

12-2-2019

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Recommended Citation

McCulloch, Emily M. (2019) "PREVIEW—Atlantic Richfield Company v. Christian: The Intersection of Superfund and State-Law Restoration Claims," *Public Land & Resources Law Review*. Vol. 0 , Article 3. Available at: <https://scholarworks.umt.edu/plrlr/vol0/iss11/3>

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PREVIEW—Atlantic Richfield Company v. Christian: *The Intersection of Superfund and State-Law Restoration Claims*

Emily McCulloch*

The Supreme Court of the United States will hear oral arguments in this matter on Tuesday, December 3, 2019, at 11:00 a.m. in the Supreme Court Building in Washington, D.C. Lisa S. Blatt will likely appear for the Petitioner. Joseph R. Palmore will likely appear for the Respondents. Solicitor General Noel Francisco will likely argue for the United States.

I. INTRODUCTION

The Atlantic Richfield Company (“ARCO”) began cleanup efforts at the Anaconda Superfund Site in 1983—stemming from the 1980 Comprehensive Environmental Response Compensation and Liability Act’s (“CERCLA”)¹ enactment—to address arsenic and lead contamination from over a century of copper mining and refining around Butte, Montana.² ARCO argues that the Environmental Protection Agency’s (“EPA”) remediation plan for the site is the sole remedy under CERCLA and therefore bars state-law claims.³ The respondents, seventy-seven area landowners (“Landowners”), contend they have a right to bring common-law claims requiring ARCO to further remediate their land, which the Anaconda Smelter polluted for over a century.⁴

The Supreme Court of the United States must review: (1) whether a state-law claim for additional clean-up “challenges” the EPA’s sole restoration remedy; (2) whether a landowner, who has never been ordered to remediate their land, is considered a potentially responsible party (“PRP”) in the EPA’s action plan; and (3) whether CERCLA preempts conflicting state-law claims that require additional restoration.⁵ The Court’s decision will impact future CERCLA claims because it could allow state-law claims in addition to EPA-ordered remediation plans for Superfund sites.

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1. 42 U.S.C §§ 9601–9628 (2018).
2. Resp’ts’ Br. at 7–10, Oct. 15, 2019, No. 17-1498.
3. Pet’r’s Br. at 9, Aug. 21, 2019, No. 17-1498.
4. Resp’ts’ Br. at 7–10.
5. Pet’r’s Br. at i.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1977, ARCO acquired the Anaconda Company in what some described as “one of the decade’s worst mergers.”⁶ Three years later, the company’s smelter in Anaconda, Montana, closed; ARCO became responsible for remediation pursuant to CERCLA’s standards.⁷ Over the next thirty-six years, ARCO spent around \$450 million in CERCLA-mandated cleanup.⁸

Local residents have asserted that the remediation efforts are insufficient⁹ and that the area surrounding the smelter’s smokestack is uninhabitable due to lead and arsenic contamination.¹⁰ ARCO, however, says it has followed all CERCLA requirements despite the “Herculean challenge[s]” posed by the “New York City-sized” site.¹¹ ARCO maintains that it has succeeded with remediation efforts and restored wetlands and lush vegetation.¹²

In 2008, Landowners sued ARCO in Montana district court for negligence, nuisance, trespass, unjust enrichment, and constructive fraud, seeking restoration damages.¹³ In December 2013, the district court granted summary judgment for ARCO, holding that Montana’s statute of limitations barred Landowners from recovery.¹⁴

On appeal, the Montana Supreme Court affirmed the dismissal of the unjust enrichment and constructive fraud claims but reversed and remanded the remaining claims, concluding the district court improperly applied the statute of limitations.¹⁵

On remand, the district court awarded Landowners a restoration remedy, which entitled Landowners to seek the measure of damages they would be entitled to if ARCO trespassed and created a nuisance on Landowners’ property.¹⁶

ARCO then requested a writ of supervisory control.¹⁷ The Montana Supreme Court agreed with Landowners, however, stating that their claim was not a “challenge” to the EPA, they were not PRPs, and CERCLA did not preempt those claims.¹⁸

6. Pet’r’s Br. at 9.

7. *Id.*

8. *Id.* at 11.

9. Resp’ts’ Br. at 7–8.

10. *Id.* at 9.

