Pace Environmental Law Review

Volume 14
Issue 2 *Summer 1997*

Article 13

June 1997

Brief for the Appellant, Greater Uniontown Vocational School: Ninth Annual Pace National Environmental Moot Court Competition

University of Baltimore School of Law

Civ. No. 96-214

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

GREATER UNIONTOWN VOCATIONAL SCHOOL,

and

WHILE-U-WAIT PHOTO SERVICE,

Appellants,

v.

STATE OF NEW UNION HEALTH SERVICES AGENCY,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief for the Appellant, GREATER UNIONTOWN VOCATIONAL SCHOOL*

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QUESTIONS PRESENTED

I. Whether application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607, to Greater Uniontown Vocational School (GUVS) exceeds Congress' Commerce Clause powers and unconstitutionally imposes retroactive liability for pre-enactment conduct?

II. Whether CERCLA's express provision for contribution claims under 42 U.S.C. § 9613(f) restricts potentially responsible parties' (PRPs) claims against other PRPs to proceeding under this cause of action and prohibits a contribution claim under 42 U.S.C. § 9607(a)?

III. Whether medical expenses incurred to assess individuals' health, as opposed to threats to the public health or environment, fail to constitute a removal or remedial action as required under § 9607(a)(4)(A)?

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Appellant, Greater Uniontown Vocational School (GUVS) has appealed the district court decision regarding its liability to the State of New Union Health Services Agency (SNUSHA) and While-U-Wait Photo Service (WUWPS) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. WUWPS also appealed the decision of the district court on the issue of CERCLA liability.

WUWPS initiated action against GUVS pursuant to 42 U.S.C. § 9607(a)(4)(B) asserting that GUVS is liable to WUWPS for the costs of water testing, site investigation and soil removal totalling $30,300. Simultaneously, SNUSHA initiated an action against GUVS and WUWPS for recovery of medical monitoring costs under 42 U.S.C. § 9607(a)(4)(A) at an approximate cost of $43,750. The appeals were consolidated following the district court's determination of the cross-motions for summary judgment.

STATEMENT OF FACTS

Post-high school educational opportunities in Union County, New Union were virtually non-existent until the 1963 New Union legislature statutorily appropriated one million dollars to establish GUVS as an educational outreach to this area. (R. at 2). The New Union legislature directed that GUVS' initial Board of Directors be appointed by the governor with the advice and consent of the New Union Senate. (R. at 2). For nearly a decade, GUVS operated at a facility located at 123 Laurel Street in Uniontown, New Union where it enrolled a total of thirty students from the Union County area in its photography program. (R. at 2-3).

During its operation at 123 Laurel Street, GUVS procured all of its photography equipment and chemicals from New Union Industrial Supply Corp. (NUISC), located in New Union. (R. at 2-3). The chemicals and equipment were formulated and manufactured in New Union by NUISC. (R. at 3). Adhering to the standard practice within the photography community and all state and environmental laws, GUVS disposed its waste photographic solutions in the backyard ditch at 123 Laurel Street. (R. at 3).

GUVS sold 123 Laurel Street and its photographic equipment to a commercial enterprise, Start-Up Photography Studios (SUPS). (R. at 3). SUPS also purchased its photochemicals from NUISC and disposed of the photochemical waste in the same ditch which GUVS had utilized until SUPS went bankrupt in 1979. (R. at 3).

In 1980, WUWPS, a film processing service, purchased the property in bankruptcy proceedings. (R. at 3). Even though WUWPS sole proprietor was fully aware of SUPS' and GUVS' disposal practices and their environmental risks, WUWPS did not obtain any warranties against environmental or property liability. (R. at 4). While the parties stipulate that the photochemical waste disposed at 123 Laurel Street was the type disposed of by both GUVS and SUPS, there are no records indicating the portion attributable to each, nor is there an accounting for the property's vacancy from 1979-80. (R. at 4).

In 1993, 123 Laurel Street's next-door neighbors, the Marinas, noticed a "camera-type" odor emanating from their well water. (R. at 4). WUWPS unilaterally had the Marinas' water analyzed and detected an above-average presence of photographic chemicals. (R. at 4). In 1994, WUWPS expended $30,000 for an investigation and soil removal at the property which conclusively determined that all health and environmental threats were eliminated. (R. at 4). Nevertheless, upon the Marinas' initial request for a health assessment in 1994, SNUSHA implemented a six-year program to monitor the health of the Marina family's seven members quarterly, at an annual rate of $1000 per person. (R. at 5). Although all activities at the site have been executed consistent with the National Contingency Plan (NCP), no federal or state environmental protection agencies have been involved in the activities at 123 Laurel Street. (R. at 5).

SUMMARY OF ARGUMENT

The district court did not reach the issue of GUVS' Eleventh Amendment immunity, and the court allowed GUVS to be brought before a court of federal jurisdiction. In dismissing GUVS' claim, the district court contradictorily recognized that the Supreme Court had expressed concern over the extension of Commerce Clause jurisdiction to reach State arms. If the district court had examined GUVS' state connections, paying particular attention to GUVS' source of funding, the court would have properly concluded that GUVS is entitled to Eleventh Amendment immunity from suit in a federal jurisdiction.

Additionally, the court incorrectly ruled that the site at 123 Laurel Street was within the realm of Congress' Commerce Clause powers. The "mass" of land which the court held subject to CERCLA was nothing more than a backyard ditch. "[D]espite the comparatively small impact" of 123 Laurel Street's ditch to interstate commerce, the court extended the reach of Congress' Commerce Clause powers to encompass this site in violation of the "substantial effects" requirement.

The district court should not have held GUVS liable under 42 U.S.C. § 9607 for its pre-1980 conduct, because at the time of the conduct's completion, no liability could have attached to GUVS under then existing New Union and environmental laws. In rendering GUVS liable, the district court erroneously determined that, as applied to GUVS, CERCLA liability was not operating retroactively. Additionally, the court failed to identify any clear legislative intent regarding retroactive operation of CERCLA. Had the court struggled to divine the intent of the 96th Congress in enacting CERCLA, the court would have discovered no express or implied language, nor any legislative history, evincing the requisite intent for statutory retroactive effect.

