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Case No. 69568-1

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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AUBURN VALLEY INDUSTRIAL CAPITAL, L.L.C.,  
a Washington limited liability company,  
Plaintiff/Respondent,

v.

ROSS B. HANSEN, a single person, and NORTHWEST TERRITORIAL MINT, L.L.C., a  
Washington limited liability company,

Defendants/Appellants.

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**REPLY BRIEF OF DEFENDANTS/APPELLANTS**

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## ARGUMENT

While this case presents novel issues of first impression, it can be resolved by answering a basic question: Whether a trial court can extend the reach of a statute beyond its plain language.

The answer is no. Accordingly, NW Mint respectfully requests that the Court reverse the erroneous trial court decisions regarding the Model Toxics Control Act (“MTCA”), Chapter 70.105D RCW, the lease between the parties (“Lease”), and attorneys’ fees and costs.

**A. NW Mint specifically identified the findings of fact it contends the trial court improperly made.**

Plaintiff/Respondent Auburn Valley Industrial Capital, L.L.C. (“Auburn”) contends that Defendants/Appellants Ross Hansen and Northwest Territorial Mint, L.L.C. (collectively, “NW Mint”) failed to comply with RAP 10.3(g), which requires a separate assignment of error for each challenged finding. “The purpose of the rule is to add order and expedite appellate procedure by eliminating the laborious task of searching through the record for such matters as findings claimed to have been made in error.”<sup>1</sup> NW Mint specifically identified the findings and conclusions it chal-

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<sup>1</sup> *Wolf v. Boeing Co.*, 61 Wn. App. 316, 323 n.5, 810 P.2d 943 (1991) (citing *In re Marriage of Stern*, 57 Wn. App. 707, 710, 789 P.2d 807, review denied, 115 Wn.2d 1013 (1990)).

lenged, but did not set forth verbatim findings and conclusions in its opening brief.<sup>2</sup> NW Mint has cured this defect in its Reply Brief (see Appendix A), thus eliminating any potential inconvenience to Auburn or this Court.<sup>3</sup>

Auburn offers “no evidence that suggesting that [it] has been prejudiced in any way by appellant's error.”<sup>4</sup> NW Mint made explicitly clear in its opening brief why it challenged the trial court’s judgment for Auburn under MTCA and the Lease.<sup>5</sup> “RAP 1.2(a) permits liberal interpretation of the rules to promote justice and facilitate a decision on the merits.”<sup>6</sup> Since NW Mint made the nature of its challenge to the trial court’s judgment clear, the violation was minor, and did not prejudice Auburn, NW

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<sup>2</sup> See page 4 of NW Mint’s Opening Brief (“NW Op. Br.”), where it challenged Findings of Fact Nos. 14, 18, 90, 93-112, 123-129 and 132-136, and page 3, where it challenged Conclusions of Law Nos. 1-13, 15-19 and 21-22.

<sup>3</sup> *Wolf*, 61 Wn. App. at 323, n.5.

<sup>4</sup> *Stern*, 57 Wn. App. at 710.

<sup>5</sup> See *Smith v. Employment Sec. Dep’t*, 155 Wn. App. 24, 33-34, 226 P.3d 263 (2010) (despite appellant’s failure to strictly comply with RAP 10.3(g), court considered appeal because the appellant discussed its contentions with specific findings of fact in the argument portion of the brief); *Professionals 100 v. Prestige Realty, Inc.*, 80 Wn. App. 833, 841, 911 P.2d 1358 (1996) (even though appellant failed to assign error to specific findings set out verbatim in the brief, where it was clear which findings and conclusions were being challenged, the court would consider them).

<sup>6</sup> *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. 204, 222, 254 P.3d 862, vacated in part, 172 Wn.2d 1006, 259 P.3d 1108 (2011).

Mint asks the Court to waive its technical violation of RAP 10.3.<sup>7</sup>

**B. MTCA Does Not Apply. Even if it Did, Auburn Could Not Establish a MTCA Claim.**

The trial court's Findings of Fact # 93-112 and 123-128 and its Conclusions of Law # 1-13, relating to MTCA, are all in error and must be reversed.

**1. The trial court erred by refusing to give any weight to Ecology's determinations regarding MTCA.**

Washington courts give "great weight" to an agency's interpretation of the statutes it administers.<sup>8</sup> Additionally, "substantial judicial deference to agency views [is] appropriate when an agency determination is based on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise."<sup>9</sup> Reviewing courts give great deference to the agency because "the agency has expertise and insight gained from administering the regulation that the review-

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<sup>7</sup> See *Union Elevator & Warehouse Co. v. State*, 144 Wn. App. 593, 601, 183 P.3d 1097 (2008), *rev'd. on other grounds*, 171 Wn.2d 54, 248 P.3d 83 (2011); *Wolf*, 61 Wn. App. at 323 n.5.

<sup>8</sup> *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 202, 286 P.3d 417 (2012) (Department's interpretation of statutes for which it is responsible given "great weight."); *DaVita, Inc. v. Dep't of Health*, 137 Wn. App. 174, 181, 151 P.3d 1095 (2007) (same).

<sup>9</sup> *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010); *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997); *Dep't of Ecology v. Public Utility Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 849 P.2d 646 (1993), *aff'd*, 511 U.S. 700, 114 S. Ct. 1900 (1994); *Schuh v. State*, 100 Wn.2d 180, 183-184, 667 P.2d 64 (1983); *English Bay Enters. v. Island Cty.*, 89 Wn.2d 16, 21, 568 P.2d 783 (1977).

ing court does not possess.”<sup>10</sup>

Auburn argues that MTCA is not ambiguous, so the Court should ignore the responsible agency’s interpretation of it. Brief of Respondent (“Aub. Br.”) at 31. Yet Auburn rests its entire case on erroneous interpretations of MTCA terms such as “environment,” “dust,” “threatened release,” and “soil.” *See generally* NW Op. Br. at 19-36.

Auburn’s interpretations are contrary to settled MTCA precedent, plain language, and accepted scientific terminology and should be rejected. *See* NW Op. Br. at 16-34. If, however, the Court does not summarily reject them, then the terms are necessarily ambiguous. In that case, according to the authority cited by Auburn, Ecology’s interpretations are due deference because “deference is accorded an agency’s interpretation” where, as here, “(1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency’s special expertise.”<sup>11</sup>

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<sup>10</sup> *Overlake*, 170 Wn.2d at 56. *Accord Freeman v. Dep’t of Soc. & Health Servs.*, 173 Wn. App. 729, 746, 295 P.3d 294 (2013); *Dep’t of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 754, 271 P. 3d 331 (2012).

<sup>11</sup> *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2000) (citations omitted) (cited in Aub. Br. at 32, n.40). The importance of deferring to Ecology’s clear and definitive determination that MTCA does not apply is highlighted by Auburn’s attempted sleight of hand with regulatory definitions. Representative circuitous arguments include Auburn’s:

Since Ecology is the agency responsible for the administration of MTCA, the trial court should have given great weight and substantial deference to Ecology's determination that MTCA did not apply to the Premises. Further, Ecology's interpretation delineated its regulatory authority with respect to areas like the Premises. The U.S. Supreme Court recently addressed this very circumstance in *City of Arlington, Texas v. FCC*.<sup>14</sup> Affirming principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>15</sup> and related jurisprudence, the Supreme Court held "that *Chevron* applies equally to statutes designed to curtail the scope of

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1. Conflation of the definitions of "facility" and "environment," in an attempt to read the key clause "into the environment" out of the statute. See Aub. Br. at 23-24, 28 (containing specious argument—based on omission of the clause "into the environment" and misinterpretation of separately defined regulatory terms and CERCLA case law—that interior dust falls under MTCA).

2. Mischaracterization of NW Mint's definitional arguments, asserting that NW Mint attempts to contract the statute's reach by, for example, not extending the term "land surfaces" to rooftops and loading docks. Aub. Br. at 28. NW Mint simply asks the Court to apply the statute as written and as interpreted by Ecology, and to reject Auburn's attempt to extend MTCA's reach beyond its express terms and Ecology's express determination of its statutorily defined jurisdictional bounds. See NW Op. Br. at 27-32.

3. Intentional confusion of the definitions of "remedial action" and associated costs. Auburn asserts that NW Mint references remedial action costs just once, Aub. Br. at 21; NW Mint expressly referenced "remedial action costs" six times. NW Op. Br. at 37-38. An entire section of NW Mint's brief (IV.B.4.e) was also dedicated to why Auburn's work was not and could not be "substantially equivalent" to an Ecology-conducted or supervised cleanup, and therefore why none of Auburn's costs are recoverable MTCA "remedial action costs." *Id.*

Auburn's attempts to mislead the Court demonstrate the precise reasons why courts defer to agency interpretations, not those of interested private parties such as Auburn.

<sup>14</sup> 133 S. Ct. 1863 (2013).

<sup>15</sup> 467 U.S. 837, 104 S.Ct. 2778 (1984).

agency discretion.”<sup>16</sup>

The trial court erred by refusing to give any weight or deference to Ecology’s determination and by failing to explain why it disregarded the agency’s interpretation of the statute Ecology is solely entrusted to administer.<sup>17</sup>

Ecology established the Voluntary Cleanup Program (“VCP”) under WAC Chapter 173-340. 8/14, RP 13. The main reason Ecology rejects a site from the VCP is if it determines that the environmental contamination doesn’t meet MTCA’s threshold requirements. 08/13, RP 14.

Russell Olsen (“Olsen”) was the supervisor of Ecology’s Toxics Clean-up Program VCP Unit for the Northwest Region. 8/13, RP 3-7. In that capacity, Olsen was responsible for administering the Program in the Northwest region of the state (which includes King County), as well as

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<sup>16</sup> *Arlington*, 133 S. Ct. 1863, Slip Op. at 12 (citing with approval decision to defer to EPA’s interpretation of statute to “limit . . . its own regulatory authority”) (citations omitted); *see also id.* at 10 (citing with approval decision to defer to federal trading agency’s interpretation of “statute it is entrusted to administer,” and “chid[ing] the Court of Appeals for declining to afford deference . . .”) (internal quotations and citations omitted).

<sup>17</sup> *Tiger Oil Corp.*, 166 Wn. App. at 754 (Courts must give “substantial weight to the agency’s interpretation of the statutes it administers” and accord “great deference” to Ecology’s interpretation of its own regulations); *Clark County v. Rosemere Neighborhood Ass’n*, 170 Wn. App. 859, 871, 290 P.3d 142 (2012) (same); *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 178, 256 P.3d 1196 (2011) (“Ecology disagrees with Petitioners on this point, and, because Ecology is the primary administrator of chapter 90.44 RCW, the court gives great weight to its interpretation of that chapter.”).

Ecology's release reporting requirements. 8/13, RP 7, 22. Olsen has specific authority for site hazard assessments and makes the final decisions regarding the VCP in the Northwest region. 8/13, RP 6, 9-10.

As discussed in NW Mint's Opening Brief, Olsen—acting in his official capacity as Ecology's VCP Supervisor—considered and rejected two VCP applications for the Premises. Ecology rejected the VCP applications because it determined that (1) the Premises was not a hazardous waste site requiring remediation under MTCA; (2) MTCA did not apply to the Premises; and (3) Ecology did not consider the Premises to be a hazardous waste site that required cleanup under MTCA. *See* Exhs. #260 and 285. Olsen worked with the Washington Attorney General's Office ("AG") in drafting Ecology's responses to the VCP applications. 8/13, RP 208.

