

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

ATLANTIC RICHFIELD COMPANY,)
 Petitioner,)
 v.) No. 17-1498
GREGORY A. CHRISTIAN, ET AL.,)
 Respondents.)

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ATLANTIC RICHFIELD COMPANY,)
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v.) No. 17-1498

GREGORY A. CHRISTIAN, ET AL.,)
Respondents.)

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Washington, D.C.

Tuesday, December 3, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

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on behalf of the Petitioner.

CHRISTOPHER G. MICHEL, Assistant to the Solicitor General, Department of Justice, Washington, D.C.;
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supporting the Petitioner.

JOSEPH R. PALMORE, ESQ., Washington, D.C.;
on behalf of the Respondents.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-1498, Atlantic Richfield versus Christian.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE PETITIONER

MS. BLATT: Thank you, Mr. Chief Justice, and may it please the Court:

This case involves whether the hundreds of thousands of landowners on Superfund sites can bring state lawsuits to implement their own piecemeal hazardous waste cleanups. The answer should be no.

CERCLA entrusts EPA to protect human health and the environment by developing a remedial plan that protects the whole community. Respondents are profoundly wrong that removing waste is always better than leaving it in place.

Superfund sites contain extremely hazardous substances, lead, mercury, plutonium, to name a few. Excavation, transportation, and disposal of these substances is risky not only to neighbors but the millions of people who live

1 next door to Superfund sites. Whether these
2 risks are worth any benefits should be evaluated
3 by EPA, not juries on an ad hoc basis.

4 Since 2013, EPA has objected that
5 Respondents' restoration remedy would thwart
6 more than three decades of efforts -- of its
7 efforts at the Anaconda site, including by
8 digging up soil that EPA wants left undisturbed
9 and by building miles of underground trenches
10 that would affect an entire community's
11 groundwater.

12 This Court should reverse for three
13 reasons. First, Section 113 bars Respondents'
14 challenge to EPA's remedy.

15 Second, Section 122 bars Respondents
16 from undertaking any remedial actions absent
17 EPA's authorization.

18 And, third, a restoration remedy is
19 preempted because it would require Atlantic
20 Richfield to effectuate the very cleanup that
21 federal law prohibits the company from doing on
22 its own, and a restoration remedy would prevent
23 EPA from carrying out its statutory mandate to
24 implement comprehensive cleanups.

25 JUSTICE SOTOMAYOR: Ms. Blatt, I've

1 been trying to unpackage this case in my own
2 mind, and I start with the language of the
3 statute. I'm sorry. I interrupted you.
4 Finish.

5 MS. BLATT: No, we're good.

6 JUSTICE SOTOMAYOR: Okay.

7 (Laughter.)

8 JUSTICE SOTOMAYOR: I'm sorry.

9 MS. BLATT: No.

10 JUSTICE SOTOMAYOR: I am trying to
11 figure out -- let's assume for the sake of
12 argument that the remedial plan that the state
13 court orders supplements, rather than
14 contradicts, the EPA plan, that it was something
15 in top of.

16 I read the savings clauses to permit
17 that. It -- the savings clauses are very
18 explicit that it's not displacing or intending
19 to displace state law remedies for liability or
20 for anything else.

21 So, if these plans supplement, why
22 would this part of Montana law be preempted?

23 MS. BLATT: So, in terms of
24 preemption, so it's quite emphatic to understand
25 that Section 122(e)(6) and the over 20

1 administrative orders impose both a floor and a
2 ceiling on the type of cleanup --

3 JUSTICE SOTOMAYOR: If I disagree that
4 it's a ceiling --

5 MS. BLATT: Well --

6 JUSTICE SOTOMAYOR: -- if I think it's
7 just a flaw -- a floor --

8 MS. BLATT: Sure.

9 JUSTICE SOTOMAYOR: -- and that the
10 EPA has the power to decide whether any plan can
11 supplement its own --

12 MS. BLATT: Of course.

13 JUSTICE SOTOMAYOR: -- where does that
14 leave this argument?

15 MS. BLATT: So you --

16 JUSTICE SOTOMAYOR: If -- if -- if --
17 if I believe --

18 MS. BLATT: Sure.

19 JUSTICE SOTOMAYOR: -- that it's a --
20 it's a floor only, not a ceiling --

21 MS. BLATT: Uh-huh.

22 JUSTICE SOTOMAYOR: -- that the EPA
23 has the right to establish when a plan will be a
24 ceiling, where does that leave this case?

25 MS. BLATT: Okay. So, in terms of

1 conflict preemption, so we know that EPA would
2 absolutely have to change federal law, which it
3 could, to approve their plan. So you're
4 absolutely correct. The EP --

5 JUSTICE SOTOMAYOR: I'm sorry.

6 MS. BLATT: EP -- federal law requires
7 a specific action level and a specific amount of
8 dirt that can be dug and that no wall could be
9 built. If that happens, EPA --

10 JUSTICE SOTOMAYOR: At the moment?

11 MS. BLATT: Yes. And EPA can change
12 it. And this Court in Mensing said that courts
13 do not withhold preemption based on the
14 speculation that federal government may change
15 the law. And the law would have to be --

16 JUSTICE GINSBURG: But it isn't the
17 law, Ms. Blatt. It's -- it's the EPA Superfund
18 plan for this site. The specific things that
19 you mention are not in the law. They are in the
20 EPA's plan.

21 And if the EPA said we permit what the
22 landowners -- the -- the further cleanup the
23 landowners want, we permit it or we permit what
24 they want with certain modifications, if EPA
25 says yes, then there's no preemption that I

1 could see that would be involved in this case.

2 MS. BLATT: So that's not correct
3 because, when you said plan -- and maybe I
4 misspoke -- the law is not a U.S. code law.
5 It's a binding administrative order where
6 Atlantic Richfield would incur massive penalties
7 every day if it violated. It's a law in terms
8 of an administrative order that sets forth the
9 plan.

10 Now Atlantic Richfield cannot carry
11 out that plan without massive fines and
12 violating law. In the order, it says
13 undertaking any action without EPA's approval
14 violates the order. And under ordinary --

15 JUSTICE GINSBURG: But suppose the EPA
16 approves. The EPA says what you want to do is
17 okay with us, or at least, as was suggested in
18 the briefing, part of what the landowners want
19 is okay with EPA.

20 MS. BLATT: So all of the pillars of
21 their plan violate EPA's order. And your
22 supposition that EPA could approve it is just
23 not the test under preemption. The test under
24 preemption is whether a party today could
25 independently do under federal law what state

1 law requires.

2 And I mean by that, and what this
3 Court in Mensing and Bartlett said, that means
4 complying with state law duties without the
5 government's assistance and permission.

6 JUSTICE KAGAN: Well, Ms. Blatt, same
7 kind of question, and maybe it goes to a bunch
8 of your arguments. I mean, look, if I were
9 writing this statute, I would say it all goes to
10 the EPA. It's just -- you know, that's the
11 sensible solution to have one party that makes
12 all the rules in this.

13 But I'm not writing the statute. And
14 the statute has three savings clauses in it,
15 which -- which suggests that the states have a
16 significant role in this. And, in particular,
17 one that says that the states get to impose
18 additional liability or requirements with
19 respect to the release of hazardous substances.

20 And I guess, you know, one way into
21 this is if I -- if -- if -- if we imagine that
22 this was done not with a damages rule, but
23 suppose the Montana legislature just said, you
24 know what, this plan that the EPA has put in
25 place, it requires arsenic at a certain level,

1 and we think it would be better to lower that,
2 and we don't really care that the EPA thinks
3 that that would not be a good idea for health
4 purposes, as well as for economic purposes; we
5 think that that arsenic level should be lowered.
6 Do you think that the state gets to do that?

7 MS. BLATT: No, and Section 121 deals
8 with this directly. It spells out in like over
9 3,000 words how states can incorporate into
10 EPA's, their plans, and EPA can override that
11 state standard. And it goes -- then states have
12 the remedy to sue. It's one of the exceptions
13 under 113.