The court erroneously held that WUWPS could proceed against GUVS, its fellow PRP, in a strict liability suit under 42 U.S.C. § 9607. However, Congress expressly codified 42 U.S.C. § 9613 to provide a mechanism for the allotment of contribution costs, including orphan's shares, among PRPs. Additionally, the court failed to investigate the necessity of the costs incurred by WUWPS during its unilateral cleanup of 123 Laurel Street. Thorough analyzation would have proven that the initial recognition of the site's containment rendered any subsequent costs at the site unnecessary under § 9607(a)(4)(B), and therefore, the costs were irrecoverable.

Despite the court's finding, assessment of medical monitoring costs against GUVS was violative of § 9607(a)(4)'s goal of providing for "removal" and "remedial" actions. The class of activities which fulfill a "removal" or "remedial" purpose under this provision address threats to public health and the environment. Congress intentionally excluded personal medical monitoring costs from § 9607's provisions, and instead, created the Agency for Toxic Substance and Disease Registry at 42 U.S.C. § 9604(1). Therefore, GUVS is not liable to SNUSHA or WUWPS for any costs stemming from 123 Laurel Street.

ARGUMENT

I. The district court's decision is reviewable de novo.

The lower court's decision imposing CERCLA liability on GUVS was based on case law and statutory interpretation. (R. at 5-7). This categorizes the court's determination as a question of law. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988). As such, the standard of appellate review is de novo. *Id.*

II. CERCLA unconstitutionally usurps Eleventh Amendment state sovereignty rights when it is applied to an arm of the state where there has been no express waiver of state immunity.

The United States' Constitution created a federalist system of government to prevent tyranny over the people. *See The Federalist No. 9* (Alexander Hamilton). The fragmentation of power and its resulting frustrations were intended to prevent the accumulation and overreach of power by either of the governments, or any of the branches, by positioning ambition against ambition. *See The Federalist No. 51* (James Madison). Specific powers were delegated to the federal government to ensure the continuation of unity among the several states, while all unenumerated powers were left to the states to govern their internal interests best. *See The Federalist No. 45* (James Madison). "The genius and character of the [federal] government seems to be, that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the states generally; but not to those which are completely within a particular state . . . ." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

The Eleventh Amendment states, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or another State, or by Citizens or Subjects of any Foreign state." U.S. Const. amend. XI. This amendment embodies two principles. "First[,] each state is a sovereign entity in our federal system; and second[,] '[i]t is inherent in the nature of sovereignty not to be amenable to

the suit of an individual without its consent.'" *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)(quoting *The Federalist No. 81*, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *See also Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996).

Seminole re-established the principle that a private party cannot sue a state, or an arm of the state, in a federal court without an express waiver of the state's sovereign immunity. In doing so, the *Seminole* court directly overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which had rendered states' amenable to suit under CERCLA based on an attenuated interpretation of Congress' Commerce Clause powers. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled by Seminole Tribe of Fla. V. Florida*, 116 S. Ct. 1114 (1996). Following *Seminole*, Congress can not supply private parties with a federal cause of action against any state or any state arm, under CERCLA, in abrogation of a state's sovereign immunity. Although GUVS conceded that it does not qualify as a state agency, it did not abandon its entitlement to Eleventh Amendment immunity as an arm of the New Union educational system. (R. at 6). If New Union is erroneously hailed into federal court, its Eleventh Amendment immunity will be rendered a nullity since the immunity to which it is entitled is not an immunity from liability, but a recognition of sovereignty which shields the states from federal jurisdiction. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). In determining whether a statutorily created entity is an arm of the state, the court should first examine "the nature of the entity created by state law." *Hadley v. North Ark. Community Technical College*, 76 F.3d 1437,1439 (8th Cir. 1996)(citing *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)); *See also Seibert v. University of Okla. Health Sciences Ctr.*, 867 F.2d 591, 594-95 (10th Cir. 1989). GUVS was created by the New Union state legislature for the express purpose of augmenting the inadequate educational services provided by New Union's state universities and community colleges to vocational students in the Union County vicinity. (R. at 4). As such, GUVS must be deemed an extension of New Union's educational arm in Union County.

The Supreme Court has not fashioned a comprehensive test for the circuits to employ in discerning which state-related entities receive Eleventh Amendment immunity. However, the Court has stated that in analyzing an entity's nexus with the state, "rendering [state] control [over the entity] dispositive does not hone in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a State's treasury." *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 404-06 (1994); *See Edelman v. Jordan*, 415 U.S. 651 (1974); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stan. L. Rev. 1033, 1129 (1983).

Meanwhile, courts have utilized various factors to determine when an entity's finances are independent of the state treasury. One factor is an entity's power of taxation. "The absence of the power to tax is a strong indication that an entity is more like an arm of the state than like a county or city, because that enablement gives an entity an important kind of independence." *Kashani v. Purdue Univ.*, 813 F.2d 843, 846 (7th. Cir 1987). Similarly, the capability of an entity to issue bonds is determinative. *See Mackey v. Stanton*, 586 F.2d 1126, 1131 (7th Cir. 1978). An entity's ability to tax or issue bonds also has proven dispositive in local school district and state university cases which have disallowed Eleventh Amendment immunity. *See Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Although GUVS has never requested additional state funding, GUVS is powerless to tax or issue bonds, and therefore, it is ultimately dependent on New Union for funding. (R. at 2). Therefore, GUVS should be treated like an arm of New Union and extended Eleventh Amendment immunity. Otherwise, any judgment against GUVS would be borne by the New Union treasury and would effectually circumscribe New Union's Eleventh Amendment protection from suit in a federal jurisdiction.

III. Application of CERCLA to GUVS' conduct exceeds Congress' Commerce Clause powers and unconstitutionally imposes retroactive liability.