11. Pet’r’s Br. at 11.

12. *Id.* at 15.

13. *Christian v. Atl. Richfield Co.*, 358 P.3d 131, 139 (Mont. 2015).

14. *Id.* at 139.

15. *Id.*

16. Resp’ts’ Br. at 51 (referencing *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1087 (Mont. 2007)).

17. *Atl. Richfield Co. v. Mont. Second Judicial Dist. Court*, 408 P.3d 515 (Mont. 2017); *see also* Pet’r’s Br. at 19.

18. *Atl. Richfield Co.*, 408 P.3d at 522–23; *see also* Pet’r’s Br. at 20.

On April 27, 2018, ARCO petitioned for certiorari, which the Supreme Court granted on June 10, 2019.¹⁹ Of the original five claims, the sole issue before the Court is the restoration damages claim.²⁰

III. SUMMARY OF ARGUMENTS

A. Petitioner's Arguments

1. Jurisdiction

ARCO argues that the Supreme Court has jurisdiction because a judgment that terminates original proceedings when the issue concerns state court jurisdiction is reviewable, even if other issues remain pending in lower courts.²¹ Additionally, ARCO notes the Court has jurisdiction because, as an exception to the finality rule, restoration damages are a distinct claim, and reversal “would dispose of the judgment before.”²²

2. State-Law Claims & CERCLA

ARCO asserts that Montana courts lacked jurisdiction over Landowners' restoration claim because the term “federal” in the statute bars state-law claims.²³ ARCO claims Congress intended for federal jurisdiction to cover all CERCLA claims because the statute's expansive language includes “all controversies” that are a “challenge” to CERCLA.²⁴ Because Landowners “challenge” CERCLA through their own proposed soil action and water contamination plans, “only federal courts . . . have jurisdiction” to adjudicate the “challenge.”²⁵ ARCO emphasizes that CERCLA's purpose is to allow challenges in very limited circumstances in federal courts, and changing this interpretation would “blow a Montana-sized hole in the statutory scheme.”²⁶

19. *Atl. Richfield Co. v. Christian*, 139 S. Ct. 2690 (2019); *see also* Atlantic *Richfield Co. v. Christian*, SCOTUSBLOG (last visited Nov. 11, 2019), <https://www.scotusblog.com/case-files/cases/atlantic-richfield-co-v-christian/>.

20. Resp'ts' Br. at 10.

21. Pet'r's Rep. Br. at 2, Nov. 14, 2019, No. 17-1498 (citing *Fisher v. Dist. Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 385 (1976)).

22. *Id.* at 3 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 482–83 (1975)).

23. Pet'r's Br. at 30 (relying on 42 U.S.C. § 9613(b), which states that matters apart from those addressed in subsection (a) and (h) are under the exclusive jurisdiction of United States District Courts and states Section (h) is irrelevant because the narrow exceptions listed do not apply).

24. *Id.* at 27 (quoting *Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999)).

25. *Id.* (quoting *Fort Ord Toxics Project, Inc. v. California EPA*, 189 F.3d 828, 832 (9th Cir. 1999)).

26. *Id.* at 31.

3. Potentially Responsible Parties

ARCO maintains that Landowners are PRPs, and, accordingly, CERCLA bars their claims because “no potentially responsible party may undertake any remedial action at the facility’ without the EPA’s authorization.”²⁷ A PRP can be any “owner and operator of a vessel or a facility,” and therefore, as ARCO argues, Landowners are subject to the EPA’s remediation plan.²⁸ ARCO asserts that allowing Landowners to fall outside the scope of PRPs would greatly undermine the CERCLA’s purpose because “landowners are the PRPs most likely to go off and pursue their own visions of remediation.”²⁹ Also, ARCO notes that “for nearly 30 years, the EPA [in its own memorandum] has interpreted the term ‘potentially responsible parties’ to encompass residential landowners.”³⁰

Additionally, ARCO challenges the Montana Supreme Court’s holding that a PRP designation can only occur through a voluntary settlement with the EPA, a judicial designation, or defendant status in a CERCLA lawsuit.³¹ ARCO argues that parties are PRPs before any litigation begins.³² ARCO states the critical statutory word in PRP is “potential” because a party has the potential of being a PRP even if they are factually non-liable.³³ Finally, ARCO points out the EPA’s remediation plan benefits all parties because it takes into account all PRPs, including Landowners.³⁴