14 And so -- and I think you're right
15 that their position under the savings clause is
16 that not only could state law say don't enact
17 EPA's remedy because we hate it and do a
18 different remedy, but state courts could order
19 independent warring cleanups, you know, case by
20 case, block by block, house by house. And this
21 Court, in the Abilene Cotton case and in the
22 AT&T case, interpreted almost an identically
23 worded savings clause and said you can't
24 interpret those clauses to completely destroy
25 other parts of the Act.

1 And this would utterly destroy EPA's
2 whole design under CERCLA.

3 JUSTICE GINSBURG: So -- so what --
4 what do they save then? I mean, the savings is
5 all over this statute. They have to save
6 something. What do they save that -- that
7 states can do independently?

8 MS. BLATT: So let -- let me be very
9 clear how narrow our argument is. They have
10 four -- four claims of compensatory damages and
11 punitive damages. So typical state law claims
12 for nuisance and whatever else they want to
13 claim for damages is fine.

14 The objection here is that the actual
15 remedy orders Atlantic Richfield to pay
16 Respondents to carry out their contrary plan and
17 that Respondents under state law must actually
18 implement the very plan that Atlantic Richfield
19 would violate federal law.

20 So this is a -- not only a challenge
21 and not only its direct remedial action that has
22 to be taken in violation of 122, but it's the
23 only claim that would meet our standard of
24 conflict preemption because it requires Atlantic
25 Richfield to effectuate a violation of federal

1 law, either whether they hire their own
2 employees or whether they hire the plaintiff's
3 employees and put a different hard hat or give
4 them a different --

5 JUSTICE SOTOMAYOR: Ms. Blatt --

6 MS. BLATT: -- shovel.

7 JUSTICE SOTOMAYOR: -- if -- if I have
8 questions about what state law requires, because
9 I -- I can't find anything in the state law that
10 requires a damages remedy to be put in trust for
11 the remediation, that's what the court below
12 said. I know that's what it said. But I can't
13 find any law that says that's what has to happen
14 --

15 MS. BLATT: Uh-huh.

16 JUSTICE SOTOMAYOR: -- number one.

17 Number two, I can't find any state law
18 requirement that the Petitioner has to prove
19 that they're going to actually use the money
20 they're awarded for the purposes that they
21 claim. So I'm very confused about the state law
22 question.

23 MS. BLATT: Yeah. And I think that's
24 all a fair question. And --

25 JUSTICE SOTOMAYOR: If it is a fair

1 question --

2 MS. BLATT: Yeah, I was going to
3 answer it.

4 JUSTICE SOTOMAYOR: -- why is it
5 preempted, meaning why wouldn't I just remand
6 this case and say you can't make -- you can't
7 award damages unless the other side proves or
8 the side claiming these damages proves that it
9 can get EPA approval of whatever it wants to do,
10 and that it will, in fact, only use that award
11 for those purposes?

12 MS. BLATT: Right. So --

13 JUSTICE SOTOMAYOR: What's wrong with
14 a ruling that's just that basic that says you
15 can get more if you can prove the EPA will give
16 you more, as simple as that?

17 MS. BLATT: So you know --

18 JUSTICE SOTOMAYOR: What's wrong with
19 that --

20 MS. BLATT: Sure.

21 JUSTICE SOTOMAYOR: -- kind of
22 opinion?

23 MS. BLATT: So you took this case on
24 the assumption -- and we cite it on page 16 of
25 our reply brief -- all the places where the

1 Respondent concedes, and the Montana Supreme
2 Court expressly said, that this money has to be
3 used to carry out the remedy. And that's the
4 way this case comes up.

5 If you want to know the reason for
6 Sunburst, it's because of the reason is
7 personal. So, if you own a property and love it
8 so much and you don't have any damages, the
9 whole point of the restoration remedy to avoid
10 the windfall is you have to spend the money.

11 So I'm quite confident that I'm
12 accurately stating Montana law and that
13 Respondents never argued to the contrary. And
14 in our reply brief, again, we cite all the
15 concessions, including, I think, the opinion
16 below in three places says the money has to go
17 to a trustee and that money has to be spent on
18 the cleanup.

19 And I'm agreeing with you that key to
20 the preemption argument is that under state law,
21 they will be forced to carry out a remedy that
22 would violate EPA's orders, these administrative
23 orders, if we carried it out itself.

24 JUSTICE SOTOMAYOR: So what's wrong
25 with an opinion that we write that says what

1 you're missing is the next step. You have to be
2 able to show that that remediation will be
3 approved.

4 MS. BLATT: Yeah. So --

5 JUSTICE SOTOMAYOR: So, if -- if
6 that's their burden, why do we need to go any
7 further?

8 MS. BLATT: So I -- two responses.
9 So, right now, they don't have federal
10 permission. And under Section 122, you have to
11 take federal --

12 JUSTICE SOTOMAYOR: I didn't say --

13 MS. BLATT: We're talking about --

14 JUSTICE SOTOMAYOR: -- they have to
15 show that they will get EPA approval.

16 MS. BLATT: And all I'm saying is you
17 know today.

18 Let me just make one other point as a
19 practical matter. This is not a case in its
20 infancy. It was cooked. It was about to go to
21 trial. It was three weeks away from jury
22 selection when the court got stayed.

23 We know they're going to trial and the
24 whole case is about whether a different remedy
25 should be put on. And we know under state law,

1 because they've conceded it, that they have to
2 carry out that remedy. And we know they don't
3 have EPA's permission.

4 So you not only know two things. You
5 know, again, it's conceded that the remedy seeks
6 something different, and it would require a
7 change in federal law. And you know they never
8 got EPA's permission. And I guess this is
9 assuming we're not even getting --

10 JUSTICE BREYER: The answer -- the
11 answer, I think, is this right, to the question,
12 which is a question I had, too, is that in order
13 to bring an action where the result will be an
14 order to do certain things, dig dirt or do
15 physical things, if they are a potentially
16 responsible party, they have to show not that
17 EPA might approve it, but what it says is unless
18 such remedial action, which is the reaction
19 they're seeking, has been authorized by EPA.

20 MS. BLATT: And you know today that --

21 JUSTICE BREYER: It has not.

22 MS. BLATT: -- not only has it not
23 been, they never ask EPA.

24 JUSTICE BREYER: And, therefore, what
25 we should do if you are right on the potentially

1 responsible party is we should send it back and
2 say they have to get that permission from EPA.
3 And there is no need to answer the other
4 questions. Is that right or wrong?

5 MS. BLATT: That's wrong and I
6 disagree. You already know today they don't
7 have it. And just as the case sits today,
8 whether they could have brought some separate
9 federal lawsuit after they asked EPA -- excuse
10 me, state lawsuit, but you already know today
11 that they never asked for it.

12 JUSTICE BREYER: Yeah. That's why I
13 say we'd send it back, they do not meet that
14 requirement if they are potentially responsible
15 parties, so dismiss the case.

16 Now, if that -- if you win in that
17 respect, I'm asking if there is a need to reach
18 the other two questions.

19 MS. BLATT: Okay.

20 JUSTICE BREYER: I suspect there
21 isn't, but am I right?

22 MS. BLATT: Yes. If you rule for us
23 under Section 122 that they can't carry out
24 their restoration remedy because they don't have
25 EPA's permission, then that's sufficient to

1 resolve the case.

2 JUSTICE BREYER: Fine. Now they say
3 they are not potentially responsible parties,
4 but you say they are. Why?

5 MS. BLATT: Because in three --
6 because they are landowners with -- with
7 hazardous waste on a Superfund site. And three
8 provisions textually equate all persons who are
9 owners and operators under 107 because they own
10 land on a Superfund site.

11 JUSTICE BREYER: But they say they are
12 not potentially responsible. Perhaps they were
13 potentially responsible, but they are not
14 potentially responsible because EPA and
15 everybody else has told them they're not
16 responsible.

17 MS. BLATT: So no, and here is why:
18 Potentially responsible parties has always been
19 understood by this Court and everyone else as a
20 status, not whether you could be liable.

21 And their rule that says could you be
22 liable at any given point in time is not only
23 unheard of, it's unworkable, because you would
24 never know whether a court would accept a
25 defense, including --

1 JUSTICE SOTOMAYOR: Whether they were
2 or they weren't potentially responsible parties,
3 they are landowners, correct? And do I
4 understand correctly, whether they're PRPs or
5 not, if they're landowners, they can't take any
6 -- they can't make any change without EPA
7 approval?

