COMMENTS

ATLANTIC RICHFIELD CO. V. GREGORY A. CHRISTIAN ET AL.: CAN STRICT LIABILITY BE TOO STRICT?

BY

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On December 3, 2019, the Supreme Court of the United States heard oral argument for Atlantic Richfield Co. v. Gregory Christian*, which involved one of the largest and oldest Superfund sites in the U.S.—the Anaconda Smelter. The case chronicles the conflict between one of America's dirtiest industries and the residents who suffered while the Smelter thrived. The underlying case,* Gregory Christian v. Atlantic Richfield Co.*, and the Atlantic Richfield Co. (ARCO) appeal raised issues of first impression for both the Montana state courts and the Supreme Court. This case revealed tensions between the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), a complex federal statute, and areas of authority traditionally left to the states—namely land use and property ownership—resulting in questions of federal supremacy, due process, and statutory construction.*

This Comment focuses on the issue of whether landowners within a Superfund site are necessarily required to seek permission from the Environmental Protection Agency (EPA) in order to undertake activities on their private properties or face severe consequences under CERCLA. By definition, these landowners

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classify as "covered persons" under section 107(a) of the statute but whether these individuals would also qualify as "potentially responsible parties" (PRPs) under the statute remained an issue of first impression. The importance of this question should not be underestimated. Whether the property owners, who were expressly absolved of any possible liability by the EPA throughout litigation, would somehow become PRPs under CERCLA after over thirty-five years of the EPA's involvement at the site, and only just before ARCO's filing of its petition for certiorari to the Court, raises serious due process concerns for individuals living within Superfund sites.

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EDITOR'S NOTE: This Comment was originally written prior to publication of the Supreme Court's Opinion and thus Part V is a later-added addendum discussing the Court's holdings.

I. INTRODUCTION

On December 3, 2019, the Supreme Court of the United States heard oral argument for the case titled *Atlantic Richfield Co. v. Gregory Christian,* (*ARCO*),[1] a case involving one of the largest and oldest Superfund[2] sites in the U.S.—the Anaconda Smelter.[3] This case chronicles the conflict between one of America's dirtiest industries[4] and the residents who suffered while the Smelter thrived.

The underlying appellate court case, *Gregory Christian v. Atlantic Richfield Co.* (*Christian*)[5], and the *ARCO* appeal raised issues of first impression for both the Montana state courts and the United States

[1] 140 S.Ct. 1335 (2020).

[2] Superfund refers to sites designated by the Environmental Protection Agency (EPA) that require extensive remediation in order to clean up past hazardous waste contamination and prevent future releases at the site. *See* 42 U.S.C. § 9604 (2012).

[3] Although the Smelter was located near Anaconda, Opportunity, and Crackerville, Montana, in Anaconda-Deer Lodge County, the smelter site now encompasses over 300 square miles of land. *See Superfund Site: Anaconda Co. Smelter, Anaconda MT, Cleanup Activities*, U.S. ENV'T PROTECTION AGENCY, https://perma.cc/4TH7-T47W (last visited Nov. 10, 2020). An interesting feature of the towns of Opportunity and Crackerville is the fact that they were actually company towns for the Anaconda Copper Mining Company. *See Anaconda 2020 Visitor's Guide*, ANACONDA LEADER, https://perma.cc/NJV4-RD3F (last visited Nov. 23, 2020).

[4] Smelting releases heavy metals including arsenic, cadmium, chromium, mercury, and lead, which are toxic at low levels of exposure. Paul Tchounwou et al., *Heavy Metal Toxicity and the Environment*, *in* 3 MOLECULAR, CLINICAL AND ENVIRONMENTAL TOXICOLOGY 133, 134 (Andreas Luch ed., 2012). Of note, ARCO is a wholly owned subsidiary of British Petroleum. *See* Petition for Writ of Certiorari at ii, Atl. Richfield Co. v. Christian, 140 S.Ct. 1335 (2020) (No. 17-1498), 2018 WL 2176311 [hereinafter ARCO's Pet. Brief].

[5] 358 P.3d 131 (Mont. 2015).

Supreme Court. This case revealed tensions between the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[6] a complex federal statute, and areas of authority traditionally left to the states—namely land use and property ownership—resulting in questions of federal supremacy, due process, and statutory construction.

This Comment will start with a brief background of the Anaconda Smelter Superfund site and the relevant state law-based restoration damage claims. Next is a discussion of the Montana Supreme Court's ruling on the petition from Atlantic Richfield Co. (ARCO) for Writ of Supervisory Control against the Montana Second Judicial District Court[7], and ARCO's subsequent petition for certiorari at the United States Supreme Court.[8]

ARCO presented three issues to the Court:

1) whether a common law claim for restoration seeking cleanup remedies that conflict with the EPA-ordered remedies is a "challenge" to the EPA's cleanup jurisdictionally barred by section 113 of CERCLA;
2) whether a landowner at a Superfund site is a "potentially responsible party" (PRP) that must seek the EPA's approval under CERCLA section 122(e)(6) before engaging in remedial action, even if the EPA has never ordered the landowner to pay for a cleanup; and
3) whether CERCLA preempts state common law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.[9]

This Comment focuses on the second of these issues: whether a landowner is a PRP.

The parties agreed that the Property Owners qualified as "covered persons" under section 107(a) of the statute,[10] but they disagreed that

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[6] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2018).

[7] Petition for Writ of Supervisory Control at 1, Atl. Richfield Co. v. Montana Second Jud. Dist. Ct., 408 P.3d 515 (Mont. 2017). *See also* Atl. Richfield Co. v. Montana Second Jud. Dist. Ct., (*ARCO I*) 408 P.3d 515 (Mont. 2017), *aff'd in part, vacated in part, remanded sub nom.* Atl. Richfield Co. v. Christian (*ARCO*), 140 S.Ct. 1135, 1357 (2020).

[8] Grant of Petition for Writ of Certiorari at 2690, Atl. Richfield Co. v. Christian, 139 S. Ct. 2690 (2019) (No. 17-1498), 2019 WL 2412911, at *1. Throughout, "Court" refers to the United States Supreme Court unless otherwise noted.

[9] Brief for Petitioner at i, *ARCO*, 140 S.Ct. 1335 (2020) (No. 17-1498), 2019 WL 3987626 at *1 [hereinafter ARCO's Brief].

[10] Section 107(a) describes "covered persons" as:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other

covered persons and PRPs are synonymous classifications. This issue will likely determine the outcome of the appeal because the first and third questions are generally quickly disposed of by the Court.[11] The first question asks whether CERCLA deprives state courts of jurisdiction over state law claims relating to contamination at a Superfund site, but it is unlikely the Court would divest state courts of state law claims, considering the "arising under" language that removes federal jurisdiction in the CERCLA statute. The Court has routinely held that "arising under" means the cause of action itself is based on the statute—which clearly would not apply to state common law claims.[12] The third question asks whether CERCLA preempts state common law claims for restoration damages, implicating federal preemption—a question the Court routinely avoids when possible.[13]

Thus, the outcome of this appeal hinged on whether the Court found that the Property Owners qualified as PRPs under CERCLA. The importance of this question should not be underestimated. Whether the Property Owners, who were expressly absolved of any possible liability by the Environmental Protection Agency (EPA) throughout litigation, would somehow become PRPs under CERCLA after over thirty-five years of the EPA's involvement at the site, and only just before ARCO's filing of its petition for certiorari to the Court, raises serious due process concerns for individuals living within Superfund sites.

Part II focuses on the parties' briefing. This section considers the arguments made in the state court proceedings for each side and the

> party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

42 U.S.C. § 9607(a).

[11] The first question involves issues of federalism, namely whether CERCLA deprives state courts of jurisdiction over actions involving Superfund sites, which the Court will interpret narrowly in favor of maintaining state court jurisdiction. *See, e.g.*, *ARCO*, 140 S. Ct. 1335, 1351 (2020) ("We have recognized a 'deeply rooted presumption in favor of concurrent state court jurisdiction' over federal claims." (quoting Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990))). The third question involves a constitutional question, namely preemption, which the Court will avoid if an alternative plausible interpretation exists. *See, e.g.*, FCC v. Fox TV Stations, Inc., 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.").

[12] This is the same language used in the federal question jurisdiction statute, 28 U.S.C. § 1331 (2018) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The Court has interpreted § 1331 to mean "[a] suit arises under the law that creates the cause of action." Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

[13] *See, e.g.*, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 744 (2010) (the Court's usual practice is to "confine ourselves to deciding only what is necessary to the disposition of the immediate case." (quoting Whitehouse v. Ill. Cent. R.R. Co., 349 U.S. 366, 373 (1955))).

arguments made in the Supreme Court briefing, focusing only on the PRP issue. Oral argument is discussed separately.

Part III distills the likely outcome of the PRP issue by analyzing the Justices' participation at oral argument, the Court's canons of statutory construction, and examines some of the implications that may result from the proposed likely outcome of the Supreme Court appeal. This is followed by a brief conclusion in Part IV.[14]

It is important to note at the outset that the issues on appeal involved only a single type of damages claimed—restoration damages under Montana law[15]—out of the five total pending types of damages sought.[16] Regardless of the outcome of this appeal, the case will almost certainly proceed to trial in Montana state court following the Court's disposition.[17]

A. Background

The Anaconda Copper Mining Company first began construction on the Anaconda Smelter, located near Opportunity and Crackerville, Montana, in 1883.[18] By 1906, the Smelter was processing upward of 9,000 tons of ore every twenty-four hours.[19] Then, in 1918, construction began on what is known as the Washoe Big Stack.[20] This brick stack, completed in 1919, was the largest free-standing brick structure in the world—thirty feet taller than the Washington Monument.[21] ARCO

[14] EDITOR'S NOTE: This Comment was drafted prior to the publication of the Court's *ARCO* opinion. An addendum, Part V, was added following the original submission of this Comment. Part V consists of a review of the Supreme Court's opinion in this matter, decided April 20, 2020.

