cause of the harm and in light of their cooperation with the EPA's plans, no damages should be apportioned to them.

III. COURT'S DECISION

In the noted case, the U.S. Supreme Court held that CERCLA did not preclude the Montana Supreme Court's jurisdiction over the landowners' tort claims seeking the restoration of their land, but also held that the statute's clear language classifies the landowners as PRPs and thus that the landowners would need to secure EPA approval before their claim could proceed in state court.[60] The Court reasoned that state claims arising under the common law and their associated remedies, including, in this case, restoration damages, fall outside of the jurisdictional bar of the Act.[61] However, the Court determined, based on a textual analysis, that the landowners were the owners of a "facility" as defined by the Act, and thus were PRPs.[62] Finally, the court decided that since the landowners were PRPs, they would need to seek approval from the EPA before seeking the remedy of restoration damages based on a nuisance claim.[63]

First, the Court dispensed with a preliminary question of whether the U.S. Supreme Court had jurisdiction to review the Montana Supreme Court's decision.[64] Because the decision by the Montana Supreme Court under review was a writ of supervisory control, the landowners argued that there was not yet a final judgment over which the U.S. Supreme Court had jurisdiction to review, and instead the Court could only review the jurisdictional questions raised in the Montana Supreme Court's decision.[65] The U.S. Supreme Court, however, was unconvinced, finding that "a supervisory writ proceeding is a self-contained case, not an interlocutory

58. *See* Restatement (Second) of Torts § 433A (1965).
59. *Burlington*, 556 U.S. at 614.
60. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1350-57 (2020).
61. *Id.* at 1349.
62. *Id.* at 1352-54.
63. *Id.* at 1355-57.
64. *Id.* at 1349.
65. *Id.*

appeal."[66] Functionally, the Court found, the writ of supervisory control initiated a suit apart from the ongoing proceedings below and the Court was within its authority to review the Montana Supreme Court's decision based on 28 U.S.C. § 1257(a).[67]

Second, the Court considered whether the Montana courts were permitted to exercise jurisdiction over the landowners' claim for restoration damages, or if the claim was barred by §§ 113(b) or 113(h) of CERCLA.[68] According to § 113(b) of CERCLA, U.S. district courts are granted exclusive jurisdiction over controversies arising under the Act, and state courts therefore lack such jurisdiction.[69] However, the causes of action for nuisance and trespass arise under state common law, rather than under the Act.[70]

Atlantic Richfield invoked § 113(h) as an alternative means to block the Montana Supreme Court's jurisdiction over the landowners' claim for restoration damages.[71] Section 113(h) provides that "[n]o Federal court shall have jurisdiction under Federal law [other than as related to diversity of citizenship] . . . to review any challenges to removal or remedial action" under the Act.[72] Atlantic Richfield argued that (1) § 113(h) removes federal jurisdiction over all cleanup challenges regardless of whether they are based in federal or state law, (2) § 113(h) can only remove jurisdiction that § 113(b) confers, (3) § 113(b)'s grant of federal jurisdiction therefore must include cleanup challenges based in state law, and (4) because § 113(b)'s grant of jurisdiction is exclusive to federal courts, state courts lack jurisdiction over even those cleanup challenges based in state law.[73] The Court pointed out myriad infirmities from which the argument suffered.[74] First, § 113(h) refers only to federal jurisdiction and is silent on state court jurisdiction to review cases arising under § 113(b). Second, federal courts sitting in diversity and state courts alike are permitted to entertain state law claims, even where those state law claims are challenges to EPA cleanups.[75] Finally, the statute's text not only fails to

66. *Id.* (citing MONT. CONST. art. VII, §§ 2(1)-(2); MONT. RULES APP. PROC. 6(6), 14(1), 14(3) (2019)).

67. *Id.*

68. *Id.* at 1349-52.

69. 42 U.S.C. § 9613(b).

70. *Atl. Richfield Co.*, 140 S. Ct. at 1349-50 (holding that a suit is considered to arise under the law that creates the cause of action, here the state common law).

71. *Id.* at 1350; *see* 42 U.S.C. § 9613(h).

72. *Id.* (citing 42 U.S.C. § 9613(h)).