8 MS. BLATT: They can't take a
9 statutorily defined term called remedial action
10 that's defined in 101/24, and it defines what a
11 remedial action is. So they can do ordinary
12 things to their property. They can't do the
13 major upheaval of 500,000 tons and --

14 JUSTICE SOTOMAYOR: Whether the PRP is
15 responsible to someone else or to the EPA,
16 whether they're continuous landowners or
17 something else that exempts them, that -- that's
18 my bottom line, which is the mere fact that they
19 want to take some action on their land that's
20 remedial, they would have to get EPA approval?

21 MS. BLATT: Absolutely. And PRP
22 status, it doesn't --

23 JUSTICE SOTOMAYOR: Can you point me
24 to the provision that says that, that says
25 whether they're PRPs or not, as long as they're

1 landowners, if they're going to take any
2 remedial action on their property?

3 MS. BLATT: So 122(e)(6) is the one
4 that says PRPs have to have EPA's permission for
5 any remedial action. And then the 107, 122(a),
6 122(e)(1) and 105(h)(4) -- (h) -- excuse me,
7 (h)(4)(A) is the one that defines or equates
8 owners and operators under 107 with PRP status.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Michel.

12 ORAL ARGUMENT OF CHRISTOPHER G.

13 MICHEL, FOR THE UNITED STATES, AS AMICUS
14 CURIAE, SUPPORTING PETITIONER

15 MR. MICHEL: Thank you, Mr. Chief
16 Justice, and may it please the Court:

17 The United States is here because the
18 narrow aspect of Respondents' suit that is
19 before this Court, namely the request for a
20 distinctive state law remedy under which a jury
21 may authorize a plan to clean up toxic
22 contamination at a Superfund site in a way that
23 conflicts with and in many respects physically
24 destroys the EPA plan selected under CERCLA,
25 squarely conflicts with CERCLA and would

1 jeopardize EPA's cleanups at this Superfund site
2 and other Superfund sites across the nation.

3 Now, to go to some of the questions
4 that have -- have been raised already, this is a
5 narrow -- our argument here is narrow. The --
6 the statute does have savings clauses, and we
7 don't dispute that Respondents can move forward
8 with their claims for money damages under state
9 law and nuisance and tort and other related
10 theories that don't call into question the EPA
11 remedy.

12 And, likewise, as Justice Kagan
13 pointed out, there are a number of mechanisms in
14 the statute for states to adopt what are called
15 ARARs, Applicable and/or Relevant and
16 Appropriate Standards, that could be implemented
17 as part of -- of the EPA cleanup plan.

18 And I think that goes to a broader
19 point, which is that CERCLA really lays out a
20 two-step process. At the first step, EPA, or
21 whatever federal agency is conducting the plan,
22 goes through a very reticulated process of
23 getting public comment, meeting with -- meeting
24 with landowners, meeting with the state, and
25 selects a cleanup plan in -- in compliance with

1 those procedural and the substantive requirement
2 that they protect human health.

3 Then, at the second stage, CERCLA says
4 go and carry out the cleanup plan and CERCLA
5 erects a number of protections --

6 JUSTICE SOTOMAYOR: Sorry, are you
7 agreeing with Ms. Blatt that your plan is both
8 the floor and the ceiling?

9 MR. MICHEL: So I think it -- not
10 necessarily in every respect, but I think in the
11 respect that matters in this case, it is. And
12 I --

13 JUSTICE SOTOMAYOR: No, no, no, let me
14 -- let me go back. Is it always the ceiling?

15 MR. MICHEL: I mean, an EPA --

16 JUSTICE SOTOMAYOR: An owner can come
17 to you and say I want to do more, and you can
18 decide yes or no, right?

19 MR. MICHEL: Yes, absolutely.

20 JUSTICE SOTOMAYOR: So it's not always
21 the ceiling.

22 MR. MICHEL: I mean -- yes. And, in
23 fact, the statute --

24 JUSTICE SOTOMAYOR: All right.

25 MR. MICHEL: -- as we discussed, as --

1 as Ms. Blatt discussed at length --

2 JUSTICE SOTOMAYOR: So are you reading
3 their state -- are you reading this remedy as
4 requiring the remediation that's awarded no
5 matter what? With or without EPA approval?

6 MR. MICHEL: I -- I think the Montana
7 Supreme Court decision implies that Respondents
8 could move forward with their claim as it now
9 exists even if they didn't have EPA approval.
10 And we think that is --

11 JUSTICE SOTOMAYOR: How about if they
12 did, if they could get your approval, if they
13 could show that they could get your approval?

14 MR. MICHEL: I mean, if they could get
15 our approval under 122(e)(6), then we wouldn't
16 have a problem with -- with the suit, but I
17 think that --

18 JUSTICE SOTOMAYOR: All right. How
19 about if they're not a PRP? Let's assume
20 they're a contiguous -- there's a whole set of
21 arguments in these briefs by some of them,
22 putting aside whether they're a PRP because of
23 -- of the statute of limitations, which, you
24 know, is not very compelling to me, okay?

25 But putting that aside, let's assume

1 that by definition they are a PRP. Or they're
2 not a PRP; they're a continuous landowner. They
3 are not a PRP. What about those people?

4 MR. MICHEL: So I think an important
5 distinction is that if they were found to be a
6 contiguous landowner, that would not take them
7 out of the status of being a PRP. That would
8 imply that they're not liable, as -- as you
9 pointed out --

10 JUSTICE SOTOMAYOR: All right. So
11 what you're saying is if you're a landowner, you
12 might not be liable because some justices might
13 have a problem with the concept that someone who
14 didn't pollute and doesn't encourage the
15 polluting would be financially liable.

16 MR. MICHEL: And that's an instinct
17 that EPA shares as we quote in our brief. EPA
18 has had a policy since 1991 of not imposing
19 liability on residential landowners on Superfund
20 sites. But --

21 JUSTICE KAGAN: So, Mr. Michel, if I
22 could ask about the PRP status, because there
23 are obvious consequences of labeling somebody a
24 PRP in the way that you suggest, that these
25 sites -- and they can be sites for decades and

1 decade and -- and deprive people of doing some
2 significant things that they want to do to their
3 land.

4 And the question, I guess, is why do
5 you -- why do we think the statute requires
6 those consequences as to a person whom has --
7 who has never been treated as a PRP by the
8 government, who has never been involved in
9 settlement negotiations, who, under reigning
10 law, including the statute of limitations, has
11 no liability exposure?

12 I mean, it would seem a big deal to
13 take a person like that and say you've lost some
14 significant property rights. Why?

15 MR. MICHEL: So I think two responses.
16 First, I do want to make clear that 122(e)(6),
17 the PRP provision that we're talking about here,
18 only applies to remedial action. And that has a
19 defined statutory definition. It's in
20 9601(a)(4).

21 JUSTICE KAGAN: But I said some
22 significant things.

23 MR. MICHEL: So -- so --

24 JUSTICE KAGAN: So, you know, look,
25 that you can still, you know, make a garden.

1 MR. MICHEL: Absolutely, you can still
2 make a garden. Now, as to significant things, I
3 think it does make perfect sense that you
4 wouldn't want somebody who lives on a Superfund
5 site doing things in the earth that will
6 interfere with the EPA remedy. Of course, you
7 know, there's -- there is, on a Superfund site,
8 a sort of butterfly flaps its wings problem
9 where, if you dig up two feet of soil on your
10 land, you can kick up arsenic into the air, or
11 if you dig a trench on your land --

12 JUSTICE KAGAN: So I guess I -- I -- I
13 completely take the point that that might have
14 been a sensible policy decision for Congress to
15 make, but, as I look at these provisions, the
16 only -- the -- the -- where this PRP comes from
17 is -- is -- is in a section that deals with
18 settlement negotiations.

19 And these people were not ever
20 involved in settlement negotiations. Nobody for
21 a moment considered that they should be involved
22 in settlement negotiations. So to apply that
23 section to these people seems, you know, a
24 stretch.