Auburn claims that Ecology's determinations regarding the VCP applications "were the product of NW Mint's attempts to manipulate him [Olsen] regarding the Auburn facility" and asserts that Olsen "rejected the applications because he accepted NW Mint's misrepresentations regarding the nature and extent of contamination at the Auburn facility."<sup>18</sup> However, Olsen testified that Ecology was aware of all the data con-

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<sup>18</sup> Aub. Br. at 32, 35 n.45. Auburn's claims are baseless. *See* Exs. #297 and 305; RP 8/31 at 175-211.

tained in Auburn's reports. 8/13, RP 205-07. Both VCP applications included information regarding the metal detected in the building and on the roof. 8/13, RP 199, 203. The information in the second application did not differ in **any** material way from the information in the first application. 08/13, 43-44

Olsen testified that, based on all the data Ecology reviewed regarding the Premises, the agency determined that no release to the environment occurred, MTCA didn't apply to the Premises and the Premises wasn't a candidate for the VCP. 8/13, RP 39-40, 43-44, 48-49, 205-07, 209-210. Ecology did not consider the Premises to be a hazardous waste site that required any cleanup under MTCA. 8/13, RP 49-50.

Auburn also claims that Olsen's testimony regarding the inapplicability of MTCA to the Premises was not a determination by the agency. According to Auburn, Olsen's testimony "was based upon his role as an employee in one program in one division of a regional office of a state agency. This cannot be deemed a determination NW Mint's MTCA liability."<sup>20</sup>

Olsen was not just "an employee;" rather, he was **the** Ecology official responsible for deciding whether a property in King County qualified for the VCP. Before testifying, Olsen discussed the testimony he intended to

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<sup>20</sup> Aub. Br. at 36, n.45.

provide at trial with his superiors at Ecology. 8/13, RP 4, 8-11. Olsen received approval from Ecology to testify regarding the agency's investigations concerning the Premises and the agency's opinions concerning MTCA and its inapplicability to the Premises. *Id.* Olsen also reviewed his testimony with—and received approval to testify from—the Washington AG. 8/13, RP 12.<sup>21</sup>

As specifically regards the Premises, Olsen testified that Ecology had determined the following:

- Ecology has the authority to implement MTCA. Private parties do not have the authority to decide what MTCA means. 8/13, RP 175.
- MTCA only applies to soil, vapor, ground water, surface water and sediment. 8/13, RP 18, 20.
- The metallic dust in the Premises was not soil for the purposes of MTCA. 8/13, RP 152.
- Without an outdoor source of contamination, MTCA method B (the method used by Auburn's expert Schell) does not apply to indoor dust. 8/13, RP 21.
- Ecology has never accepted a building into the VCP based solely on the presence of indoor dust and metal on a roof. 8/13, RP 22, 211.
- Ecology has never treated a building as a hazardous under MTCA

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<sup>21</sup> *Contrast City of Sunnyside v. Fernandez*, 59 Wn.App. 578, 581, 799 P.2d 753 (1990) (not deferring to toxicologist's subjective understanding of code drafters' intent, where such understanding was not vetted or in any way approved by the relevant agency or AG) (cited in Aub. Br. at 32, n.40).

based solely on the presence of indoor dust on a metal roof. 8/13, RP 22.

- Ecology has never ordered remediation of a building or pursued enforcement or cost recovery actions against anyone based solely on the presence of indoor dust and metal on a roof. *Id.*
- If there is contamination in a building and on its roof from processes that occur inside a building, but no exterior source of contamination, Ecology would not regulate that contamination under MTCA. 08/13, RP 35.
- If a release of a hazardous substance occurs, but the release doesn't pose a threat to human health or the environment, that release would not be regulated under MTCA. 8/13, RP 27.<sup>22</sup>
- Ecology rejected the VCP application for the Premises because it determined that MTCA did not apply. 8/13, RP 39-40.

Ecology based these determinations on “factual matters which are complex, technical, and close to the heart of the agency's expertise.”<sup>23</sup> The trial court should have given “great weight” and “substantial deference” to these determinations. At the least, the trial court should have explained why it disregarded Ecology's determinations and entered judgment for Auburn on its MTCA claim.

The trial court did not enter **any** findings of fact concerning Ecology's determinations; indeed, the findings do not even mention Ecology's re-

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<sup>22</sup> NW Mint's experts expressly testified that the conditions in the Premises did not present an actual or potential risk of harm to human health or the environment. 8/14, 32, 76, 115, 8/16, 158-59; 8/20, 31, 59, 62, 65, 238.

<sup>23</sup> *Hillis*, 131 Wn.2d at 396.

jection of the VCP applications or Olsen's testimony at trial. The trial court erred by refusing to give any weight or deference to Ecology's determination and by failing to explain why it disregarded the agency's interpretation of MTCA.<sup>24</sup>

## **2. Auburn Has No MTCA Claim.**

Auburn attempts to distract the Court from its inability to meet its burden of proof by presenting a baseless, alarmist parade of hypothetical horrors, and relying on inapposite and non-precedential opinions. Neither tactic changes the fact that Auburn has no MTCA claim.

### **a. There are no cleanup standards for interior dust.**

The prima facie elements of a MTCA case are set forth in detail in NW Mint's opening brief at pages 22-40. Auburn did not and cannot meet those elements, factually or legally.

Auburn argues that a single molecule of a hazardous substance threatens health and the environment and triggers MTCA liability. This is wrong. See Op. Br. at.23-24. "Under the MTCA, a property owner is legally liable for third party property damage only when contamination ex-

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<sup>24</sup> See *Schuh v. State*, 100 Wn.2d 180, 187, 667 P.2d 64 (1983) ("Here, the court gave no weight to the DOE's expertise in the area, but again substituted its judgment for that of the DOE. Again the court erred.").

ceeds the limits set forth in the MTCA.”<sup>25</sup>

Since no MTCA limits apply to the dust at issue in his case, there is no measure by which to judge an alleged “exceedance.” See NW Op. Br. at 24-27.<sup>26</sup>

Even if MTCA levels existed or could be formulated, Auburn admits it did not attempt to develop such limits until *after* it fully cleaned and remodeled the premises. See NW Op. Br. at 24-25. Auburn makes a variety of blanket assertions regarding the existence of regulatory surface contamination limits and their alleged applicability to indoor building areas. In fact, as Auburn’s own witness noted, there are no surface contamination standards for any of the metals EBI looked at other than lead, RP 8/1 at 67-68, and Auburn mischaracterizes the standard it references.<sup>27</sup> The “lead standard,” a HUD standard, actually applies only to residential or child-occupied properties that have some type of government funding.

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<sup>25</sup> *Puget Sound Energy v. Certain Underwriters at Lloyd’s*, 134 Wn.App. 228, 253-54, 138 P.3d 1068 (Div. 1 2006).

<sup>26</sup> Further, for NW Mint to be legally liable under MTCA for contamination, “it must be proven that the alleged contamination exceeded MTCA levels during those [relevant] periods. If a MTCA exceedance is not proven during the [relevant] periods . . . , there is no compensable property damage under the MTCA . . . .” *Id.* at 254.

<sup>27</sup> See Aub. Br. at 10 (referring to unqualified “EPA” standard). Auburn cites to Ex. 203 and testimony of Elisabeth Black, while Exhibit 203 merely sets out the permitted uses for M-1 light industrial districts, and Ms. Black identified the HUD standard for lead on floors of facilities that are residential or child-occupied. Auburn provides no support for its assertion that these regulatory limits apply to the Premises.

RP 8/6 at 42-43. It has no application here.

**b. Auburn's primary citation is irrelevant and nonbinding.**

Auburn's entire theory of a "threatened release" is based on an unpublished and irrelevant decision, *BCW Assocs., Ltd. v. Occidental Chemical Corp.*<sup>31</sup> For the reasons set forth below and in our opening brief, *BCW* does not apply and the Court should not consider it.<sup>32</sup> In its insistence that *BCW* applies, Auburn utterly ignores the cases most factually and legally analogous to this case: *Rivas v. Safety-Kleen*<sup>33</sup> and *SDC/Pullman*

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<sup>31</sup> No. 86-5947, 1988 WL 102641 (E.D. Pa. 1988). *BCW* is distinguishable and inapplicable. See NW Op. Br. at 30. GR 14.1(b) allows parties to cite unpublished opinions from non-Washington state courts so long as the issuing court allows citation to its unpublished opinions. The party offering the unpublished opinion to this Court must provide authority from the outside jurisdiction; without such proof, this Court will not consider the unpublished case in its analysis. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 723 n.34, 189 P.3d 168 (2008). No Third Circuit or Eastern District of Pennsylvania rule provides that their unpublished decisions may be cited as precedential authority. Auburn's citation to a report from the Federal Judicial Center, Aub. Br. at 39, n.48, is unavailing; the Third Circuit Internal Operating Procedure ("IOP") referenced in that report directly contradicts Auburn's assertion. See IOP 5.7 (providing that the Third Circuit "by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.") (emphasis supplied).

*BCW* was also decided before the 1992 enactment of the Workers' Family Protection Act, 29 U.S.C. 671a—a statute that directly addresses any potential threat from hazardous substances being transported out of industrial areas on worker clothing to homes. As explained in *Rivas v. Safety-Kleen*, 98 Cal. App. 4th 218, 119 Cal. Rptr. 2d 503 (2002) and analogous cases, see NW Op. Br. at 30, hazardous waste laws were not meant to "muscle in on the territory" of the agencies charged with administering that and other laws addressing workplace safety. See Op. Br. at 30-31 (quoting *Rivas*).

<sup>32</sup> See NW Op. Br. at 30.

<sup>33</sup> 98 Cal. App. 4th 218, 119 Cal. Rptr. 2d 503 (2002).

*Partners v. Tolo Inc.*<sup>34</sup> Both dictate that the trial court must be reversed.

*See infra*; NW Op. Br. at 30-34.<sup>35</sup>

- C. **The single piece of data supporting Auburn's MTCA claim—a dust sample weighting .007 ounces—does not constitute the “substantial evidence” necessary to sustain the trial court’s decision.**

Substantial evidence in the record must support findings of facts.<sup>39</sup>

“Substantial evidence” is “defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.”<sup>40</sup>

A single piece of data—a 0.2 gram (0.007 ounce) bulk dust sample (“Sample”) taken from a beam 25 feet above the Premises’ warehouse floor—is all that supports Auburn’s MTCA claim.<sup>41</sup> The Sample was too

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<sup>34</sup> 60 Cal. App. 4th 37, 70 Cal. Rptr. 2d 62 (1997).

<sup>35</sup> Auburn also explicitly misstates the U.S. District Court for the Western District of Washington’s holding regarding the applicability of CERCLA’s “necessary” limitation to MTCA. Aub. Br. at 40, n.50. In fact, the federal district court held that, **under CERCLA and MTCA**, “response costs must be ‘necessary’ . . . .” *Iron Partners v. Maritime Admin.*, No. 08-05217, 2011 WL 4502139, at \*6 (W.D. Wn. Sept. 28, 2011); *see also* NW Op. Br. at 34, n.58. Accordingly, even if Auburn could establish a MTCA claim (it cannot), it could only recover demonstrably necessary costs.

<sup>39</sup> *Wash. State Comm’n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 210, 293 P.3d 413 (2013); *Chevalier v. Woempner*, 172 Wn. App. 467, 474, 290 P.3d 1031 (2012).

<sup>40</sup> *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012). *Accord Douglas v. Visser*, 173 Wn. App. 823, 829, 295 P.3d 800 (2013); *Collings v. City First Mortg. Servs., LLC*, 175 Wn. App. 589, 611, 308 P.3d 692 (2013).

