UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 17-2473

Kristen Giovanni, et al., Appellants,

v.

United States Department of the Navy, Appellee.

On Appeal From The Order Of The United States District Court For The Eastern District Of Pennsylvania (E.D.Pa. Civ. No. 16-4873 (GJP))

REPLY OF APPELLANT KRISTEN GIOVANNI, et al.

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Argument in Reply

The government never actually explains *how* the Giovanni Appellants' claim would interfere with the cleanup of the property. The government just concludes that the claim does interfere – without any analysis, explanation, or support – and runs the rest of its argument through that misframe. Although puzzling at first, it becomes clear that that is the only way that the government can respond to the Appellants' arguments without actually responding to them. The government's brief contains over five pages of factual contentions ungrounded in the record and over ten pages of general legal principles with which no one would disagree, but the brief ignores or sidesteps the crux of the inquiry, including the following points made in the Appellants' opening brief:

- That the district court's interpretation violates canons of statutory construction, especially the important substantive canon that federal statutory provisions should not be interpreted in a way that effectively preempt state law without a clear statement of congressional intent;
- That the district court's interpretation would render invalid Third Circuit law in the In re Paoli cases;
- That Pennsylvania's Hazardous Sites Cleanup Act recognizes the claim brought by the Giovanni Appellants as an important remedy that complements other laws, including CERCLA, and that is not available as a remedy under CERCLA;

- That the Giovanni Appellants' claim would not affect the cleanup action; it would simply impose the costs of setting up a medical monitoring trust fund on the sole defendant in this case.

In addition to failing to address the main points on appeal, the government mischaracterizes the record and caselaw on key issues.

More specifically, Appellants reply with the following six points.

1. **The district court's interpretation of Section 9613(h) violates canons of statutory construction by creating federal preemption in the absence of clear congressional intent and constitutional safeguards, and it leads to an absurd result.**

The government responds to this argument by setting forth two general principles of law with which the Appellants agree,[1] and by urging this Court to accept a broad interpretation of Section 9613(h) simply because it is "broad." What the government utterly fails to address, however, is that the district court's interpretation of Section 9613(h) violates canons of statutory construction in a manifestly unconstitutional way.

The government accuses the Giovanni Appellants of failing to "grappl[e] with the text of Section 9613" and instead "miss[ing] the mark" by making "misguided preemption arguments." (Joint Response Br., at 23). But the

[1] The government admits that CERCLA expressly states that it does not preempt all state law, and that Section 9613(h) only bars claims that interfere with a site's cleanup, two general principles of law that the Giovanni Appellants made in their opening brief.

government stops there – it never explains *why* the preemption argument is misguided or what mark is being missed. And grappling with text requires this court to determine whether an interpretation of that text leads to unintended preemption. Statutory interpretation – which Appellants agree leads this analysis – follows certain canons, all of which the government has ignored. Some of these canons are linguistic or generally interpretative, but these are subordinate to substantive canons – i.e., important, overarching presumptions that favor or disfavor substantive results. When one of these substantive canons applies, the Court requires a clear statement of congressional intent to negate it. One of the most important substantive canons is grounded in "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991). See also Medtronic Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.").

The government sidesteps all these canons of statutory construction in its argument and instead relies repeatedly on how "broad" the language is in Section 9613(h). First, while admitting that the term "challenge" in Section 9613(h) is

undefined, the government says, conclusively and without any support at all, that "[t]he statute specifically refers to '*any* challenges,' which favors a broad reading of the term." (Joint Resp. Br., at 26). Second, the government says (also conclusively and without any support at all), that "removal" action and "remedial" action are "broadly defined" to include the Giovanni Appellants' claims. (Joint Resp. Br., at 26-27). And third, the government argues that given the "broad terms" of Section 9613(h), the provision deprives a court of power to hear claims "that would interfere with" the cleanup, (Joint Resp. Br., at 27-28) – a statement with which the Giovanni Appellants, again, agree.[2] Calling statutory language "broad" does nothing toward helping a court determine what it means; it is the government who has failed to grapple with the text. For all the reasons expressed in the opening brief, the Giovanni Appellants respectfully submit that this Court should review the district court's interpretation of Section 9613(h) through the lens of established canons of statutory construction and conclude that the district court erred when it ruled that the Appellants' claim was a challenge to the plan, because

[2] Appellants also agree with the government's statement on page 28 that several courts have reached the conclusion that Section 9613(h) bars a claim only if it will interfere with a removal or remedial action; Appellants have cited the same cases, as well as others, in their brief to support the same principle.

it in no way "challenges" any proposed removal or remedial action under CERCLA.