25 MR. MICHEL: So I -- I don't think so,

1 Justice Kagan. I -- PRP is used in the statute
2 a lot of different times, not just in the
3 settlement. You're right that (e)(6) is under
4 the settlement provision, but if you look at
5 (e)(1), it's -- it -- it equates owners on the
6 site with PRPs. And so the Court could leave
7 for another day whether PRP is coterminous with
8 covered persons under Section 107 and simply
9 decide that owners on Superfund sites are PRPs.

10 And, again, we think that makes
11 perfect sense because, by definition, when you
12 have a cleanup plan that takes into account an
13 entire Superfund site, as this one does, and one
14 landowner does something that affects the earth
15 or affects the environment, it's going to spread
16 across onto other parts of the Superfund site.

17 And the water barriers that we've
18 discussed in this case are a good example, where
19 EPA has a considered plan to treat the water in
20 a certain way, and Respondents want to dig -- I
21 think it's an 8,000-foot trench that would
22 change the gradient and would physically change
23 the land in a way that could endanger the whole
24 Superfund site off of their own property.

25 So it is true that when you live on a

1 Superfund site and you have large amounts of
2 toxic chemicals, you are more restricted in the
3 kind of land use that you --

4 JUSTICE KAVANAUGH: But it seems a
5 very indirect way for Congress to have gone
6 about this, as Justice Kagan says, to, in
7 essence, hinder a landowner from doing any
8 significant action for decades.

9 MR. MICHEL: I mean, I think on --
10 it's not that strange to see that an owner of a
11 Superfund site, somebody who lives on a
12 contaminated property, is hindered from taking
13 remedial action, which is a fairly significant
14 action, without EPA approval. Of course, EPA
15 can grant approval, and EPA has in other cases
16 granted approval for remedial actions on
17 Superfund sites.

18 JUSTICE KAVANAUGH: So your two
19 answers are, one, it's only significant action
20 and, two, EPA could grant approval?

21 MR. MICHEL: Absolutely. It's a -- so
22 it's a limited incursion to the degree that it
23 restricts property rights. That's what comes
24 with living on -- on a Superfund site, and
25 that's what's necessary to protect --

1 JUSTICE GINSBURG: Then -- then what
2 is your answer to the question Ms. Blatt was
3 asked? If we say the landowners are PRPs and
4 they have to get EPA permission for any
5 restoration that they want to do, if the Court
6 said that, then I don't see that the further
7 questions in this case need to be answered. And
8 I don't see any reason to get into preemption.

9 MR. MICHEL: I agree with you, Justice
10 Ginsburg. You could resolve the case by -- by
11 saying that Respondents are PRPs who need EPA
12 authorization -- authorization and don't have it
13 and, therefore, their -- their claim fails.

14 JUSTICE GORSUCH: What do we do about
15 the government's prior representations that
16 permission might be granted for something like
17 this?

18 MR. MICHEL: Well, I mean, the
19 government stands ready to listen to EPA -- to
20 any proposals from the landowners. They have
21 not formally presented us with any proposals, so
22 we're working off of the best available
23 information, which is the expert reports that
24 they have introduced in the state litigation.

25 JUSTICE GORSUCH: So it's still at

1 least possible that the government might approve
2 something like this?

3 MR. MICHEL: I mean, based on what we
4 know, we've made very clear, we're now in the
5 Supreme Court litigating this case, that we
6 would not approve what we understand their plan
7 to be, but we're not saying never. Of course,
8 they could present something and we would listen
9 to it.

10 JUSTICE GORSUCH: And I might -- might
11 have missed it, but just when is the
12 government's role here likely to finish in this
13 particular site?

14 MR. MICHEL: So I think the government
15 -- the ongoing remediation will continue through
16 2025, is the latest -- is the latest projection.
17 It may be that, you know, there are continuing
18 operations beyond that, but the active site
19 remediation we expect to continue through about
20 2025.

21 JUSTICE GORSUCH: Is there -- is there
22 a takings claim, do you think, that arises from
23 the government's position that any remediation
24 efforts for a period of, I guess, 45 years is
25 prohibited by landowners?

1 MR. MICHEL: I mean, in the literal
2 sense, there's no takings claim because they
3 haven't raised one in this case. I think more
4 -- more broadly -- of course, one could raise a
5 takings claim, but I think it would be a very
6 weak claim given that, in fact, EPA's remedy has
7 improved the value of the property and that you
8 have to start from the premise that the property
9 is -- is covered with arsenic.

10 JUSTICE GORSUCH: Well, it's -- it's
11 -- it's improved the value of the property from
12 its prior state but not -- not to a level that
13 state law would allow.

14 MR. MICHEL: Well, I -- I do think
15 that that's an important point, Justice Gorsuch,
16 is that the EPA plan fully complies with the
17 state environmental laws. Those are the ARARs
18 that I mentioned earlier. This is a separate
19 private plan that a jury would have to approve.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Palmore.

23 ORAL ARGUMENT OF JOSEPH R. PALMORE

24 ON BEHALF OF THE RESPONDENTS

25 MR. PALMORE: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 This Court lacks jurisdiction, but, if
3 it finds it has jurisdiction, it should affirm.

4 Briefly on jurisdiction: The decision
5 below affirming denial of summary judgment on
6 one damages theory and remanding for trial is
7 non-final. This Court has exercised review over
8 Montana's supervisory writ decisions only where
9 reversal by this Court would end the case
10 entirely. That critical condition is absent
11 here.

12 On the merits: This Court held and
13 explained in CTS versus Waldburger --

14 JUSTICE SOTOMAYOR: If we -- I'm
15 sorry, go ahead.

16 MR. PALMORE: -- that CERCLA does not
17 establish a comprehensive remedial framework;
18 instead, it leaves untouched state judgments
19 about causes of action and the scope of
20 liability for property damage. Montana, like
21 many other states, has made the judgment that
22 one who puts toxic materials on another person's
23 property is liable for trespass and nuisance and
24 that a measure of recovery is the cost of
25 removal.

1 Nothing in CERCLA bars that core
2 exercise of state authority to vindicate private
3 property rights. ARCO's invocation of Section
4 113(h) fails -- that's the challenge provision
5 -- because it doesn't apply in federal court and
6 even in federal court, it doesn't apply to state
7 law claims.

8 ARCO fares no better on
9 Section 122(e)(6), the PRP provision, because
10 the landowners here are not potentially
11 responsible for anything because they face no
12 possible liability. And that provision
13 certainly cannot be read to give EPA the vast
14 power that it seeks, the ability to control
15 forever the removal of a shovelful of dirt from
16 a private landowner's backyard.

17 There's no basis for preemption
18 either. CERCLA establishes a floor, not a
19 ceiling, on environmental remediation, and in
20 several provisions makes clear that Congress
21 wanted to leave state law in place.

22 Nor is there any impossibility. The
23 duty that ARCO breached was the duty not to
24 pollute. Nothing in federal law required it to
25 do so. Justice Sotomayor?

1 JUSTICE SOTOMAYOR: I -- I still have
2 a problem, which is it seems to me that if you
3 go on a piece of -- if you own a piece of land
4 and you know the EPA has been fixing it up, that
5 whether you're responsible financially for the
6 cleanup, that you shouldn't be able to interfere
7 with the EPA's efforts, meaning you might have a
8 takings claim, as Justice Gorsuch claims, you
9 might have some other claims, but I don't know
10 how you can go about instituting a plan without
11 conflict preemption, instituting a plan that
12 interferes with what the EPA is doing.

13 MR. PALMORE: Your Honor, first of
14 all, and this is critical, there is no
15 interference here. The vast majority of my
16 clients have had zero work done on their land.

17 And if you put all their land
18 together, the work has been done on only
19 5 percent, okay? So, on 95 percent of the land,
20 literally nothing has been done. So there's no
21 undoing there.

22 On groundwater, EPA made the decision
23 to do nothing to clean the groundwater in
24 Opportunity, so we're not undoing a remedy.
25 We're doing something that EPA -- where EPA has

1 done nothing. And what's the 5 percent? They
2 dug down 18 inches, they put in clean soil, and
3 they planted grass.