ARCO also questions the Montana Supreme Court’s ruling that CERCLA limits PRP designation to six years.³⁵ ARCO maintains that because Landowners did not fall within the three designations, the statute of limitations prevents their designation as PRPs.³⁶ ARCO argues the intent behind designating PRPs was to avoid “reach[ing] the six-year mark without facing a qualifying suit or settlement and launch[ing] their own

27. *Id.* at 32 (referencing *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009) (holding that landowners were PRPs because they owned and used the contaminated land)).

28. *Id.* at 33.

29. *Id.*

30. *Id.* at 35 (referencing Memorandum from Don R. Clay, Assistant Adm’r, Office of Solid Waste and Emergency Response & Raymond B. Ludwiszewski, Acting Assistant Adm’r, Office of Enforcement, to EPA Reg’l Adm’rs, *Policy Towards Owners of Residential Property at Superfund Sites*, 1, 3–4 (July 3, 1991) (available at <https://bit.ly/2TEmQ1E>)).

31. *Id.*

32. *Id.* at 36.

33. *Id.*

34. *Id.* at 37.

35. *Atl. Richfield Co. v. Mont. Second Judicial Dist. Court*, 408 P.3d 515, 522 (Mont. 2017).

36. Pet’r’s Br. at 38 (rejecting the court’s reasoning, which was based on 42 U.S.C. § 9613(g)(2)(B), stating the party must commence the initial recovery action for remedial costs within 6 years.)

37. *Id.*

personal cleanup plan.”³⁷ ARCO emphasizes the purpose of CERCLA is to allow the EPA to remediate a situation as soon as possible without interference from proposed limitations.³⁸ Moreover, ARCO notes Landowners have no exemptions from designation, and if the Court found an exemption, it would permit “anyone who could invoke these defenses to do whatever they want with Superfund sites.”³⁹ If Landowners did have a defense, ARCO contends they are only covered if they abide by the EPA’s plan.⁴⁰ Finally, ARCO denies Landowners’ contention that they are a “contiguous party” because no court has granted them such status.⁴¹

4. Preemption

ARCO argues state and federal law conflict, and thus it cannot comply with both the EPA plan and Landowners’ claims.⁴² Additionally, ARCO maintains that once the EPA performed a remedial investigation, ARCO then lacked the authority to move ahead with any other remedial plans without the EPA’s permission.⁴³ Because the EPA’s regulations set both a ceiling and a floor, ARCO argues that states cannot require more remediation.⁴⁴

Moreover, ARCO asserts that a restoration remedy conflicts with CERCLA’s objectives.⁴⁵ If state law conflicts with a federal law’s objectives, then it is considered an “obstacle to Congress.”⁴⁶ ARCO argues the “obstacle” here is Montana’s law which does not allow CERCLA “to choose and implement the most effective means of cleaning up hazardous waste sites.”⁴⁷ Additionally, ARCO states that if Landowners succeed with their remediation claim, it would dissuade voluntary cooperation from PRPs because of additional litigation threats.⁴⁸

Finally, ARCO declares that CERCLA’s savings clauses do not apply to Landowners’ remediation claims.⁴⁹ Although CERCLA does not preempt all state environmental claims, ARCO nevertheless argues that it does not encompass state laws that “seek to dictate substantive clean-up” steps.⁵⁰ In short, CERCLA’s savings clauses only allow for common-law

38. *Id.* at 40.

39. *Id.*

40. Pet’r’s Rep. Br. at 10.

41. *Id.* at 15.

42. Pet’r’s Br. at 40.

43. *Id.* at 44.

44. *Id.* at 50.

45. *Id.* at 47.

46. *Id.* (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

47. *Id.* at 48 (citing 42 U.S.C. § 9621(a)–(d)).

48. *Id.* at 50.

49. *Id.* at 52.