2. The Giovanni Appellants claim has always been for injunctive relief to set up a medical monitoring trust fund, which is completely different from the activities of the Agency for Toxic Substances and Disease

The government appears to be accusing Giovanni Appellants of deviously trying to trick the court as to what form of relief they seek. (Joint Resp. Br., at 28-30) ("Before this Court, they claim to seek only 'the costs of setting up a medical monitoring trust fund.' Their pleadings tell a different story.") (Joint Resp. Br., at 28). In support of this point, the government extracts from disparate places in the Complaint factual allegations that describe the contamination at the site and the ongoing cleanup, along with damage that the contamination has caused and continues to cause. (Joint Resp. Br., at 28-30). And then the government simply concludes that based on those extracts, the district was correct in concluding that the Appellants' claim for relief challenged ongoing response actions at the facilities. (Joint Resp., at 30).

Not only has the government failed to make any logical connection between its selected excerpts from the Complaint and its conclusion that the Appellants are secretly seeking something other than they pled, but the selected excerpts are entirely consistent with all the Appellants' factual assertions and legal claims

raised before the district court and in this appeal. The Appellants do not dispute that both contamination and cleanup are ongoing, nor that the EPA oversight has been ineffective. The requested relief is engendered by those facts***, but those facts don't change the nature of the requested relief*** – a state law remedy under Pennsylvania's Hazardous Sites Cleanup Act, 35 P.S. § 6020.101 et seq., for declaratory and injunctive relief in the form of medical monitoring and a health effects study. As explained in the opening brief, the relief sought by the Giovanni Appellants acts as a remedy for past exposure for individuals and is not recoverable as a response cost, which is critically different from the monitoring and health studies that are conducted to prevent or minimize public contact with hazardous substances (and that are included under § 9601(23) and (24)). Appellants' claim for relief is also significantly different from the activities that the Agency for Toxic Substances and Disease Registry is tasked with conducting, as explained in the case of Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469 (9th Cir. 1995), which as discussed below, firmly supports the Giovanni Appellants' argument.

3. **The Hanford Downwinders case relied on by the government clearly supports the Giovanni Appellants.**

The government argues that the Appellants "do not seek *private* medical monitoring," (Joint Resp. Br. at 32), but it never actually analyzes Appellants'

claim other than labeling it. The government appears to argue that the claim brought by the Giovanni Appellants is a claim for "public" health monitoring rather than a private medical monitoring claim simply because the U.S. Navy is the defendant. But that does ***not*** make this a "public" medical monitoring claim, because nowhere in any of the pleadings or moving papers have the Appellants said that they are bringing the type of claim that was the subject of Hanford Downwinders – i.e., an action seeking injunctive relief requiring the Agency for Toxic Substances and Disease Registry (ATSDR) to fulfill its undisputed duties under a CERCLA plan. 71 F.3d 1469, 1471-73 (9th Cir. 1995). The Hanford Downwinders case actually explains very clearly why the relief sought by the Giovanni Appellants is different from what the ATSDR is supposed to be doing, and in fact, the Ninth Circuit in Hanford Downwinders demonstrated this difference by distinguishing another case in which the U.S. Navy was the defendant, Price v. United States Navy, 39 F.3d 1011 (9th Cir. 1994), which the Giovanni Appellants compared their claim to in their opening brief. There is nothing in the Hanford Downwinders case that suggests that a private medical monitoring claim like the one brought by the Giovanni Appellants transforms into a challenge to an ATSDR activity simply because the Navy is a defendant.

This distinction is set out by district court in Boggs v. Divested Atomic Corp., No. C-2-90-840, 1997 WL 33377790 (S.D. Ohio Mar. 24, 1997), in which

the contaminated property was owned by the U.S. Department of Energy. The Boggs court explained how the Ninth Circuit in Hanford Downwinders was dealing with a different kind of claim than a private medical monitoring claim like the one brought by the Giovanni Appellants and how that claim was not a "challenge" to a plan:

> The Defendants assert that by requesting a medical monitoring fund, the Plaintiffs are seeking to have this Court review a challenge to a removal or remedial action selected by the Agency for Toxic Substances and Disease Registry ("ATSDR"), an agency within the Public Health Service, charged with the responsibility of conducting health assessments of persons exposed to toxic substances. See 42 U.S.C. § 9604(l). In Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469 (9th Cir.1995), the Ninth Circuit explained the role of the ATSDR:
>
> Congress created the ATSDR in 1980 as part of CERCLA, and significantly expanded the ATSDR's role as part of the 1986 Superfund Amendments ("SARA"). Congress gave the Agency the responsibility to "effectuate and implement [CERCLA's] health related authorities." 42 U.S.C. S 9604(i)(1). Among those authorities is a requirement that the ATSDR complete a "health assessment" within one year of an EPA proposal to list a site on the NPL. See 42 U.S.C. § 9604 (i)(6)(A). The purpose of the health assessment is to help determine "whether actions ... should be taken to reduce human exposure to hazardous substances from a facility and whether additional information on human exposure and associated health risks is needed and should be acquired by conducting epidemiological studies ..., establishing a health surveillance program ..., or through other means." 42 U.S.C. § 9604(i)(6)(G). Only if the ATSDR Administrator determines that "there is a significant increased risk of adverse health effects in humans from exposure to hazardous substances based on the results of a health assessment" must the ATSDR initiate a health surveillance program. 42 U.S.C. § 9604(i)(9). Once initiated, the

program must include both periodic medical testing to screen the exposed population for disease and a mechanism to refer for treatment anyone who needs medical attention. 42 U.S.C. § 9604(i)(9)(A), (B).

Id. at 1474–75. The ATSDR has conducted a health assessment of the vicinity surrounding the Plant, and the Defendants argue that the imposition of a medical monitoring fund will constitute a review by this Court of a challenge to that assessment. This Court does not agree.

Herein, the Plaintiffs seek, as a remedy, an order requiring the Defendants to pay a sum of money to fund a program of diagnosis and treatment for themselves and members of the class. Awarding that remedy will not in any manner require this Court to interfere with the ongoing activities of the ATSDR. […] In Durfey v. E.I. DuPont De Nemours Co., 59 F.3d 121 (9th Cir.1995), the plaintiffs sued the operators of the Hanford nuclear weapons facility, requesting the imposition of a medical monitoring fund. The District Court, relying upon § 113(h), dismissed the suit, reasoning that such a remedy was a challenge to the ongoing health related activities being conducted by the ATSDR. The Ninth Circuit reversed, concluding that privately funded medical monitoring, which the plaintiffs had sought with their lawsuit, was not a response cost under CERCLA and that, therefore, § 113(h) did not deprive the District Court of jurisdiction. Id. at 124–25. The Ninth Circuit also concluded that the request for a medical monitoring fund was not a challenge to any action the ATSDR might take, despite the fact that the goal of such a fund was related to the goal of the clean up of the Hanford site. Id. at 125–26.

This Court finds Durfey to be persuasive and will follow that decision. ***Indeed, to conclude otherwise would effectively prevent plaintiffs from obtaining a medical monitoring fund in any litigation arising out of a toxic waste site which is on the national priorities list, since the ATSDR is obligated to perform a health assessment for all such sites.***

Accordingly, the Court concludes that ***Plaintiffs' request for a medical monitoring fund is not a challenge to the remedial activities of the ATSDR and that, therefore, § 113(h) does not prevent this Court from awarding that requested remedy,*** if it is otherwise appropriate. Moreover,

> the legislative history of § 113(h) supports this conclusion. The purpose of that statutory provision was to clarify that "there is no right of review of the ... selection and implementation of the response actions until after the response action (sic) have been completed." H. Rep. 99–253(l) at 81, reprinted in, 1986 U.S.C.C.A.N. 2835, 2863. By determining whether Plaintiffs are entitled to a medical monitoring fund, as a remedy, this Court will not be conducting any type of pre-implementation review of any remedial action selected by the ATSDR. Therefore, the Court concludes, as a matter of law, that the Plaintiffs' request for a medical monitoring fund is not a challenge to the ATSDR health assessment.

Id. at *5–6.(emphasis added).

The government never addresses this distinction; it simply run its entire analysis through the wrong gateway with the unsupported conclusion that the Appellants' claim is "public" and therefore the Hanford Downwinders case applies and should be followed. The Giovanni Appellants agree that the Hanford Downwinders case is persuasive and should be followed; it compels the conclusion that the Appellants' claim is not a challenge under § 9613(h), and it should not have been dismissed.

4. The Giovanni Appellants rely on much more than "three cases" to demonstrate why the remedy that they seek is not a challenge to the plan, and they have not ignored or misconstrued the substantial body of case law that supports their argument.