73. *Id.*

74. *Id.*

75. *Id.* at 1350-51.

rebut the strong presumption in favor of concurrent jurisdiction for federal claims, but the company's reading of § 113(h) sought to take such a jurisdictional restriction even further, stripping a state court of jurisdiction to hear claims based in its own common law.[76] In short, the Court held that the two provisions of § 113 only overlap in (1) challenges to cleanup plans (2) in federal court (3) that arise under the Act; thus, the Montana Supreme Court was not barred from exercising jurisdiction over the state law claims advanced by the landowners.[77]

Next, the Court determined whether the landowners should be considered PRPs under § 107(a) of the Act.[78] That section lists four classes of PRPs and states that they "shall be liable for, among other things, all costs of removal or remedial action incurred by the United States Government."[79] The Court found that, since the plaintiffs owned land where hazardous substances had come to be located, they were owners of a facility under 107(a) the Act and thus classified as PRPs.[80] The Court considered not only a bare statutory interpretation, that is, the language of the Act, in making this determination, but also considered what decision would be best suited to the policy outcomes anticipated for the Act and the congressional intent in drafting it.[81] In the Court's estimation, to rule that the landowners were not PRPs otherwise would run counter to the purpose of the Act to develop a comprehensive environmental response to hazardous waste pollution.[82] The Act's purpose, to develop a single EPA-led cleanup effort, would be frustrated if individual landowners were permitted to pursue their own cleanup plan apart from, and potentially counter to, the agency's centralized control of cleanup efforts.[83]

The landowners argued in the alternative that they should not be considered PRPs because they did not receive a notice of settlement negotiations as required by § 122(e)(1).[84] However, under EPA policy, the agency does not seek to recover costs from residential landowners who are not responsible for the contamination and do not interfere with the agency

76. *Id.* at 1351.
77. *Id.* at 1352.
78. *Id.* at 1352-54.
79. *Id.* at 1352 (citing Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 161 (2004)) (cleaned up).
80. *Id.*
81. *Id.* at 1353.
82. *Id.*
83. *Id.*
84. *Id.* at 1354.

remedy.[85] Because of this policy, the EPA did not include the landowners in settlement negotiations.[86] Despite the nonenforcement policy, the statute unambiguously defines the "owners of a facility" as PRPs, and the Court held that EPA discretion not to prosecute does not modify such determination.[87]

Finally, the Court considered whether, as PRPs, the landowners would need to seek approval of their cleanup plans from the EPA based on § 122(e)(6) of the Act.[88] The Court held that the landowners would need to seek approval for their proposed remediation actions before continuing their suit in state court and seeking the damages necessary to carry out augmentation of the EPA plan.[89] The pertinent section of the Act states in part: "When . . . a potentially responsible party . . . has initiated a remedial investigation and feasibility study for a particular facility under this Act, no [other] potentially responsible party may undertake any remedial action . . . unless such remedial action has been authorized by the President."[90] The landowners worried that the application of that section to their case would preclude them from planting a garden or "dig[ging] out part of their backyard to put in a sandbox for their grandchildren" without receiving approval from the EPA.[91] The Court assuaged such worries, stating that "the grandchildren of Montana can rest easy: the Act does nothing of the sort."[92] Section 122(e)(6) refers only to remedial action, only those acts engaged in specifically to address hazardous waste.[93] So, the only things which need clearance by the EPA are those acts that would seek to remediate the land's hazardous state.[94] Ultimately, so long as the landowners obtain the EPA's approval, the court held that Atlantic Richfield could be held liable for the additional remediation sought by the landowners beyond that required by the EPA.[95]

Justice Gorsuch, in his separate opinion, worried about the effects of the Court's decision on the landowners' individual liberty and about the

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85. *Id.* (citing EPA, POLICY TOWARDS OWNERS OF RESIDENTIAL PROPERTY AT SUPERFUND SITES, OSWER DIRECTIVE NO. 9834.6 (July 3, 1991), https://www.epa.gov/sites/production/files/documents/policy-owner-rpt.pdf).

86. *Id.*

87. *Id.*

88. *Id.* at 1354-56.

89. *Id.* at 1354-57.

90. 42 U.S.C. § 9622(e)(6).

