NOTES

Residents of Gordon Plaza, Inc. v. Cantrell: Broad Interpretation of "Removal" Leaves Community with No Remedy

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I. OVERVIEW

As the environment continues to deteriorate over time, low-income minority communities are the first to face the deadly effects of government's inaction to clean up toxic waste.[1] *Residents of Gordon Plaza, Inc. v. Cantrell* concerns Gordon Plaza, a primarily African American neighborhood, which was built on top of a former landfill that was once owned and operated by the City of New Orleans (City).[2] The Residents of Gordon Plaza (Residents) contend that the City targeted Black individuals when selling the property without disclosing its previous use as a landfill.[3] After closure of the landfill, the land contained

1. Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NRDC (Mar. 17, 2016), https://www.nrdc.org/stories/environmental-justice-movement.

2. 25 F.4th 288, 293 (5th Cir. 2022).

3. *Id.*

significant amounts of toxic waste, and the Environmental Protection Agency (EPA) listed the landfill site (Site) as a Superfund site.[4] Despite the deadly levels of toxins that remained, the City built a residential area around twenty years after the closure.[5] From 1994 to 2001, EPA removed two feet of toxic soil and placed a mat over it to create a barrier from the surface.[6] When Hurricane Katrina devastated New Orleans in 2005, these preventative efforts to remedy the toxic waste in the area were diminished.[7] The Residents alleged that Hurricane Katrina and the length of time from when the original preventative work was done caused the mats to be exposed or missing, releasing contaminated soil.[8]

In order to mitigate the damage from Hurricane Katrina, EPA and the City agreed to a Superfund Consent Decree (Decree) in 2008 that required the City to ensure the remedy installed by EPA is protected to help upkeep public health.[9] The Residents allege that the City did not do its duty to maintain the Site and that residents of the neighborhood suffered from cancer and other health conditions.[10] An earlier suit brought by the residents in 2018 was dismissed due to lack of standing.[11] The Residents then brought this citizen suit on May 15, 2020, alleging that the Site remained contaminated with toxic chemicals and, as a result, residents of the neighborhood suffered from cancer and other health conditions.[12] The Residents sought a declaration of substantial endangerment and a mandate that the City must carry out proper risk assessments to reduce the effects of the toxic waste in the Site.[13] Since the complaint lacked information regarding the 2008 Decree between the City and EPA, the City moved to dismiss under FRCP 12(b)(1) and 12(b)(6) asserting that the lawsuit was precluded by the Resource Conservation and Recovery Act (RCRA), which bars citizen suits where one of the parties is diligently conducting a "removal action" in

4. *Id*.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id*.
9. *Id*.
10. *Id*. at 294.
11. Residents of Gordon Plaza, Inc. v. Cantrell, No. CV 18-4226, 2019 WL 2330450 (E.D. La. May 31, 2019).
12. *Residents of Gordon Plaza*, 25 F.4th at 294.
13. *Id*.

accordance with a consent decree with EPA.[14] The district court granted the motion to dismiss because the 2008 Decree stated that the City must maintain consistent removal actions and the Residents failed to plausibly allege that the City's actions were not removal actions.[15] The Residents asked the court to reconsider its order, and when the district court denied their motion, the Residents appealed the decision.[16] The United States Court of Appeals for the Fifth Circuit *held* that the City's actions were, in fact, removal actions and that the City conducted them diligently, therefore barring the residents from bringing a citizen suit. *Residents of Gordon Plaza, Inc. v. Cantrell*, 25 F.4th 288 (5th Cir. 2022).

II. BACKGROUND

Environmental justice movements have continuously demanded justice for low-income minority communities that have been the first to face the consequences of environmental hazards and the effects of climate change.[17] One of the main enforcement mechanisms for these communities that suffer from abandoned environmental hazards is citizen suits.[18] Citizen suits have been a mechanism to hold state and local government in compliance with their obligation to maintain these areas.[19] Yet, some citizen suits have been barred by Congress to prevent citizens from conflicting with ongoing clean-up efforts by these government entities.[20]

14. *Id*.; *see* 42 U.S.C. § 6972(b)(2)(B)(iv). RCRA defaults to use the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) definition of removal action. 42 U.S.C. § 9601(23) (defining removal as "the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release").