50. *Id.* at 54.

claims and do not permit “challenges” brought against ARCO’s cleanup obligations.⁵¹

B. Respondents’ Arguments

1. Jurisdiction

Landowners assert the Supreme Court lacks jurisdiction⁵² because the lower courts have not issued a final holding on the remediation damages claim, and thus it is not “an effective determination of the litigation . . . [but rather is] merely interlocutory or intermediate”⁵³

2. State-Law Claims & CERCLA

Landowners assert ARCO failed to take into account the second provision under the “express terms” of 42 U.S.C. § 9613(h), which only applies to claims brought under federal jurisdiction, not state-law jurisdiction.⁵⁴ Landowners argue Congress intended to use precise language by creating the exceptions under Section (a) and Section (h).⁵⁵ Additionally, Congress intended to limit Section (b) by using “arising under[,]” so Landowners argue ARCO misinterpreted Congress’s intent.⁵⁶ Ultimately, Landowners argue that Section (b) does not apply because CERCLA does not apply.⁵⁷

Landowners also note the legislative history “confirms what the statutory text dictates: Section 113 does not bar state-law actions in state court.”⁵⁸ The original Superfund Amendments and Reauthorization Act⁵⁹ (“SARA”) included a similar section to CERCLA’s Section (h) but left out “federal” and merely stated “No court shall have jurisdiction”⁶⁰ Then Congress revised the SARA to include “federal[,]” which Landowners argue shows Congress did not intend for CERCLA to preempt all state-law claims.⁶¹

Further, Landowners argue even if Section (h) applied to state-law claims, ARCO’s argument still fails because Landowners are not

51. *Id.* at 55.

52. Resp’ts’ Br. at 18.

53. *Id.* (quoting *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997)).

54. *Id.* at 22.

55. *Id.* at 23–24.

56. *Id.* at 24–25.

57. *Id.* at 21–23.

58. *Id.* at 29.

59. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, 1650.

60. *Id.*; Resp’ts’ Br. (citing H.R. Res. 2005, 99th Cong. § 113(h) (1985)).

61. Resp’ts’ Br. at 30–31 (citing 132 Cong. Rec. 33,554-55 (Oct. 17, 1986 (stating that the provision was revised to preserve actions “based on State nuisance law, or actions to abate the hazardous substance release itself, independent of Federal response action”)).

challenging the EPA’s remedial orders.⁶² To qualify as a challenge, Landowners contend a plaintiff must contest the “legality of an EPA ordered remedy” leading to judicial review.⁶³ Based upon the Section (h)’s five timing exceptions, Landowners argue Congress was specifically concerned with timing of review based on their “selective remedy for a qualified time.”⁶⁴ Therefore, given the timing of the suit, Landowners maintain this is not a challenge with respect to an EPA remedial order.⁶⁵

Finally, Landowners dispute ARCO’s argument that CERCLA governs any legal claim that involves a cleanup outside EPA’s remedy.⁶⁶ Landowners note that “had Congress intended Section 113(h) to preclude any additional, non-CERCLA remediation, it would have said so expressly”⁶⁷

3. Potentially Responsible Parties

Landowners agree a PRP is a “party who faces some possibility of CERCLA liability” but argue there is no such possibility here because Landowners did not contaminate their property.⁶⁸ Landowners argue an owner is defined as a “covered person[,]” not a PRP as ARCO insists.⁶⁹ According to the Landowners, the Supreme Court has held that PRPs are covered persons under CERCLA, but it has never considered whether all covered persons are PRPs.⁷⁰ Because the Court has never specifically decided this issue, Landowners argue they are not automatically PRPs.⁷¹ Further, as Landowners assert, if property owners are PRPs, then the EPA would possess absolute authority to control any remedial action, thus constituting a taking under the Fifth Amendment.⁷² Landowners state that forcing innocent parties to “forever house pollutants” on their land amounts to a “current physical occupation of land” and therefore a taking.⁷³ Additionally, Landowners explain that legislative history shows Congress did not intend for a PRP to include any party other than those who could be liable.⁷⁴ Moreover, statutes of limitations do apply here to

62. *Id.* at 31.

63. *Id.* at 32 (referencing 42 U.S.C. § 9604).

64. *Id.*

65. *Id.*

66. *Id.* at 34.

67. *Id.*

68. *Id.* at 36.

69. *Id.* at 38.

70. *Id.* at 38–39.

71. *Id.* at 39.

72. *Id.* at 42.

73. *Id.* (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982)).