Our founding fathers empowered Congress "to regulate Commerce with foreign Nations, and *among* the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3 (emphasis added). If this enumeration is to have any effect, it must "presuppose[ ] something not enumerated . . . the exclusively internal commerce of a State." *Gibbons*, 22 U.S. at 195. For over 50 years, the Supreme Court found Congress' commerce clause powers boundless. This era ended when the Court demonstrated that Congress' commerce clause powers *are* "subject to outer limits." *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995).

A. Application of CERCLA to the small ditch at 123 Laurel Street unconstitutionally exceeds the limits of Congress' commerce clause powers and encroaches on New Union's police powers.

Writing for the *Lopez* majority, Justice Rehnquist warned:

> the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Id., 114 S. Ct. at 1628-29 (quoting *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.* 301 U.S. 1, 37 (1937)). In the wake of *Lopez*, many courts have heeded the Court's warning and have held unconstitutional statutes that were enacted under the premise of Congress' commerce clause powers for their failure to satisfy the *Lopez* test. *See, e.g.*, *United States v. Danelli*, 73 F.3d 328 (11th Cir. 1996)(per curiam)(federal arson statute); *United States v. Pinckney*, 85

F.3d 4 (2nd Cir. 1996)(federal Anti Car Theft Act); *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995)(federal arson statute); *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996)(Violence Against Women Act). Similarly, *Lopez'* refusal to "pile inference upon inference" in determining the bounds of the interstate commerce clause is dispositive and precludes this court from finding the ditch at 123 Laurel Street to be within the realm of Congress' powers. *Lopez*, 115 S. Ct. at 1634. To hold otherwise unconstitutionally "convert[s] congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.*

Lopez recognized that Congress can regulate, "the use of the channels of interstate commerce . . . the instrumentalities of interstate commerce . . . [and] activities having a *substantial* relationship to interstate commerce." *Id.*, 115 S. Ct. at 1629 (emphasis added). Like *Lopez*, the wholly intrastate activities on Laurel Street fall within the third category which requires that the activities must be "economic" and "substantially effect" interstate commerce. *Id.*, 115 S. Ct. at 1630.

1. The presence of photographic chemicals in the ditch at 123 Laurel Street does not substantially effect interstate commerce.

As applied to 123 Laurel Street, CERCLA attempts to reach non-migrating substances buried in the ground. The presence of these substances is neither economic, nor interstate. Although some composition of the substance may have once traveled across state lines, the attachment of federal regulations to their altered form now dissipated in New Union's sub-stratum would have absurd ramifications. *See Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1436-37 (7th Cir. 1988)(stating that CERCLA has the potential to be applied to "everything pertaining to planet Earth."). Congressional skepticism recognized that CERCLA may not be able to reach properties like 123 Laurel Street where "the effects of inadequately contained wastes are reasonably localized . . . [and] their impact frequently does not cross state lines." Subcommittee on Oversight and Investigations of the House Com-

merce Comm., 96th Cong., 1st Sess., *Hazardous Waste Disposal* 73, 80 (Comm. Print 1979) (separate views of Rep. Dannemeyer).

GUVS never directly engaged in interstate commerce when purchasing its photo chemicals and equipment. (R. at 5). Although NUISC utilized raw materials purchased from the national market when it manufactured the chemicals and equipment used by GUVS' photography program (R. at 5), manufacture and pre-manufacture were never intended to fall under Congress' interstate commerce clause powers. *See Lopez*, 115 S. Ct. at 1643-44 (Thomas, J., concurring)(stating that raw materials "may have been in commerce at one time, but manufacturing takes place at a discrete site."). Furthermore, GUVS procured photographic supplies and equipment for three students per year for less than ten years during its occupation of 123 Laurel Street. Thus, attributing the presence of photographic chemicals in the ditch at 123 Laurel Street to interstate commerce is characteristic of the attenuation which *Lopez* disapproved.

2. Aggregation analysis fails to bring the Laurel Street activities within the reach of Congress' Commerce Clause powers because the activities are confined to a small backyard ditch.

In 1942, the Court announced the most far-reaching decision regarding Congress' powers to regulate interstate commerce. *See Wickard v. Filburn*, 317 U.S. 111 (1942). During that era when the United States struggled to emerge from the quagmire of the Great Depression and simultaneously was concerned with global warfare wartime efforts, the stabilization of wheat prices was imperative to the nation's economic survival. Thus, the Court determined that despite the de minimis character of Roscoe Filburn's wheat overgrowth, Filburn was subject to congressional authority. *Id.* The Court reasoned that the aggregate effect of other wheat farmers similarly situated could adversely impact the stabilization of one of the nation's largest market commodities, and

therefore, Congress had the power to regulate even de minimis intrastate actors. *Id.*, 317 U.S. at 128.

Roscoe Filburn's twelve-acre overgrowth of wheat is not analogous to the backyard ditch at 123 Laurel Street. The target of Congress' Commerce Clause powers on Laurel Street is not a market commodity which must be regulated to ensure the stabilization of the nation's economy. Even if similarly situated backyard ditches were aggregated, they would not substantially effect interstate commerce because the regulated actions are de minimis and are not economic.

Additionally, GUVS was an educational non-profit entity who by law had to procure as many of its supplies as possible from in-state vendors. (R. at 2). While the *Lopez* court conceded that Congress' Commerce Clause powers could encompass "numerous commercial activities that substantially affect interstate Commerce and also affect the educational process," the court recognized that those powers are not infinite. *Lopez*, 115 S. Ct. at 1633. The Court acknowledged that, "[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far." *Id.*, 115 S. Ct. at 1640 (O'Connor, J., concurring). Since GUVS' procured photographic chemicals manufactured in New Union to educate a total of thirty students, its impact on interstate commerce was minimal, and its actions should not be subjected to Congress' Commerce Clause powers.