15. *Residents of Gordon Plaza*, 25 F.4th at 294.

16. *Id*. at 295.

17. Skelton & Miller, *supra* note 1.

18. 1 Caroline N. Broun & James T. O'Reilly, *RCRA and Superfund: A Practice Guide*, 3d § 5:31 (2022).

19. *Id*.

20. *Residents of Gordon Plaza*, 25 F.4th at 301.

A. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) bars citizen suits during removal actions.[21] RCRA was passed in 1976 and delegated to EPA the power to supervise the "generation, transportation, treatment, storage and disposal" of hazardous waste.[22] RCRA further allows EPA to address environmental problems surrounding hazardous waste and create management plans for conducting safe removal of toxic material and regulating hazardous chemicals.[23] In 1984, amendments to RCRA delegated more power to EPA to protect public health and the environment. The amendments also included provisions for citizen suits, with a few exceptions, including removal actions.[24] RCRA has a statutory bar for citizen suits where the "responsible party is diligently conducting removal actions." However, RCRA does not explicitly define removal actions, instead deferring to the definition provided by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[25]

B. Comprehensive Environmental Response, Compensation, and Liability Act

CERCLA outlines what constitutes a "Superfund" site and what steps must be taken for removal.[26] CERCLA created a system where EPA could clean up and maintain abandoned hazardous waste sites and other emergency releases of toxic chemicals that are labeled as Superfund sites.[27] CERCLA empowers EPA to find the responsible parties for these uncontrolled sites and ensure that they comply with steps to clean up the site and maintain it so that the hazardous toxins are not released.[28] According to CERCLA, the term "removal" includes all actions necessary to monitor the threat of release of hazardous chemicals,

21. 42 U.S.C. § 6972(b)(2)(B)(iv).

22. *Summary of the Resource Conservation and Recovery Act*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (last updated Sept. 12, 2022), https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act; 42 U.S.C. §§ 6902, 6905(b)(1).

23. 42 U.S.C. §§ 6921-39.

24. 42 U.S.C. § 6972(a).

25. 42 U.S.C. § 6972(b)(2)(B)(iv).

26. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9602–9675.

27. *Id.* §§ 9604, 9621.

28. *Id.* § 9607.

disposal of such hazardous material, or any other actions to mitigate damage to public health and the environment.[29]

C. Requirements of the 2008 Consent Decree

In the noted case, the 2008 Consent Decree constitutes the binding agreement at issue between the City of New Orleans and EPA.[30] A Consent Decree usually outlines a settlement to mandate the final clean-up of a Superfund site and the remedial actions that must be taken by both parties to remain in compliance.[31]

The agreement mandated that the City protect the remedy EPA set in place at the Gordon Plaza site.[32] The remedy included uprooting two feet of soil, placing mats to cover the toxic soil, filling the area with new soil, and topping it with grass.[33] The Decree specifically required the City to maintain the vegetation cover by mowing the grass twice a year to ensure that the mats were not exposed.[34] The Decree also required the City to assign a Project Coordinator who would serve as the liaison between the City and EPA and who would be in charge of supervising the City's compliance with the Decree.[35] The City was required to submit a written progress report every year indicating what actions it took to comply with the Decree.[36] EPA agreed to review the area every five years and determine whether the City was compliant with maintaining the Site.[37]

D. Establishing a Test for Reviewing Agency's Construction of a Statute

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. outlines a two-prong analysis to review an agency's construction of a statute.[38] In *Chevron*, the dispute surrounded the amendments to the Clean Air Act that required states to create a permit program regulating new or

29. *Id.* § 9601(23).