<sup>41</sup> *See* FOF #98. Auburn claims that Schell’s backward-looking risk analysis utilizing a modified MTCA Method B approach, which he based entirely upon this one sample, is “[t]he most compelling evidence of the threat that NW Mint’s contamination at the Auburn facility posed to human health and the environment.” Au. Br., at 24.

small and too unrepresentative of the Premises to constitute substantial evidence.<sup>42</sup> Additionally, there is no evidence that the Sample resulted from NW Mint's operations.

1. The sample was too small.

The Sample's total size was .2153 grams (0.0076 ounces). For testing, the Sample was split into two separate samples, one weighing .1428 grams (0.005 ounces) and the other weighing .0725 grams (0.0026 ounces). 08/08, RP 144 and Exhibit 159.

NW Mint's expert Peter Jewett testified that "typically, when we collect a soil sample, we collect a minimum of 200 grams." 8/14, RP 39. Two hundred grams is the recommended minimum weight of a bulk dust

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On this topic and throughout its brief, Auburn mischaracterizes and misstates NW Mint's experts' testimony. For example, Dr. Mackay testified that Dr. Schell's *post hoc* risk assessment was invalid. RP 8/20 at 211-12. Yet Auburn cherry-picks and mischaracterizes one sentence from pages of testimony where Dr. Mackay disavowed the methodology Dr. Schell employed, to assert an agreement. In fact, the opposite is true—Dr. Mackay established that Schell's analysis was flawed and unverifiable, and all of NW Mint's experts established that no threat to health or the environment was presented by the Premises. See Op. Br. at 24-37.

Further, and contrary to Auburn's misrepresentations, NW Mint's experts established that no actual or threatened release occurred. See NW Op. Br. at 27-31.

<sup>42</sup> As NW Mint's expert Peter Jewett testified, "Auburn made a decision based on a data set. That data set consists of one sample. That one sample may have errors included in it, the sample size may be small, might have had a little particle in there that skewed it, the holding time was in error, the [provenance] of how that is held was not defined." 08/14, RP 99-100. Because there was only one data sample, there was no way to conduct a statistical analysis of the data "under normal data evaluation protocols to determine whether there is or is not an error." 8/14, RP 96. "When you only have one sample, it is impossible to evaluate whether there are or are not data errors." *Id.*, RP 100-101.

sample under EPA Guidance on Environmental Data Verification and Data Validation EPA QA/G-8 and EPA Guidance SW846.<sup>43</sup> *Id.*, RP 39-41. The Sample was 1,000 times smaller than the EPA's recommended minimum weight. *Id.*

Jewett testified that by using a small (0.22 grams) sample, "you are introducing the potential for significant error in your analytical result. You could get one little piece that could completely throw those data off, since there is only one sample, essentially, because he split one sample. You don't have any data to compare against." *Id.*, RP 39. Jewett further testified that because of its extremely small size, the Sample is "not something either under EPA certainly, or MTCA, or Ecology cleanup [that] would be appropriate to make the decisions that were made." *Id.*, RP 41-42.

2. The sample is not representative of the Premises.

Underlying Schell's opinion was his assumption that the Sample represented the conditions throughout the Premises. Schell agreed that his Method B calculations were invalid if the Sample did not reflect the conditions in the Premises. 08/09, RP 62.

Schell admitted that the Sample, by itself, was **not** representative of

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<sup>43</sup> Schell didn't know the EPA's recommended minimum sample size. 8/08, RP 60.

the facility. 08/09, RP 107. Schell testified that he “need[ed] the wipe samples to put it [the Sample] into context.” *Id.* Schell concluded that the Sample was “representative of [the] facility as a whole” because “the wipe sample data corroborated it.” 8/9, RP 63. Schell claimed the wipe samples showed that the “material that was distributed throughout the facility were very consistent in the nature of the concentrations of the metals that were in the dust.” 8/9, RP 34-35.

In October 2012, NW Mint’s expert Elizabeth Black took 15 samples in targeted areas and 10 samples in random areas (selected by a random number generator).<sup>44</sup> 8/6, 51-52. “Targeted sampling is going to give you results for those areas where you most likely expect to find the metals and surface dust.” Random sampling “looks at the rest of the facility” so that you can “get a better sense of what the distribution of these metals and surface dust is.” *Id.* Schell agreed that Black’s wipe samples “probably are” representative of the facility as a whole. 8/9, RP 73.

Schell testified that the “drivers” of the MTCA cleanup were selenium, arsenic, copper and chromium. The following is a comparison of the concentrations (in micrograms per square foot) of these metals (and of calcium) in the Sample and the average concentrations for the remainder

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<sup>44</sup> The results of Black’s wipe sampling are found in Exhibit 219.

of the Premises:

Metal	Beam Concentration	Average of Premises Concentration	Percentage of of Beam Concentration
<b>Selenium</b>	11,000 m/psf	260 m/psf	0.6%
<b>Arsenic</b>	330 m/psf	Below Detectible Limits	0.0%
<b>Chromium</b>	8,500 m/psf	137 m/psf	1.6%
<b>Copper</b>	18,000 m/psf	7,195 m/psf	39.97%
<b>Calcium</b>	230,500 m/psf	6,440 m/psf	2.79%

Contrary to Schell's testimony, the wipe sampling results are completely **inconsistent** with the Sample. The average concentration of copper in the Premises is less than 40% of the concentration found on the beam. The concentrations of the other three metals—selenium, chromium and arsenic—are less than 1.6% of the concentrations in the Sample.<sup>45</sup> The data definitively establish that the Sample was **not** representative of conditions throughout the entire warehouse.<sup>46</sup> Auburn's entire MTCA case hinges on that Sample. On such evidence, no rational, fair-minded person could conclude that the Sample formed a valid basis for Schell's *post hoc* cleanup levels, or that it indicated the need for any

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<sup>45</sup> See 8/20, RP 89-95.

<sup>46</sup> *Id.*, RP 219.

cleanup at all under MTCA.

3. There is no evidence the sample resulted from NW Mint's operations.

Auburn did not attempt to establish the source of the metals detected in the Sample. 8/20, 96, 220-21. The substances detected in the Sample were not attributable to NW Mint's operations. *Id.*, 31-32, 92-96.

The Sample's primary component is calcium, which NW Mint did not use or generate in its operations. *Id.*, RP 95-96. The major sources of calcium at the Premises were the concrete and the gypsum in the drywall. *Id.*, RP 42-43, 95-99. Concrete and wallboard dust were likely deposited on the beam during construction of the Premises. *Id.*; 8/14, RP 206-207; 8/15, RP 93-94, 100-101.

A comparison of the Sample and the wipe sampling results confirms this conclusion. The average concentration of calcium in the Premises is less than 3% of the calcium on the beam. NW Mint cleaned the Premises during the eight years it occupied the Premises, but never cleaned the beams; thus, any construction dust would still have been there when Frost took the Sample in October 2012. 8/15, RP 104. Substantial evidence does not support the trial court's conclusion that "[t]he contamination at the Auburn Property resulted from NW Mint's operations." FOF

#100.

**D. The trial court erroneously determined that NW Mint breached Sections 11 and 13 of the Lease.**

**1. Auburn did not clean the Premises to “effect compliance with any statute, regulation or order.**

Section 11 of the Lease required NW Mint to **comply** with all statutes, regulations, orders and the like (collectively “regulations”) concerning hazardous substances. If—and only if—NW Mint failed to comply with the regulations, Section 11 authorized Auburn to “take such actions and incur such costs and expense **to effect such compliance** as it deems advisable to protect its interest in the Premises (emphasis added).”<sup>47</sup>

Auburn does not claim that NW Mint failed to comply with any regulation other than MTCA.<sup>48</sup> Auburn did not clean the Premises to “effect compliance” with the regulations; rather, its cleanup was purely voluntary. 8/02, RP 173-174. The trial court erred in holding NW Mint liable under Section 11 of the lease. See COL’s Nos. 15-17.<sup>49</sup>

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<sup>47</sup> See FOF Nos. 10-11.

<sup>48</sup> Auburn concedes this. See Aub. Br. at 50.

<sup>49</sup> Auburn incorrectly claims in its brief that NW Mint did not challenge the trial court’s award of damages. See Aub. Br. At 6, 16. NW Mint specifically challenged the remediation costs the trial court awarded under MTCA. See FOF #124-126. The trial court also awarded Auburn \$158,983.16 to repair damages caused during remediation and \$299,947.20 for lost rent. See FOF Nos. 129, 132-136. Since NW Mint was not liable under MTCA or the Lease, it is not liable for these damages.

**2. NW Mint did not have to remove from the Premises every molecule of any “hazardous substance.”**

Ignoring the express language of Section 11, Auburn claims that “NW Mint assumed contractual liability for more than regulatory compliance. NW Mint agreed to avoid **all** releases of hazardous substances.”<sup>50</sup> However, Auburn **permitted** NW Mint to store “hazardous substances”—like silver, copper and nickel—on the Premises and to use those materials in its manufacturing operations.<sup>51</sup> Auburn knew that a release of hazardous substances on the Premise could hypothetically occur.

Auburn’s unspoken argument is that NW Mint had to remove from the Premises every molecule of any “hazardous substance,” regardless of whether it presented an actual risk of harm or legal liability.<sup>52</sup> Rejecting this same argument, the California Court of Appeals held in *SDC/Pullman*

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<sup>50</sup> Aub. Br. at 50 (emphasis in original).

<sup>51</sup> See *Tufco, Inc. v. Pac. Env'tl. Corp.*, 113 P.3d 668, 672 (Alaska 2005) (landlord’s acceptance of a tenant’s use of hazardous materials in its manufacturing operation was an “implicit assertion” that it “would not enforce the hazardous-materials provision of the lease”). The trial court erred by concluding the NW Mint breached § 11 of the Lease by storing, generating or releasing “hazardous substances” such as silver, copper and nickel, on the Premises. See COL Nos. 11-13.

<sup>52</sup> Dr. Walters, who developed EBI’s surface contamination limits, testified the limits were so low that a person could “get more exposure than that if you take a vitamin.” 8/7, 45-49. Walters also testified that he was “not sure that these vitamins are safe” and that, if he could do things over, he would have set the limits at zero “because zero is a reasonable number in this situation.” 8/6, RP 191, 197-98, 210-11; 8/7, RP 70-71. However, even EBI admitted that “it is often unrealistic to expect that you can get it [surface limits] back down to zero” and that such limits are “probably not totally necessary.” 8/1, RP 66-68. NW Mint’s expert Dr. Chris Mackay testified that it would be “physically, chemically and toxicologically impossible [to] set a value to zero.” 8/20, RP 209-10.

*Partners v. Tolo Inc.*<sup>53</sup> that a lessee does not need to extract *de minimis* amounts of hazardous substances from the lessor's property when the lessor faces no actual threat of environmental liability.

Tolo was an aerospace manufacturer that began occupying an industrial property in the late 1960's. SDC/Pullman Partners (SDC) purchased the property in 1985. In 1989, the parties renewed the lease with a provision that required Tolo to pay for the removal of all hazardous substances that violated any environmental law.<sup>54</sup> When the parties renewed the lease, Tolo was engaged—as it had been for about 20 years—in the manufacture of aerospace parts. As the court observed, “[t]here is no way that such parts can be made without using toxic materials; radar antennas and such things, if we may be forgiven for making the point facetiously, are not made of tofu and sprouts.”<sup>55</sup>

The revised lease directed Tolo not to “use, store or permit toxic waste or other hazardous substances or materials on the Premises.” However, recognizing the nature of Tolo’s business, the lease continued by stating that if Tolo “desires to use or store toxic or hazardous substances on the Premises,” it must “comply with all applicable laws, and

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<sup>53</sup> 60 Cal. App. 4th 37, 70 Cal. Rptr. 2d 62 (1997).

<sup>54</sup> *Id.* at 40.