74. *Id.* at 43 (emphasis added) (explaining that usage was reflected in the version of SARA that passed the House, which expressly defined “potentially responsible party” to mean “a person against whom an action could be brought under section 106 with respect to [a] release or a person who would be liable under section 107 if response costs were incurred.” H.R. Res. 2005, 99th Cong. § 122(k) (1985)).

encourage timely prosecution, which does not negate the EPA’s power to prosecute PRPs as ARCO contends.⁷⁵

Furthermore, Landowners—assuming *arguendo* that the statutory language considers them PRPs—assert they are nonetheless considered an exempt “contiguous party” under 42 U.S.C. § 9607(q).⁷⁶ Pursuant to that section, real property owners who own land next to a hazardous site “shall not be considered to be an owner or operator” of a “facility.”⁷⁷ Landowners note that even if they are PRPs, the Court will still have to remand in order for the state court to determine how to proceed.⁷⁸

4. Preemption

Landowners argue that because they are bringing state nuisance and trespass claims, there is no conflict between federal and state law.⁷⁹ Landowners state “no federal law required ARCO to deposit arsenic, lead, and other toxic metals on Landowners’ yards or prohibits ARCO from paying money to Landowners to use in cleaning their land.”⁸⁰ Further, Landowners note “unless EPA would never permit ARCO to further remediate, it would not be impossible for ARCO to compl[y] with both federal and state regulations.”⁸¹ Also, Landowners contend ARCO did not make an effort to seek the EPA’s permission to remove any additional contamination from the land.⁸² For example, ARCO argues the proposed underground trenches for water contamination and additional soil removal are inconsistent with the EPA’s remediation plan, precluding the additional requirements.⁸³ Landowners contend the additional remediation does not conflict with EPA’s plan because there is no indication that the EPA would not allow additional remedies.⁸⁴

In response to ARCO’s concern that a state-law suit will interfere with CERCLA’s goals, Landowners contend that Congress would have specifically laid that out as its intent in creating CERCLA, arguing that

75. *Id.* at 46–47.

76. *Id.* at 47.

77. *Id.* at 48 (explaining that under 42 U.S.C. § 9607(q)(1)(A)(i)–(vii), Landowners did not “cause, contribute, or consent to the release” of that substance; they are not potentially liable through any relationship with the entity that did pollute their land, i.e., ARCO; they have not allowed any further releases from their property; and they have complied with any land-use and notice obligations that might be imposed).

78. *Id.* at 49–50.

79. *Id.* at 50.

80. *Id.* at 53–54.

81. *Id.* at 55 (quoting *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1675 (2019)).

82. *Id.* at 56.

83. *Id.* at 58.

84. *Id.* at 59.

85. *Id.* at 59–60 (referencing *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 126 (3d Cir. 1991)).

Congress intended CERCLA to set a floor—not a ceiling—relating to hazardous wastes, so states can enact supplemental laws.⁸⁵ Landowners point to language in 42 U.S.C. § 9614(b) that reduces the amount a person can recover under state law for removal costs, which indicates there is recourse on a state level.⁸⁶ Landowners cite to Justice Alito’s opinion which stated, “if CERCLA’s remedies preempted state remedies for recovering costs of hazardous waste cleanups, § 114(b) would make no sense at all”⁸⁷ Additionally, a state law claim for remedial efforts provides only additional, not conflicting liability.⁸⁸ Finally, in addressing ARCO’s point that allowing state-law claims will negate negotiation settlements and create environmental risks, Landowners again declare that Congress neither intended state law claims to preclude settlements nor intended to prohibit state law claims from requiring additional cleanup.⁸⁹

IV. ANALYSIS

A. Jurisdiction

The Court will need to address Landowners’ argument that the Court lacks jurisdiction over their state-law claim because the case has not fully been decided. The Court has twice exercised jurisdiction over Montana Supreme Court’s original petition decisions in *Fisher v. District Court* and *Kennerly v. District Court*.⁹⁰ The Court will likely look to *Cox Broadcasting Corporation v. Cohn* to determine if one of the following exceptions—specifically the fourth exception—to the finality rule may apply: (1) when a federal issue is conclusive or there is a likely outcome of the proceedings; (2) when a federal issue decided by a state supreme court may “survive” regardless of future proceedings; (3) when a federal claim has been decided but there are other issues on the merits still being tried in state courts; or (4) when a federal issue is final but the party seeking review may prevail on nonfederal grounds.⁹¹

Additionally, ARCO argues this matter may fall under a fifth exception: original proceedings.⁹² The Court has stated “new situations call for adaptation of judicial remedies.”⁹³ The Court will likely consider

86. *Id.* at 61.