B. CERCLA may not be applied retroactively because the statute is devoid of express or implied language, or a legislative history, which evince the clear legislative intent required by Landgraf for CERCLA to operate retroactively.

The Supreme Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), strengthened the presumption against retroactivity by disentangling the requirement of "clear legislative intent" necessary for retroactive statutory application. *Landgraf*, 114 S. Ct. at 1500. While acknowledging that retroactive operation of statutes is sometimes be-

nign, the Court re-emphasized its continuing disdain for statutes which unfairly disrupt settled expectations. *Id.*, 114 S. Ct. at 1497-98. The eight-justice majority warned Congress that courts may no longer fill intentional gaps regarding the temporal reach of statutes. *Id.*, 114 S. Ct. at 1500. With this warning, the era of judicial policy-making interpreting CERCLA to operate retroactively must come to an end.

1. Express language regarding retroactive liability is noticeably absent from CERCLA's broad provisions.

The interpretation of a statute must begin with the language of the statute itself. *See Touche Ross v. Redington*, 442 U.S. 560, 568 (1979). "Absent a clearly expressed legislative intention to the contrary, [a statute] must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Nowhere in CERCLA's expansive provisions can "retroactive" be found. 42 U.S.C. § 9601, et. seq. Although Congress is not required to use "retroactive" where retroactivity is being created, the 96th Congress knew how to craft plain language to convey retroactivity. *See* H.R. 7020, 96th Cong. § 3072 (1980); 42 U.S.C. § 6924(u) (requiring "corrective action . . . regardless of the time at which waste was placed in such unit.")

Despite Congress' ability to clearly express retroactivity, the only provision which Congress empowered to trigger CERCLA's temporal span is silent on retroactive operation. 42 U.S.C. § 9652(a). Specifically, § 9652(a) states: "Unless otherwise provided, all provisions of this chapter shall be effective on December 11, 1980." As discussed in *Landgraf*, analyzation of an effective date provision is unavailing to the search for legislative intent regarding retroactivity. *Landgraf*, 114 S. Ct. at 1493. Although not all of the courts which favor appellees agree with this interpretation of § 9652(a), all agree that no express language of retroactivity appears in CERCLA's vast provisions. *See e.g., United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 732; *Nevada v. United States*, 925 F. Supp. 691, 698 (D. Nev.

1996); *United States v. Shell Oil*, 605 F. Supp. 1064, 1069 (D. Colo. 1985); *Ohio v. Georgeoff*, 562 F. Supp. 1300, 1309 (N.D. Ohio 1983).

2. CERCLA's utilization of past tense language does not imply clear legislative intent to operate retroactively.

The framing of CERCLA's provisions in past tense language is insignificant to the retroactivity issue. *Landgraf* never contemplated the past tense language in the 1991 Civil Rights Act to be indicative of retroactivity. *See Landgraf*, 114 S. Ct. at 1483. Courts which ultimately find the requisite intent for retroactive application of CERCLA have also dismissed the statute's past tense language. *See, e.g. Nevada*, 925 F. Supp. at 699-700; *Georgeoff*, 562 F. Supp. at 1309-10. Were the past tense language employed in section 107 to be considered, corresponding present tense language would negate all possible verb tense implications. *See Shell Oil*, 605 F. Supp. at 1073.

3. Congress' inclusion of specifically prospective provisions in CERCLA is not implicit of clear legislative intent to impose liability retroactively.

The Court, in *Landgraf*, examined an effective date provision which parallels § 9652(a). There, the petitioner's argued, as do appellees here, that the statute operated retroactively because Congress included two provisions which "otherwise provided" for prospective operation in the act. *Landgraf*, 114 S. Ct. at 1493. While the *Landgraf* Court recognized the limited validity of this negative implication argument, the Court stated that,

> given the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in [the introductory] bill, it would be surprising for Congress to have chosen to resolve th[e retroactivity] question through negative inferences drawn from [ ] provisions of quite limited effect. . . .Had

> Congress wished [the effective date provision] to have such a determinative meaning, it surely would have used language comparable to the predecessor [ ] provisions . . .

Id., 114 S. Ct. at 1493-94.

Analogously, CERCLA's effective date provision had a predecessor which would have directed the statute to operate retroactively. H.R. 7020, 96th Cong., § 3072(1980). As introduced, H.R. 7020 applied "to releases of hazardous waste without regard to whether or not such releases occurred before, or occur after, the date of the enactment." *Id.* However, Congress contemplated this provision, eliminated it, and provided no comparable language in the final enactment. *See* CERCLA, 42 U.S.C. § 9601. Arguably, Congress' deletion of the retroactive provision from CERCLA's predecessor statute strongly suggests legislative intent to impose liability prospectively only. *See United States v. $814, 254.76*, 51 F.3d 207, 212 (9th Cir. 1995). Additionally, the use of negative implication analysis is diametrically opposed to the ascertainment of clear legislative intent. *See* 2B *Sutherland Statutory Construction* § 55.02 (5th ed. 1996). Thus, if any value is to be garnered through negative implication in CERCLA's context, the import conveyed by Congress' intentional deletion of the retrospective language must be, at a minimum, that there was no clear congressional intent behind retroactive liability.

4. CERCLA can be effectuated through a prospective reading.

Without a retroactive application of CERCLA, parties would still be legally responsible if their pre-enactment conduct was actionable under a then existing state cause of action or if their conduct spanned the pre-enactment and post-enactment eras. *See* George Clemon Freeman, Jr., *A Public Policy Essay:*

Superfund Retroactivity Revisited, 50 Bus. Law. 663, 681 (1995). Courts which have found CERCLA's provisions to implicitly provide for retroactivity have ignored these possible interpretations of Congress' intent in their attempts to vindicate the perceived remedial object of CERCLA more effi-

ciently. *See Shell Oil*, 605 F. Supp. at 1075-76. *See also United States v. South Carolina Recycling & Disposal Inc.*, 653 F. Supp. 984, 996-98 (D.S.C. 1986). However, the Court cautioned that efficiency does not warrant a presumption of retroactivity since "[s]tatutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting [less efficient] means. . . ." *Landgraf*, 114 S. Ct. at 1507-08.