<sup>55</sup> *Id.* at 45.

shall provide evidence of such compliance reasonably acceptable to Lessor.”<sup>56</sup>

After the lease terminated, SDC discovered certain hazardous substances on the property. SDC demanded that Tolo remove every trace of the hazardous substances, even though their concentrations were far below regulatory limits. SDC asserted that the lack of government action didn’t matter and argued that Tolo had to spend whatever was necessary to remove the trace amounts of the hazardous substances.<sup>57</sup>

The trial court rejected SDC’s claim and the California Court of Appeals affirmed that decision. The appellate court determined that an absolutist reading of the lease was unreasonable from the standpoint of actual hazard or toxicity:

The list of hazardous substances found in appendix A to section 302.4 of title 40 of the Code of Federal Regulations contains a number of common materials which are not “toxic” in *de minimis* or infinitesimal concentrations. The list contains zinc and chromium, for example, which one can obtain at health food or vitamin stores, and cadmium, which is contained in stainless steel cutlery. Nickel and silver are also listed, even though no one would ever think that collec-

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<sup>56</sup> *Id.* at 42. If Tolo’s operations caused a release of hazardous substance on the property, the lease required Tolo to “take all necessary and appropriate actions and shall spend all necessary sums to cause the same to be cleaned up and immediately removed from the Premise.” If Tolo defaulted on this obligation, the lease gave SDC the right to clean up the contamination at Tolo’s expense. *Id.* at 43.

<sup>57</sup> *Id.* at 41.

tions of silver coins were “hazardous.”<sup>58</sup>

The court observed that, given the long industrial use of the property, SDC should have expected the release of some hazardous substances:

This is not a residential lease. Tolo's use of the property was already ongoing when SDC bought the property and became a landlord with a tenant already in place. SDC knew that Tolo was an aerospace manufacturer and could not conduct even the cleanest operations without some use of toxic substances. Obviously, in such circumstances, Tolo had to be cut a little slack as far as the containment of those substances was concerned. . . . The “nature of the lessee's use of the property” meant that at least a few molecules on the list of hazardous substances might escape into the environment and on to the ground.<sup>59</sup>

The court said that “the mere presence of *de minimis* amounts of certain substances otherwise toxic in larger quantities does not trigger the clause's cleanup obligation.”<sup>60</sup> The court held that the lease's toxic substance clause was intended to protect SDC from the “realistic threat of actual liability” resulting from Tolo's non-compliance with environ-

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<sup>58</sup> *Id.* at 47. The court also said “[i]t would be ludicrous to hold that, say, a buried bag of silver coins constituted a ‘hazardous substance.’ Obviously, a rule of reason must be used in explicating what is hazardous.” *Id.* In our present case, Auburn agreed that it “didn’t bring the case because people had [silver] coins in their pocket, we brought the case because of the metallic dust in the premises.” 7/30. RP 190-191.

<sup>59</sup> 60 Cal. App. 4<sup>th</sup> at 47 (citations omitted). Our present case also involves an industrial lease. NW Mint's use of the Premises had been ongoing for almost five years before Auburn bought the property. Auburn knew that NW Mint could not conduct its manufacturing operations without storing and using substances like silver, copper and nickel.

<sup>60</sup> *Id.* at 41, 50.

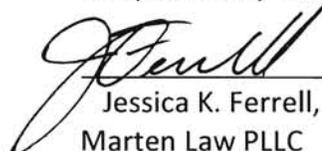
mental laws, not to require Tolo “to spend potentially enormous sums to extract trace and *de minimis* amounts of certain molecules to avoid purely speculative environmental liability.”<sup>61</sup>

Auburn did not face a “realistic threat” of MTCA liability on the Premises; indeed, Ecology specifically determined that the Premises did not need to be cleaned. Auburn voluntarily spent enormous sums to extract trace and *de minimis* amounts of silver, copper and other metals that did not present a risk of harm to human health of the environment. The trial court erred in awarding Auburn recovery for these expenses under MTCA and the Lease, as well as any of Auburn’s attorneys’ fees.

#### CONCLUSION

For the reasons set forth above and in NW Mint’s Opening Brief and Supplemental Brief Regarding Attorneys’ Fees and Costs, the trial court’s rulings on MTCA liability, breach of contract, and attorneys’ fees and costs should be reversed.

Respectfully submitted,

  
\_\_\_\_\_  
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<sup>61</sup> *Id.* at 45

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on November 4, 2013, I caused the Appellants' Reply Brief in the above-captioned matter to be served upon the parties herein as indicated below:

Keith E. Moxon Van Ness Feldman GordonDerr LLP 719 Second Ave, Suite 1150 Seattle, WA 98104	U.S. Mail <input checked="" type="checkbox"/> Hand delivered <input type="checkbox"/> Overnight express <input type="checkbox"/> E-mail <input checked="" type="checkbox"/>
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DATED this 4th day of November, 2013.

  
\_\_\_\_\_  
Jessica K. Ferrell

No. 69568-1

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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AUBURN VALLEY INDUSTRIAL CAPITAL, L.L.C.,  
A Washington Limited Liability Company,

Plaintiff/Respondent,

vs.

ROSS B. HANSEN, a single person, and NORTHWEST TERRITORIAL  
MINT, L.L.C., A Washington Limited Liability Company,

Defendants/Appellants.

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**APPENDIX TO REPLY BRIEF OF DEFENDANTS/APPELLANTS**

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# Tab A

## CHALLENGED FINDINGS OF FACT

NW Mint challenges the following Findings of Fact the trial court entered in its October 15, 2012 Findings of Fact and Conclusions of Law:

### **Finding of Fact No 14:**

Section 11 of the Lease authorizes the Landlord to take action if, after reasonable notice, Tenant fails to comply with legal requirements applicable to “Hazardous Waste.” In such circumstances, Section 11 of the Lease gives the Landlord the right to take actions and incur costs and expenses “as it deems advisable to protect its interest in the premises” and obligates the Tenant to reimburse the Landlord for such costs and expenses:

*After notice to Tenant and a reasonable opportunity for Tenant to effect such, Landlord may, but is not obligated to, enter upon the Premises and take such actions and incur such costs and expenses to effect such compliance as it deems advisable to protect its interest in the Premises; provided, however, that Landlord shall not be obligated to give Tenant notice and an opportunity to effect such compliance if (i) such delay might result in material adverse damage to Landlord or the Property, (ii) Tenant has already had actual knowledge of the situation and a reasonable opportunity to effect such compliance, or (iii) an emergency exists. Whether or not Tenant has actual knowledge of the release of Hazardous Waste on the Premises or Property or any adjacent property as the result of Tenant's use of the Premises, Tenant shall reimburse Landlord for all costs and expenses incurred by Landlord in connection with such compliance activities.*

### **Finding of Fact No 18:**

Section 13 of the Lease applies to the physical condition of Suite 101, and the “broom clean” specification in Section 13 does not modify or supersede the requirements of Section 11 of the Lease regarding hazardous substances:

### **Finding of Fact No 90:**

NW Mint made it difficult for Auburn to investigate the condition of Suite 101 prior to the expiration of the lease.

### **Finding of Fact No 93:**

Laboratory analysis of samples collected by EBI at the end of the Lease in April 2010 showed high levels of hazardous substance metals throughout the facility, including arsenic, lead, chromium, selenium, silver, copper, and zinc.

**Finding of Fact No 94:**

The metals found at high levels in Suite 101 are defined as “hazardous substances” under applicable state and federal law: the Model Toxics Control Act, Ch. 70.105D RCW (“MTCA”) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as Amended, 42 U.S.C. §§ 9601 to 9675 (“CERCLA”).

**Finding of Fact No 95:**

The presence of high levels of hazardous substance metals in Suite 101 was an “unusual” condition for commercial or industrial premises of this type and was not attributable to background levels of these hazardous substance metals.

**Finding of Fact No 96:**

NW Mint’s own experts confirmed high levels of hazardous substance metals at the Auburn Property, using the same surface wipe sampling methods used by Auburn’s consultants.

**Finding of Fact No 97:**

The levels of hazardous substance metals in the facility warranted further investigation by Auburn to determine the extent of contamination and to identify necessary cleanup measures to address the contamination.

**Finding of Fact No 98:**

Based on “bulk dust sample” analyses, Auburn confirmed that: (a) the hazardous substance metal dust/residue from NW Mint’s operations posed a threat or potential threat to human health; (b) there was a threat of future releases to the environment; and (c) cleanup of the facility was necessary for the protection of human health and the environment.

**Finding of Fact No 99:**

Dr. John Schell, an experienced toxicologist, conducted a human health risk assessment in accordance with MTCA procedures, which confirmed that that the hazardous substance metal contamination at the facility exceeded MTCA cleanup levels and required remediation to achieve compliance with these cleanup levels.

**Finding of Fact No 100:**

The contamination at the Auburn Property resulted from NW Mint's operations, which generated significant amounts of hazardous substance metal fumes, dust and residues throughout the facility.

**Finding of Fact No 101:**

Hazardous substance metal fumes, dust and residues were dispersed throughout the facility and were also released to the "environment," as evidenced by high levels of hazardous substance metal dust/residue found outside of the building, both on the roof and on the loading dock area outside of the building.

**Finding of Fact No 102:**

Hazardous substance metal contamination was found in the outlet chamber of an oil/water separator at the facility.

**Finding of Fact No 103:**

The presence of hazardous substance metal contamination inside and outside of the building at the end of the Lease term posed a threat of future releases to the environment if the contamination was not remediated.

**Finding of Fact No 104:**

Sampling confirmed that hazardous substance contamination was not limited to interior areas of the facility.

**Finding of Fact No 105:**

Suite 101 is a “facility” as that term is defined under MTCA.

**Finding of Fact No 106:**

Sampling conducted by EBI confirmed that releases of hazardous substances from the facility into the “environment” occurred during the time of NW Mint’s operations, including evidence that hazardous substance metals in vapor form had been released to the air in the vicinity of the furnace exhaust roof vent and had been deposited on the roof of the facility.

**Finding of Fact No 107:**

The remedial actions undertaken by Auburn to investigate and remediate the metal dust/residue contamination at the former NW Mint facility were appropriate, were generally consistent with MTCA regulations and led to a cleanup that achieved a high level of overall effectiveness.

**Finding of Fact No 108:**

At the end of the Lease in April 2010, the condition of the former NW Mint facility posed a threat or potential threat to human health or the environment. The facility was not safe for occupancy by a future tenant without conditions or limitations, including uses allowed under Auburn’s zoning code, such as residential, daycare, preschools, nursery schools, health and fitness clubs, restaurants, and other uses.

**Finding of Fact No 109:**

NW Mint’s own expert, Elisabeth Black (a Certified Industrial Hygienist), recommended a thorough cleaning of the facility by an experienced abatement firm with training in hazardous waste operations to address the potential health hazard posed by the presence of the hazardous substance metals.

**Finding of Fact No 110:**

Expert witness testimony confirmed that thorough cleaning of the facility by an experienced abatement firm with training in hazardous waste operations was appropriate and necessary to restore the facility to a condition suitable for marketing and leasing of the facility for unrestricted and unconditional use as allowed under Auburn’s zoning code.

**Finding of Fact No 111:**

NW Mint did not cooperate with Auburn’s investigation and cleanup of the contamination in 2010 and 2011.

**Finding of Fact No 112:**

The contamination of the facility necessitated cleaning by a professional remediation contractor. Clean Harbors was engaged by Auburn to perform the environmental cleanup of Suite 101.

**Finding of Fact No 123:**

Auburn incurred costs to investigate and remediate releases and threatened releases of hazardous substances into the environment at the Auburn Property.

**Finding of Fact No 124:**

Auburns costs are “remedial action costs” as defined under MTCA.