87. *Id.* at 62 (quoting *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 127 (3d Cir. 1991)).

88. *Id.* at 63.

89. *Id.* at 65–66.

90. United States Amicus Br. at 16, Aug. 28, 2019, No. 17-1498.

91. 420 U.S. 469, 479–83 (1975).

92. Pet’r’s Br. at 19.

93. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 133 (1945) (stating “[the Court] will give full play both to the powers that belong to the States and to those that are entrusted to the Federal Communications Commission, where the two are intertwined as they are here, to enforce the accommodation we have formulated”).

this an original proceeding and therefore consider the issue ripe.⁹⁴ Although none of the current Justices presided over these past cases, precedent indicates the Court likely will find it has jurisdiction.

B. Can Landowners Bring State-Law Claims Notwithstanding CERCLA?

The Court must address two issues under this claim: (1) if the Montana Supreme Court had jurisdiction to adjudicate the claim; and (2) if Landowners' claim "challenges" the EPA's remedy under CERCLA. ARCO cites *Clinton County Commissioners v. EPA*, in which the Court held that 42 U.S.C. § 9613(h)(4) "do[es] not permit district courts to exercise jurisdiction over citizens suits challenging incomplete EPA remedial actions even where impending irreparable harm is alleged."⁹⁵ In essence, the Third Circuit states the pre-remediation review through public comment serves as judicial review.⁹⁶ There are narrow exceptions under 42 U.S.C. § 9613(h) where review by federal courts is appropriate.⁹⁷ For example, the Ninth Circuit held in *Fort Ord Toxics Project, Inc. v. Cal. EPA* that only federal courts have jurisdiction over CERCLA claims.⁹⁸ Landowners do not disagree that federal courts have jurisdiction under CERCLA, but they argue that their claim is one that arises under state law.⁹⁹ In *Sunburst School District No. 2 v. Texaco, Inc.*, the Montana Supreme Court held that the Comprehensive Environmental Cleanup and Responsibility Act, a state environmental law like CERCLA, does not preempt state-law claims.¹⁰⁰ Additionally, if this were a state-law claim, the complaint does not arise under federal law because ARCO's issues are based on defenses to CERCLA, which cannot invoke federal law under the well-pleaded complaint rule.¹⁰¹

If the Court does, however, decide that this matter is under federal jurisdiction or that state-law claims are precluded, the Court must decide if this was a "challenge" to the EPA's remediation plan. In order to address whether state-law claims are considered a challenge and are therefore barred through CERCLA, the Court will likely look at legislative intent. In order to determine the scope of the statutory provision stating "all controversies arising under this chapter," the Court must decide whether Congress intended to use "language more expansive than necessary" to encompass all claims brought under CERCLA.¹⁰² In contrast, the Court

94. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 482 (1975).

95. 116 F.3d 1018, 1023 (3d Cir. 1997).

96. *Id.* at 1025.

97. Pet'r's Br. at 26.

98. 189 F.3d 828, 832 (9th Cir. 1999).

99. Resp'ts' Br. at 27-28.

100. 165 P.3d 1079, 1091 (Mont. 2007).

101. Resp'ts' Br. at 24 (referencing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)).

102. Pet'r's Br. at 27 (citing 42 U.S.C. § 9613(b)).

103. Resp'ts' Br. at 34.

may also consider Landowners' contention that if Congress intended to encompass all claims, it would have expressly said so in the statute.¹⁰³

In weighing whether this is a state-law or federal claim, the Court will likely address states' rights in making their own legislation. While many lower courts have barred state-law claims, the Court's current members appear friendly to state rights. Justice Alito, for example, has previously stated in a case looking at preemption issues that: "[I]t is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."¹⁰⁴ With this sentiment in mind, the Court may lean toward state court jurisdiction.