While attempting to distinguish the Appellants' claim from the significant number of cases that Appellants set forth in their opening brief that found claims were not challenges under § 9613(h), the government makes a blatantly false statement:

> "Plaintiffs seek injunctive relief under the Act for medical monitoring and a health effects study, ***which (in their view) would improve upon the ongoing CERCLA cleanup*** that Giovanni characterizes as 'a decades-long' failure."

(Joint Resp. Br., at 37).

Relief in the form of medical monitoring to remedy past effects of human exposure to contaminated water *does not* improve cleanup of the property. The government continues to fail to explain how it is that the Appellants' claim has anything to do with cleanup of property, preferring instead to just say that it does.

Indeed, the government goes to such lengths to create the appearance of "interference" with the cleanup that it inserts five pages of factual allegations, ***none*** of which cite the record in this case, in order to create the impression that the government is doing so much that virtually any lawsuit against it would "challenge" the "cleanup." Government's brief at 9-13. None of this can be considered on a motion to dismiss, and, in any event, only demonstrates why the trial court erred by dismissing this case without a fact-intensive determination of the impact this lawsuit would actually have on existing cleanup plans.

As set forth in the opening brief, a suit is not a challenge under § 9613(h) if granting the relief requested would not affect the selection of remedial action or the

ongoing cleanup efforts. The Giovanni family's suit would not affect the cleanup action; it would simply impose the costs of setting up a medical monitoring trust fund on the sole defendant in this case. Therefore, it is not a challenge to an EPA-mandated plan, and § 9613(h) is not a jurisdictional bar. That conclusion is consistent with the law of all the Federal Circuits to have addressed the interpretation of "challenge" under § 9613(h).[3]

5. The District Court's Error in Interpreting 9613(h) was its sole grounds for finding a lack of Derivative Jurisdiction

The district court only ruled that the state court lacked jurisdiction because it concluded that Section 9613(h) blocked state court actions as well:

> Congress would not have barred challenges to removal or remedial actions in federal court only to allow unfettered litigation in state courts. JA 17. See also JA 20.

[3] See Clinton Cty. Comm'rs v. U.S. E.P.A., 116 F.3d 1018, 1023 (3d Cir. 1997); Boarhead Corp. v. Erickson, 923 F.2d 1011, 1019 (3d Cir. 1991); El Paso Nat. Gas Co. v. United States, 750 F.3d 863, 880 (D.C. Cir. 2014); ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Montana, 213 F.3d 1108, 1115 (9th Cir. 2000); Cannon v. Gates, 538 F.3d 1328, 1335 (10th Cir. 2008); Broward Gardens Tenants Ass'n v. EPA, 311 F.3d 1066, 1072 (11th Cir.2002); Costner v. URS Consultants, Inc., 153 F.3d 667 (8th Cir. 1998); McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 330 (9th Cir. 1995); Beck v. Atlantic Richfield Co., 62 F.3d 1240 (9th Cir. 1995); Durfey v. E.I. DuPont de Nemours Co., 59 F.3d 121 (9th Cir. 1995); United States v. State of Colo., 990 F.2d 1565, 1576 (10th Cir. 1993). *See also* Atlantic Richfield Company v. Montana Second Judicial District Court, __P3d___,2017 WL 6629410 (Supreme Court of Montana)(following the 9th Circuit's approach to defining "challenge" to a removal or remedial action).

Consequently, by challenging the dismissal under 9613(h) the Giovanni Appellants effectively challenged the dismissal for lack of derivative jurisdiction. No argument has been waived or "abandoned."

6. The government has waived sovereign immunity.

The Giovanni Appellants agree with the government on the general principles of how a waiver of sovereign immunity works. But the government's argument that the RCRA waiver provision bars the Appellants' claims is inaccurate. The Giovanni Appellants alleged in their Complaint that: "Defendant has waived its sovereign immunity pursuant to Section 6001(a) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6961(a)," (Compl. ¶ 6). From that allegation, the government references an incomplete and inapposite portion of the RCRA waiver provision and then claims that "Plaintiffs have never explained how this RCRA provision could amount to an unequivocal waiver of sovereign immunity applicable here. . . . Plaintiffs point to no case holding that RCRA could provide a waiver for the claims they assert." (Gov't Br., at 45).