30. Residents of Gordon Plaza, Inc. v. Cantrell, 25 F.4th 288, 293 (5th Cir. 2022).

31. *Negotiating Superfund Settlements*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (last updated Aug. 15, 2022), https://www.epa.gov/enforcement/negotiating-superfund-settlements.

32. *Residents of Gordon Plaza*, 25 F.4th at 293.

33. *Id*.

34. *Id*. at 293–94.

35. *Id*. at 294.

36. *Id*.

37. *Id*.

38. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

modified major stationary sources of air pollution.[39] EPA regulation, however, allowed states to adopt their own plantwide definition of "stationary source."[40] Therefore, the main issue decided in *Chevron* was whether EPA's decision to allow states to categorize all pollution-emitting devices within one single "bubble" was based on a reasonable construction of the statutory term "stationary source."[41]

In reviewing EPA's construction of the term "stationary source," the Supreme Court applied a two-prong analysis to determine whether it was reasonable.[42] The Court's first question was whether Congress had directly spoken to the precise issue before.[43] If Congress had directly spoken to the issue and Congressional intent was unambiguously clear, then the court conducting the analysis would defer to the agency's interpretation of what Congress meant when creating the statute.[44] If the statute is silent or unclear about the specific issue, the court must determine "whether the agency's answer is based on a permissible construction of the statute."[45] In those circumstances, courts have limited power to interpret statutes, and the power to fill any gaps is left to Congress.[46] The Court further held that if Congress left any gaps with vague language in the statute, then Congress expressly delegated authority to the agency to interpret, and the agency's regulations should be given controlling weight unless they are arbitrary or obviously contrary to legislative history and the intent of Congress.[47] In short, if the interpretation by an agency is reasonable then the court cannot provide its own interpretation.[48] The *Chevron* decision gives deference to agencies.

E. Adding a Threshold Requirement to Merit the Chevron Two-Prong Analysis

The Supreme Court added to the *Chevron* test in *U.S. v. Mead Corp.*, adding a threshold requirement that would trigger the *Chevron* two-prong analysis. *Mead* concerned the Harmonized Tariff Schedule of the United

39. *Id.* at 840.
40. *Id.*
41. *Id.*
42. *Id.* at 842.
43. *Id.*
44. *Id.* at 842–43.
45. *Id.*
46. *Id.*
47. *Id.* at 843–44.
48. *Id.* at 845.

States, which taxes imports.[49] In *Mead*, the Supreme Court considered the outer bounds of *Chevron* deference and when the *Chevron* test should be applied.[50] The Court held that to give rise to *Chevron* deference, Congress must have given the agency the authority to make rules that carry the force of law.[51] If a statute does not carry the force of law, then the analysis will stop there and the *Chevron* two-step analysis will not be applied.[52] To prove that the agency was delegated such authority, the agency can show that it had the power to adjudicate or implement notice and comment rulemaking to demonstrate congressional intent.[53] The *Mead* threshold test is now used in conjunction with *Chevron* to screen out statutes that do not merit *Chevron* deference.[54]

F. Skidmore Alternative to Chevron Test

Finally, in *Skidmore v. Swift and Co.*, the Supreme Court determined the extent of the deference an agency should be granted in its interpretation of a statutory term. The *Skidmore* case was brought by firefighters who were not being paid overtime while sleeping overnight at the station in case of fire alarms; they only got paid when called out on an actual alarm.[55] The issue was whether wait times counted as work time.[56] The Court found that an agency's interpretation is not binding on courts but may be used as a guide.[57] The Court further stated that the courts, not Congress, must determine whether a case falls under an agency rule and must analyze each case individually since the issue is of fact.[58] The weight given to an agency's interpretation depends on its persuasiveness, which is proven through the depth of the agency's consideration, the validity of its reasoning, and its consistency with earlier precedent.[59] This test is only used when the agency does not have the power to control.[60] *Skidmore* now serves as an alternative to the *Chevron* test when determining the amount