[15] *See* discussion *infra* Part I.B.

[16] *See* Response Brief for Gregory A. Christian at 10, *ARCO*, 140 S.Ct. 1335 (2020) (No. 17-1498), 2019 WL 5260152, at *10 [hereinafter P.O.'s Brief].

[17] *ARCO I*, 408 P.3d 515, 523 (Mont. 2017).

[18] *Smelter History in Brief*, MONT. STANDARD (Sep. 25, 2010), https://perma.cc/8R2V-TAX2.

[19] *Id.* In 1905, farmers in the area sued the copper company in state court, attempting to get the Smelter shut down because, within the first year of the stack's operation, "livestock were dying due to the 20 tons of arsenic coming out of the stack every day." Susan Dunlap, *A Dangerous Job That Gave Life to a Town: A Look Back at the Anaconda Smelter*, MONT. STANDARD (Jan. 22, 2019), https://perma.cc/U8WZ-LE4Y [hereinafter *A Dangerous Job*]. *See also* Bliss v. Washoe Copper Co., 186 F. 789, 790 (9th Cir. 1911) (discussing how the smoke from the Anaconda Smelter was affecting farmlands located in the "smoke zone"). This case was decided in the mining industry's favor but motivated the Anaconda Copper Mining Company to build a taller stack, the Washoe stack, with the idea being that "a taller stack would send the arsenic farther up into the atmosphere and spread out the toxins." *A Dangerous Job*, *supra*. The Washoe stack was not able to prevent tons of arsenic and other toxins settling into the land surrounding the Smelter—land purchased from farmers to house Smelter workers in what is today Opportunity and Crackerville, Montana. Susan Dunlap, *The Nation's Eyes Are About to Be on Opportunity*, MONT STANDARD (Oct. 3, 2019), https://perma.cc/87RN-8Q9J [hereinafter *The Nation's Eyes*].

[20] *A Dangerous Job*, *supra* note 19.

[21] *Anaconda Smoke Stack State Park*, MONT. STATE PARKS, https://perma.cc/3PCT-DQVA (last visited Nov. 11, 2020).

merged with the Anaconda Copper Mining Company in 1977 and briefly took over operation of the Smelter until the Smelter's ultimate closure in 1980.[22] 1980 also marked the enactment of the CERCLA statute.[23]

In 1983, the Smelter site was added to the EPA's National Priority List.[24] In 1984, the EPA issued its first administrative order to ARCO to begin inspection of the site for hazardous waste contamination.[25] The EPA did not officially select a cleanup plan outlining ARCO's cleanup responsibilities at the site until 1998.[26] Over twenty years later, cleanup is ongoing.[27] The EPA estimates that cleanup efforts will not be completed until 2025, and may continue indefinitely.[28] To this day, the Washoe Big Stack remains one of the most recognizable structures in the state.[29]

B. Montana's Common Law Restoration Damages Claims

The restoration damages claim made by the Property Owners, which is the subject of the *ARCO* appeal, is based on Montana common law. The primary authority lies in the Montana Supreme Court's decision in *Sunburst School District No. 2 v. Texaco, Inc.* (*Sunburst*).[30] The goal of restoration damages is to "compensate a plaintiff more effectively than diminution in value under certain circumstances."[31] In order to make a restoration damages claim, a plaintiff must demonstrate that the damage to her property is reasonably abatable, and that she has "reasons personal" for remaining on the contaminated property and seeking restoration.[32] Further, the plaintiff must demonstrate that the funds sought will be used for the restoration plan presented to the factfinder.[33] Any funds obtained for restoration

[22] *Id.*

[23] CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–28, 9641, 9651–62, 9671–75 (2018)).

[24] Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40,658, 40,667 (Sept. 8, 1983).

[25] *Superfund Site: Anaconda Co. Smelter, Cleanup Progress*, U.S. ENV'T PROTECTION AGENCY, https://perma.cc/57EX-QDAR (last visited Nov. 11, 2020).

[26] *ARCO I*, 408 P.3d 515, 517 (Mont. 2017).

[27] *Id.* at 522.

[28] ARCO's Brief, *supra* note 9, at 15. Some sites, especially those where the hazardous substances are naturally occurring minerals in the area, will retain hazardous substances even after EPA's plan is complete. This then requires the EPA to continue reviewing and amending its plan every five years per 42 U.S.C. § 9621(c) and 40 C.F.R. § 300.430(f)(4)(ii).

[29] *Anaconda Smoke Stack State Park*, *supra* note 21.

[30] 165 P.3d 1079 (Mont. 2007).

[31] *Id.* at 1087.

[32] Lampi v. Speed, 261 P.3d 1000, 1005 (Mont. 2011) (citing *Sunburst*, 165 P.3d at 1086).

[33] *Sunburst*, 165 P.3d at 1086.

damages are then put into a trust and used solely for remediation efforts.[34]

Although this damages claim is less relevant to the issue of whether the Property Owners are necessarily PRPs, it is important in that ARCO and the Government rely on section 122(e)(6) to preclude the Property Owners' plan. This section prohibits any PRP from undertaking remedial activities within an active Superfund site absent the EPA's prior approval.[35] Because an award of restoration damages under Montana law must be put in a trust and used only for remedial activities, the Property Owners would ultimately be undertaking remedial action within a Superfund site, which is expressly barred by the statute if the Property Owners are held to be PRPs.

C. Christian v. Atlantic Richfield Co.*: What a Long, Strange Trip It Has Been*

In 2008, ninety-eight landowners within the Anaconda Smelter site brought suit against ARCO, the current owner of the site.[36] The landowners brought claims of common law trespass, nuisance, and strict liability against ARCO, and sought state law-based restoration damages.[37] The Property Owners included individuals with generational ties to the area and the Smelter, individuals who moved to the area for its scenic beauty and inexpensive property, and others who moved to the area for job opportunities.[38] ARCO raised several affirmative defenses including a claim that CERCLA preempted some of the Property Owners' claims.[39]

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[34] *Id.* at 1089. *See* Transcript of Oral Argument at 12, *ARCO*, 140 S.Ct. 1335 (2020) (No. 17-1498) https://perma.cc/B7V6-LEPF (Sotomayor, J., questioning ARCO's counsel) (appearing to doubt whether the funds were required to be put into a trust) [hereinafter Oral Argument].

[35] Section 122(e)(6) provides:

> When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this Act, has initiated a remedial investigation and feasibility study for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

CERCLA, 42 U.S.C. § 9622(e)(6) (2018).

[36] *ARCO I*, 408 P.3d 515, 517–18 (Mont. 2017).

[37] *Id.* at 518.

[38] This is important because in order to meet the requirements of a restoration damages claim, landowners must demonstrate a personal connection with the land that forms the basis for why they seek to remain on the contaminated property. *See Sunburst*, 165 P.3d 1079, 1088 (Mont. 2007) (explaining that plaintiffs satisfied the personal connection requirement where the affected areas encompassed plaintiffs' personal residences). *See also infra* Part I.B.

[39] *ARCO I*, 408 P.3d at 519, 522–23.

Years of litigation ensued—the case was removed to federal court and remanded back to the state,[40] dismissed once,[41] appealed twice,[42] and handled by multiple state court judges along the way. In 2016, the Montana Supreme Court granted a writ of supervisory control in ARCO's favor solely on plaintiffs' claim for state law-based restoration damages and ARCO's CERCLA preemption affirmative defenses.[43] ARCO's petition for a writ of certiorari followed the Montana Supreme Court's affirmance of the Montana district court's rulings on these issues in the Property Owners' favor.[44]

Notably, the EPA was not a party to the underlying litigation until invited to participate by the Montana Supreme Court in the writ of supervisory control proceedings.[45] This is significant, considering the EPA is the federal agency tasked with administering CERCLA and had been present at the site for over thirty-five years. As discussed below, the EPA's belated involvement caused serious changes in the course of this litigation and likely serious damage to property owners on Superfund sites generally.[46]

II. *ATLANTIC RICHFIELD CO. V. CHRISTIAN:* WHAT GOES AROUND, COMES AROUND

Following the Montana Supreme Court's affirmance of the district court's rulings, ARCO appealed to the United States Supreme Court. ARCO's petition for writ of certiorari to the Court raised questions of statutory construction, due process, and federal preemption under CERCLA—issues of first impression in the High Court.[47] Again, the focus of this analysis is only on the question of whether the Property Owners should be classified as PRPs under the statute, which would necessarily preclude any remediation activities on their properties within the Superfund site, absent the EPA's prior approval.[48] This Part

40 Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *ARCO*, 140 S.Ct. 1335 (2020) (No. 17-1498), 2019 WL 4075081, at *10 [hereinafter Govt's Brief].

41 In 2013, the District Court for the Second Judicial District of Montana dismissed plaintiffs' case on statute of limitations grounds; this decision was appealed and ultimately overturned by the Montana Supreme Court. *Christian*, 358 P.3d 131, 137, 139 (Mont. 2015). This Comment focuses on the rulings and appeals that occurred after the case was reinstated.

42 *ARCO I*, 408 P.3d at 518. Montana does not have an intermediate appellate court, so all appeals go directly to the Montana Supreme Court.

43 *Id.*

44 ARCO's Pet. Brief, *supra* note 4, at i.

45 Brief for the United States as Amicus Curiae at 5–6, *ARCO*, 140 S.Ct. 1335 (2020) (No. 17-1498), 2019 WL 1932661, at **5–6 [hereinafter CVSG Brief].

46 *See* discussion *infra* Parts II and III.