3. *Are Landowners Considered Potentially Responsible Parties?*

Additionally, the Court will likely address whether Landowners are PRPs within the statutory definition. Again, the Court's answer will likely hinge on its evaluation of Congressional intent. ARCO argues the clear intent of CERCLA was to include landowners as PRPs to preempt any restoration claims.¹⁰⁵ Moreover, *United States v. Best Foods* held that parties who are potentially responsible are liable under CERCLA.¹⁰⁶ Landowners maintain, however, that the Court has never addressed whether a party can be a PRP if they did not cause the contamination.¹⁰⁷

The Court will likely resist ARCO's argument that a PRP can be an innocent landowner because "questions that merely lurk in the record" require further analysis by the Court.¹⁰⁸ Additionally, Landowners cite to legislative history that may persuade this Court, such as the fact that the original CERCLA language never included PRP.¹⁰⁹ SARA added PRP to "refer to the parties with which it negotiated and that would be responsible for cleanup[.]"¹¹⁰ Given the legislative history, as well as the Court's concerns regarding ambiguity, the Court will not likely consider a non-polluting land owner to automatically qualify as a PRP.

4. *Does CERCLA Preempt a Restoration Remedy?*

Finally, the Court will consider ARCO's impossibility preemption claim, as well as Landowners' savings clause defense. With regard to the

104. Murphy v. Natl. Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018).

105. Pet'r's Br. at 36.

106. 524 U.S. 51 (1998).

107. Resp'ts' Br. at 39.

108. Cooper Industries, Inc. v. Avaiil Services, Inc., 543 U.S. 157, 170 (2004).

109. Resp'ts' Br. at 43.

110. *Id.*

impossibility preemption claim, ARCO relies on the Court's holding that when federal law forbids an action—but state law requires it—then federal law preempts the state law.¹¹¹ In a series of decisions, the Court held that certain state laws make it impossible for a party to also follow federal law.¹¹² The Court will likely need to analyze whether the state law claims for remediation will interfere with the federal law to the extent that federal law can preempt the state claim.¹¹³ Based on the holdings of three FDA cases where the Court found impossibility preemption, it is likely Landowners will lose on this issue. However, in *Mutual Pharmaceutical Company, Inc. v. Bartlett*, Justices Breyer, Kagan, Ginsberg, and Sotomayor all dissented, specifically noting “Congress' preservation of a role for state law generally, and common-law remedies specifically, reflects a realistic understanding of the limitations of ex ante federal regulatory review”¹¹⁴ Considering these differing opinions, the holding on impossibility preemption will likely depend on Justice Kavanaugh's stance.

Landowners also argue CERCLA's savings clauses prevent federal preemption.¹¹⁵ Section 9614(a) of CERCLA states, “Nothing in this [Act] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.”¹¹⁶ In *Williamson v. Mazda Motor of American, Inc.*, Justice Thomas wrote in concurrence that the plain text of a savings clause speaks for itself.¹¹⁷ Additionally, Justices Roberts, Breyer, Ginsburg, and Alito all agreed that if there is express preemption language, then the regulation does not preempt the state law.¹¹⁸ It remains uncertain, however, whether Court will agree with Landowners that there is express language in CERCLA's savings' clauses. The Court may, alternatively, agree with ARCO and the read savings clauses narrowly in deciding the issue.¹¹⁹

V. CONCLUSION

Landowners' ability to bring a state-law claim, in addition to the EPA's prescribed remedy, will likely come down to a states' rights battle.

111. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 486 (2013).

112. Pet'r's Br. at 41–42 (citing *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013); *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009)).

113. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

114. 570 U.S. 472, 520 (2013).

115. Resp'ts' Br. at 62.

116. *Id.*

117. 562 U.S. 323, 339 (2011).

118. *Id.* at 336.

119. ARCO maintains that the savings clauses only apply to state liability laws governing “compensation for injury to persons of property, but not state laws that purport to require cleanups that differ from CERCLA's.” Pet'r's Br. at 25. 51–56.

Ultimately, this Court's precedent shows its deference to states' rights arguments. However, ARCO's position that allowing state-law claims will open the flood gates and become highly burdensome on companies may persuade this Court. If the Court decides that CERCLA bars Landowners' claim, the Court's holding will nonetheless provide guidance as to what constitutes a challenge to CERCLA and whether non-polluting landowners are PRPs.