49. U.S. v. Mead Corp., 533 U.S. 218, 221 (2001).
50. *Id.* at 226.
51. *Id.* at 226–27.
52. *Id.* at 227.
53. *Id.*
54. *Id.*
55. Skidmore v. Swift & Co., 323 U.S. 134, 135–36 (1944).
56. *Id.* at 136–37.
57. *Id.* at 139.
58. *Id.* at 136–37.
59. *Id.* at 140.
60. *Id.*

of deference an agency should have in its interpretation of a statutory term.

III. COURT'S DECISION

In the noted case, the Fifth Circuit applied the *Chevron*, *Mead*, and *Skidmore* tests in analyzing what EPA intended "removal" to mean and whether the City's actions per the 2008 Consent Decree constituted a "removal" action.[61] The court began by reviewing the three grounds on which the Residents argued for reversal after the district court dismissed their complaint based on RCRA's statutory bar.[62] First, the Residents contended that the district court abused its discretion when it found the City's actions were removal actions, since the City had previously raised this defense.[63] Second, the Residents argued that the district court erred in finding the City had engaged in removal actions.[64] Finally, the Residents argued that the court erred when it found the City had been diligently performing the actions required by the Consent Decree.[65] The court applied the de novo standard of review and reviewed the complaint in the light most favorable to the Residents to determine if the complaint contained sufficient factual matter to state a plausible claim of relief on its face.[66]

Turning to the first issue, the court focused on whether the district court abused its discretion in accepting the City's assertion in its reply brief, indicating that the City was engaging in removal actions.[67] The court explained that the district court abuses its discretion if an argument is new and was never previously raised, thus providing no opportunity for the other side to respond before a ruling is made.[68] The Residents contended that the City and district court never brought up the City's involvement in removal actions in either of the cases brought, but the Fifth Circuit disagreed.[69] The court found that the district court did not abuse its discretion because the main issue in the 2018 litigation was whether the City diligently conducted removal activities, which would bar citizen

61. Residents of Gordon Plaza, Inc. v. Cantrell, 25 F.4th 288, 296–297 (5th Cir. 2022).
62. *Id.* 295.
63. *Id.* at 295–296.
64. *Id.* at 296.
65. *Id.*
66. *Id.* at 295.
67. *Id.* at 296.
68. *Id.*
69. *Id.*

suits.[70] The City also asserted the same grounds for its motion to dismiss in this current litigation.[71] Finally, the court concluded that the City provided information in their reply about how the 2008 Consent Decree demonstrated their compliance in diligently conducting removal actions.[72]

Second, the Fifth Circuit analyzed what the term "removal" included and whether the City was engaged in removal actions in this case.[73] The City alleged that the citizen suit was barred because the City was engaged in removal actions; the Residents argued that neither EPA nor the City was carrying out removal actions because the agency finished removal actions in 2001 when the toxic soil was removed.[74] The court first determined whether EPA had provided an authoritative interpretation of "removal" that should be given deference under *Chevron*, and if not, whether there was a persuasive interpretation under *Skidmore*.[75] The Residents argued that EPA's authoritative interpretation maintained removal does not include operation and maintenance, and in support cited to the preamble of a proposed rule.[76] When analyzing what constituted removal actions, the court first determined whether *Chevron* deference should apply in this case.[77] Using *Mead*'s threshold step zero, the court found that EPA never interpreted the term "removal" in a way that carried the force of law and therefore it does not give rise to *Chevron* deference.[78] The only interpretation that the Residents pointed to was merely a proposed rule by EPA.[79] A proposed rule does not carry the force of law and cannot be given deference; only a final rule carries the force of law.[80] As such, the court did not apply *Chevron*.[81]

The court then analyzed whether this case merited *Skidmore* deference.[82] The court found that EPA's proposed rule should not receive *Skidmore* deference because it lacked the necessary persuasion.[83] The Residents alleged that the preamble's definition of "response" helped