4 All we want to do --

5 CHIEF JUSTICE ROBERTS: Well, on the
6 ground -- on the groundwater, I understand their
7 position to be that if they did do something
8 along the lines that you're proposing, it would
9 have very significant adverse impacts. So the
10 fact that they haven't done anything, that's
11 what they want you -- they don't want you to do
12 anything.

13 So you can't say having -- having done
14 nothing represents that there's no -- there
15 would be no adverse impact from what you plan to
16 do.

17 MR. PALMORE: A couple answers on
18 that, Chief Justice Roberts.

19 First of all, they decided, and if you
20 look at the actual regulatory materials, and
21 that -- the EPA makes decisions in this area
22 through records of decision, which are official
23 documents, they say they didn't want to do the
24 groundwater remedy, it was a different wall, it
25 was a different one, because it was technically

1 impracticable, which is a term of art under
2 CERCLA for too expensive.

3 In the regulatory materials, there is
4 absolutely no finding that that wall, much less
5 the one that we've proposed which is different,
6 would call any environmental harm. If you look
7 to what the government cites here for that
8 proposition, if you trace it through, it's
9 citing its own amicus brief in the Montana
10 Supreme Court.

11 If you look at the Montana Supreme
12 Court amicus brief, the government cites
13 literally nothing.

14 CHIEF JUSTICE ROBERTS: So you're
15 talking about the particular specifics in your
16 case. But, as a general matter, for example,
17 you can understand that the EPA looking at this
18 might say, okay, we're going to do this, we're
19 going to do this, we're going to do this, and
20 we're going to get to that as soon as we're done
21 doing this other stuff.

22 And yet someone else in your position
23 would come in and say: Well, you're not doing
24 anything here, and so we're going to go ahead
25 and do this, when the EPA's answer might simply

1 be that well, we haven't gotten to it yet, but
2 we want to be the ones to decide what to do,
3 rather than the particular landowners there,
4 because we have a broader perspective affecting
5 the whole site, rather than individual sites
6 where the people may reasonably want something
7 to be done but still may be inconsistent with
8 EPA's plan.

9 MR. PALMORE: Well, here, Mr. Chief
10 Justice, the issue isn't we'll get to that
11 later. They're done. All the remedial work
12 such as it was on our property has been over for
13 several years. They are completely done. And
14 that's another reason why there's no
15 interference with anything they're doing.
16 They're finished.

17 CHIEF JUSTICE ROBERTS: I'm trying to
18 move beyond your particular --

19 MR. PALMORE: And I understand that.
20 So one can imagine a different case involving a
21 conflict preemption claim with respect to the
22 EPA remedial orders. That's not this case.

23 ARCO's argument here, which -- which
24 Ms. Blatt articulated, is that CERCLA itself
25 establishes a floor and a ceiling, such that any

1 state law remedy that goes beyond even one inch
2 beyond what CERC -- what a remedial order
3 required is preempted.

4 They are not making a very different
5 argument that in -- perhaps in a case like Your
6 Honor is referring to could be made, which there
7 could be an argument made that there is obstacle
8 preemption with respect to an actual remedial
9 order. That case might look a lot like Geier,
10 right?

11 So if in a -- in a case EPA had
12 evaluated various remedies and it had rejected a
13 remedy because it said that remedy will cause
14 environmental harm, so we choose not to adopt it
15 --

16 JUSTICE BREYER: No, the problem isn't
17 -- I don't think the problem we're stating is
18 anything to do with preemption or anything.
19 It's just whether someone in your position
20 should first have to go and get the EPA's
21 permission.

22 And you're talking about a shovel of
23 dirt or something. Suppose they did do
24 something like that. Isn't there a remedy?
25 It's called the Administrative Procedures Act.

1 And you say here they've made an administrative
2 procedure, and it was arbitrary, capricious, and
3 abuse of discretion. That way, as the Chief
4 said, as others say, we channel all this through
5 the EPA and the courts reviewing the EPA.

6 And what we don't have is 10,000
7 juries or -- or 50 states or whatever it is
8 imposing sometimes conflicting duties and
9 leaving it up to hundreds of different judges to
10 decide.

11 MR. PALMORE: Your Honor, a couple
12 answers. One is EPA doesn't need this
13 122(e)(6), which is what you're referring to, to
14 prevent harm at a Superfund site or protect the
15 integrity of its remedy. The government made
16 that point at page 17 of its invitation brief.

17 It said we have plenty of tools. We
18 can get administrative orders. We can get
19 injunctions. There's no problem here. We can
20 use those tools to protect the integrity of our
21 -- of our remedy.

22 122(e)(6) applies only to potentially
23 responsible parties. What is a potentially
24 responsible party? It is not defined in the
25 statute. So, under normal rules of statutory

1 construction, this Court looks to what does that
2 mean. Is someone potentially responsible if
3 they face no prospect of liability? No, they're
4 not potentially responsible.

5 JUSTICE GORSUCH: I -- I --

6 JUSTICE GINSBURG: It's been said they
7 are covered parties. And who is a covered party
8 that is not a potentially responsible party?
9 The -- the -- we are told that this Court has
10 equated the term "covered party" with personally
11 responsible party, that a covered party is a
12 potentially responsible party. And you say
13 that's not right, they're not one and the same
14 thing.

15 So who is a covered party but would
16 not be a potentially responsible party?

17 MR. PALMORE: There could be a number
18 of ways. And you're right, Justice Ginsburg,
19 that this Court has, as shorthand, used the two,
20 linked the two. And the concepts are clearly
21 linked. All potentially responsible parties
22 have to at one point been covered persons.

23 But a covered person would include a
24 residential landowner with certain exceptions.
25 Justice Sotomayor, you asked about the

1 contiguous landowner defense. If you look at
2 that, that is a carveout from the definition of
3 owner, so someone who establishes the
4 requirements that that carveout is not even an
5 owner, so, under ARCO's view, where all owners
6 under Section 107 are potentially responsible
7 parties, those who satisfy that defense and the
8 bona fide purchaser defense aren't even owners.

9 But, more importantly, Congress could
10 have said in 122(e)(6) all 107 covered parties
11 have to get EPA permission in order to remove
12 toxic waste for -- or arsenic from their land.
13 It didn't say that. It said potentially
14 responsible parties. It used a different term.

15 JUSTICE KAGAN: Well, it did -- it
16 did, Mr. Palmore, but, under your theory, how
17 would you decide whether somebody is a
18 potentially responsible party? It sounds like
19 you would need a court adjudication to do that.

20 And that seems unlikely that Congress
21 meant for that to happen.

22 MR. PALMORE: Well, Your Honor, I
23 don't think it would necessarily need a court
24 adjudication. And, in fact, the statute puts
25 the onus on EPA. This is Section 113(k)(2)(D)

1 to notify, identify and notify all potentially
2 responsible parties as early as it can before
3 taking any removal action.

4 So, here, we're talking about in the
5 1980s. It's on them to identify potentially
6 responsible parties and send them a letter. And
7 when there's settlement negotiations and you
8 referred to this in Section 122, they have to
9 identify all potentially responsible parties and
10 include them. They never --

11 JUSTICE KAGAN: So you're saying that
12 even in the absence of the statute of
13 limitations issue, these would not be
14 potentially responsible parties because the
15 government is subject to a kind of estoppel
16 principle?

17 MR. PALMORE: I'm saying that if there
18 is some concern about how will we know who a
19 potentially responsible party is, the government
20 has tools to at least put people on notice that
21 it thinks they are potentially responsible
22 parties.

23 Now, of course, it might be wrong.
24 But, in -- in this case, though, we never got
25 any of those kinds of notices. In the district

1 court in this case, the government's brief said
2 we take no position on whether these landowners
3 are potentially responsible parties.

4 JUSTICE GINSBURG: They are -- they --
5 they own land that contains hazardous
6 substances. I thought that potentially
7 responsible parties are people who own land,
8 whether they have any fault or not, but their
9 land does contain hazardous substances.

10 MR. PALMORE: It does, Justice
11 Ginsburg. And that makes them owners under
12 Section 107, unless they are carved out from
13 that definition by one of the defenses that we
14 were talking about. That makes them owners, but
15 107 does not use the phrase "potentially
16 responsible party."