47 ARCO's Pet. Brief, *supra* note 4, at i.

48 *See* CERCLA, 42 U.S.C. § 9622(e)(6) (2018) ("When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, *no potentially responsible party may undertake any remedi-*

breaks down the PRP issue as the parties presented it to the Court. First, Part II discusses how this issue was treated in state court, including the parties' arguments and the ultimate disposition by the Montana Supreme Court. Next, this Part looks at the arguments the parties raised at the U.S. Supreme Court level.[49] Oral argument is discussed in Part III.

Notably, courts have routinely used the term "PRP" to refer to "covered persons" described in section 107(a) without explaining why these terms should be treated as synonymous. Indeed, the Court did just that in its opinion in *United States v. Atlantic Research Corp.*[50] However, in *Atlantic Research*, the issue of whether these terms were in fact synonymous was not before the Court. The only issue before the Court centered on the interpretation of sections 107 and 113, namely, the cost recovery provision in section 113(f), which allows liable or potentially liable parties to recover costs from other liable parties.[51] Section 113(f) expressly cross-references section 107(a) which defines "covered persons." The *Atlantic Research* Court's use of the term "potentially responsible party" when referring to section 107(a) "covered persons" was not explained—in fact, that section's title, "covered persons," appears nowhere in the opinion. This is important because both the Government and ARCO relied heavily on the repeated use of these terms as synonyms. But, because this issue was not actually before the Court in *Atlantic Research*, the Court's use of these terms interchangeably is mere dicta. And, although Supreme Court dicta is more persuasive than that of lower courts, it remains nonbinding.[52]

This case elicited strong involvement from various amici in support of both sides.[53] ARCO's amici argued that the Montana Supreme Court's

al action at the facility unless such remedial action has been authorized by the President.") (emphasis added)).

[49] The Property Owners made an additional argument at the Supreme Court that it lacked jurisdiction to hear ARCO's petition because the Montana Supreme Court had ruled only on a writ of supervisory control, which did not otherwise terminate the underlying action; in other words, ARCO's appeal did not constitute an appeal from a final judgment. P.O.'s Brief, *supra* note 16, at 17–21. This argument is not discussed within this Comment.

[50] 551 U.S. 128, 131–32, 136, 141 (2007). *See* 42 U.S.C. § 9607(a).

[51] 551 U.S. at 131 (the issue before the Court was "whether § 107(a) provides so-called potentially responsible (PRPs), 42 U.S.C. §§ 9607(a)(1)–(4), with a cause of action to recover costs from other PRPs."). Section 113(f) provides in relevant part: "Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action . . . under section 107(a) . . . ." 42 U.S.C. § 9613(f)(1).

[52] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 et al., 551 U.S. 701, 737 (2007) ("as the Court explained just last Term, 'we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.'" (quoting Cent. Va. Cmty. College v. Katz, 546 U.S. 356, 363 (2006))).

[53] For support of ARCO's position, see generally Govt's Brief, *supra* note 40; Brief for Treasure State Resources Ass'n. of Mont. et al., as Amici Curiae Supporting Petitioner, *ARCO*, 140 S.Ct. 1335 (2020) (No. 17-1498), 2019 WL 4192151; Brief of Amici Curiae U.S. Chamber of Commerce et al., Supporting Petitioner, *ARCO*, 140 S.Ct. 1335 (2020) (No. 17-1498), 2019 WL 4192150; Brief of Washington Legal Found., as Amicus Curiae Supporting

decision threatened "the [EPA's] authority under [CERCLA] to comprehensively, efficiently, and with finality address remediation issues at Superfund sites."[54]

Interestingly, the Government's invitation brief at the petition stage argued that ARCO's petition for certiorari should be denied, stating, "[a]lthough the Montana Supreme Court erred in its analysis of the questions presented here, this Court's review would be premature at the present time."[55]

The Property Owners were not supported by amici at the certiorari stage; ultimately, certiorari was granted and a total of eleven briefs were filed in the briefing stage of the United States Supreme Court case.[56]

A. Does a Landowner at a Superfund Site Qualify as a "Potentially Responsible Party" Even if the EPA has Never Ordered the Landowner to Pay for a Cleanup?

CERCLA, as a strict liability statute, relies on the status of a party when determining whether it may be liable for any cleanup at a Superfund site. Although not specifically spelled out in the statute, courts have determined there are three possible ways a party may be designated as a PRP: First, a party may enter into a voluntary settlement with the EPA regarding contamination.[57] Second, a court may make a judicial determination that a party is a PRP.[58] Third, a party is automatically considered a PRP if it is currently a defendant in

Petitioner, *ARCO*, 140 S.Ct. 1335 (2020) (No. 17-1498), 2019 WL 4192152. There was also strong support for the Property Owners' position. *See* Brief Amici Curiae of the Commonwealth of Virginia, et al. in Support of Respondents, *ARCO*, 140 S.Ct. 1335 (2020) (No. 17-1498), 2019 WL 6524884; Brief of Amicus Curiae Pub. Citizen in Support of Respondents, *ARCO*, 140 S.Ct. 1335 (2020) (No. 17-1498), 2019 WL 5542989; Brief Amicus Curiae of Pac. Legal Found. & Prop. and Env't Research Ctr. in Support of Respondents, *ARCO*, 140 S.Ct. 1335 (2020) (No. 17-1498), 2019 WL 5485610; Brief of the Clark Fork Coal. & Mont. Env't Info. Ctr. as Amici Curiae in Support of Respondents, *ARCO*, 140 S.Ct. 1335 (20200 (No. 17-1498), 2019 WL 5485642.

[54] *See, e.g.*, Brief of Amici Curiae U.S. Chamber of Commerce et al., Supporting Petitioner, *supra* note 53, at 2.

[55] CVSG Brief, *supra* note 45, at 7. The Government further stated:

> Deferring review in this manner would have limited practical consequences. EPA is not a party to the case and is not bound by the Montana Supreme Court's judgment. EPA therefore retains power to protect its cleanup plan against challenges by respondents at this Superfund site or potential challenges by landowners at other Superfund sites in Montana.

Id. at 8.

[56] *ARCO I*, 408 P.3d 515 (Mont. 2017).

[57] Taylor Farm Ltd. Liab. Co. v. Viacom Inc., 234 F. Supp. 2d 950, 966–71 (S.D. Ind. 2002).

[58] *See, e.g.*, *ARCO I*, 408 P.3d at 522.

a CERCLA suit and no statutory defense applies.[59] Most importantly here, landowners of contaminated property are listed in the statute as a "covered person."[60] This means that, regardless of a landowner's relationship to the contamination, the landowner is a "covered person" under the statute by default and liability is removed only when one of CERCLA's narrow affirmative defenses applies.[61] The main question before the Court is thus whether PRP and covered persons define the same class of entities. If PRPs and covered persons are synonymous, then the Property Owners, by virtue of their landownership alone, would be expressly barred from undertaking any independent cleanup efforts inconsistent with the EPA's plan at a Superfund site under section 122(e)(6).[62]

For a party to assert a statutory defense, an action must be brought against it, which necessarily begs the question: How can a landowner who has not been treated as a PRP, or had any cause of action brought against her throughout the CERCLA process, raise *any* defense? That was precisely the case here, where the Property Owners were never advised of their potential status until just prior to ARCO filing its petition for a writ of certiorari to the Supreme Court following the Montana Supreme Court's ruling, nearly thirty years after the EPA's first CERCLA administrative order to ARCO.[63]

Additionally, whether the Property Owners, who reasonably relied for years on the EPA's representations that they were not liable, could now be potentially responsible for the cleanup efforts, raises serious constitutional due process issues. The courts grappled with this, asking whether Property Owners should be able to make an estoppel-based argument against the EPA's new position that the Property Owners likely were PRPs or whether the five-year statute of limitations under CERCLA should apply to the EPA's actions as well.[64]

1. Arguments Below and Disposition by the Montana Supreme Court

Throughout the state court litigation, the Property Owners—based exclusively on their status as landowners of contaminated land within the Superfund site—were never advised by the EPA of their potential liability under CERCLA. The Property Owners never entered into a voluntary settlement with the EPA; they were never found to be PRPs through a judicial determination; and they were never defendants in a

[59] *Taylor Farm Liab. Co.*, 234 F. Supp. 2d at 970 (citing Pneumo Abex Corp. v. High Point, Thomasville and Denton R.R. Co., 142 F.3d 769, 773 n.2 (4th Cir. 1998)).

[60] CERCLA, 42 U.S.C. § 9607(a) (2018).

[61] New Castle Cty. v. Halliburton NUS Corp., 111 F.3d 1116, 1120 n.2 (3d Cir. 1997). The applicable statutory defense here is the "contiguous landowner" defense. 42 U.S.C. § 9607(q). The "contiguous landowner" defense is discussed *infra* Part II.A.2.c.

[62] 42 U.S.C. § 9622(e)(6).

[63] P.O.'s Brief, *supra* note 16, at 47.

[64] The Montana Supreme Court found the statute of limitations argument dispositive of ARCO's claims. *ARCO I*, 408 P.3d 515, 522 (Mont. 2017).

CERCLA lawsuit in which it was determined they were not entitled to statutory defenses.[65]

Further, ARCO never brought any claims for cost recovery against the Property Owners, as allowed under section 113(f)(3)(B),[66] based on their status as landowners. In fact, the Property Owners were assured they were not potentially liable for cleanup costs and were never led to believe otherwise. Yet, the EPA changed its position on whether the Property Owners were possible PRPs when invited to participate in briefing on ARCO's writ of supervisory control.[67] There, the EPA argued that section 107(a)(1), describing "covered persons" under the statute, designates the Property Owners as PRPs unless they met the requirements of CERCLA's "contiguous-landowner" defense.[68]

When ARCO filed its petition for a writ of supervisory control, ARCO argued that the Property Owners were PRPs, and that even if they were able to satisfy one of the statutory defenses, they would still fall under the broader definition of PRP.[69] ARCO's goal in making this argument was to show that the Property Owners were barred from undertaking any independent remedial measures per section 122(e)(6).[70]

The Property Owners argued that the six-year statute of limitations applicable to CERCLA actions should likewise apply to the EPA's designation of a PRP.[71] The Montana Supreme Court agreed, citing *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*[72] The court opined, "[p]ut simply, the PRP horse left the barn decades ago."[73]

It appears the Montana Supreme Court's ruling relied on the fact that ARCO's new argument was one of gamesmanship. ARCO had not raised the issue of the Property Owners' PRP status until this late stage. Under the Montana Court's view, ARCO appeared to raise this

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65 *Id.* at 522–23.