5. CERCLA's legislative history contains no clear evidence of congressional intent to retroactively impose liability.

Although CERCLA's predecessor bill shared the designation "Public Law No. 96-510" and had a considerable legislative history, the legislative history behind the bill actually enacted at 42 U.S.C. § 9603 is sparse. *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 Colum. J. Envtl. L. 1 (1982). This brevity is attributable to Congress' chaotic atmosphere in the final days of its outgoing session. *Id.*

Retroactivity was debated only on the Senate floor, before CERCLA was placed before the House on a "take it or leave it basis." *Id.* There, individual members voiced their partisan opinions regarding the effect of CERCLA's liability provisions; however, these statements are unavailing of Congress' *collective* intent in enacting CERCLA. *See* Alfred R. Light, *CERCLA Law and Procedure Compendium* (BNA, Washington, D.C., 1992) at 1-1. Indeed, "[t]hat CERCLA passed at all is a minor wonder. Only the frailest, moment-to-moment coalition enabled it to be brought to the Senate floor . . . ." 126 Cong. Rec. at H11,772 (daily ed. Dec. 3, 1980). As the Court has heeded, "[i]t is . . . highly probable [ ] that, because it was unable to resolve the retroactivity issue with the clarity of," H.R. 7020, § 3072, "Congress viewed the matter as an open issue to be resolved by the courts. Our precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance. . . ." *Landgraf*, 114 S. Ct. at 1494. Congress agreed to disagree on

CERCLA's liability issues and compromised by leaving ambiguities for judicial resolution under evolving common-law principles. *See* 126 Cong. Rec. S14,964 (daily ed. Nov. 24, 1980)(statement of Sen. Randolph). Thus, Congress unconstitutionally delegated the difficult policy decision of retroactivity to the courts. Congress' unwillingness to determine CERCLA's retroactivity prohibits the courts from imposing CERCLA retroactively even if the congressional majority covertly agreed that retroactive operation would emerge. *See Landgraf*, 114 S. Ct. at 1496 (citing *INS v. Chadha*, 462 U.S. 919, 946-951 (1983)).

C. Assessing CERCLA liability to GUVS' pre-1980 conduct is retroactive because it creates new legal consequences for acts completed seven years prior to CERCLA's enactment.

Since the late eighteenth century, American jurisprudence has recognized that a retroactive statute "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability. . . ." *Sturges v. Carter*, 114 U.S. 511, 519 (1885) (quoting *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814)(No. 13, 156)). In the instant case, SNUSHA and WUWPS seek to hold GUVS liable for its conduct which was legal and unactionable under any New Union state claim when it was completed in 1973. (R. at 3, 5). Application of CERCLA's liability provisions to GUVS would create new liabilities for conduct which predated CERCLA's enactment, and therefore, would require a retrospective application of CERCLA. *Cf.*, *Landgraf*, 114 S. Ct. at 1499.

The district court incorrectly pinpointed CERCLA's liability attachment at the commencement of the cleanup expenditures at 123 Laurel Street in 1993. *See United States v. Olin Corp.*, 927 F. Supp. 1502, 1516. The district court's misplaced focus lends to a prospective interpretation of the statute; however, the true focus must be on the conduct to which the statute is seeking to attach liability. *Landgraf*, 114 S. Ct. at 1499. *Landgraf* emphasized the long settled principle that

the creation of "new legal consequences to events *completed* before [the statute's] enactment" is the determinative inquiry into a statute's retroactive nature. *Id. Landgraf* added that without a clear statement from Congress, the Court had never read a statute to apply to pre-enactment conduct where that interpretation would "substantially increas[e] [the] monetary liability of a private party." *Id.*, 114 S. Ct. at 1506-07.

Here, respondents seek to attach retroactive liability to GUVS. Application of CERCLA is not rendered retroactive merely because GUVS' conduct at 123 Laurel Street ceased eight years before CERCLA's enactment, but because this application seeks to impose new liabilities on GUVS for its conduct which occurred wholly before the statute's enactment. Despite appellant's assertion to the contrary and the erroneous conclusions of the district court, the imposition of new liabilities for actions completed before CERCLA's enactment date requires a retrospective application of the statute. Since clear legislative intent regarding retroactivity is not apparent, CERCLA liability may not be assessed against GUVS.

IV. GUVS may not be held jointly and severally liable by a fellow PRP under § 9607 since Congress expressly provided § 9613 to provide for equitable apportionment between PRPs.

A. WUWPS must proceed under 42 U.S.C. § 9613(f) for contribution costs from its fellow PRP, GUVS.

CERCLA § 9607(a) imposes strict liability on all past and present owners and operators of hazardous waste sites. *See* § 9607(a). Under CERCLA both GUVS and WUWPS are potentially responsible parties (PRPs), and as such they are limited to the four enumerated defenses. § 9607(b)(1)-(4). While WUWPS does not seek to avail itself of any of the aforementioned defenses, WUWPS attempts to be absolved of its liability through a non-existent fifth defense: The first PRP to the courthouse door is absolved of all liability. *See Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal*, 814 F. Supp. 1269, 1277 (E.D. Va. 1992). WUWPS attempts to evade liability and hold GUVS strictly liable for the costs

WUWPS incurred following its unilateral cleanup 123 Laurel Street. However, as the owner of 123 Laurel Street, WUWPS was the only private party capable of initiating actions at that location. Since GUVS relinquished its control of 123 Laurel Street more than twenty-three years ago, GUVS was legally incapable of commencing any action at 123 Laurel Street in 1993.