**Finding of Fact No 125:**

Auburn’s remedial action costs in the amount of \$391,573.23, include the following:

Clean Harbors	Cleanup and remediation services	\$228,307.30
EBI Consulting	Environmental Consulting	\$134,777.08
Stephen Frost, CIH	Environmental Consulting	\$10,470.05
	Miscellaneous expenses	\$18,018.80
	TOTAL	\$391,573.23

**Finding of Fact No 126:**

Auburn incurred remedial action costs to identify, eliminate and minimize the threat or potential threat to human health or the environment posed by hazardous substances at the Auburn Property.

**Finding of Fact No 127:**

Auburn's actions resulted in an effective removal of the hazardous substances that posed a threat or potential threat to human health or the environment.

**Finding of Fact No 128:**

Although given the opportunity, NW Mint did not undertake any meaningful or constructive actions to eliminate or reduce the threat or potential threat to human health or the environment posed by hazardous substances at the former NW Mint site. Moreover, NW Mint has not yet contributed to any of the remediation costs.

**Finding of Fact No 129:**

Because the premises were not suitable for leasing at the end of the NW Mint lease term, Auburn was unable to lease Suite 101, and lost rent.

**Finding of Fact No 132:**

Auburn requested lost rent from May 1, 2010 through October 2011, 18 months at \$21,424.80 for a total of \$385,646.40. The court finds that there was unnecessary delay in completing the clean-up due to the fact that Clean Harbors had to repeatedly return to the premises for cleaning. Auburn chose Clean Harbors, not NW Mint. In order to discount for that delay, the court will award lost rent for 14 months, not 18 months. Therefore, lost rent for 14 months at \$21,424.80 per month is equal to \$299,947.20

**Finding of Fact No 133:**

NW Mint left the leased premises damaged at the conclusion of the Lease term in breach of Section 13 of the Lease.

**Finding of Fact No 134:**

Specifically, in an inspection after NW Mint moved out, a sink had been pulled out, the plumbing was not capped and there was damage to some doors. Auburn incurred \$9,292.17 for repairs due to this damage.

**Finding of Fact No 135:**

Additionally, damage was caused by the remediation. In order to restore the Premises to a condition similar to when NW Mint began leasing the property, Auburn was billed \$158,983.16 by Kelly Thomas to repair the Premises. The repairs included replacing ceiling tiles, insulation, drywall, light fixtures, and electrical work. (See Exhibit #155).

**Finding of Fact No 136:**

Auburn's costs to repair property damage to Suite 101 caused by NW Mint was  $\$158,938.16 + \$9,292.17 = \$168,230.33$ .

**CONCLUSIONS OF LAW**

NW Mint challenges the following Conclusions of Law the trial court entered in its October 15, 2012 Findings of Fact and Conclusions of Law:

**Conclusion of Law No. 1:**

Pursuant to RCW 70.105D.040 & 70.105D.080, both Defendant Ross Hansen and Defendant Northwest Territorial Mint, LLC (collectively "NW Mint") are strictly liable, jointly and severally, for all remedial action costs incurred by Auburn at the Auburn Property.

**Conclusion of Law No. 2:**

Defendant Ross Hansen and Defendant Northwest Territorial Mint, LLC were both “operators” of a “facility” as those terms are defined under MTCA at the time of disposal or release of the hazardous substances at the Auburn Property.

**Conclusion of Law No. 3:**

A release or threatened release of hazardous substances into the environment occurred at the Auburn Property as a result of NW Mint’s operations.

**Conclusion of Law No. 4:**

The metal dust/residue, including arsenic, chromium, lead, selenium, silver, copper, nickel and zinc, at the Auburn Property are hazardous substances as defined by MTCA/CERLCA.

**Conclusion of Law No. 5:**

The release or threatened release of hazardous substances at the Auburn Property posed a threat to human health or the environment.

**Conclusion of Law No. 6:**

The remediation actions undertaken by Auburn at the Auburn Property were the substantial equivalent of a Washington State Department of Ecology (“Department”) conducted or supervised remedial action based upon the overall effectiveness of the cleanup. *Taliesen Corp. v. Razore Land Co.*, 135 Wn.App. 106, 144 P.3d 1185 (2006).

**Conclusion of Law No. 7:**

Auburn incurred “remedial action” costs, as defined under MTCA, RCW 70.105D.020(21), including costs to investigate the release or threatened release of hazardous substances to the environment at the Auburn Property.

**Conclusion of Law No. 8:**

Pursuant to RCW 70.105D.080, Auburn is awarded its remedial action costs in the amount of \$391,573.21.

**Conclusion of Law No. 9:**

Auburn is a “prevailing party” under RCW 70.105D.080 and is entitled to an award of its reasonable attorneys’ fees and costs incurred in pursuing its MTCA liability claims against Defendant Ross Hansen and Defendant Northwest Territorial Mint, LLC, in an amount to be determined upon application for an award of attorneys’ fees to this Court. *Dash Point Village Associates v. Exxon Corp.*, 86 Wn.App. 596, 937 P.2d 1148 (1997); *Taliesen Corp. v. Razore Land Co.*, 135 Wn.App. 106, 144 P.3d 1185 (2006).

**Conclusion of Law No. 10:**

Pursuant RCW 70.105D.040, Auburn is not liable for any remedial action costs incurred in response to the contamination that resulted from NW Mint’s operations in Suite 101 of the Property for the reason that Auburn had undertaken, at the time of acquisition of the Auburn Property in 2007, all appropriate inquiry into the previous ownership and uses of the property and had no knowledge or reason to know that any hazardous substances had been released or disposed of on, in, or at the Property (including Suite 101) in a manner that would result in or contribute to the need for remedial action

**Conclusion of Law No. 11:**

NW Mint stored, generated, disposed, or otherwise released hazardous materials on the premises, in breach of Section 11 the Lease.

**Conclusion of Law No. 12:**

The hazardous waste stored and released at the Auburn Property, including arsenic, chromium, lead, selenium, silver, copper, nickel and zinc, are hazardous substances as defined by MTCA/CERLCA and are therefore subject to Section 11 of the Lease.

**Conclusion of Law No. 13:**

NW Mint failed to notify Auburn of the release of hazardous waste at the Auburn Property in breach of Section 11 of the Lease.

**Conclusion of Law No. 15:**

Pursuant to Section 11 of the Lease, Defendants are liable, jointly and severally, for all costs and expenses incurred by Auburn in undertaking the remedial action that Auburn deemed advisable to protect its interest in the Auburn Property

**Conclusion of Law No. 16:**

Pursuant to Section 11 of the Lease, Defendants are liable, jointly and severally, for all cleanup costs (including without limitation, consultant fees, attorneys' fees and disbursements) resulting from Defendants' acts or omissions that resulted in the release of hazardous waste at the Auburn Property.

**Conclusion of Law No. 17:**

Pursuant to Section 11 of the Lease, Auburn is awarded its remedial action costs in the amount of \$657,818.68.

**Conclusion of Law No. 18:**

NW Mint breached Section 13 of the Lease by failing to maintain the premises in good order and repair at the time of surrender on April 30, 2010.

**Conclusion of Law No. 19:**

Auburn is entitled to an award of damages in the amount of its costs necessary to repair damage to Suite 101 caused by NW Mint in the amount of \$168,230.33.

**Conclusion of Law No. 21:**

NW Mint is responsible for Auburn's lost rental income, due to Auburn's inability to re-let the premises until the environmental cleanup and repairs were made. Therefore, Auburn is

entitled to recover its damages against NW Mint, including loss of rental income in the amount of \$299,947.20. Fisher Properties, Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 846 (1986).

**Conclusion of Law No. 22:**

Pursuant to Section 24 of the Lease, Auburn is entitled to an award of attorney's fees, statutory court costs, and all other litigation costs and expenses incurred in connection with its Breach of Lease claims.

# Tab B

## CHALLENGED FINDINGS OF FACT

NW Mint challenges the following Findings of Fact the trial court entered in its June 4, 2013 Order Granting Plaintiff's Motion for an Award of Attorneys' Fee and Costs:

### **Finding of Fact No. 8:**

Auburn was unsuccessful in its tenant improvement claim and the award should be reduced for the hours expended on that claim. The tenant improvement claim constituted a minimal amount of work however, and there are limited invoices that are applicable to it. Defendants argued that it is impossible to determine the number of hours expended on this claim due to the nature of the invoices. Defendants suggested a fee reduction of \$231,000 based on approximately a 19% portion of the work. The court does not find this proposal reasonable. The court finds that the invoices were sufficient to determine the work performed in this lawsuit. Much of the testimony provided and the work performed regarding the tenant improvement claim related to Auburn's other property damage and contamination claims; hence, the claims were inextricably intertwined. The tenant improvement claim itself was simply a very minor part of the litigation. Nevertheless, a reduction is necessary and the court accepts the 100 hour estimate proffered by the Plaintiff totaling approximately \$37,000 in reduction as reasonable and frankly, perhaps generous.

### **Finding of Fact No 9:**

The court has made a reduction for duplicative efforts at trial. It was not necessary to have four partner level lawyers present at the entire trial, particularly due to the fact that one lawyer never made any oral representation to the court and the other lawyer's participation was limited to questioning two witnesses on the first day of trial. The

presence of these attorneys was unnecessarily duplicative. Given that there were two experienced lawyers already representing Auburn at trial, the court does not find it necessary that Mr. Johnson was present at trial or that Mr. Hamell remained after his witnesses testified on the first day of trial. The court will reduce the award for their trial time. Mr. Johnson billed approximately 104 hours at \$33,800 and Mr. Hamell billed 104 hours at \$30,680.

**Finding of Fact No 10:**

Defendants argued that other time was duplicative as well. The court does not find this defense argument convincing. This case was aggressively litigated by the Defendants and Auburn had the right to respond in kind. The communication between plaintiff's counsels was reasonable and not excessive. The court finds that plaintiff's counsels reasonably allocated their resources for their motions practice and depositions. Finally, the court finds that the costs requested are appropriate given the broad definition of costs in MTCA claims.

**Finding of Fact No 11:**

Aside from the specific reductions discussed above, the evidence established that Auburn's counsel expended a reasonable number of hours in representing Auburn with respect to Auburn's "remedial action" responses to the contamination caused by Defendants, and in achieving a successful litigation result to resolve Auburn's claims under MTCA and under the 2002 Lease.

**Finding of Fact No 12:**

As evidenced by the detailed documentation provided by Auburn, the hours billed by Auburn's counsel as part of the remedial action and in the course of the litigation of the MTCA and 2002 Lease claims were not wasteful or duplicative.

**Finding of Fact No 13:**

Auburn has provided contemporaneous records documenting the number of hours worked by its counsel as part of the remedial action and in the course of the litigation. These records adequately informed the Court of the type of work performed and the category of attorney who performed the work.

**Finding of Fact No 14:**

The evidence demonstrates that the remedial action attorney fees and costs claimed by Auburn are properly included as MTCA “remedial action costs” as further supported by the Declarations of Keith Moxon, Joe Hamell, Robert Mitchell, Bradley Cohen, Doreen Ray, and Charles Losinger filed on December 13, 2012 and the Reply Declarations of Keith Moxon, Doreen Ray, Charles Losinger, and Tom Colligan filed on May 3, 2013. The legal services provided to Auburn were necessary and appropriate to guide and assist Auburn in the investigation and remediation of the former Northwest Mint facility and to achieve a successful litigation result to resolve Auburn’s claims under the Model Toxics Control Act (“MTCA”) and under the 2002 Lease.