66 Section 113(f)(3)(B) provides:

> A person who has resolved its liability to the United States or to a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement . . . .

42 U.S.C. § 113(f)(3)(B).

67 P.O.'s Brief, *supra* note 16, at 13.

68 *Id.* EPA's counsel admitted at oral argument at the Montana Supreme Court that the EPA had not actually evaluated all aspects of the Property Owners' plan, that prior orders had not rejected the Property Owners' plan, and that certain aspects may actually be actions the EPA would authorize. *Id.* See detailed discussion of this defense *infra* Part II.A.2.c.

69 *ARCO I*, 408 P.3d at 522.

70 "When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this Act, has initiated a remedial investigation and feasibility study for a particular facility under this Act, *no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized* by the President." 42 U.S.C. § 9622(e)(6) (emphasis added).

71 *ARCO I*, 408 P.3d at 522.

72 596 F.3d 112, 128 (2d Cir. 2010).

73 *ARCO I*, 408 P.3d at 522.

argument for the sole purpose of being able to rely on a statutory provision to create an absolute bar to the Property Owners' restoration claims.[74] It is understandable that the Montana Supreme Court would decline to extend ARCO's designation to the Property Owners at this late stage. However, its application of the statute of limitations contained in CERCLA was not persuasive to the United States Supreme Court.

2. Arguments in the United States Supreme Court Briefing

The parties maintained the same positions from the Montana Supreme Court in briefing at the United States Supreme Court. No amici briefed the PRP issue. The issue became one of statutory interpretation as ARCO and the Government stressed that the Property Owners should be considered PRPs under the statute based on the definitions contained in section 107 governing covered persons.[75] Importantly, for this issue in particular, the EPA did not sign on to the Government's brief.[76] Interestingly, throughout the course of litigation, the EPA changed its view of the statute twice, "arriving at its latest position in an informal letter to Landowners' counsel issued weeks before ARCO's certiorari petition."[77] The Property Owners argued that, based on its constantly changing position, "[p]erhaps for these reasons, no one contends the EPA's current reading (whatever it is) warrants any deference."[78]

The Montana Supreme Court and the Property Owners relied on the statute of limitations found in section 113 to argue the EPA could no longer bring claims against the Property Owners, which disposed of the PRP issue in that court.[79] However, as will be discussed more fully below, the United States Supreme Court did not find the statute of limitations issue persuasive and summarily dismissed the Property Owners' and Montana Supreme Court's argument.[80]

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74 The Montana Supreme Court stated: "Despite the EPA never engaging the Property Owners as PRPs, ARCO now asks us to treat the Property Owners as PRPs—for the first time in these proceedings—solely for the purpose of using § 122(e)(6) to bar their claim for restoration damages. We decline to do so." *Id.* at 522–23.

75 ARCO's Brief, *supra* note 9, at 22–23; Govt's Brief, *supra* note 40, at 33.

76 P.O.'s Brief, *supra* note 16, at 47. *But cf.* Brief for the United States as Amicus Curiae, Supporting Petitioner at 35, County of Maui v. Hawaii Wildlife Fund, 140 S.Ct. 1462 (2020) (No. 18-260), 2019 WL 2153160, at *35 (attorney for U.S. EPA signed on to the Government's brief).

77 P.O.'s Brief, *supra* note 16, at 47.

78 *Id.* (parenthetical in original).

79 CERCLA, 42 U.S.C. § 9613(g) (2018). The longest possible statute of limitations period is for a cost recovery action, which must be brought within six years from the date remedial activities begin. *Id.* § 9613(g)(2)(B).

80 *See* discussion *infra* Part III.

a. "Covered Persons" Under Section 107 vs. "Potentially Responsible Parties" Under Section 122

The Property Owners argued that the term "potentially responsible parties" is only contained in CERCLA sections governing settlement negotiations.[81] Because the Property Owners were never involved in any settlement or otherwise threatened with possible liability, they argued that they do not qualify as PRPs.[82] The Property Owners raised an interesting potential problem were the Court to adopt ARCO's and the EPA's application of section 107 to parties not risking liability: "ARCO's contrary contention—that Congress, in a narrow provision governing settlement mechanics, granted the EPA a perpetual veto over every decision innocent landowners make on their own properties—would raise serious constitutional concerns."[83] The Property Owners further asserted that even if "potentially responsible parties" and "covered persons" were the same, they would be exempt from liability as "contiguous" landowners under section 107(q).[84]

Additionally, CERCLA has several statutory requirements the EPA must follow when designating PRPs, entering into negotiations, and settling with covered persons under the statute.[85] This includes listing the names and addresses of all PRPs, providing that list to each entity, and apprising those listed entities of ongoing negotiations.[86] In this case, the EPA never included the Property Owners on any mandatory lists, did not include them in any of the extensive negotiations with ARCO—the sole listed party—and, until just prior to ARCO's petition for certiorari, never apprised the Property Owners of their potential PRP status.[87]

Although the EPA failed to meet these statutory obligations when assessing the Property Owners as PRPs under CERCLA, both ARCO and the Government clutched to their arguments that defining PRPs as anything other than section 107 "covered persons" was simply impossible under the statute.[88]

81 P.O.'s Brief, *supra* note 16, at 16.

82 *Id.* at 36 ("The parties appear to agree on the plain meaning of the phrase 'potentially responsible party.' As ARCO puts it, 'PRP' starts with a 'P' because [it] covers everyone who is potentially responsible for hazardous-waste contamination, not just parties actually deemed liable for cleanup costs or remediation.' Exactly right: a 'potentially responsible party' is a party who might potentially be liable under CERCLA.").

83 *Id.* at 16.

84 *Id.*

85 CERCLA, 42 U.S.C. § 9622(e)(1)(A) (2018).

86 *Id.*

87 P.O.'s Brief, *supra* note 16, at 44–45.

88 ARCO's Brief, *supra* note 9, at 22–23; Govt's Brief, *supra* note 40, at 33–34.

b. Operation of CERCLA's Statute of Limitations

There was no robust discussion of whether CERCLA's statute of limitations may operate against the EPA at either the Montana Supreme Court or the United States Supreme Court. Although the Montana Supreme Court found this issue dispositive to ARCO's and the EPA's contention that the Property Owners were now PRPs, it provided limited analysis of this conclusion. The primary discussion came from the Property Owners themselves, who noted that statutes of limitations work to "encourage 'diligent prosecution of known claims' and allow parties ultimately to 'put past events behind' them."[89]

ARCO's main contention was that the EPA is not subject to statutes of limitations under CERCLA because the EPA "can issue unilateral administrative orders compelling landowners to spend money effectuating EPA's cleanup," citing sections 106(a) and (b)(2).[90] However, the text of these statutory provisions does not provide such a clear conclusion. Section 106(a) allows the agency to, "because of an actual or threatened release of a hazardous substance from a facility . . . take . . . action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment."[91] Section 106(b)(2) likewise does not expressly grant what ARCO seems to believe it does. That section, titled "Fines; reimbursement," pertains to the potential fines imposable on individuals who violate an order they are subject to under section 106(a), as well as the rights of private parties who obey such an order to seek cost recovery from the agency.[92] Nothing in this section expressly states that the EPA could at any time issue an order compelling the Property Owners to expend money on the EPA's cleanup. Unlike ARCO's assertion, this authority seems to depend on "an actual or threatened release of a hazardous substance" rather than an unlimited power to order payment.[93] The Government's amicus brief in support of ARCO did not take up this issue but did address it somewhat in its petition stage brief.[94] It is worth repeating that the Government's brief supported *denying* ARCO's petition for certiorari.[95]

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89 P.O.'s Brief, *supra* note 16, at 45–46 (quoting CTS Corp. v. Waldburger, 573 U.S. 1, 8–9 (2014)).

90 Reply Brief for Petitioner at 10–11, 140 S.Ct. 1335 (20200 (No. 17-1498), 2019 WL 6045344 [hereinafter ARCO's Reply Brief]; 42 U.S.C. §§ 9606(a), (b)(2).

91 42 U.S.C. § 9606(a).

92 *Id.* § 9606(b)(2).

93 Per section 106(a), the EPA's authority under section 106 arises "when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment *because of an actual or threatened release of a hazardous substance from a facility*[.]" *Id.* § 9606(a) (emphasis added).