The federal appellate courts which have considered the availability of a remedy between PRPs have determined that the only appropriate means of redress is a suit for contribution under § 9613(f). *See Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930 (8th Cir. 1995); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530 (10th Cir. 1995); *United Technologies Corp. v. Browning-Ferris Indus.*, 33 F.3d 96 (1st Cir. 1994); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989); *See also, Dant & Russell, Inc. v. Burlington N. R.R.*, 951 F.2d 246 (9th Cir. 1991). Following principles of equity, current case law demonstrates that "the trend is towards holding [ ] PRPs [ ] limited to [§ 9613(f)] claims when they bring private causes of action under CERCLA." Steven F. Baicker-McKee and James M. Singer, *Narrowing the Roads of Private Cost Recovery: Recent Developments Limiting the Recovery of Private Response Costs Under CERCLA § 107*, 25 Envtl. L. Rep. 10593, 10595-96, n.30 (1995). Ironically, Baicker-McKee's article is the sole authority upon which the district court relied in *allowing* WUWPS to bring a suit against GUVS under § 9607. (R. at 7).

In suits between PRPs, "[§ 9607] provides the framework for a plaintiff to establish a defendant's liability" while "[§ 9613(f)] creates a mechanism for apportioning that liability among the responsible parties." *Akzo Coatings*, 909 F. Supp. 1154, 1160 (N.D. Ind. 1995)(citing *Town of Munster v. Sherwin-Williams Co. Inc.*, 27 F.3d 1268, 1270 (7th Cir. 1994)); *See also Control Data*, 53 F.3d at 934.

While the Supreme Court in *Key Tronic Corp. v. United States*, 114 S. Ct. 1960, 1966 (U.S. 1994), intimated that § 9613 does not preempt "overlapping remedy in § [9607]", this dicta must be read cautiously since the issue was not

before the court for resolution. *See United Technologies*, 33 F.3d at 103 n. 12. Additionally, *Key Tronic* involved an action initiated by a settling PRP. *Key Tronic*, 114 S. Ct. at 1963.

1. Congress enacted § 9613(f) as the sole remedy between PRPs.

Originally, CERCLA provided no express means for apportionment of liability among PRPs - any PRP could have been "singled out as the defendant in a cost-recovery action without any apparent means of fairly apportioning CERCLA costs [levied] against it to other PRPs." *United States v. Colorado & E. R.R.*, 50 F.3d 1530, 1535 (10th Cir. 1995). To address this inequity, many courts recognized a "correlative right of contribution" between PRPs. *Mardan Corp. v. C.G.C. Music Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986). Congress "confirm[ed]" this right of contribution by enacting § 9613 in the 1986 SARA amendments. *See* H.R. REP. No. 99-253(I) at 79 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 2861.

Some lower courts have held that § 9607(a)(4)(B)'s inclusion of "any other person" allows PRPs to sue under § 9607 or § 9613. *Chesapeake & Potomac Tel. Co.*, 814 F. Supp. at 1277; *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221, 225 (E.D. Pa. 1995). One court also found dispositive CERCLA's lack of expressly limiting PRPs to the remedy provided under § 9613(f). *See Bethlehem*, 891 F. Supp. at 225. However, other courts have determined that "any other party" effectually requires innocence. "Congress would not have taken the trouble to codify the right of contribution in [§ 9613(f)], if a responsible or potentially responsible party all along had the right to seek to impose joint and several liability under [§ 9607]." *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 681 (S.D.N.Y. 1996)(citing, *United Technologies*, 33 F.3d at 100-01).

2. Following the canons of statutory construction, PRPs must proceed under § 9613(f) for contribution suits.

Ascribing the plain language meaning to § 9613(f)'s use of "contribution" complements CERCLA's scheme. *See United Technologies*, 33 F.3d at 99. Contribution is defined as, "a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.'" *Colorado & E. R.R.*, 50 F.3d at 1536 (citing *Akzo Coatings*, 30 F.3d at 764). "[W]ere PRPS . . . allowed to recover expenditures incurred in cleanup and remediation from other PRPs under [§ 9607]'s strict liability scheme, § 9613(f)] would be rendered meaningless." *Id.*, 50 F.3d at 1536.

In an attempt to effectuate every provision in a statute, the *United Technologies* "refuse[d] to follow a course that [would] ineluctably produce[ ] judicial nullification of an entire SARA subsection." *United Technologies*, 33 F.3d at 101. Any actions under § 9607, with a six-year statute of limitations, would be an attempt to avoid the three-year time limitation of § 9613. *See Id*, 33 F.3d 96; *Colorado & E. R.R.*, 50 F.3d at 1530. Allowing a PRP to proceed under the greater statute of limitations provided under § 9607 also would circumscribe CERCLA's promotion of early settlement. *United Technologies*, 33 F.3d at 103.

Finally, the broad sweeping nature of CERCLA has not been compromised by the enactment of § 9613. CERCLA still casts a large "strict liability" net among all PRPs subject to a few defenses which are extremely difficult to assert. Section 9613 simply provides the means by which PRPs may equitably allocate this liability.

B. GUVS is not liable for the cleanup costs incurred at Laurel Street because they were not "necessary."

CERCLA liability does not attach to response costs unless the plaintiff can demonstrate that these costs were both "necessary" and "consistent" with the National Contingency Plan (NCP). § 9607(a)(4)(B). *See Control Data*, 53 F.3d at

934 (citing § 9607); *Amoco Oil v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989). While all parties have stipulated that the costs incurred during the cleanup of 123 Laurel Street were consistent with NCP, the costs were not "necessary."

Response costs are only deemed necessary if "an actual and real public health threat exists prior to initiating a response action." *G.J. Leasing Co. Inc. v. Union Elec. Co.*, 854 F. Supp. 539, 562 (S.D. Ill. 1994)(citing *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 904-906 (5th Cir. 1993)); *See also Amoco*, 889 F.2d at 669-70. Although public health is not defined at § 9601 et. seq., the term is commonly understood as referring to "the art and science of protecting and improving community health." *The American Heritage Dictionary*, 1001 (2nd ed. 1982).