**Finding of Fact No 15:**

Application of the “lodestar” approach to the attorney fees included in Auburn’s claim for “remedial action” costs and in Auburn’s claim for attorney fees and costs awarded to Auburn for prevailing on its MTCA and 2002 Lease claims results in an award of **\$1,116,279.33** in attorney fees. In addition, Auburn is entitled to an award of its litigation expenses in the amount of **\$425,767.28** and additional attorney fees and costs (for December 2012 through entry of the Supplemental Judgment) in the amount of **\$50,000**, for a total award of **\$1,592,046.61**.

**Finding of Fact No 16:**

Auburn’s claim for “remedial action” attorney fees and costs and for its attorney fees and costs as the prevailing party in this litigation is also supported by equitable factors, including, but not limited to, the following: (1) Defendants caused the contamination; (2) Auburn did not contribute to the contamination in any way; (3) Defendants did not cooperate with Auburn in the cleanup of the facility; (4) Defendants did not take responsibility for the contamination; and, (5) Defendants failed to take effective remedial actions at the facility, notwithstanding the recommendations of their own consultants.

**CONCLUSIONS OF LAW**

NW Mint challenges the following Conclusions of Law the trial court entered in its June 4, 2013 Order Granting Plaintiff’s Motion for an Award of Attorneys’ Fee and Costs:

**Conclusion of Law No. 4:**

Allowing a full recovery of Auburn’s attorney fees and litigation expenses in this case will serve the important purpose of providing “an incentive to foster environmental cleanup and discourage protracted and expensive efforts to evade environmental responsibility.” *Louisiana-Pacific v. ASARCO*, 131 Wn.2d. 587, 602, 934 P.2d 685 (1997).

**Conclusion of Law No. 7:**

In allocating MTCA remedial action costs, the trial court must apply equitable factors it deems appropriate, including “the cause of the contamination, the defendant’s relationship to the contamination, as well as other pertinent discretionary factors.” *Dash Point Village Associates v. Exxon Corporation*, 86 Wn.App 596, 937 P.2d 1148 (1997). The equitable factors in this case weigh in favor of a full award of Auburn’s “remedial

action” legal expenses. The legal services provided by Auburn’s counsel were necessary and appropriate to guide and assist Auburn in the investigation and remediation of the former Northwest Mint Facility and to achieve a successful litigation result to resolve Auburn’s claims under the Model Toxics Control Act (“MTCA”) and under the 2002 Lease..

**Conclusion of Law No. 8:**

The evidence supports a full award of all of Auburn’s “remedial action” legal expenses under MTCA and its attorney fees and costs under the 2002 Lease based on both the traditional “lodestar” analysis and an “equitable factors” analysis.

# Tab C

98 Cal.App.4th 218, 119 Cal.Rptr.2d 503, 67 Cal.  
Comp. Cases 608, 02 Cal. Daily Op. Serv. 3931, 2002  
Daily Journal D.A.R. 4995

HECTOR RIVAS et al., Plaintiffs and Appellants,

v.

**SAFETY-KLEEN CORPORATION** et al.,  
Defendants and Respondents.

HECTOR MONTIEL, Plaintiff and Appellant,

v.

**SAFETY-KLEEN CORPORATION** et al.,  
Defendants and Respondents.

No. B133572.

Court of Appeal, Second District, Division 4,  
California.

May 7, 2002.

#### SUMMARY

Two workers brought separate actions against the same manufacturers and suppliers of various chemicals, alleging products-liability-related claims involving exposure to toxins in the workplace that caused both plaintiffs kidney damage. The trial court granted summary judgment for defendants and dismissed the cases on statute of limitations grounds, concluding that plaintiffs had sufficient knowledge of injury and wrongdoing for purposes of accrual of the statute of limitations more than one year prior to the dates their complaints were filed. The trial court ruled that plaintiffs' claims, including a claim for fraudulent concealment based on failure to warn of a product defect, were subject to the one-year statute of limitations for personal injury rather than the three-year statute of limitations for fraud. (Superior Court of Los Angeles County, Nos. VC026692 and EC022324, Charles Carter Lee, Judge.)

The Court of Appeal affirmed. The court held that the trial court properly ruled that the first worker's product liability claims were barred by the one-year statute of limitations for personal injury claims (Code Civ. Proc., § 340, subd. (3)). That worker was diagnosed with a malfunctioning kidney in 1991, provided his doctor with a list of chemicals he worked with, and was told to stay away from a particular solvent. This should have been sufficient to arouse a reasonable person's suspicion and lead to further investigation. However, the action was not filed until 1998. The court also held that plaintiffs' causes of action for fraudulent concealment were subject to the one-year statute of limitations for personal injury claims under Code Civ. Proc., § 340, subd. (3), rather than the three-year statute of limitations for fraud under Code Civ. Proc., § 338, subd. (d). The court further held that 42 U.S.C. § 9658, which is part of the Comprehensive Environmental Response, Compensation, and Liability

Act of 1980, did not preempt California's statute of limitations. (Opinion by Curry, J., with Vogel (C. S.), P. J., and Epstein, J., concurring.)

#### HEADNOTES

(<sup>1</sup>)

Limitation of Actions § 31--Commencement of Period--Accrual of Cause of Action--Discovery Rule--Personal Injury Claims.

California's statute of limitations for claims of personal injury is one year from the date of accrual (Code Civ. Proc., § 340, subd. (3)). Under the common law, an action accrues on the date of injury. But that principle is modified by the discovery rule, under which the accrual date of a cause of action is delayed until the plaintiff is aware of the injury and its negligent cause.

(<sup>2</sup>)

Limitation of Actions § 31--Commencement of Period--Accrual of Cause of Action--Discovery Rule--Exposure to Toxic Chemicals in Workplace.

In a products liability action by a worker against the manufacturers and suppliers of allegedly toxic chemicals, arising from kidney damage that plaintiff attributed to his use of the chemicals at work, the trial court properly ruled that the action was barred by the one-year statute of limitations for personal injury claims (Code Civ. Proc., § 340, subd. (3)). The statute of limitations begins to run when the claimant suspects or should suspect that his or her injury was caused by someone's wrongdoing. It is not necessary that the injured party has been explicitly informed by his or her doctor that a certain substance or product caused the medical disorder or has had an opportunity to personally review medical records specifying the cause of the disorder. In the present case, plaintiff was diagnosed with a malfunctioning kidney in 1991, provided his doctor with a list of chemicals he worked with, and was told to stay away from a particular solvent. This alone should have been sufficient to arouse a reasonable person's suspicion and lead to further investigation. However, if the doctor's statements were deemed ambiguous, the fact that plaintiff filed a workers' compensation claim in 1996 based on exposure to toxic chemicals at work was definitive proof that he had a suspicion of wrongdoing long before his civil complaint was filed in 1998.

[See 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 517 et seq.; West's Key Number Digest, Limitation of Actions  
95(5).]

(<sup>3a, 3b</sup>)

Limitation of Actions § 26--Period of Limitation--Torts--Products Liability--Claim for Failure to Warn Designated as Fraudulent Concealment.

Workers' causes of action against the manufacturers and suppliers of toxic chemicals for fraudulent concealment were subject to the one-year statute of limitations for personal injury claims (Code Civ. Proc., § 340, subd. (3)), rather than the three-year statute of limitations for fraud (Code Civ. Proc., § 338, subd. (d)). Although plaintiffs' complaints purported to assert separate and distinct causes of action for failure to warn and fraudulent concealment, the essence of both claims was that defendants' products were defective because they lacked warnings adequate to inform plaintiffs of their toxic hazards and serious effects upon the human body, and because they lacked instructions for handling and use adequate to prevent exposures to plaintiffs causing serious injury. Thus, plaintiffs' fraud claim was merely a failure to warn claim recast as a claim for fraudulent concealment, and there was no reason to depart from the general rule applying the one-year statute of limitations to claims for product liability, regardless of how they are denominated.

(<sup>4</sup>)

Limitation of Actions § 71--Pleading--Applicable Statute--Nature of Rights Sued Upon.

In ruling upon the applicability of a statute of limitations, courts look to the nature of the rights sued upon rather than to the form of action or to the relief demanded. Neither the caption, form, nor prayer of the complaint will conclusively determine the nature of the liability from which the cause of action flows. Instead, the true nature of the action will be ascertained from the basic facts.

(<sup>5</sup>)

Products Liability § 1--Basis of Liability.

Product liability may arise from a manufacturing defect, a defective design, or failure to warn.

(<sup>6</sup>)

Limitation of Actions § 26--Period of Limitation--Torts--Products Liability--Exposure to Toxic Chemicals in Workplace--Action Preempted by CERCLA.

In personal injury actions by workers against the manufacturers and suppliers of toxic chemicals to which plaintiffs were exposed in the workplace, 42 U.S.C. § 9658, which is part of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), did not preempt California's statute of limitations. The federal statute provides that in a state law action for personal injury caused by exposure to a hazardous substance released into the environment from a facility, the federal statute of limitations shall govern if it is longer than the state limitations period. However, the statutory definition of "release" contains an express exclusion for any release that results in exposure to persons solely within a workplace, with respect to claims that such persons may assert against their employer (42

U.S.C. § 9601(22)(A)). Congress enacted CERCLA to establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites. The intent was not to make injured parties whole or to create a general vehicle for toxic tort actions by individuals. Although Congress intended 42 U.S.C. § 9658 to have impact beyond actions for recovery of expenses incurred in cleaning up toxic waste sites, it was never meant to extend to all state court lawsuits for personal injury and property damage arising from exposure to toxic substances.

(<sup>7</sup>)

Limitation of Actions § 43--Commencement of Period--Toxic Tort Action.

A plaintiff in a toxic tort action must identify each product that is alleged to have caused the injury, and it is insufficient to allege that the toxins in a defendant's products caused it. Even if a toxic tort complaint is not complete until a particular chemical compound is identified, the statute of limitations does not await the plaintiff's discovery of every specific fact he or she needs to allege a cognizable claim. It accrues as soon as the plaintiff suffers an injury and suspects or should suspect that his or her injury was caused by wrongdoing or has notice or information of circumstances to put a reasonable person on inquiry. He or she must go find the facts, and cannot wait for the facts to find him or her. Once the plaintiff knew or reasonably should have known that a product was the likely potential source of injuries, the plaintiff has the responsibility to investigate and determine whether to pursue legal action.

COUNSEL

Law Offices of Raphael Metzger, Raphael Metzger; Ron Archer; and Mark Julius for Plaintiffs and Appellants Hector and Macrina Rivas and Hector Montiel.

Arter & Hadden, Frederick J. Ufkes and William S. Davis for Defendant and Respondent Safety-Kleen Corporation. Stream & Stream, Theodore K. Stream, David D. Werner; and Jamie E. Wrage for Defendant and Respondent Petro Source Refining Corporation.

Prindle, Decker & Amaro and James G. Murray for Defendant and Respondent Calsol, Inc.

Steptoe and Johnson, Lawrence P. Riff and W. Chelsea Chen for Defendants and Respondents Chevron U.S.A., Inc., and Union Oil Company of California.

Gordon & Rees, Roger M. Mansukhani and Brian Ledger for Defendant and Respondent Kern Oil and Refining Co.

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**CURRY, J.**

The claims of appellants Hector Rivas, his wife, Macrina, and Hector Montiel against the manufacturers and suppliers of various allegedly toxic chemicals and compounds were dismissed on statute of limitations grounds. The trial court ruled that appellants had

sufficient knowledge of injury and wrongdoing for purposes of accrual of the statute of limitations more than one year prior to the dates their complaints were filed, and that all their claims, including a claim for fraudulent concealment based on failure to warn of a product defect, were subject to the one-year statute of limitations for personal injury rather than the three-year statute of limitations for fraud. Appellants contend these rulings were error. They also present the issue of whether federal law governing release of hazardous substances preempts California's statute of limitations. We conclude that the trial court did not err in granting summary judgment and that California's statute of limitations is not preempted. We, therefore, affirm.