94 Because the EPA's position on this issue had shifted throughout the course of litigation, it seems even less likely that ARCO's contention, that the EPA shares its views, should hold any weight. As the Property Owners stated, "[i]n the guidance document on which ARCO relies, EPA announced it would exercise its enforcement discretion not to

Further, the Property Owners pointed out several ways in which the EPA would not be powerless, even if the statute of limitations applicable to CERCLA were enforced against it.[96] For example, if the Property Owners were to create "an imminent and substantial endangerment to the public health or welfare or the environment," "CERCLA empowers EPA to seek equitable relief."[97] The Property Owners also pointed out that they would "face liability if they were to somehow worsen the environmental harms ARCO caused."[98] Ultimately though, "[n]othing in the record suggests Landowners' contemplated restoration could have such adverse effects."[99]

c. Property Owners as "Contiguous Landowners"

The Property Owners' final argument on whether they could be PRPs at this stage in litigation relied on the CERCLA defense for "contiguous" landowners.[100] This defense requires that the landowner own land "contiguous to or otherwise similarly situated with respect to" property she does not own that releases hazardous substances which she does not cause to be released or otherwise contribute or consent to the release or allow further releases, has no relationship to the polluting entity, and complies with any imposed land-use or notice obligations.[101] ARCO argued that the Property Owners may not qualify for this defense based on the fact that they should have known of ARCO's pollution, considering they were buying property "neighboring a Washington Monument-sized smelter."[102] Whether this is a viable defense for the Property Owners was never briefed at the lower court level and is a fact-

impose liability on residential landowners. . . . EPA did not say such individuals are forever 'potentially responsible parties' under Section 122(e)(6) or any other provision." P.O.'s Brief, *supra* note 16, at 46–47 (internal citations omitted). This position was consistent with the position taken by the agency at the district court level. *Id.*

95 CVSG Brief, *supra* note 45, at 1.

96 P.O.'s Brief, *supra* note 16, at 46 (citations omitted).

97 *Id.* (citing CVSG Brief, *supra* note 45, at 17 (CERCLA provides the EPA ample "mechanisms" to address any remedial actions that would "undermine[ ]" the EPA's remedial plan)).

98 P.O.'s Brief, *supra* note 16, at 46.

99 *Id.* The EPA did state during oral argument at the Montana Supreme Court that the Property Owners' plan may contribute to environmental harm but did not elaborate and ultimately admitted that it had not evaluated all aspects of the Property Owners' plan. *See ARCO I*, 408 P.3d 515, 524 (Mont. 2017) (Baker, J. concurring) ("The Property Owners' counsel protested during argument that it was the first time they had heard that some aspects of their plan would 'undo' what already has been done, and that in nine years of litigation no evidence had been presented to the District Court that the Property Owners' plan conflicted with EPA's remedy.").

100 P.O.'s Brief, *supra* note 16, at 47.

101 CERCLA, 42 U.S.C. § 9607(q)(1)(A) (2018).

102 ARCO's Reply Brief, *supra* note 90, at 15–16 (citing *Christian*, 358 P.3d 131, 154–55 (Mont. 2015)).

intensive inquiry, which provides an additional reason why remand in this appeal would be proper.

III. LIKELY OUTCOME AT THE UNITED STATES SUPREME COURT

Oral argument was held on December 3, 2019. The PRP designation issue elicited the most interest from the Justices. Counsel for all three parties at argument received extensive questions about how and why the Court should find in its favor on whether the Property Owners were PRPs under the statute. Several Justices asked counsel for ARCO and the Government whether the Court's determination on this issue would allow the Court to avoid deciding the other two issues, namely, whether the Property Owners' plan constituted a "challenge" under section 113, thereby barring their claims, and whether preemption applies to state common law restoration damages. Both agreed it would.[103]

This Part reviews the questions the Justices asked the three parties, starting with the impact of finding the Property Owners to be PRPs and how those questions may play into the Court's determination of the PRP issue. Next, this Part examines canons of statutory interpretation routinely used by the Court and likely to be used in this case. This is important because the ultimate determination of whether "PRP" and "covered persons" are in fact synonymous depends squarely on how the Court interprets the statutory language and statute as a whole. Several of these canons were discussed in the parties' briefing and raised during oral argument, as well. Next, this Part presents a brief overview of the likely outcome of this appeal based on the case in its entirety. Last, this Part looks at various implications that may arise if the Court finds PRPs and covered persons are identical entities.

A. The Justices' Questions at Oral Argument

This subpart reviews the parties' arguments in turn, highlighting the questions by the Justices regarding the PRP issue and counsels' corresponding answers. Justices Sotomayor, Kagan, and Gorsuch appeared to be the most sympathetic to the Property Owners' interpretation of PRP as separate from covered persons. Chief Justice Roberts and Justices Breyer, Alito, and Kavanaugh appeared the most skeptical. True to form, Justice Thomas did not ask any questions of counsel during oral argument.

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[103] Oral Argument, *supra* note 34, at 17 (argument of L. Blatt on behalf of ARCO) ("If you rule for us under Section 122 . . . then that's sufficient to resolve the case."); *id.* at 29 (argument of C. Michel on behalf of the Government) ("You could resolve this case by . . . saying respondents are PRPs who need EPA authorization . . . and don't have it and, therefore . . . their claim fails.").

1. ARCO's Argument

Lisa Blatt appeared on behalf of ARCO. When asked by Justice Breyer why the Court should consider the Property Owners to be PRPs when the Property Owners argue they are not, ARCO stated that CERCLA sections 107(a), 122(a), 122(e)(1), and 105(h)(4)(A)[104] textually equate PRP with covered persons.[105] Justice Breyer followed up by asking whether a PRP would be classified as such at one time but then lose that status if the "EPA and everyone else has told them they're not responsible," to which ARCO responded that PRP status does not depend on liability.[106]

Justice Sotomayor asked whether landowner status alone is sufficient to invoke the requirement that the Property Owners must seek the EPA's approval before undertaking actions on their land.[107] This question is important because, if the Property Owners are not PRPs but hold the status of covered persons as landowners at the Superfund site, yet were still barred by the same mechanics of section 122(e)(6) applicable to PRPs, then all PRPs are covered persons and all covered persons are necessarily PRPs. Justice Sotomayor's question asked where in the statute this proposition was located, to which ARCO cited section 122(e)(6).[108]

ARCO argued in its rebuttal following the Property Owners' argument that "no matter what your defenses may be, you are always on the hook;" that is, property owners in any Superfund site must refrain from doing anything that may interfere with the EPA's selected remedy.[109] This is necessarily so, ARCO argued, because PRP is a status and applying PRP as a status ensures the EPA's control over the ongoing cleanup of a Superfund site.[110]

2. The Government's Argument

Christopher Michel appeared on behalf of the Government, appearing as amicus in support of ARCO. The bulk of the Court's questions to the Government centered on the PRP issue. Justice Sotomayor asked the Government to assume that the Property Owners were contiguous landowners rather than PRPs.[111] The Government's response continued an argument presented in the briefing, which revolves around the distinction between status and liability.[112] The

104 CERCLA, 42 U.S.C. §§ 9607(a), 9605(h)(4)(A), 9622(a), (e)(1) (2018).

105 Oral Argument, *supra* note 34, at 18, 20.

106 *Id.* at 18.

107 *Id.* at 19.

108 *Id.* at 19–20.

109 *Id.* at 65.

110 *Id.* at 66–67.

111 *Id.* at 23. The "contiguous landowner" exception to liability is discussed in *infra* Part II.A.2.c.

112 Oral Argument, *supra* note 34, at 24.

Government argued that, even if they could qualify for the contiguous landowner defense, they would nonetheless hold the status of PRP.[113]

The distinction between status and liability raised by the Government was important to the Justices because, as Justice Sotomayor pointed out, a Justice "might have a problem" with holding an individual who did not pollute or encourage polluting to "be financially liable" for that pollution based solely on status.[114] Justice Kagan continued this line of questioning, raising another important issue: the consequences of being labeled a PRP on a site that could take decades to remediate, thereby "depriv[ing] people of doing some significant things they want to do to their land."[115] Because the Property Owners here have no liability exposure, were never included in any of the settlement negotiations, and were never treated as PRPs, this question bears considerable significance. The Government stated that the limitation imposed on private property owners relates only to "remedial actions," a statutorily defined term.[116] These actions must be significant, meaning the Property Owners would still be free to plant a garden but would not be able to do things that would interfere with the EPA's selected remedy.[117]

Justice Kagan raised another issue involving the structure of the statute itself. Justice Kagan expressed concern because the term PRP comes from the section governing settlement negotiations, and "apply[ing] that section to these people seems, you know, a stretch."[118] Again, the Property Owners were never involved in any settlement negotiations between the EPA and ARCO. The Government countered that all the Court needs to do in this case is determine that all landowners on Superfund sites are PRPs under section 122(e)(1).[119]

The Justices then turned their attention to the consequences of labeling the Property Owners as PRPs. Justice Gorsuch asked how the Court should treat the Government's representations that the Property Owners could get authorization from the EPA for some of their proposed remedial actions.[120] The Government replied simply that the Property Owners here have not sought any authorization, and that the EPA "would not approve what we understand their plan to be."[121] The Government, however, did not foreclose the possibility that the Property Owners' plan, or aspects of it, may be approved.

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113 *Id.*

114 *Id.*

115 *Id.* at 24–25. Justice Kagan continued, "I mean, it would seem a big deal to take a person like that and say you've lost some significant property rights." *Id.* at 25.

116 *Id.* at 25 (referencing CERCLA, 42 U.S.C. § 9601(a)(4) (2018)).

117 The distinction between what may or may not be considered "significant" was not discussed outside the example of building a garden.

118 Oral Argument, *supra* note 34, at 26.

119 *Id.* at 26–27.

120 *Id.* at 29.

121 *Id.* at 29–30.

Justice Gorsuch asked the final string of questions and raised a question that was not heavily briefed by the parties but was certainly significant.[122] The question was whether property owners on Superfund sites may have a takings claim against the Government if they are foreclosed from using their private property as they see fit until the EPA's remedial plan is complete.[123] Justice Gorsuch asked if these Property Owners could raise a takings claim after being prohibited from undertaking remediation efforts on their land for a period of thirty-five years and counting.[124] The Government responded that the EPA's efforts have improved the value of the Property Owners' land so "it would be a very weak claim," considering their properties were previously "covered with arsenic."[125] Justice Gorsuch's retort highlights the absurdity of the Government's response: "it's improved the value of the property from its prior state but not . . . to a level that state law would allow."[126] That statement, made at the last minute of the Government's argument, summarized the entire course of this case's lengthy litigation.