The response costs incurred at 123 Laurel Street were unnecessary because there was "no evidence of an immediate threat to public health or the environment . . . [n]or . . . any persuasive evidence of the possibility or likelihood that [the contaminants] . . . would migrate . . . ." *Yellow Freight Sys., Inc. v. ACF Indus., Inc.*, 909 F. Supp. 1290, 1299-1300 (E.D. Mo. 1995). The "release" at 123 Laurel Street was incapable of migrating beyond the Marina property's border and affecting any other property's water source. (R. at 4). Therefore, there was no threat to the community's health, and accordingly, no public health concerns. Additionally, there was no Environmental Protection Agency directive or order, and no settlement or injunctive relief commanding such measures. (R. at 5). Thus, the costs incurred were unnecessary and irrecoverable.

C. Should the court determine that the cleanup costs were necessary, GUVS is only responsible for its equitable share of the total liability, including the orphan share.

Section 9613(f) provides that, "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." § 9613(f). In a CERCLA action for contri-

bution, the PRP would only be liable to recover an amount from any recalcitrant PRP that is equal to its equitable contribution. *See Akzo Coatings*, 30 F.3d at 764; *United States v. Monsanto Co.*, 858 F.2d 160, 172 (4th Cir. 1988).

Most courts have relied on the "Gore factors" in allocating response costs among liable parties under CERCLA. *See Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326 (7th Cir. 1994); *Control Data*, 53 F.3d at 935. These equitable factors distinguish PRPs' contributing conduct, considering: the types, amount and toxicity of the waste involved; the type of activity engaged in during the conduct; and the parties' cooperation in remediating the site. *See Kerr-McGee Chemical Corp*, 14 F.3d at 326, n.4; *Control Data*, 53 F.3d at 935. Other considerations are the "circumstances and conditions involved in the property's conveyance." *Amoco*, 889 F.2d at 673.

Although there are no records allocating the amount of waste disposed of by GUVS and SUPS (R. at 4), the Gore factors can be considered in determining the parties' level of liability. Considering the amount and degree of the conduct carried out by GUVS and SUPS at 123 Laurel Street, the harm attributable to GUVS' education of three students annually is distinguishable from the harm attributable to SUPS' commercial photo-processing service. Furthermore, WUWPS' owner was fully aware of the photo chemical dumping at 123 Laurel Street and SUPS' insolvency when she purchased the property in bankruptcy proceedings. (R. at 4). "Equity and fairness dictate[ ] that the shares that would have been attributed to parties that are now insolvent should be apportioned among all of the solvent PRPs," including plaintiff. *Charter Township of Oshtemo v. American Cyanamid Co.*, 898 F. Supp. 506, 509 (W.D. Mich. 1995). Therefore, SUPS' orphan share must be equitably apportioned to all solvent parties, including WUWPS. *See Chesapeake & Potomac Tel. Co.*, 814 F. Supp. at 1277-78.

V. CERCLA does not provide a cause of action for recovery of medical monitoring costs pursuant to 42 U.S.C. § 9607(a)(4)(A).

In analyzing the recoverability of medical monitoring costs pursuant to § 9607(a)(4)(A), the beginning point must be the plain language of the statute. *See Touche Ross*, 442 U.S. at 568. Section 9607(a)(4)(A) provides recovery for all "removal" or "remedial actions." Removal is defined in pertinent part as:

> such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment

§ 9601(23). "Remedial actions" are defined as, "those actions consistent with permanent remedy taken instead of or in addition to removal actions." § 9601(24). The section provides liability for "all costs of removal or remedial action incurred by . . . a State . . . not inconsistent with the [NCP]." § 9607(a)(4)(A).Although prior case law has not examined medical monitoring recovery under § 9607(a)(4)(A), courts have analyzed the issue under § 9607(a)(4)(B) which analogously allows recovery for "any other necessary costs of response . . . consistent with the [NCP]." *See* § 9601(25). Therefore, actions permitted under § 9607(a)(4)(A) for "removal" or "remedial action" correspond with those addressed under § 9607(a)(4)(B) for "costs of response." While the parties agree that SNUSHA's actions were not inconsistent with the NCP, at issue is whether those actions constitute "removal" or "remedial action."

A. Analyzing the class of conduct which constitutes removal and remedial actions demonstrates that medical monitoring is not a similar action recoverable under § 9607(a).

The first federal appellate court to address the issue of whether or not medical monitoring may be recovered as a "response" cost or "remedial action" relied on ejusdem generis and answered the question in the negative. *See Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir. 1992)(relying on legislative history and canons statutory construction); *See also Durfey v. E.I. DuPont De Nemours Co.*, 59 F.3d 121 (9th Cir. 1995); *Price v. United States Navy*, 39 F.3d 1011, 1015-17 (9th Cir. 1994).

The class of actions constituting removal include, "security fencing or other measures to limit access . . . alternative water supplies, temporary evacuation and housing of threatened individuals." § 9601(23). Section 9601(24) specifically enumerates "storage, confinement, perimeter protection . . ., [and] onsite treatment . . ." as remedial actions. § 9601(24). While acknowledging that the list of specific examples of "removal" in § 9601(23) was nonexclusive, the *Daigle* court found that "under traditional statutory canons of construction" it was only reasonable "to conclude that any other recoverable costs must be at least of a similar type." *Daigle*, 972 F.2d at 1535; *See also*, *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1247 n.17 (M.D. Pa. 1990). The heart of CERCLA's definitions of removal and remedy are "directed at containing and cleaning up hazardous substances releases." *Daigle*, 972 F.2d at 1535. "As these definitions indicate, removal actions are designed to effect an interim solution to a contamination problem, while remedial actions are designed to effect a permanent solution." *Id.*, 972 F.2d at 1533-34. CERCLA's plain language does not "address monitoring of individuals for personal health reasons." *Wehner v. Syntex Corp.*, 681 F. Supp. 651, 653 (N.D. Cal. 1987).