91. *Atl. Richfield Co.*, 140 S. Ct. at 1354.

92. *Id.*

93. *Id.* (citing 42 U.S.C. § 9601(24)).

94. *Id.*

95. *Id.* at 1355.

actual outcomes of the remediation overseen by the EPA.[96] Gorsuch's main issue with the decision relates to the Court's ultimate holding that the landowners must seek approval from the EPA for their planned remediation actions.[97] In his estimation, the purpose of CERCLA is to supplement rather than overshadow state law remedies and to encourage rather than obstruct the cleanup of contaminated land.[98] Gorsuch, in considering the ordinary public meaning of "potentially responsible party," found it to be a ridiculous and lamentable result that innocent landowners, whose land was impaired by an industrial smelting operation, could be held liable to the Federal government for the damage to their land by a third party.[99] Gorsuch took further issue with the fact that the landowners were never consulted in the settlement process even though § 122, the section concerning settlement, was the section applied to the landowners to implicate them as PRPs; further, the statute of limitations to consider the plaintiff landowners responsible parties had expired.[100] Central to Gorsuch's issue with the Court's decision was that, in his estimation, the Court conflated the "covered person" language of § 107(a) and the "potentially responsible party" language from § 122.[101] To Gorsuch, the Court was operating under the assumption that Congress, meaning the same thing, wrote two different phrases into the statute.[102] Justice Scalia, the venerable arch-textualist, is surely spinning in his grave in light of the majority's embrace of this assumption.[103]

IV. ANALYSIS

The holding in the noted case clarified and departed from precedent in several important ways. Notably, the decision distinguished the decision of the Tenth Circuit in *New Mexico v. General Electric Co.* in that the Supreme Court made clear that state law claims are cognizable in state court and that such claims do not necessarily conflict with CERCLA.[104] The Court resolved a gray area as to when §§ 113(b) and 113(h) apply and

96. *Id.* at 1361-67 (Gorsuch, J., concurring in part and dissenting in part).
97. *Id.* at 1363-65.
98. *Id.* at 1363.
99. *Id.* at 1363-64.
100. *Id.*
101. *Id.* at 1366.
102. *Id.*
103. *See generally* Siegel, Jonathan, THE LEGACY OF JUSTICE SCALIA AND HIS TEXTUALIST IDEAL, 85 GEO. WASH. L. REV. 857 (2017) (outlining Scalia's commitment to a textualist interpretation of the law).
104. *Atl. Richfield Co.*, 140 S. Ct. at 1350-52 (majority opinion).

overlap,[105] as such provisions had been previously read conjunctively by the Court to bar nearly any challenge to an EPA cleanup under CERCLA while it was underway.[106] After *Atlantic Richfield*, there may be a path to meaningfully augment EPA decisions at Superfund sites in state court using a state law remedy, though such a course was previously considered entirely jurisdictionally barred by § 113.[107] Where augmentation of the EPA's remediation plan is not considered a challenge to the EPA plan, or if the challenge is shielded from the jurisdictional bar of § 113 by use of state law claims, the noted case creates a narrow opening for an aggrieved party to seek tort remedies the EPA might have considered too costly or unnecessary to protect human health and welfare.[108] This course of action could be used both by plaintiffs seeking restoration of the natural world and by PRPs intent on calling into question the actions of the EPA that implicate their financial viability so long as the remedy sought is based in state law.[109] "The Act permits federal courts and state courts alike to entertain state law claims, including challenges to cleanups."[110] Plaintiffs aggrieved by damage to their land might now more readily bring a claim for restoration damages.[111] On the other hand, PRPs might now make creative use of state law to circumvent some EPA decisions on remediation.[112]

The noted case also clarified the expansive nature of the PRP section of CERCLA.[113] Now the EPA is faced with a difficult decision, both in the instant case and in the future. Should the agency allow an interested party to proceed with a remedy it found to be too costly and unnecessary for the protection of human health when challenged in state court? This decision also calls into question the finality of settlements under CERCLA that are

105. *Id.*

106. *See* Cooper Indus. v. Aviall Servs., 543 U.S. 157 (2004); *see* United States v. Atl. Rsch. Corp., 551 U.S. 128 (2007); *see also* Laura Ashdown & Benjamin Lippard, *Initial Thoughts on Atlantic Richfield Co. v. Christian*, JD SUPRA (Apr. 28, 2020) https://www.jdsupra.com/legalnews/initial-thoughts-on-atlantic-richfield-26066/.