3. The Property Owners' Argument

Joseph Palmore argued on behalf of the Property Owners. The Property Owners continued to stress that they had never been considered potentially liable for anything throughout the life of this case.[127] In support of this argument, the Property Owners noted that PRPs are not defined in the statute, and that under rules of statutory construction, the Court looks to the plain meaning of the statute's language.[128] Based on the plain language of "potentially responsible," the Property Owners argued that it logically follows that a party who "face[s] no prospect of liability" could not be considered potentially responsible.[129]

Justice Ginsburg then asked whether there could be an individual who falls under section 107(a)'s definition of a covered person while not also qualifying as a PRP.[130] This question is significant because all parties agree that a PRP is necessarily a covered person under the statute, but the Property Owners argued that the inverse is not necessarily so. The Property Owners pointed out that a residential landowner at a Superfund site would qualify as a covered person but would fall outside the qualification of PRP if all requirements of a statutory exception were met.[131]

122 *See id.* at 29–30.
123 *See id.*
124 *Id.* at 30.
125 *Id.* at 30–31.
126 *Id.* at 31.
127 *Id.* at 33.
128 *Id.* at 39.
129 *Id.*
130 *Id.* at 40.
131 *Id.* at 40–41.

The Court seemed to worry that if it were to hold that PRPs and covered persons are separate classes of entities then determining whether a party was a PRP would possibly require court intervention.[132] The Property Owners responded that the statute puts the onus on the EPA to determine PRP status, citing section 113(k)(2)(D), which mandates that the EPA notify all PRPs early in the process and before undertaking remedial actions.[133] Justices Kagan and Kavanaugh both stressed that there did not seem to be any other mechanism in the statute to govern a dispute over PRP status designations.[134] The Property Owners responded by reiterating that the burden is on the EPA to make PRP designations, and that EPA does not need to rely on section 122(e)(6) to undertake its remediation plans.[135] Justice Gorsuch asked the Property Owners to elaborate on what other tools the EPA may have at its disposal to address plans that potentially interfere, to which counsel responded by pointing directly to the Government's petition brief, wherein the Government referenced its ability to "use any of the mechanisms that CERCLA provides, including administrative orders and enforcement actions, to ensure that the EPA's remedy is not undermined."[136]

Another important point stressed by the Property Owners was that Congress used the term "PRP" in section 122(e)(6) without reference to section 107(a)'s covered persons, unlike elsewhere in the statute.[137] This is a basic canon of statutory interpretation: When Congress uses a term in one section and omits that term in another, this necessarily means the omitted term does not apply. Based on a plain reading of the statute, this would tend to indicate that Congress's use of PRP in one section without reference to section 107(a)'s covered persons means that PRP is not, in fact, synonymous with covered persons.

The Property Owners likened ARCO's reliance on section 122(e)(6) to "a critical kind of elephants in a mouse hole" because section 122 is about settlements and other references to PRPs within the statute refer back to these settlement provisions.[138] Ultimately, as counsel stated toward the end of the Property Owners' argument, "there's no evidence that Congress intended this obscure corner of § 122 about settlements to give the EPA that kind of vast control forever over private property."[139]

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132 *Id.* at 41 (Kagan, J.).
133 *Id.* at 41–42.
134 *Id.* at 46–47.
135 *Id.* at 48, 52.
136 *Id.* at 57–58 (citing CVSG Brief, *supra* note 45, at 17).
137 *Id.* at 41.
138 *Id.* at 43–44. This argument is discussed more fully *infra* Part III.B.3.
139 Oral Argument, *supra* note 34, at 65.

B. Canons of Statutory Interpretation

This Section looks at common canons of statutory interpretation and how each may apply to this case. Professor Nina Mendelson conducted a comprehensive study of the Roberts Court's use of canons over the last decade and, based on her findings, it seems likely the Roberts Court will employ canons in its decision of this case as well.[140] Although there are numerous canons, the ones most applicable here are the plain meaning rule, the whole act rule, the harmonious reading canon, and as discussed briefly at oral argument, the "no elephants in mouseholes" rule.

1. Plain Meaning Rule

When courts set out to interpret statutory language, the starting point is always the language of the statute itself, giving the words their plain meaning.[141] Here, the issue centers on how the Court should interpret PRP as it appears in the statute, an otherwise undefined term. In this case, the Court would likely look to the plain meaning of "potentially" and "responsible" to see if these terms would support a finding that PRPs are also covered persons.

The Property Owners argued that the terms' plain meaning shows that a PRP can only be someone who is potentially responsible, which would apply only to an entity facing possible liability for contamination.[142] Notably, no other party seemed to appeal the plain language of the statute in this way, even though the plain language is the Court's starting point. Instead, the other parties focused more on the statute as a whole and what is essentially the harmonious reading canon—that because covered persons are defined and PRPs are not, defining PRP to be something other than a covered person would create a contradictory result. Without competing interpretations of the actual language of the statute, the Court can either follow the Property Owner's analysis and find PRPs are not covered persons, or supply its own analysis of the statute's language.

Because the Court must start with the plain meaning of the statute's language, it will have to determine whether PRPs are covered persons and vice versa. The parties agree that PRPs must necessarily be covered persons, but the disagreement centers on whether that holds true in the opposite direction.

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[140] Nina Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 99 (2018) ("Majority opinions considered (though did not necessarily apply) at least one canon in roughly 70% of contested statutory issues.").

[141] Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001) ("We begin, as always, with the language of the statute. In examining the statutory language, we follow the Supreme Court's instruction and adhere to the 'Plain Meaning Rule.'") (citations omitted).

[142] Oral Argument, *supra* note 34, at 39–40.

The Court will thus have to decide whether all covered persons are necessarily PRPs. The outcome of this question rests on whether the Court starts with this canon or chooses to assume that these terms are in fact synonymous. It seems likely that the Court will consider the plain language of the statute since no court has provided remotely robust reasoning as to why the terms should be—and routinely are—treated interchangeably. If the Court determines that section 107(a)'s list of covered persons is also the definition of PRPs, then the Property Owners' claims fail. If, on the other hand, the Court gives the terms "potentially" and "responsible" their plain meaning, the Court may well determine that, while the Property Owners are covered persons by virtue of their status as landowners, they are not automatically PRPs by virtue of their lack of responsibility as it relates to the contaminating activity. This result would be supported by another canon of construction, the whole act rule.

2. Whole Act Rule

The "whole act rule" mandates that courts interpret a statutory term by assuming that a term used in a statute means the same thing wherever it appears and that different words mean different things.[143] Similar to the plain language rule, this canon essentially precludes the Court from interpreting differing terms in a statute to mean the same thing where Congress' intent that they be the same is unclear. This canon also supports a finding that PRP and covered persons are not synonymous terms for several reasons. First, they appear in different sections of CERCLA. PRP appears in sections relating directly to the settlement process, while covered persons is referenced more generally. Second, Congress' use of covered persons and cross-reference to section 107(a) in other sections of the statute, while not using the same cross-reference when discussing PRPs, indicates that they are not the same.

Although section 107 is the only section in the Act that expressly references who may be liable for cleanup, the Act requires the EPA to determine PRP status so this term should not rest solely on the list outlined in section 107.[144]

3. Harmonious Reading Canon

Under the "harmonious reading" canon, the Court should not interpret a statute in a way that nullifies a section or renders it contradictory with another section.[145] Under this canon, it is plausible that the Court would find that reading PRP and covered persons as interchangeable creates a more harmonious reading of the statute than if the terms were treated as distinct. As discussed by ARCO's counsel at

143 Mendelson, *supra* note 140, at 81.
144 *See* CERCLA, 42 U.S.C. § 9613(k) (2018).
145 Mendelson, *supra* note 140, at 91.

oral argument, there are three statutory sections that could be construed to textually equate PRP with covered persons. Although this argument is somewhat meagre, it is possible that the Court will follow this logic and find a more harmonious reading lies in equating the terms.

However, it is unlikely the Court will use this canon, considering that using the terms interchangeably does not necessarily nullify or render sections contradictory. The real issue centers on the application of these terms to litigants, and although the statute must be read as a whole, each case is factually distinct and may present different challenges than what the Court faces here.

4. No Elephants in Mouseholes

Justice Scalia's clever canon of "no elephants in mouseholes"[146] presumes that "Congress does not bury important concepts in obscure provisions or phrases, instructing courts to interpret those phrases narrowly to exclude the important concept."[147] This canon was invoked by the Property Owners to argue that Congress would not have buried the definition of PRP as meaning covered persons in an "obscure corner" of section 122, titled settlements, thereby granting the EPA "perpetual veto power" over a private property owner's use of her land.[148] Justice Kavanaugh picked up on this as well.[149] When ARCO's counsel argued that if you live on a Superfund site, your property rights are more restricted, Justice Kavanaugh interjected that "it seems a very indirect way for Congress . . . to, in essence, hinder a landowner from doing any significant action for decades."[150] Although this canon is somewhat new,[151] it may play into the Court's opinion as to whether landowners, such as the Property Owners here, are forever foreclosed from exercising their property rights if they happen to be located in a Superfund site.

C. Likely Outcome

The likely outcome of this case is far from clear. The Justices at oral argument seemed more inclined to treat PRPs as covered persons under the statute. When questioning all three parties, the Justices kept returning to the same central question: If PRPs are not covered persons, then how do we decide who is?[152] But whether the Court's opinion memorializes this concern is certainly not a foregone conclusion.

146 This canon originated in Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

147 Mendelson, *supra* note 140, at 111.

148 *See* P.O.'s Brief, *supra* note 16, at 41–42; Oral Argument, *supra* note 34, at 65.