17 And I think there's a -- there's a
18 critical kind of elephants in a mouse hole
19 aspect to this argument. Section 122 -- and we
20 reproduce all of it in the appendix to our brief
21 at 50a through 80a -- is all about settlement.
22 If you read it front to back, it's all about
23 settlement.

24 JUSTICE KAGAN: I understood --

25 MR. PALMORE: And if that --

1 JUSTICE KAGAN: -- Ms. Blatt, as I --
2 because I made that point to her, and I thought
3 that she said to me that there are other places
4 in the statute which use the term "potentially
5 responsible parties," so that it's not all about
6 settlement.

7 MR. PALMORE: There are a few others,
8 most of them refer back to the settlement
9 provision, but I think that explains the purpose
10 of 122(e)(6) and also explains why it should be
11 read according to its ordinary plain terms,
12 which "potentially responsible" means --
13 "potentially responsible" means like someone who
14 could be liable, which is that when there are
15 settlement negotiations and EPA has notified all
16 the PRPs of the settlement negotiations and
17 included them -- something they've never done
18 here, we've been excluded -- then they don't
19 want these -- these parties who face possible
20 liability and, therefore, are in settlement
21 negotiations to go off and do their own remedial
22 plan.

23 JUSTICE ALITO: But you think a party
24 could be potentially responsible at one point
25 but then at a later point cease to be

1 potentially responsible?

2 MR. PALMORE: Absolutely, Your Honor,
3 I do think that. That's --

4 JUSTICE ALITO: And what sense --

5 MR. PALMORE: -- that's inherent in
6 the --

7 JUSTICE ALITO: -- would -- what sense
8 would that make with respect to a rule limiting
9 the ability of that party to engage in
10 remediation? It's not consistent with the EPA
11 plan.

12 MR. PALMORE: Because, Your Honor,
13 first of all, that's the way statute of
14 limitations work. Right? Parties get repose
15 when the statute has passed.

16 And I think you have to understand the
17 implications of the contrary position, which is
18 -- you asked -- someone asked the question, when
19 will this plan be over? It's already over on
20 our land. The plan overall is targeted to be
21 completed in 2025.

22 But it's never over because all of the
23 arsenic and other contaminants will not be
24 removed. There is a five-year review process
25 where more remedial action could be taken. ARCO

1 could be required to do it. And that will go on
2 literally forever.

3 So the argument on the other side is
4 that EPA has a permanent easement on my client's
5 property requiring them to store ARCO's arsenic
6 and lead forever unless we get EPA permission to
7 remove it.

8 JUSTICE KAVANAUGH: Can I go back to
9 Justice Kagan's question for a second? If EPA
10 notified landowners early on that they were all
11 PRPs, and you disagreed, how would that be
12 resolved?

13 MR. PALMORE: Well, I think we -- we
14 would then -- I think it kind of depends on how
15 it comes up here. This PRP issue is coming up
16 in an odd posture in this case because I think
17 it's critical to point out that what we're
18 talking about here is, one, a measure of
19 damages. Right? These are trespass and
20 nuisance claims.

21 And under Montana law, we have -- the
22 default is diminution of value. But, if we can
23 establish that we have personal reasons for
24 wanting to stay on our property and -- and
25 remove the arsenic, then we can get this other

1 measure of damages, restoration damages. And
2 then it comes in, ARCO has argued that as like a
3 defense to -- to that.

4 JUSTICE KAVANAUGH: I think her
5 question went to it would be odd to think that
6 the statute creates uncertainty about who is
7 subject -- who is a PRP and who isn't, given who
8 needs to get approval from EPA to do
9 improvements on the land. You would want
10 certainty at the front end. And if you can
11 disagree and she said go to court, that seems
12 unusual for this statutory structure. Do you
13 want to respond to that?

14 MR. PALMORE: Well, Your Honor, of
15 course, EPA has the ability to provide some
16 measure of certainty. At least it can put
17 people on notice that it believes they are PRPs.
18 It's actually obligated to do that under the
19 statute. And it didn't do that here.

20 JUSTICE KAVANAUGH: Right. But even
21 if they do, there's disagreement, that would
22 have to be resolved somehow with satellite
23 collateral litigation, I think, or else we'd be
24 back in the same spot decades later.

25 MR. PALMORE: Perhaps, Your Honor.

1 But I think that the assumption behind those
2 kinds of questions is that EPA critically needs
3 122(e)(6) in order to effectuate its goals --

4 JUSTICE KAGAN: Would -- would you --

5 MR. PALMORE: -- on a CERCLA run --

6 JUSTICE KAGAN: -- think it would be a

7 --

8 MR. PALMORE: -- site, and that's not
9 correct.

10 JUSTICE KAGAN: -- would you think it
11 would be an appropriate rule if basically it
12 were up to EPA to designate potentially
13 responsible parties or at least that there were
14 a strong presumption that, if EPA designated
15 somebody as a potentially responsible party,
16 they were one?

17 MR. PALMORE: I -- I -- I don't --
18 they certainly don't have the -- the power to do
19 it unquestionably, because it's -- it's a
20 defined term under the statute.

21 So they did send us such a letter as a
22 litigation filing, as a letter to counsel, right
23 before the cert petition in this case was filed.

24 And so I don't think that -- that's
25 not binding because they're wrong. We're not

1 potentially responsible parties. And it also
2 came decades after they were supposed to do
3 that. And they've never treated us as
4 potentially responsible parties.

5 But at least that would define a
6 universe, if done properly, according to the
7 statute --

8 JUSTICE KAGAN: Yeah, I --

9 MR. PALMORE: -- of people --

10 JUSTICE KAGAN: -- actually -- you're
11 quite right. I was not clear enough in my
12 question.

13 I actually meant as -- that they would
14 designate somebody as part of putting together
15 the settlement negotiations that 136 is all
16 about.

17 MR. PALMORE: Absolutely. That would
18 at least allow them to identify the universe and
19 put people on notice that EPA --

20 JUSTICE BREYER: The problem, knowing
21 your land -- your clients are landowners of land
22 that is polluted, and it's a Superfund site.
23 Now they know that.

24 MR. PALMORE: Yes.

25 JUSTICE BREYER: You're a good lawyer.

1 I wouldn't think there was actually a problem of
2 their being ignorant. Maybe there is. I don't
3 know what it is. I haven't seen it.

4 So does it boil down to -- and you
5 said this, but I don't think you're right --
6 that -- that, on the one hand, you said EPA gets
7 some kind of permanent easement on their
8 property to tell them what to do. But isn't
9 that an overstatement?

10 What EPA can do is they can say we
11 don't want you physically to change this land.
12 And if you think that they are unreasonable, you
13 go to court. That's their side of it.

14 And you say they're unreasonable.
15 Okay? That's simple. And most people can do
16 that. And if you win, then it's really about
17 the same thing. You can go and say, look, we
18 under our Montana statute believe that we should
19 not just get money, but we should get money that
20 is earmarked and must be used to make physical
21 changes in the property. That's the problem.

22 And if you can do that, it may be
23 easier to get. But the problem is that there
24 could be many states that have that, and you
25 can't run it in a central way.

1 Have I stated correctly what the issue
2 is?

3 MR. PALMORE: Perhaps, Your Honor.
4 First of all, a couple answers. One is Congress
5 wanted to allow state law to -- to proceed --

6 JUSTICE BREYER: They did for damages.
7 There is no doubt.

8 MR. PALMORE: And for what --

9 JUSTICE BREYER: But is there --

10 MR. PALMORE: -- and --

11 JUSTICE BREYER: -- any indication
12 they wanted physical changes to be made by 40
13 different entities?

14 MR. PALMORE: Yes, Your Honor. If you
15 look at Section 114(b), which is a no double
16 recovery provision, Congress contemplated that
17 there would be state law recovery for removal,
18 and the only limit it put on it was that there
19 be no double recovery.

20 Congress knew that there could be
21 state law -- state law recovery for removal and
22 it allowed it to continue.

23 And also I think that the -- the --
24 the --

25 JUSTICE GINSBURG: But what, Mr.

1 Palmore, of the argument that what the state
2 court might order conflicts with what EEOC --
3 that what the EPA, for -- one example was given
4 here. You want more arsenic removed. EPA said
5 that that would involve danger. There would be
6 additional hazards.