### **Factual and Procedural Background**

#### ***The Rivas and Montiel Complaints***

On April 3, 1998, appellant Rivas and his wife, Macrina, filed a complaint for negligence, strict liability (failure to warn, design defect, and manufacturing defect), fraudulent concealment, breach of warranty, battery, and loss of consortium. Rivas claimed to have suffered severe damage to his kidneys, leading to a kidney transplant, as a result of exposure to toxic chemicals during his employment with Lakenor Auto & Truck Salvage Company. The defendants were respondents Safety-Kleen Corporation, Chevron U.S.A., Inc., and Union Oil Company of California. Respondents Calsol, Inc., Petro Source Refining Corporation, and Kern Oil and Refining Co. were subsequently added in place of Doe defendants. The complaint acknowledged that Rivas was diagnosed with kidney disease in 1991, but, to justify tolling the statute of limitations, alleged that he was "ignorant of the toxic cause of his [disease] until March 23, 1998."

Appellant Montiel filed a complaint for strict product liability, negligence, and breach of express and implied warranties on April 29, 1997, and subsequently filed a first amended complaint that contained the same causes of action as the Rivas complaint. Factually, the Montiel complaint alleged that between January 1993 and January 1996, Montiel worked for Automotive Rebuild Exchange, Inc., and performed duties which included the continual use of cleaning solvents. The complaint contended that Montiel "became aware of the connection between his disease and his exposure to \*223 the defective products within one year of filing [the] Complaint." The first amended complaint alleged that Montiel was diagnosed with kidney failure in January 1996, but that "it was not until July of 1996 that [his] physician causally related his kidney failure to his occupational exposure to solvents." The same parties were named defendants as in the Rivas complaint. As of the time of filing the complaint, Montiel was awaiting a transplant.<sup>1</sup>

#### ***The Rivas Motion for Summary Judgment***

Respondents moved for summary judgment in the Rivas action on statute of limitations grounds. Certain facts were not disputed. Rivas worked for Lakenor from 1973 to 1991.<sup>2</sup> One of his daily tasks was to degrease automobile parts using a Safety-Kleen parts washer machine and Safety-Kleen 105 Solvent.

In March 1991, Rivas visited a physician, Dr. Arthur Howard, because he was not feeling well. Dr. Howard diagnosed Rivas with kidney failure and asked him about chemicals he used at work. Rivas told his doctor about his use of the Safety-Kleen solvent and provided a list of chemicals copied from the Safety-Kleen container. Dr. Howard told Rivas to stay away from the solvent. Rivas immediately complied. Rivas was referred to two kidney specialists who diagnosed him with renal disease, "etiology undetermined." Over the next several years, Rivas's kidney condition deteriorated as he sought various forms of treatment including two years of dialysis. In November 1995, he received a kidney transplant.

In March or April 1996, Macrina heard from her son that Rivas might be entitled to workers' compensation if his kidney problems had been caused by harmful solvents at work. She informed Rivas. In September, Rivas consulted a workers' compensation attorney to investigate the possibility that the solvent he used at Lakenor caused his kidney damage. Later that month, the attorney filed an application with the Workers' Compensation Appeals Board on Rivas's behalf in which Rivas sought recovery for injury to his kidneys as a result of "repetitive exposure to toxic fumes, gases and liquids."

In December 1996, Rivas went to see Dr. Jay Prakash, who had been hired by Lakenor's insurer. He provided Dr. Prakash with the same list of chemicals that he had taken from the Safety-Kleen container in 1991. The Rivases filed their complaint on April 3, 1998. \*224

#### ***Montiel Motion for Summary Judgment***

Respondents also sought summary judgment in the Montiel matter on statute of limitations grounds. They established without dispute that Montiel worked at Automotive Rebuild Exchange from approximately January 1993 to January 1996. His regular tasks included washing automotive parts using a machine and solvent supplied by Safety-Kleen. Montiel sought medical treatment at a hospital in Mexico in January 1996. The doctors there told him that he had kidney failure caused by the solvent he used at work. Shortly thereafter, Montiel began undergoing dialysis. In April 1996, Montiel retained an attorney to represent him in filing a workers'

compensation claim. His claim form, filed April 26, 1996, indicated that he had incurred "internal injuries including but not limited to kidneys, head (headaches)." Montiel saw a physician in connection with his workers' compensation claim and told the physician that the doctors in Mexico had related his kidney problems to solvents used at work. Montiel's complaint was not filed until April 29, 1997.

#### **Trial Court's Ruling on Motions**

The trial court granted summary judgment on statute of limitations grounds on both the Rivas and Montiel complaints. The court ruled that all of the claims were governed by the one-year statute of limitations and found that each claimant filed his complaint "more than one year after his first actual or constructive suspicion that the solvents he used at work had caused the injuries claimed ... and that such injuries were the result of someone's wrongdoing." These appeals followed.<sup>3</sup>

#### **Discussion**

##### **I**

(<sup>11</sup>) California's statute of limitations for claims of personal injury is one year from the date of accrual. (Code Civ. Proc., § 340, subd. (3).) Under the common law, "an action accrues on the date of injury ...." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) But that principle is modified by the discovery rule under which "the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause." (*Ibid.*, fn. omitted; accord, *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 389 [87 Cal.Rptr.2d 453, 981 P.2d 79] ["Under the statute of limitations, a plaintiff must bring a cause of action within the \*225 limitations period applicable thereto after accrual of the cause of action. The general rule for defining the accrual of a cause of action sets the date as the time when the cause of action is complete with all of its elements. An exception is the discovery rule, which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action, until, that is, he at least suspects, or has reason to suspect, a factual basis for its elements."].<sup>4</sup>)

In *Jolly*, the plaintiff, who had suffered from cancer, knew that her mother had taken the synthetic drug estrogen, diethylstilbestrol (DES) and, beginning in 1972, suspected it was a defective product. She delayed legal action because she did not know the identity of the manufacturer of the DES ingested by her mother. In 1980, the Supreme Court decided *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588 [163 Cal.Rptr. 132, 607 P.2d 924, 2 A.L.R.4th 1061], holding that a claimant could state a claim against DES manufacturers based on market share and shift the

burden to the defendant manufacturer to disprove its involvement. *Jolly* filed her complaint in 1981, and the trial court granted a defense motion for summary judgment based on the statute of limitations. The Court of Appeal reversed, relying on its earlier decision in *Kensinger v. Abbott Laboratories* (1985) 171 Cal.App.3d 376 [217 Cal.Rptr. 313], that a claimant having awareness of an injury and its cause, but no knowledge of facts indicating wrongdoing by a particular defendant, could not be expected to pursue a legal claim. (See *id.* at p. 384.)

The Supreme Court disagreed with the Court of Appeal and disapproved *Kensinger*. It rejected the notion that the statute should be tolled where the claimant suffers injury, is aware of its origin, and suspects wrongdoing, but lacks knowledge of specific facts establishing misconduct, such as "failure to test" "or" "failure to warn." (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1110.) "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her.... [T]he limitations period begins once the plaintiff 'has notice or information of circumstances to put a reasonable person on inquiry ....'" [Citations.] A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, \*226 it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Id.* at pp. 1110-1111, fn. omitted.) The court made clear that the words "wrong" and "wrongdoing" were meant "in their lay understanding," not in their legal sense. (*Id.* at p. 1110, fn. 7.) It further stressed that "[a] plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." (*Id.* at p. 1109.)

The Supreme Court went on to explain why *Jolly's* claim was not revived by its decision in *Sindell*, which admittedly "bridged the causal gap between DES manufacturers as a group and [*Jolly's*] injury." (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1115.) "*Sindell* did not provide [*Jolly*] with the critical 'fact' that started the limitations period. Nor did it create a new tort with an independent starting date for purposes of the statute of limitations. Rather, *Sindell* demonstrated the legal significance of facts already known to plaintiff. The statute had started to run for [*Jolly*] well before *Sindell* was decided." (*Jolly*, at p. 1115.) "[A] change in the law, either by statute or by case law, does not revive claims otherwise barred by the statute of limitations." (*Id.* at p. 1116.) This rule "encourages people to bring suit to change a rule of law with which they disagree, fostering growth and preventing legal stagnation.... [¶] ... [¶] ...

[Jolly] was in no worse a position than Judith Sindell, who ultimately prevailed in changing the law.“ (*Id.* at p. 1117.)

## II

(<sup>2</sup>) With this in mind, we turn to the issues in the present case. Appellant Rivas contends that the trial court erred in ruling that his product liability claims were barred by the California statute of limitations.<sup>5</sup> As we have seen, Rivas was diagnosed with a malfunctioning kidney in 1991, provided his doctor with a list of chemicals he worked with, and was told to stay away from the Safety-Kleen solvent. He did not file a civil lawsuit until April 1998, although he had submitted a workers' compensation claim in September 1996 attributing his disease to exposure to toxic fumes, gases, and liquids at work.

To support his contention that the statute of limitations did not accrue in 1991 when his doctor diagnosed the kidney malfunction and told him not to work with the Safety-Kleen solvent or in 1996 when he filed the workers' compensation claim, appellant relies on a Court of Appeal decision which preceded *Jolly-Pereira v. Dow Chemical Co.* (1982) 129 Cal.App.3d 865 [181 Cal.Rptr. 364]. In that case, a worker spilled a dangerous chemical on \*227 his pants, below his protective apron. He used a solvent to clean it off. The spill occurred in January 1974. Two weeks later, a small rash appeared on each of his legs. It disappeared without treatment. Two months later, his ankles began to swell and his doctors diagnosed a kidney malfunction. They discussed with the injured worker "the possible causal connection between [the spilled chemical] and a nephrotic<sup>6</sup> syndrome" (*id.* at p. 869) and " 'the likelihood of possible toxic effects from the chemicals as well as the probable immunologic aspects of his disease' " (*id.* at p. 870). The injured worker was advised to return to work and " 'avoid[] intimate contact with the chemicals for the moment ....' " (*Ibid.*) The disease continued to worsen, until by June 1974, it extended to the worker's waist. He filed a workers' compensation claim on July 16, 1975. As a result of that filing, he obtained access to his medical files which included a letter sent in January 1975 from his physician to his employer's insurance carrier saying that the cause of kidney disorder was " 'most likely toxic, having been caused by the [spilled chemical]' ...." (*Id.* at p. 870.) A complaint was filed against the manufacturer and distributor of the chemical on January 14, 1976. The Court of Appeal reversed summary judgment granted in favor of the defendants based on the running of the statute of limitations.

The court cited two earlier decisions, *G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22 [122 Cal.Rptr. 218] and *Velasquez v. Fibreboard Paper Products Corp.* (1979) 97 Cal.App.3d 881 [159 Cal.Rptr. 113], which

discussed accrual of the statute of limitations when the claimant suffers an injury that causes an underlying pathological effect without perceptible trauma. In *Velasquez*, where the claimant was diagnosed with asbestosis more than a year before filing his complaint but had manifested only a slightly elevated glucose level and some minor abnormality in his EKG, the court saw no reason why "the discovery rule should not be applied in the novel situation before us where the plaintiff learns of the occupationally related disease before knowingly suffering its severe effects." (*Velasquez*, at p. 887.) Applying the discovery rule, the court held: "A brief explanation of findings and prognosis by the examining physician is necessary before it can be asserted that the patient has 'discovered' a latent or progressive disorder which has not, in all those years of exposure, caused noticeable harm. Where the physical manifestations have not yet occurred, discovery must mean a reasonable knowledge that they are likely to occur." (*Id.* at p. 889.)