149 Oral Argument, *supra* note 34, at 27–28.

150 *Id.*

151 Mendelson, *supra* note 140, at 111–12.

152 *See, e.g.*, Oral Argument, *supra* note 34, at 16–20.

ARCO's and its supporting amicis' briefings heavily relied on the fact that courts *do* routinely use the list of covered persons to define PRPs, which would give the Court an easy solution. All the Court would need to do is cite any of these cases as demonstrating the definition of PRP. Likewise, the Justices seemed to struggle with the idea that the definition of PRP could not be found in the statute and any designation of PRP may result in derivative litigation. The Court's questioning revealed a belief that Congress would not create a comprehensive statute that would necessarily require derivative litigation or other court intervention.[153]

The Court may follow the plain meaning analysis outlined above and find that the plain meaning of "potentially responsible" does not automatically refer to the listed entities in section 107(a). Alternatively, the Court may conclude that the statute taken as a whole necessarily demonstrates that the two terms are interchangeable. Although unlikely, the Court may decline to decide the issue at all. The most likely, and unfortunate, prediction based on the briefing and oral argument is that the Court will equate the terms and render the Property Owners' claims for restoration damages invalid until they seek and obtain, or are denied, the EPA's authorization to pursue their remediation plans.

Ultimately, the Court's determination on this issue will have far reaching impacts.

D. Implications of Finding PRPs are Covered Persons and Vice Versa

There are social justice implications to finding all property owners on any Superfund site are PRPs. Many Superfund sites, including the Anaconda Smelter, are located in areas populated by underrepresented individuals, often in lower socio-economic classes.[154] The Property Owners in this case are not sophisticated parties.[155] The parties do not dispute that it was common knowledge the area around the Smelter was heavily contaminated. But expecting parties such as these to know and follow statutory guidelines in order to protect themselves from possible liability decades down the road—especially a complex, convoluted statute like CERCLA—is unreasonable and raises serious due process concerns. The consequences of labeling individuals such as these as PRPs under CERCLA, a statute premised on harsh and strict liability,

153 *See, e.g.*, *id.* at 41 (Kagan, J.) ("It sounds like you would need a court adjudication to [decide whether someone is a PRP]. And that seems unlikely that Congress meant for that to happen.").

154 Paul Mohai & Robin Saha, *Which Came First, People or Pollution? A Review of Theory and Evidence from Longitudinal Environmental Justice Studies*, ENV'T RES. LETTERS, Dec. 2015, at 1, 1–3; Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, ENV'T RES. LETTERS, Nov. 2015, at 1, 1–2, 8.

155 *See The Nation's Eyes*, *supra* note 19 ("the annual average income [in Anaconda-Deer Lodge County] is $27,107").

will have serious consequences. As ARCO's counsel stated at oral argument, "PRPs . . . [are] always liable in a suit by Atlantic Richfield when the cleanup ends under Section 113(g)(2)(A). We might not get much money, but they're . . . definitely on the hook."[156]

The greater implications of the Court's ruling, should it find that PRPs are synonymous with covered persons under section 107(a), are twofold. First, private property owners who happen to be situated in a Superfund site would have to seek the EPA approval for any activity that may rise to the level of "significant" under the meaning of remedial activity in the statute. Second, if the EPA denies a property owner's request for permission to undertake some activity, that property owner will be foreclosed from undertaking activity on her property until the EPA's selected remedy is complete, which—as this case amply demonstrates—may be never.

IV. CONCLUSION

Based on the briefing presented to both the Montana Supreme Court and United States Supreme Court and the oral argument at the Court, the likely outcome of this case is remand back to state court. There are at least three possible results of this remand. On one hand, the state court could hold the trial as planned and allow the parties to present evidence on the Property Owners' proposed plans. Alternatively, the state court could stay the case while the Property Owners seek the EPA's permission to pursue their remedial plan. In the worst case, the state court could dismiss the Property Owners' case entirely without prejudice, again in order to seek the EPA approval.

Regardless of what the Court decides, an additional round of appeals or some other derivative litigation seems likely. For example, if the jury returns a verdict awarding restoration damages in the Property Owners' favor, ARCO will likely appeal. If the Property Owners are foreclosed from presenting their claim for restoration damages to the jury, they will likely either appeal or pursue litigation against the EPA under the Administrative Procedure Act, as briefly discussed by Justices Breyer and Gorsuch. If the case is stayed or dismissed without prejudice, the parties will likely end up back in court based on the EPA's determination of whether the Property Owners can pursue their plan. Ultimately, the case will proceed to trial regardless of the outcome of the United States Supreme Court appeal. All that will change will be whether the Property Owners may pursue their claim for restoration damages.

156 Oral Argument, *supra* note 34, at 66.

V. ADDENDUM

On April 20, 2020, the United States Supreme Court issued its opinion on ARCO's appeal.[157] The Court's opinion had some surprises but was generally as predicted. Chief Justice Roberts authored the opinion for the Court, which affirmed the Montana Supreme Court's ruling in part while remanding the issue of whether the Property Owners must first seek the EPA approval to move forward with their remediation plans. The opinion divided the Justices—only two sections of the opinion were unanimous.[158] Justice Alito filed a separate opinion concurring in part and dissenting in part; Justice Gorsuch also filed a separate opinion concurring in part and dissenting in part, which was joined by Justice Thomas.

Ultimately, the majority opinion treated the classification of the Property Owners' PRP status as a non-issue by summarily looking to the definition of "covered persons" under section 107: "To determine who is a potentially responsible party, we look to the list of 'covered persons' in § 107, the liability section of the Act."[159] This was the extent of reasoning as to why this section of the Act should be used to establish PRP status; the Court did not discuss why section 107's list of covered persons necessarily establishes PRP status under section 122. Thus, because "[b]oth parties agree that this provision would require the landowners to obtain EPA approval for their restoration plan if the landowners qualify as potentially responsible parties,"[160] the Property Owners must seek such approval.

This Addendum addresses several of the specific arguments raised by the parties and directly addressed in the Court's Opinion: a) the statute of limitations applicable to classifying the Property Owners as PRPs has long expired, b) covered persons under section 107 are a distinct group of persons from PRPs under section 122, c) the Government's failure to notify the Property Owners of their PRP status per section 122(e)(1) precludes classifying them as such now, and d) the "contiguous landowner" exception saves the Property Owners from liability under CERCLA.

A. CERCLA's Six-Year Statute of Limitations Does Not Preclude PRP Status

Justice Gorsuch supported the Property Owners' position that CERCLA's statute of limitations applied to a finding of PRP status such that where this limitations period expires, PRP status can no longer

157 *ARCO*, 140 S.Ct. 1335, 1335 (2020).

158 Only Parts I and II–A of Chief Justice Roberts's opinion were unanimous; Part II–B was joined by all of the Justices excluding Justice Alito; and Part III was joined by all of the Justices excluding Justices Gorsuch and Thomas. *Id.*

159 *Id.* at 1352.

160 *Id.*

apply.[161] The majority interpreted this argument to mean that landowners would be free to dig up contaminated soil or divert contaminated waters, so long as they were not sued within the limitations period.[162] Considering innocent landowners may nonetheless be classified as "covered persons" or PRPs under the statute, the majority found it unlikely that status could terminate simply because the party no longer faces liability due to the passage of time. Based on this analysis, the majority reasoned that it was unlikely Congress would provide "such a fragile remedy to such a serious problem."[163]

B. "Covered Persons" and PRPs Are Not Two Distinct Groups of Persons

In the Property Owners' favor, Justice Gorsuch argued that equating covered persons in section 107 with PRPs in section 122 overlooks the distinct focus of each section and requires "linguistic contortion" and reliance on a "logical leap."[164] Nominally, section 107 applies to entities the government is authorized to sue: covered persons.[165] On the other hand, section 122 applies to those who are potentially liable for cleanup costs and the procedures by which PRPs may seek settlement with and discharge from liability from the federal government.[166] Logically, although a PRP must necessarily be a covered person, a covered person is not necessarily a PRP because "[i]t is possible to be a person the government is authorized to sue without also being a person the government has chosen to single out for potential responsibility."[167] Thus, because the Government failed to follow CERCLA's prescribed process for establishing PRP status and did not seek to establish PRP status within the statute of limitations period, the Property Owners could not now be considered PRPs.[168]

The majority's response proceeded as follows: 1) neither term is included in CERCLA's list of defined terms; 2) "covered persons" only appears in the caption of section 107 while "potentially responsible parties" appears outside of section 122; 3) the Act consistently refers to

161 *Id.*

162 *Id.* at 1352–53.

163 *Id.* at 1353.

164 *Id.* at 1365 (Gorsuch, J., concurring in part and dissenting in part) ("The terms use different language, appear in different statutory sections, and address different matters. Nor are these two sections the only ones like them. CERCLA differentiates between covered persons and potentially responsible parties in many places: Some sections apply to all persons covered by §107 (*see, e.g.*, 42 U.S.C. §§ 9619(d), 9624(b)), while others extend their mandates only to potentially responsible parties (*see, e.g.*, §§ 9604, 9605, 9611).").

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.* at 1366. Section 122(e) of CERCLA establishes the requirements the government must follow when imposing PRP liability, including "notify[ing] all such parties." CERCLA, 42 U.S.C. § 9622(e) (2018). The Government did not notify the Property Owners of their potential PRP status until April 2018, nearly thirty-five years after the EPA's Superfund site designation. CVSG Brief, *supra* note 45, at 20.