7 The -- the problem with not having EPA
8 as the overall supervisor means that there --
9 that there can be clashes between what state law
10 says is okay and what EPA says should be the
11 proper treatment. So --

12 MR. PALMORE: Justice Ginsburg, of
13 course, if EPA thinks that a remedy is going to
14 cause harm, as it said in its invitation, we
15 believe it has ample tools to stop it.

16 Second of all, there is simply in this
17 case -- that might be an issue in another case.
18 In this case, there is no such finding in any of
19 the regulatory documents of -- of environmental
20 harm.

21 They just said we're going to go this
22 far and no further. They didn't reject any --
23 they didn't reject our permeable wall to clean
24 the groundwater. They didn't say we can't do 24
25 inches, much less did they say that any of those

1 things would cause environmental harm.

2 So in a -- in -- one can imagine --

3 JUSTICE SOTOMAYOR: Maybe it was a
4 moot question if it's your obligation to ask
5 them, meaning, if you are a PRP and that's what
6 we conclude, it would be your obligation to ask
7 them for permission.

8 So, if Ms. Blatt is right that the
9 award here, assuming you were to get one, were
10 conditioned on you being a PRP and any action
11 you took had to be approved by the EPA, what
12 damage does this do to you?

13 MR. PALMORE: That would be a
14 question --

15 JUSTICE SOTOMAYOR: You -- you would
16 have administrative remedies to challenge their
17 denial of any activity you wanted to take. That
18 would be litigated by a court. But at least
19 there would be clarity. Landowners on super
20 site funds, before you interfere with the EPA,
21 get their approval or before you attempt to or
22 before you attempt to do anything, get their
23 approval. What's wrong with such a ruling?

24 MR. PALMORE: Well, Your Honor, of
25 course, our position is we're not required to

1 get approval because we're not PRPs. If we lose
2 on that and if you conclude we -- we also are
3 not contiguous landowners, which carves us out
4 --

5 JUSTICE SOTOMAYOR: I don't have to
6 decide that.

7 MR. PALMORE: -- of the definition of
8 owner --

9 JUSTICE SOTOMAYOR: That -- the Court
10 --

11 MR. PALMORE: Well, their argument is
12 all owners are PRPs.

13 JUSTICE SOTOMAYOR: Whether --

14 MR. PALMORE: If we're not owners --

15 JUSTICE SOTOMAYOR: -- whether --

16 MR. PALMORE: -- we're not a PRP.

17 JUSTICE SOTOMAYOR: -- just assume --

18 MR. PALMORE: If you --

19 JUSTICE SOTOMAYOR: -- that we rule
20 that you're --

21 MR. PALMORE: -- assume away all of
22 that, then it's really a state law question.
23 This is a state law question.

24 JUSTICE SOTOMAYOR: No, it's not a
25 state law question.

1 MR. PALMORE: It -- it --

2 JUSTICE SOTOMAYOR: We would hold that
3 it would -- it would conflict with federal law,
4 with federal rules, if you go ahead with that --
5 with remediation without EPA approval. You are
6 a PRP. And conflict preemption stops you from
7 taking any actions that are not approved by the
8 EPA, period, end of case.

9 MR. PALMORE: The reason that would be
10 a remand question, Justice Sotomayor, is because
11 we haven't asked the EPA for that permission
12 because we've -- we don't believe we are PRPs.
13 And, in fact, EPA itself took no position on
14 whether we are PRPs in this very case.

15 So we might be able to get in the
16 district court in Montana --

17 JUSTICE SOTOMAYOR: I thought their
18 whole brief said you were --

19 MR. PALMORE: In the district court in
20 Montana, the U.S. Government said we take no
21 position on whether landowners here are PRPs.
22 Their position has changed dramatically over
23 time.

24 What I'm saying is we never had any
25 reason to seek their permission. If you were to

1 hold that we need their permission, then we --
2 A, we might get it, they've said before that
3 there are aspects of our plan they could
4 approve; and, B, to the extent that there's
5 uncertainty about that, that is a state law
6 question because, again, all we're talking about
7 here is whether --

8 JUSTICE SOTOMAYOR: No, it's not a
9 state law question.

10 MR. PALMORE: It's embedded -- it's a
11 federal question --

12 JUSTICE SOTOMAYOR: We have said
13 there's a conflict, it's a federal question --

14 MR. PALMORE: It's a federal question
15 embedded in a state law question because the
16 state law question is: Do we intend to use this
17 money to clean up our land? And that prevents
18 windfalls. That's the Montana Supreme Court's
19 decision in Sunburst.

20 What they're saying is, well, you may
21 not get EPA approval to clean your land, so you
22 wouldn't actually be able to do it. How that
23 uncertainty, that possibility of need for EPA
24 approval would be factored into the damages
25 calculation is a state law question.

1 JUSTICE GORSUCH: Can --

2 MR. PALMORE: If I could return to
3 Justice Breyer's question.

4 JUSTICE GORSUCH: Well, okay, before
5 you do that, I just was hoping you might return
6 to Justice Ginsburg's question. And let --
7 let's suppose for the purposes of this
8 hypothetical that you're -- you're not a PRP but
9 that EPA thinks that some aspects of your plan
10 would interfere with its interests.

11 You said that the EPA has plenty of
12 tools available to it in that scenario to
13 address any conflicts. Can you be specific
14 about what EPA could do to take care of its
15 interests in that scenario?

16 MR. PALMORE: Yes, Your Honor. And I
17 -- I -- you don't have to take my --

18 JUSTICE GORSUCH: Because 122 won't
19 work, right?

20 MR. PALMORE: You don't have to take
21 my word for it. You can look at page 17 of the
22 government's invitation brief in this case,
23 where it said you don't need to take cert on
24 this PRP issue because we have plenty of tools
25 in order to safeguard the integrity of our

1 remedial plan. Those are under Section 106. It
2 can seek administrative orders. It can seek
3 injunctions. There are plenty of tools it
4 can --

5 JUSTICE GORSUCH: Can it do that even
6 with respect to somebody who's not a PRP?

7 MR. PALMORE: Absolutely. If -- if
8 someone is going to do something that's going to
9 release toxic substances into the -- onto their
10 neighbors' property or into a creek or
11 something, then they have plenty of tools to
12 address that. They don't need this -- this
13 ongoing supervision.

14 And that ties into a part of Justice
15 Breyer's question, which I didn't ask yet. I
16 think -- answer yet, which is you were asking
17 about well, couldn't they get approval and why
18 is this -- why might this be a taking. It
19 depends on what the default rule is, right?
20 Where does the property right lie? Does it lie
21 with -- lie with EPA? Or does it lie with the
22 landowners?

23 Under Montana law, we have a right, a
24 wrongdoer has put arsenic on our land, and we
25 have a state law right to get a judgment

1 sufficient to remove it.

2 It's not -- that's not applying the
3 CERCLA health standard. That's applying
4 bread-and-butter Montana property law.

5 JUSTICE KAVANAUGH: Am I right that
6 your answer to Justice Gorsuch's question really
7 just turns on who has the burden? Under your
8 theory, EPA has the burden to initiate
9 proceedings; under the other side's argument,
10 the landowner has the burden to go to EPA first?
11 Is that an accurate way of looking at it?

12 MR. PALMORE: That is, Your Honor. So
13 they -- the presumption is we are private
14 property owners, that we have control of our own
15 property, and we can remove arsenic on our own
16 property if we want to. Nothing in their
17 122(e)(6) argument --

18 JUSTICE KAVANAUGH: The question is
19 whether CERCLA displaces that presumption.

20 MR. PALMORE: Whether CERCLA displaces
21 that forever --

22 JUSTICE KAVANAUGH: Right.

23 MR. PALMORE: Right? A thousand years
24 from now, under their view, we would -- if we
25 wanted to remove a shovelful --

1 JUSTICE KAVANAUGH: But either --

2 MR. PALMORE: -- of dirt --

3 JUSTICE KAVANAUGH: -- way -- sorry to
4 interrupt. Either way, EPA would have the say.
5 It's just whether EPA initiates or you go to
6 EPA. I think you just said that.