107. *Atl. Richfield Co.*, 140 S. Ct. at 1349-50; Ashdown & Lippard, *supra* note 106.

108. *Atl. Richfield Co.*, 140 S. Ct. at 1350.

109. Noah Perch-Ahern, Atlantic Richfield Co. v. Christian—*Perpetuating the Cycle of Supreme Court Environmental Law Decisions that Spark Litigation and Confusion*, JD SUPRA (Apr. 27, 2020), https://www.jdsupra.com/legalnews/atlantic-richfield-co-v-christian-86612/ [https://perma.cc/5SWZ-U3CS?type=image].

110. *Atl. Richfield Co.*, 140 S. Ct. at 1351.

111. Perch-Ahern, *supra* note 109.

112. *Id.*

113. *Atl. Richfield Co.*, 140 S. Ct. at 1352-53.

central to the statute.[114] Now, the finality of such settlement agreements could be undone if the EPA approves of additional remediation—beyond that agreed to in a settlement—where landowners with contaminated land pursue state law tort claims against a party to the settlement.[115]

The familiar canon of statutory construction provides that where a statute is clear, the language of the statute should be considered conclusive.[116] The law should be interpreted and carried out based on the clear language of the statute.[117] However, much of CERCLA's language is anything but clear and the numerous instances of litigation seeking to parse the language of the statute are evidence of such ambiguity.[118] CERCLA, furthermore, lacked a formal legislative history which might be used to parse the intent of its drafters, the Act was passed hurriedly and unconventionally at the close of a lame duck session of Congress.[119] In writing the law, did Congress intend to consider a private residence a facility? Did Congress intend to classify individual homeowners who were uninvolved with the contamination of their land properly as PRPs? Without a developed legislative history on which to base a conclusion, to state Congress's intent firmly one way or the other would be mere speculation.

The Court here determined, considering that CERCLA is intended to be a comprehensive statute utilizing a strict and absolute theory of liability, that the landowners were PRPs.[120] In the noted case, one issue that the Court declined to consider was the interest in settlement finality, which is central to all ongoing and future administration of the Superfund

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114. Dawn M. Lamparello et al., *U.S. Supreme Court Requires EPA Approval of State Law Remedy for Extra Cleanup at ARCO's Anaconda Smelter CERCLA Superfund Site*, THE NAT'L L. REV. (Apr. 27, 2020), https://www.natlawreview.com/article/us-supreme-court-requires-epa-approval-state-law-remedy-extra-cleanup-arco-s [https://perma.cc/C66Y-G2WW?type=image].

115. *Id.* at 114.

116. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

117. *Id.*

118. Frank P. Grad, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 ("SUPERFUND") ACT OF 1980, 8 COLUM. J. ENV'T L. 1 at 2 (1982) ("In the instance of the 'Superfund' legislation, a hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law.")

119. *Id.* at 1. ("The bill which became law was hurriedly put together by a bipartisan leadership group of senators (with some assistance from their House counterparts), introduced, and passed by the Senate in lieu of all other pending measures on the subject. It was then placed before the House, in the form of a Senate amendment of the earlier House bill. It was considered on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments.").

120. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1353 (2020).

program.[121] If landowners whose land was blighted by a nearby factory or industrial operation are owners of a "facility," based on § 122(e)(1), they should have had the fair opportunity to enter negotiations at the inception of administrative action.[122] Otherwise, if the agency exercises its discretion and does not hold a private landowner liable, that landowner should not later be held to be the owner of a facility and thus a PRP. Every interested party who might one day be held a PRP should be able to see their interests represented in a settlement agreement or consent decree. Irrespective of the EPA policy not to hold individual residential landowners liable, every party that might be held potentially responsible and thus might be bound by a settlement agreement or consent decree should be involved in the administrative process from its inception.