The only courts allowing the recovery of medical monitoring costs have been district courts. *See Brewer v. Ravan*, 680 F. Supp. 1176 (M.D. Tenn. 1988); *See also*, *In re Hanford Nu-*

clear Reservation Litig., 780 F. Supp. 1551 (E.D. Wash. 1991). The *Brewer* court found it dispositive that the words "monitoring" and "health and welfare" were encompassed in the definitions section § 9601(24). *Brewer*, 680 F. Supp. at 1178. However, as *Daigle* illustrates, *Brewer*'s reliance was misplaced. *See Daigle*, 972 F.2d at 1535 (stating "Both definitions are directed at containing and cleaning up hazardous substance releases.").

Daigle concluded that "removal actions" are actions designed to effect an interim solution to a contamination problem - such as security fencing, alternative water supplies, temporary evacuation and housing of threatened individuals. *Daigle*, 972 F.2d at 1533-34. The enumerated examples in § 9601(23) are all designed to prevent or mitigate damage to public health by preventing contact between spreading contaminants and the public. Monitoring long-term health has nothing to do with preventing such contact. *Price*, 39 F.3d at 1016-17 (9th Cir. 1994).

Therefore, *Brewer*'s holding is only applicable in cases where monitoring public health is necessary to remediate a hazardous waste release. *See e.g.*, *Woodman v. United States*, 764 F. Supp. 1467, 1470 (M.D. Fla. 1991) (disallowing medical monitoring costs because they did not relate to public health, but rather to the health of each family member). Furthermore, the *Brewer* court did not find that all medical monitoring costs are CERCLA response costs. In *Brewer*, the plaintiffs sought recovery of medical testing and screening costs which were necessary to measure the extent of local hazardous waste contamination and the subsequent threat the health of the local population. *Brewer*, 680 F. Supp. at 1179; *See also*, *Werlein v. United States*, 746 F. Supp. 887, 904 n.18 (D. Minn. 1990)(holding that medical monitoring might be recoverable where "medical tests would be necessary to determine how far a particular contaminant had spread.").

Therefore, even under the purview of *Brewer* and its progeny, medical monitoring costs must be limited to those necessary for the "public health." In this case, the extent of the hazardous waste contamination was confined. (R. at 4).

The engineering report, accepted as accurate by all parties, stated that, "with the contaminated soil removed from the ditch, there is now no longer a threat to anyone's health or the environment." (R. at 4). In fact, the contamination would have only reached the Marina's private drinking well - not a community water source. (R. at 4). Clearly, SNUSHA is not trying to recover costs aimed at monitoring the public health or environment. To the contrary, SNUSHA is seeking costs arising from the periodic monitoring of an individual family's health. Moreover, the seven affected individuals initiated their own medical examinations. (R. at 4). This is not a public health issue.

B. The legislative history behind 42 U.S.C. § 9607(a)(4)(a) clearly indicates congress' intent not to include medical monitoring costs.

The stated purpose of CERCLA was "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." H.R. REP. NO. 1016, 96th Cong., 2d Sess. 22 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6125. A thorough and comprehensive review of the legislative history reveals that Congress did *not* authorize the recovery of medical monitoring costs. To the contrary, Congress intentionally eliminated provisions which would have created private causes of action for personal injury, medical, and economic loss from early House and Senate bills. These provisions were not revived in the final Senate amendment which became CERCLA. *See* 125 Cong. Rec. S14,964 (daily ed. Nov. 24, 1980)(statement of Sen. Randolph)("We have deleted the Federal cause of action for medical expenses or income loss."). The *Daigle* court also found Senator Randolph's statement to be a "reliable indicator of Congressional intent to exclude medical expenses from recovery," inasmuch as he was a co-sponsor of the compromise bill. *Daigle*, 972 F.2d at 1536 (internal quotations omitted); *Wehner*, 681 F. Supp. At 653.

C. Congress specifically intended to include medical monitoring costs in the Agency for Toxic Substance and Disease Registry provision of CERCLA, 42 U.S.C. § 9604(i).

Congress explicitly established the Agency for Toxic Substance and Disease Registry (ATSDR) to undertake medical testing and collection of information in certain circumstances. § 9604(i); *See Daigle*, 972 F.2d at 1535-37. ATSDR was created by the 1980 CERCLA legislation, and the 1986 SARA Amendments empowered ATSDR with an elaborate scheme of functions relating to the assessment of health effects of actual and threatened hazardous substances releases. *Daigle*, 972 F.2d at 1536. ATSDR was expressly given the ability to conduct formal health assessments at sites if provided with information from individuals or physicians regarding human contact with released hazardous materials. §9604(i)(6)(B); 400 C.F.R. § 300.400(f). In the case of a serious health risk, ATSDR was additionally given the authority to establish a long-term "health surveillance program" to include "periodic medical testing." 42 U.S.C. § 9604(i)(8). As, the *Ambrogi* court notes, "Congress created an expanded role for the [ATSDR] to provide medical examinations . . ." to remedy the perceived inadequacies of the 1980 enactment. *Ambrogi*, 750 F. Supp. at 1249. "Clearly, Congress was not ignorant of the potential need for medical testing arising out of a release of toxic substances. It chose to delete the medical provisions from section 9607, and to address testing concerns via section 9604(i)." *Werlein*, 746 F. Supp. at 904.

CONCLUSION

For the foregoing reasons, Greater Uniontown Vocational School (GUVS) respectfully requests this court to: 1) find that the district court erroneously precluded the extension of New Union State's Eleventh Amendment immunity to GUVS; 2) reverse the district court's finding that Congress' Commerce Clause powers extend CERCLA liability to GUVS; 3) reverse the district court's findings that, as applied to GUVS, CERCLA does not unconstitutionally impose retroactive lia-

bility; 4) reverse the district court's conclusion that GUVS is subject to a strict liability suit under 42 U.S.C. § 9607(a) by WUWPS; and 5) reverse the district court's finding that CERCLA allows SNUSHA to recover medical monitoring costs from GUVS pursuant to 42 U.S.C. § 9607(a)(4)(A).

Respectfully submitted,
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