7 MR. PALMORE: Yeah, but I think the
8 default rule is critical, right? I mean, we
9 have the bundle of property rights --

10 JUSTICE KAVANAUGH: Yeah.

11 MR. PALMORE: -- and if we, you know,
12 commit an environmental offense, then EPA as a
13 regulator can use its power --

14 JUSTICE KAGAN: What would the --

15 MR. PALMORE: -- to go after us.

16 JUSTICE KAGAN: -- government have to
17 show? What's the -- what would -- what would
18 the test be? What would the legal standard be?

19 MR. PALMORE: If -- if they went after
20 us, it would be a violation of -- of CERCLA.
21 These are the -- this is what -- and the
22 government itself took the position that those
23 tools are fully adequate here to protect the
24 integrity of the remedy.

25 JUSTICE BREYER: These things are

1 likely to be pretty complicated. And if we --
2 one way, it's central, everyone goes to EPA, and
3 there's a central review in court.

4 The other way, you want EPA to go to
5 any place where a landowner has a law in -- in
6 his favor that lets him do some things, and EPA
7 is going to have to prove that this particular
8 thing in each of these cases is a CERCLA
9 violation, which is already a standard that's --
10 it might not, it might just be an interference
11 with their plan. It might just be raising the
12 cost of their plan. It might be who knows. I'm
13 not an expert in this.

14 But that's -- that's the question:
15 How did Congress want this to work?

16 MR. PALMORE: Right. And one can
17 imagine Congress writing a statute to give EPA
18 complete control, but it didn't -- it didn't do
19 that.

20 JUSTICE BREYER: And it might have
21 used the words potentially responsible person
22 has to go to EPA and, by that, meant that those
23 people who live or own property on a toxic waste
24 center. That's what they argue.

25 MR. PALMORE: Right, Your Honor, their

1 position is that every single private property
2 landowner --

3 JUSTICE BREYER: Yeah.

4 MR. PALMORE: -- in this vast
5 300-square-mile Superfund site has to get their
6 permission to remove even a shovelful of dirt
7 from their own backyard.

8 JUSTICE BREYER: No, I don't know that
9 they --

10 CHIEF JUSTICE ROBERTS: Well, but
11 that's the reason, though --

12 MR. PALMORE: That is page 34 of the
13 Blue Brief. ARCO says remedial action covers
14 virtually any physical action with respect to
15 hazardous waste at the site, including storage,
16 excavation. It has a list there. It's
17 virtually anything.

18 They're saying that our -- my clients
19 in Opportunity, Montana, have to get permission
20 from EPA in Washington if they want to dig out
21 part of their backyard to put in a sandbox for
22 their grandchildren and --

23 JUSTICE BREYER: And are you saying
24 also it's an --

25 CHIEF JUSTICE ROBERTS: Well, you can

1 say dig out -- you can say dig out part of their
2 backyard. EPA would say if you want to disturb
3 arsenic-infected land, dirt in a way that would
4 not only harm your neighbors but could harm
5 people many -- many miles away. I mean, yes,
6 you want to just do things --

7 MR. PALMORE: And if --

8 CHIEF JUSTICE ROBERTS: -- on your
9 land, but you can't overlook the fact that that
10 is going to have harmful effects on everybody
11 else around you.

12 MR. PALMORE: And if you assume that
13 harm that's assumed, embedded, in your question,
14 they have the tools to go after that. What I'm
15 talking about is when there's no showing of
16 harm. Their argument is whether there's harm or
17 not, we have to get their permission.

18 And if I can --

19 JUSTICE KAGAN: I guess the --

20 JUSTICE KAVANAUGH: Just --

21 JUSTICE KAGAN: -- question, though,
22 is -- and, you know, you might say, look, this
23 is a policy matter and Congress decided it. But
24 I guess the question is it -- it's hard for EPA
25 to go around and try to figure out who's

1 creating sandboxes. And so why should the onus
2 be on EPA to figure out who's creating
3 sandboxes?

4 MR. PALMORE: Well, EPA is, of course,
5 all over this site, and it can enforce the law
6 here. The question is whether we are -- should
7 be similarly situated to just you and me and any
8 American who, if we violate the law, the
9 regulator, the law enforcement, can come after
10 us, or whether we have this kind of
11 superintending presence of agency authority over
12 us and our private property for the rest of our
13 lives. And that's not what -- that's not the
14 scheme that Congress created. It went out of
15 its way to allow state law over these
16 traditionally state law subjects to continue.

17 JUSTICE KAVANAUGH: But your -- your
18 -- your parade of horrors can still come true
19 with EPA being aggressive in getting to all
20 those places. So really the question that --

21 MR. PALMORE: If -- if they want to
22 come out -- you're right.

23 JUSTICE KAVANAUGH: -- the question
24 Justice Breyer asked is does it make sense to
25 have you go to EPA first so that they can

1 maintain control? "Comprehensive" is the word
2 in the statute after all.

3 MR. PALMORE: Your Honor, there's no
4 evidence that Congress intended this obscure
5 corner of Section 122 about settlements to give
6 EPA that kind of vast control forever over
7 private property.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Three minutes, Ms. Blatt.

11 REBUTTAL ARGUMENT OF LISA S. BLATT

12 ON BEHALF OF THE PETITIONER

13 MS. BLATT: Thank you, Mr. Chief
14 Justice.

15 Justice Sotomayor, I answered one of
16 your questions incorrectly on a cite, and I -- I
17 need to correct it. Section 107(q)(1)(A) 3
18 through 5 is the contiguous landowner provision
19 that says if you live on a Superfund site, no
20 matter what, you have to make sure you comply
21 and not interfere with EPA.

22 So there's provisions throughout
23 CERCLA that say no matter what your defenses may
24 be, you always are on the hook to not do
25 anything to interfere with EPA's remedy. And I

1 just gave you different cites.

2 So, on PRPs, in terms of this is a
3 status and not a financial liability, EPA,
4 they're always liable under 106 for abatement.
5 And they're always liable in a suit by Atlantic
6 Richfield when the cleanup ends under Section
7 113(g)(2)(A). We might not get much money, but
8 they're -- they're definitely on the hook.

9 But the real question is one of
10 status. And it's -- Justice Gorsuch and Justice
11 Kavanaugh, you were wrong on this as being a
12 question of who has to sue and a burden. EPA
13 would have no way of knowing what -- they only
14 know in this case and wrote them a letter
15 because there's a lawsuit and a Supreme Court
16 case in the state of Montana, but there are
17 hundreds of thousands of people who live on --
18 live on Superfund sites with uranium and God
19 knows what else, and how is EPA exactly supposed
20 to know when someone is removing uranium? It
21 has a half-life of 4.7 billion years.

22 Arsenic has no half-life. It always
23 is there. It cannot be destroyed. It doesn't
24 evaporate. So, yeah, they have some
25 restrictions before they move hazardous waste.

1 The other thing is in terms of who
2 you'd have to sue, I would freak out if I got a
3 -- a -- a letter. Their view is you have to sue
4 these poor innocent landowners and say you're
5 liable under CERCLA. Just so you know, that's
6 the only way we can keep control of the site.

7 That's the only way we're going to
8 know and then, you know, now they're on notice
9 because, otherwise, you would have this
10 metaphysical thing of who knows who's liable?

11 In terms of the taking issue, and I
12 think that Justice -- I mean, you guys already
13 answered this, but this is really a question of
14 do you have to go to EPA. If EPA denies
15 permission and they want to bring a takings
16 claim, go sue EPA.

17 There's also a citizen suit provision
18 that in 2025, they can bring a lawsuit and say:
19 EPA, your remedy was terrible, we don't like it,
20 it violated CERCLA, come up with a new one.
21 That -- that's what the citizen suit provision
22 is before -- for.

23 On the mouse hole point, I don't think
24 it's a mouse hole. So it has mouses or
25 elephants, I guess, all the way in the statute.

1 There are provision after provision in the
2 contiguous landowner, in the demicrominimus --
3 or whatever that word is -- in the bona fide
4 landowner that says at all times you have to
5 make sure you don't interfere with EPA's remedy.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 12:07 p.m., the case
10 was submitted.)

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