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 297–99.
76. *Id.* at 297.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 297–98.
81. *Id.* at 298.
82. *Id.*
83. *Id.*

interpret the unclear provision of CERCLA, but the court disagreed.[84] The court explained that the interpretation of the term "response" did not constitute notice and comment rulemaking of an ambiguous statute but was merely a comment on one specific case.[85] The court further explained that the proposed rule was never intended to provide a general application of "removal" since operations and maintenance were never mentioned in the final rule.[86]

The Residents next asserted that CERCLA's definition of "removal" does not include the City's mandated responsibilities under the Decree.[87] The court disagreed and emphasized that removal included the City's ongoing duty to protect EPA's remedy by taking any actions necessary to prevent issues of public health or damage to the environment.[88] The court pointed to the City's duty to maintain a vegetative cover and regarded it as a removal action to prevent damage from the toxic contents underneath the protective layer.[89] After analyzing the definition of "removal," the court found that the Residents failed to present any authority that excluded operation and maintenance from the definition of "removal."[90] Therefore, the court found that the tasks the City was required to perform under the Consent Decree constituted removal actions.[91]

The court next turned to the Residents' allegation that the City was not diligently conducting removal actions.[92] The court acknowledged all the steps EPA was taking to monitor the City's work to remain in compliance with the Decree and emphasized that Congress barred citizen suits to ensure they do not conflict with state and federal enforcement efforts.[93] The court concluded that the Residents failed to demonstrate the City was not diligently complying with removal actions set out in the Decree.[94] The court pointed to the 2018 five-year inspection per the Consent Decree in which EPA found that the City was in compliance.[95] The report stated that the soil had been covered entirely and that it was

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 299.
88. *Id.* at 299–300.
89. *Id.* at 300.
90. *Id.* at 301.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*

expected to remain in place over time and prevent any contaminants from reaching the surface.[96] The report also said that EPA found the City was mowing the grass more than required and that no geotextile mats were exposed during their inspection.[97] The court further noted that the sentence stating the grass was overgrown did not mean the City was out of compliance.[98] Overall, the court found that the Residents could not use merely a single photo and statement to prove the City was not diligent.[99]

Finally, the Residents alleged that the district court improperly dismissed the complaint without leave to amend.[100] The court explained that the motion to amend was dismissed because they found that the second motion was unduly delayed and made in bad faith since the City did not have proper notice of the material issue making it unduly prejudicial to them.[101] The court found that the district court did not abuse its discretion because the Residents never gave a clear reason why they wanted to amend their complaints and had previously said that they could not give any more detailed allegations until after discovery.[102]

IV. ANALYSIS

This court's decision will have serious implications regarding environmental justice and communities seeking to remedy environmental hazards in their area. If citizen suits are barred whenever the City is engaging in "removal" activities, citizens will have little recourse for harm sustained while living on a Superfund site where removal activities are ongoing.[103] This holding gives significant power to EPA to decide whether the City is being compliant, which, as this case demonstrates, is an ineffective remedial strategy.[104] EPA's five-year inspections and its minimal interaction with the community are inadequate; they do not confront the struggles communities face every day.[105] Citizen suits help

96. *Id.* at 294.
97. *Id.* at 302.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 303.
102. *Id.*
103. *See Citizen Suit Provisions in Environmental Law*, ENV'T RIGHTS DATABASE, http://environmentalrightsdatabase.org/citizen-suit-provisions-in-environmental-law/.
104. *See* Darryl Fears, *Gordon Plaza was Sold as a Dream for Black Home Buyers. It Was a Toxic Nightmare*, WASH. POST (Apr. 1, 2022), https://www.washingtonpost.com/climate-environment/2022/04/01/new-orleans-gordon-plaza-epa/.
105. *See id.*

hold governmental bodies accountable and ensure they are doing their part in ensuring ongoing cleanup efforts.[106] With cancer rates and deaths reaching alarming levels, it is clear that the toxins on this site are not being properly contained, yet there has been no action by EPA to hold the city of New Orleans accountable.[107] Citizens are stuck living in these communities without the financial capacity to relocate and they have been facing the life-threatening consequences of living on top of toxic waste for decades.[108]