First of all, the relevant portion of the RCRA provision relied on in the Complaint (and omitted from the government's brief) *does* set forth an unequivocal waiver of sovereign immunity:

(a) In general

> ***Each department, agency, and instrumentality of the executive*** *. . .* ***branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any . . . provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.*** The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. ***The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief,*** administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). *. . .* ***Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.*** *. . .*

42 U.S.C. § 6961(a) (emphasis added).

And second, the Appellants, in response to the government's motion to dismiss before the district court, *did* explain how this RCRA provision could amount to an unequivocal waiver of sovereign immunity applicable here, and they *did* point to case law holding that RCRA provides a waiver for the claims they

assert.[4] In Charter Int'l Oil Co. v. United States, 925 F. Supp. 104, 108 (D.R.I. 1996), a case in which an oil company sought relief under Rhode Island's Hazardous Waste Management Act for the cost of cleaning up a contaminated piece of property previously owned by the government, the court held that "the drafters of 42 U.S.C. § 6961(a) explicitly intended to waive sovereign immunity for past actions of the federal government that violate state hazardous and solid waste laws." Likewise, in Crowley Marine Services, Inc. v. Fednav, Ltd., 915 F. Supp. 218, 222-23 (E.D. Wash. 1995), the court held that RCRA waived sovereign immunity for liability for private cost recovery under Washington's Hazardous Waste Management Act. And in California ex rel. Ingenito v. U.S. Army, 91 F. Supp. 3d 1185, 1188 (E.D. Cal. 2015), the court held that "Congress waived sovereign immunity for *any* state substantive and procedural requirements relating to the disposal or management of hazardous waste," including the claims brought in that case under California's Hazardous Waste Control Law. (emphasis in original). See also United States v. Manning, 527 F.3d 828, 832 (9th Cir. 2008) (Congress amended the RCRA federal facilities waiver "to make it 'as clear as humanly possible' that Congress was waiving federal sovereign immunity and

[4] The only reason that Appellants did not address sovereign immunity in their opening brief was because the district court made no ruling on sovereign immunity.

making federal facilities subject to state laws.") (citing 138 Cong. Rec. H9135–02 (daily ed. Sept. 23, 1992) (statement of Rep. Dingell).

In this case, the record shows that the Giovanni plaintiffs are seeking relief under Pennsylvania's Hazardous Sites Cleanup Act, 35 P.S. § 6020.101 et seq., for declaratory and injunctive relief, and as explained in Appellants' opening brief, Pennsylvania adopted a medical monitoring claim as a form of response cost under HSCA. See Redland Soccer Club, Inc. v. Dept. of Army and Dept. of Defense, 696 A.2d 137 (Pa. 1997). Indeed, HSCA specifically includes the "Federal Government" within the definition of "person" who can be sued under HSCA. 35 P.S. § 6020.103. Therefore, Pennsylvania's HSCA falls squarely within the RCRA federal facilities provision and that provision unequivocally waives sovereign immunity for the Appellants' claims.

Conclusion

The Government recognizes that the concerns raised by appellants are understandable and serious. There is no legal reason why they should not be heard on their merits. The decision of the lower court should be reversed and remanded for further proceedings.

Respectfully submitted,

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COMBINED CERTIFICATION

BAR MEMBERSHIP

Pursuant to Third Circuit L.A.R. 28.3(d), I, Mark R. Cuker, certify that I am a member of the Bar of this Court, having been admitted in 1980.

WORD COUNT AND TYPEFACE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief complies with the type-volume limitation of Rule 32(a)(7(B) because it contains **5,004** words, excluding the parts of the Brief exempted by Rule 32(a)(7)(B)(iii).

2. This Brief complies with the typeface and type-style requirements of Rule 32(a)(5)-(6) because it has been prepared in a proportionately-spaced typeface using Microsoft Word in 14-point Time New Roman font.

IDENTICAL COMPLIANCE OF BRIEF AND VIRUS CHECK

Pursuant to Third Circuit L.A.R. 31.1(c), I certify that the foregoing E-Brief and the hard copies of the Brief have identical text. I also certify that a virus detection program – Symantec Norton Anti-Virus (2008 version) – was run on the file and that no virus was detected.

Dated: February 16, 2018 By: /s/ *Mark R. Cuker*
Mark R. Cuker
Counsel for Plaintiffs-Appellants

CERTIFICATION OF SERVICE

I hereby certify that on February 16, 2918, I electronically filed the foregoing Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that seven (7) paper copies of the foregoing Brief of Appellants shall be filed by hand delivery to the Office of the Clerk, United States Court of Appeals for the Third Circuit, within five days of the date of electronic filing of the Brief.

Dated: February 16, 2018

By: /s/ *Mark R. Cuker*
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