The reason this decision may seem bizarre is that cleanup was likely already well underway when many of the homeowners purchased their land or, if they did own the land when the Anaconda smelter was listed on the National Priorities List, they were left out in the cold during negotiations. Nonetheless, because it is within the EPA's authority to exercise its discretion in pursuing a policy of not holding individual landowners liable under CERCLA, the plaintiffs here were not brought to the negotiating table when the Anaconda site was listed nor when the cleanup plan was created or since modified.[123] For the landowners to later be held to be PRPs seems a confusing result that sidesteps the settlement process of § 122 and the administrative discretion not to include private landowners.[124] Because the landowners were not consulted at the inception of the cleanup plan, their interests were not represented. To now hold them potentially responsible, to bind the landowners to a settlement that they had no hand in creating, allows the EPA to exert its discretion to its own benefit and to the detriment of the landowners. If the EPA exerts its discretionary authority not to include private landowners in a settlement negotiation or in the formulation of a cleanup plan, it seems counterintuitive to later bind such landowners to such a settlement agreement or cleanup plan.

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121. Lamparello, *supra* note 114.

122. 42 U.S.C. § 9622(e)(1) (stating that when the president determines that negotiations would facilitate the taking of a response action, the President shall notify all PRPs of the opening of negotiations, as well as other crucial information including the identity of all known PRPs and the volume and nature of hazardous substances).

123. EPA, OSWER DIRECTIVE NO. 9834.6, POLICY TOWARDS OWNERS OF RESIDENTIAL PROPERTY AT SUPERFUND SITES (1991).

124. *See* 42 U.S.C. § 9622; EPA, OSWER DIRECTIVE NO. 9834.6.

Discretionary authority here was a double-edged sword. The plaintiff landowners were not brought in at the inception of the cleanup as PRPs to face potential liability; thus, their interests were likely not represented fully when the plan was created. It is unlikely that in 1983, just a few years after the Anaconda smelter closed and CERCLA was passed, that many of the landowners who brought the claim currently working its way through the court considered giving, or were even capable of giving, input into the cleanup plan by commenting on the proposed cleanup. Indeed, many were too young to understand the need to do so, others were not yet even born. Still others would have seen generations of their family and neighbors employed by the predecessor in interest of the company which was now being held liable for the remediation of massive swaths of land. Even if the landowners had engaged in the administrative process in 1983, commenting on the proposed cleanup plan soon after the Anaconda smelter was designated a Superfund site, in the nearly four decades since, their concerns and priorities would reasonably be expected to evolve. Due to more extensive monitoring, a better scientific understanding of the potential risks people face as a result of contact with arsenic, lead, and the other dangerous chemicals released by the operation, and a greater understanding of the severity and scope of contamination around the smelter, the landowners today have access to information they did not have in 1983. Bringing their claim for restoration damages now using state law, as the EPA cleanup nears completion, might be the only way that landowners can see their land remediated and restored to a state they consider safe and livable.

V. CONCLUSION

In the noted case, the Supreme Court clarified some of the many hazy sections of CERCLA. The Court's decision in the noted case struck a pragmatic middle path. Though the plaintiff landowners are now bound to seek administrative approval for their more stringent remediation plans, they are not altogether jurisdictionally barred from seeking the restoration of their land, as the claim for restoration damages arose not under CERCLA but under state common law. Previously, such a claim was considered entirely jurisdictionally barred. Now, potentially responsible parties have a way to seek the restoration of their land above and beyond an EPA cleanup plan where they advance a state law claim. So long as such a claim is not considered to arise under the Act, there is a narrow window through which the restoration of a plaintiff's land can be ordered by a state or federal court. Though EPA approval of the augmentation of a

cleanup plan is a hurdle the landowners here must now clear, the Supreme Court allowed their ultimate claim to proceed. Pending administrative approval, the landowners might yet have their land remediated to their satisfaction on Atlantic Richfield's dime.

Micah Carper*

* © 2021 Micah Carper, J.D. candidate 2022, Tulane University Law School; B.A., 2011, Political Science, Warren Wilson College. The author would like to thank his wife Elizabeth for her unwavering support, his advisor Adam Babich for his helpful insight and for keeping the author focused, as well as his friends, classmates, and the *Tulane Environmental Law Journal* editorial board for their encouragement, advice, and support throughout this process.