This broad interpretation of the term "removal" to include maintenance and operations could bar important citizen suits meant to hold governmental bodies accountable for their actions or lack thereof.[109] The court's decision creates a low standard for diligence, including only small tasks that occur years after the actual remedy was put in place.[110] In this case, the court found that mowing lawns counted as diligent removal actions and that even decades after EPA's cleanup was completed, maintenance of the land is still considered removal.[111] This precedent creates an incredibly low bar as to what is considered diligence for removal actions, making it extremely difficult for citizens to prove that a city or agency is not diligently conducting removal actions sufficient to protect the health and wellbeing of the community.[112] Plaintiffs in future cases will have to carefully consider whether small acts by the City or EPA are considered removal before pursuing citizen suits.[113] This will ultimately leave citizens with few legal remedies.[114]

Although there was no legal remedy in this case, the Residents have built up a coalition that has been putting pressure on the City and government to fund the relocation of the community.[115] Due to the public

106. Broun & O'Reilly, *supra* note 18.

107. *See* Fears, *supra* note 104.

108. *Id*.

109. *See* Brent A. Rosser & Kate Perkins, *Fifth Circuit Endorses Broad Reading of "Removal" Under CERCLA to Bar RCRA Citizen Suit*, THE NAT'L L. REV. (Mar. 7, 2022), https://www.natlawreview.com/article/fifth-circuit-endorses-broad-reading-removal-under-cercla-to-bar-rcra-citizen-suit.

110. *See* Residents of Gordon Plaza, Inc. v. Cantrell, 25 F.4th 288, 301 (5th Cir. 2022).

111. *See id*. at 300.

112. *See* Rosser & Perkins, *supra* note 109.

113. *See id*.

114. *See id*.

115. Michael Isaac Stein, *City's First Gordon Plaza Buyout Offer Roughly Half the Price Residents Initially Proposed for Relocation*, LOUISIANA WEEKLY (Oct. 31, 2022), http://www.louisianaweekly.com/citys-first-gordon-plaza-buyout-offer-roughly-half-the-price-residents-initially-proposed-for-relocation/.

pressure and high-profile status of this case, the City is now making efforts to help relocate the Residents of Gordon Plaza.[116] Although these efforts have led to some progress, it is still not enough. The buyout price and costs related to relocation has been a heated debate over the past months and the funds the City is supplying to these families will not cover the purchase of a new home in New Orleans.[117] It is clear that the City is undervaluing the Residents. The appraisal process has been flawed since the City's initial appraiser came back with half the value, a Tulane study found, because the City compared Gordon Plaza homes to a neighborhood that has significantly lower home values than the other surrounding areas.[118] The New Orleans City Council has been making efforts to create a separate fund outside of the buyout costs for moving expenses to help compensate the Residents, but they have yet to receive the money that was promised to provide for relocation.[119]

V. CONCLUSION

The court's decision in this case will have lasting and damaging effects on environmental justice for the low-income communities that are most affected by environmental hazards and toxins. This decision will make it harder to hold governmental actors accountable for their actions and will leave communities trapped in unsafe and hazardous living conditions with no remedy.

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116. *Id.*

117. *Id.*

118. *Id.*

119. Halle Parker, *Gordon Plaza Residents to Receive Moving Expenses to Aid Relocation, but Hurdles Remain*, NEW ORLEANS PUBLIC RADIO (Nov. 3, 2022), https://www.wrkf.org/2022-11-03/gordon-plaza-residents-to-receive-moving-expenses-to-aid-relocation-but-hurdles-remain.

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