PRPs as "parties that may be held accountable for hazardous waste in particular circumstances";[169] 4) the only place that identifies these parties is the list of "covered persons" in section 107. The majority reasoned, then, that "Congress therefore must have intended 'potentially responsible party' in § 122(e)(6) (as elsewhere in the Act) to refer to 'Covered persons' in § 107(a)."[170] While this logic is a parsimonious solution to an otherwise complicated problem, the majority's analysis glosses over Justice Gorsuch's and the Property Owners' point that, when a court interprets otherwise ambiguous statutory language, the court should look first to the plain meaning of the terms.[171]

Justice Gorsuch raised a separate issue with conflating covered persons and PRPs: the government would possibly be on the hook for extensive takings claims or challenges to Congress' powers over private property relating to requiring landowners to house toxic contaminants indefinitely, contaminants existing by no fault of the landowners.[172] The majority concluded by stating: "The grandchildren of Montana can rest easy: The Act does nothing of the sort" because CERCLA's bar on remedial actions does not cover "planting a garden, installing a lawn sprinkler, or digging a sandbox."[173] This analysis likely does little to reassure the Property Owners who have housed ARCO's contaminants for nearly four decades, with no real end in sight, who desire to do more with their personal property than merely plant a garden or build a sandbox. Perhaps the grandchildren residing in the twenty-five active Superfund sites of Montana[174] may rest easy, but their parents and grandparents likely will not—the options have become either house toxic contaminants on their private residential properties potentially indefinitely or face serious financial repercussions from industry giants for undertaking action without seeking the EPA's approval.

169 *ARCO*, 140 S.Ct. at 1353.

170 *Id.* at 1354.

171 *Id.* at 1363 (Gorsuch, J., concurring in part and dissenting in part) ("When interpreting a statute, this Court applies the law's ordinary public meaning at the time of the statute's adoption, here 1980.").

172 *Id.* at 1364–65 ("If CERCLA really did allow the federal government to order innocent landowners to house another party's pollutants involuntarily, it would invite weighty takings arguments under the Fifth Amendment. . . . And if the statute really did grant the federal government the power to regulate virtually each shovelful of dirt homeowners may dig on their own properties, it would sorely test the reaches of Congress's power under the Commerce Clause.").

173 *Id.* at 1354.

174 *Federal Superfund and Construction*, MONT. DEP'T OF ENV'T QUALITY, https://perma.cc/N2JB-4NZ5 (last visited Nov. 12, 2020) (listing the 25 Superfund sites currently active in Montana).

C. The Government's Failure to Comply with CERCLA's Notification Requirements in Section 122(e)(1) is Simply an Exercise in Enforcement Discretion and Does Not Change the Property Owners' Status as PRPs

The parties did not dispute that the EPA failed to notify the Property Owners of their status as PRPs, as required under section 122(e)(1), until approximately ten years after the Property Owners originally filed suit against ARCO.[175] The Property Owners and Justice Gorsuch argued that this failure precluded the EPA from now designating the Property Owners as PRPs.[176] However, the majority held that the EPA's failure to follow the proscribed requirements for identifying PRPs was merely an exercise of the EPA's longstanding policy of refraining from suing residential property owners within Superfund sites.[177] The majority further stated that the EPA's nonenforcement did not change the Property Owners' PRP status because section 107 "unambiguously defines" PRPs while section 122(e)(1) only sets the notification requirements applicable to PRPs.[178] The majority concluded by stating: "In short, even if the EPA ran afoul of § 122(e)(1) by not providing the landowners notice of settlement negotiations, that does not change the landowners' status as potentially responsible parties."[179]

Like most of the majority's analysis on the PRP status issue, this analysis is likewise problematic for residential property owners within Superfund sites. Although the policy of refraining from suing such property owners is reassuring, it provides little comfort that the EPA could unilaterally change this policy at any time.

D. The Property Owners Do Not Satisfy the Statutory Requirements for Invoking CERCLA's "Contiguous Landowner" Defense Against Liability

Under the statute, "contiguous landowners" are not PRPs.[180] However, in order to benefit from this liability shield, the property owner must establish that he or she meets all eight requirements of the statute.[181] As the majority pointed out, this is a high bar the Property

175 The Property Owners filed their original action in 2008 while the EPA did not notify the Property Owners of their PRP status until 2018. *See ARCO*, 140 S.Ct. at 1347–48; CVSG Brief, *supra* note 45, at 20.

176 *ARCO*, 140 S.Ct. at 1364 (Gorsuch, J., concurring in part and dissenting in part) ("In the first place, the federal government never notified the landowners that they might be responsible parties, as it must under §122(e)(1). Additionally, everyone admits that the period allowed for bringing a [CERCLA] claim against them has long since passed under § 113(g)(2)(B). On any reasonable account, the landowners are potentially responsible to the government for exactly nothing.").

177 *Id.* at 1354 (referencing the EPA's Policy Towards Owners of Residential Property at Superfund Sites, OSWER Directive #9834.6 (July 3, 1991)).

178 *Id.*

179 *Id.*

180 CERCLA, 42 U.S.C. § 9607(q) (2018). *See also* discussion *supra* Part II.A.2.c.

181 42 U.S.C. § 9607(q)(1)(A).

Owners would likely struggle to clear, primarily due to the requirements that the landowner had no knowledge of the contamination prior to acquisition, and when cleanup efforts are underway, the landowner must fully comply with the government's selected remediation plan.[182]

Evidence throughout the life of the case demonstrated that most of the Property Owners were aware of the presence of contamination on their properties prior to acquisition, or at least the high likelihood of such contamination.[183] Further, the majority deferred to the EPA's statements that the Property Owners were not fully complying with the government's remediation efforts, which would likewise terminate any "contiguous landowner" protection.[184]

The primary problem with the majority's "contiguous landowner" analysis is the fact that the Property Owners never had the opportunity to establish any CERCLA defenses, let alone this one in particular. CERCLA defenses, including the contiguous landowner defense, are affirmative defenses. As such, the defendant has the burden of persuasion at trial. If the EPA had brought suit against the Property Owners in the first instance, the Property Owners—as defendants—would have raised CERCLA's "contiguous landowner" affirmative defense. However, no case was brought against the Property Owners; they were never given the opportunity to raise this defense. So why did the Court determine the Property Owners' likely "difficulty" with meeting the "high bar" of the statute, when this affirmative defense had never been raised or particularly scrutinized? The answer is unclear.

Although the "contiguous landowner" defense was not briefed in the lower courts, the issue arose on ARCO's Motion for Summary Judgment.[185] ARCO moved for the conclusion that the Property Owners were PRPs without, dispensing of any available defenses that precluded ARCO's assertion.[186] To the contrary, the Property Owners offered the "contiguous landowner" defense in arguing that ARCO had not carried its burden of conclusively establishing the Property Owners' status as PRPs.[187]

The Court should not have addressed the Property Owners' ability to prevail on this claim because that was not the issue before *any* court. Rather, the issue was whether ARCO could prevail on its assertion that the Property Owners were PRPs, which put the burden of persuasion on

182 *ARCO*, 140 S.Ct. at 1356.

183 *Id.* at 1357. However, a strong argument could be made that takings claims are not automatically barred simply because an owner acquires title to the property after the regulation, or, in a CERCLA case, after the remediation begins. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (concluding that if acquisition of title were determinative of ability to raise a takings claim, the government would effectively be allowed to place an expiration date on Fifth Amendment takings claims).

184 *ARCO*, 140 S.Ct. at 1356.

185 *ARCO I*, 408 P.3d 515, 518, 522 (Mont. 2017).

186 P.O.'s Brief *supra* note 16, at 48–49.

187 *Id.*

ARCO to demonstrate the Property Owners were PRPs not subject to any possible CERCLA defense. Ultimately, the Property Owners were never required, nor given the chance, to affirmatively plead their ability to raise the "contiguous landowner" defense.

E. Conclusion

The outcome of the United States Supreme Court appeal was generally predictable, but the positions taken by the Justices proved surprising—especially the separate opinion written by Justice Gorsuch and joined by Justice Thomas. Justices Sotomayor and Kagan seemed more responsive to the Property Owners' arguments at oral argument, but ultimately joined Chief Justice Roberts's majority opinion.

The implications of the Court's ruling, discussed above, are now real perils. Superfund site property owners will find new obstacles navigating an already complicated system. The holding that any and all property owners within a Superfund site must seek the EPA's approval before undertaking activities on their private land has far-reaching implications. Only through further court intervention will the real consequences be realized.

Perhaps this ruling will encourage prospective property purchasers to investigate for contamination or inspire real estate agents to learn the laws that apply to potentially contaminated property—including what purchasers should or should not do both prior to and during ownership. Perhaps landowners will successfully raise Fifth Amendment takings claims against the government for allowing private entities to house contamination on their private property indefinitely, as suggested by Justice Gorsuch in his separate concurrence.[188]

However, these behavioral changes seem unlikely considering CERCLA's thirty-year history of relatively little change. Although not previously litigated, the prospect of raising a successful regulatory takings action within a Superfund site is not promising, considering the nature of the government action—promoting comprehensive remediation of heavily contaminated sites—and the reality that CERCLA cleanups generally increase an owner's property value rather than eliminate it.[189]

Ultimately, this ruling benefits polluters more than it benefits the EPA or private property owners seeking remediation on their

[188] *ARCO*, 140 S.Ct. at 1364–65. (Gorsuch, J., concurring in part and dissenting in part).

[189] CERCLA takings claims generally arise on challenges to the retroactive application of CERCLA liability, not on the housing of contaminants on private property. *See, e.g.*, Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 552–53 (6th Cir. 2001) (upholding CERCLA's retroactive liability against Fifth Amendment Takings claim). The Court applies the *Penn Central* takings analysis in CERCLA cases, one factor of which compares the value of the challenger's property prior to and after the government action. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

contaminated land, land contaminated through no fault of their own while facing potential cost recovery suits brought by some of the largest industrial entities in the world.[190]

[190] As ARCO stated at oral argument, it could technically seek contribution costs from the Property Owners, same as any responsible party against any private property owner within a Superfund site, even if they "might not get much money." Oral Argument, *supra* note 34, at 66–67.