The *Pereira* court's reliance on these authorities indicates that it considered the primary issue before it to be one of delayed discovery of serious injury. Like the claimant in *Velasquez*, the worker in *Pereira* manifested relatively minor physical problems at the time of the diagnosis. He may not \*228 have known for some time that he was suffering from a severe and progressive disorder, which was likely to cause serious debility in the future.

In its analysis, however, the court discussed not only the lack of perceptible serious trauma after the initial spill, but also the fact that the "plaintiffs [the injured worker and his wife] did not see any medical records until November 1975"; "[n]o medical person told them that the kidney problem was caused by the spill"; and "[a] specialist ... told [the worker] to return to work but to avoid intimate contact with the chemicals temporarily." (*Pereira v. Dow Chemical Co.*, *supra*, 129 Cal.App.3d at p. 874.) The court stated that this record did not "justif[y] a conclusion, as a matter of law, that plaintiffs were or should have been aware that the kidney problem was only caused by the spill." (*Ibid.*) Because "the earliest indication in the record that a component of [the chemicals to which the worker was exposed] can be both nephrotoxic and cumulative in the effect was when Valley Memorial Hospital records were subpoenaed in connection with the application for workmen's compensation benefits in July 1975" the court believed "it was improper to conclude, as matter of law, that plaintiffs acted unreasonably or without due diligence in pursuit of their claims." (*Id.* at pp. 874-875.)

Rivas seeks to construct from this language a rule precluding accrual of the statute of limitations until the injured party has been explicitly informed by his doctors that a certain substance or product caused the medical disorder or has had an opportunity to personally review medical records specifying the cause of the disorder. To

the extent *Pereira* supports Rivas's belief that accrual of the statute of limitations is delayed until the claimant has knowledge of specific facts establishing causation, it has been superseded by *Jolly*. As we have discussed, the Supreme Court specifically rejected the proposition that "the statutory clock did not begin to tick until the plaintiff knew or reasonably should have known of the facts constituting wrongful conduct, as well as the fact of her injury and its relation to [the product], " in favor of the rule that the statute of limitations begins to run when the claimant "suspects or should suspect" that his or her injury was "caused by [someone's] wrongdoing ...." (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1110, fn. omitted.)

Here, Rivas was informed by his physicians in 1991 that he was suffering from a serious and debilitating condition. He was asked to provide a list of all the chemicals he came in contact with and told in no uncertain terms to keep away from the solvent he was using at work. This alone should have been sufficient to arouse a reasonable person's suspicion and lead to further investigation. However, even were we to deem the doctor's statements ambiguous as Rivas urges due to the fact that the kidney specialists to whom \*229 he was referred said the etiology of his disease was "undetermined," the fact that he filed a workers' compensation claim in September 1996 based on exposure to toxic chemicals at work is definitive proof that he had a suspicion that "someone ha [d] done something wrong to [him]" long before his civil complaint was filed in April 1998. (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1110.)

### III

(<sup>[3a]</sup>) Appellants contend that their separate causes of action for fraudulent concealment were subject to the three-year statute of limitations for fraud (Code Civ. Proc., § 338, subd. (d)) rather than the one-year statute of limitations for personal injury. The causes of action for "fraudulent concealment" alleged that respondents were under a legal duty to disclose the toxic nature of their product and the risk of exposure to their products by labeling, and that they failed to do so.

(<sup>[4]</sup>) "In ruling upon the applicability of a statute of limitations, it has been recognized that courts will look to the nature of the rights sued upon rather than to the form of action or to the relief demanded. Neither the caption, form, nor prayer of the complaint will conclusively determine the nature of the liability from which the cause of action flows. Instead, the true nature of the action will be ascertained from the basic facts ...." (*H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp.* (1979) 99 Cal.App.3d 711, 717 [160 Cal.Rptr. 411]; accord, *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995 [90

Cal.Rptr.2d 665].)

(<sup>[5]</sup>) The essence of appellants' claims is that they were injured by a defective product. Product liability may arise from a manufacturing defect, a defective design, or failure to warn. (6 Witkin, Summary of Cal. Law (2001 supp.) Torts, § 1247, pp. 474-475.) (<sup>[3b]</sup>) Although appellants' complaints purport to assert separate and distinct causes of action for "failure to warn " and "fraudulent concealment," the essence of both claims is that respondents' products were defective "because they lacked warnings adequate to inform [appellants] of their toxic hazards and serious effects upon the human body, and because they lacked instructions for handling and use adequate to prevent exposures to [appellants] causing serious injury."

The one-year statute of limitations has been applied to an action for breach of contract or breach of warranty where the alleged breach led to personal injury in cases such as *Rubino v. Utah Canning Co.* (1954) 123 Cal.App.2d 18, 23 [266 P.2d 163] (holding that action against distributor of \*230 canned food for breach of implied warranty of fitness was subject to the one-year limitation governing personal injury claims) and *Cardoso v. American Medical Systems, Inc.* (1986) 183 Cal.App.3d 994 [228 Cal.Rptr. 627] (where appellants' action was for personal injury caused by a malfunctioning medical implant, one-year statute of limitations applied to their cause of action for breach of warranty). In addition, in *Weinstock v. Eissler* (1964) 224 Cal.App.2d 212 [36 Cal.Rptr. 537], where the plaintiff claimed brain injury from a cerebral angiogram and a spinal tap and alleged that false statements were made about the safety of the angiogram, the court held: "The one-year statute of limitations is applicable even where, as here, the plaintiff-patient alleges a cause of action for deceit based on the physician's false representations or fraudulent concealment of the nature and extent of the injury." (*Id.* at p. 227.) Similarly, in *Aerojet General Corp. v. Superior Court* (1986) 177 Cal.App.3d 950 [223 Cal.Rptr. 249], the plaintiffs, husband and wife, alleged that the husband's employer concealed from the husband and the doctors trying to treat him that he was suffering from a disease caused by the ingestion and exposure to various chemicals. The court concluded that "the one-year statute of limitations provided by Code of Civil Procedure section 340, subdivision (3), provides the appropriate period of limitation. " (*Aerojet General Corp.*, at p. 954, fn. 2.) More recently, in *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048 [100 Cal.Rptr.2d 223], where the plaintiff, a nurse, suffered a severe reaction to allegedly defective latex gloves and pled a cause of action for fraudulent concealment, the court noted: "Although [the plaintiff] argued at the summary judgment hearing at the trial court that a separate limitations period should apply to that claim (3 year, § 338), she has abandoned any such argument on appeal. That is appropriate since this is

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a personal injury suit to which the one-year statute clearly applies. (§ 340, subd. (3).)" (Clark, at p. 1054, fn. 2.) Thus, the weight of authority supports the trial court's decision to apply the one-year statute of limitations to all of appellants' claims.

Appellants point to the contrary decision in *Snow v. A. H. Robins Co.* (1985) 165 Cal.App.3d 120 [211 Cal.Rptr. 271]. The plaintiff there had become pregnant while using the Dalkon Shield birth control device. She alleged that defendants falsely represented that the device was a superior birth control device with the lowest failure rate of any other intrauterine device on the market. Her complaint further alleged that defendants knew that the failure rate was significantly higher than they represented. As can be seen from the facts, *A. H. Robins* was not a typical product liability case. The plaintiff did not suffer an unexpected injury as a side effect of using the product; her injury was sustained because the product did not work as it was intended. She was able to point to specific affirmative misrepresentations made by the manufacturer about the product's effectiveness, which induced \*231 her to use the product. Here, in contrast, there is no issue about the effectiveness of the solvent. Appellants maintain that their injury was an unintended side effect and that respondents' fault lies in their failure to warn of the product's potential for toxicity. Thus, the fraud claim is merely the failure to warn claim recast as a claim for fraudulent concealment. In this situation, we see no reason to depart from the general rule applying the one-year statute of limitations to claims for product liability however they are denominated.

#### IV

(<sup>6</sup>) Appellants contend that California's statute of limitations is preempted by federal law, specifically section 9658 of title 42 United States Code (section 9658), part of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) added by the Superfund Amendments and Reauthorization Act of 1986 (SARA). Appellants maintain that under this provision the statute of limitations does not accrue until the claimant becomes aware of or identifies not just the injury-causing product, but the specific hazardous substance or chemical compound within the product which led to the injury.

Respondents counter with the arguments that (1) section 9658 does not apply to toxic exposure in the workplace and (2) even if it did, accrual of the statute of limitations is the same under CERCLA as under California law and is not tolled while the claimant seeks the precise scientific identity of the chemical compound that harmed him.

There is no dispute that if section 9658 applies to the situation and if accrual under California law occurs

sooner than under its provisions, California law would be preempted. Section 9658 expressly provides: "In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute."<sup>7</sup>

The statute, by its terms, applies only where the harmful substances to which claimants were exposed were "released" into the "environment" from "a facility." Section 9658 further states that "[t]he terms used in this section shall have the same meaning as when used in subchapter I of this chapter." (§ 9658(b)(1).) These terms are all the subject of statutory definitions found in section 9601 of title 42 United States Code (located in subch. I) and were part of CERCLA since its original enactment in 1980. (See Pub.L. No. 96-510, tit. I, § 101(8), (9) & (22) (Dec. 11, 1980) 94 Stat. 2767.) "The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) ...." (42 U.S.C. § 9601(22).)

"The term 'environment' means (A) the navigable waters, the waters of the contiguous zone, and the ocean water of which the natural resources are under the exclusive management authority of the United States ..., and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States." (42 U.S.C. § 9601(8).)

"The term 'facility' means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." (42 U.S.C. § 9601(9).)

The statutory definition of "release" contains an express exclusion for "any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons ...." (42 U.S.C. § 9601(22)(A).) Both sides

focus on this language in their briefs. Respondents stress the language in the first part of the exclusion and contend that since the alleged exposure occurred “solely within [the] workplace,” no release occurred for purposes of CERCLA or section 9658. Appellants interpret the exclusion differently, believing that the phrase “with respect to a claim which such persons may assert against the employer of such persons” is evidence that “Congress considered whether occupational exposures constitute ‘releases’ within the meaning of CERCLA, and determined that they do, except as such might permit exposed workers to assert tort liability claims against their employers” and that “Congress determined that the occupational exposures do indeed constitute \*233 ‘releases’ for the purpose of asserting toxic tort claims against third party manufacturers ....”

We disagree with appellants’ interpretation. Congress could not have had in mind the needs of workers asserting toxic tort claims against third party manufacturers in 1980 when the relevant definitional provisions of CERCLA were drafted. To appreciate why, one need only review briefly CERCLA’s original purpose and effect. Congress enacted CERCLA 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. No. 96-1016, 96th Cong., 2d Sess., pt. 1, p. 22 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News, at pp. 6119, 6125; see also 3550 *Stevens Creek Assoc. v. Barclays Bank* (9th Cir. 1990) 915 F.2d 1355, 1357, quoting Pub.L. No. 96-510, *supra*, 94 Stat. 2767 [“CERCLA was enacted to ‘provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.’”].) CERCLA “generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed. [Citations.] To promote these objectives, Congress created a private claim for certain ‘response costs’ against ‘various types of persons who contributed to the dumping of hazardous waste at a site.’” (3550 *Stevens Creek Assoc.*, at p. 1357, quoting *Ascon Properties, Inc. v. Mobil Oil Co.* (9th Cir. 1989) 866 F.2d 1149, 1152.) The intent behind CERCLA was not “to make injured parties whole or to create a general vehicle for toxic tort actions.” (*Ambrogi v. Gould, Inc.* (M.D.Pa. 1990) 750 F.Supp. 1233, 1238; accord, *Struhar v. City of Cleveland* (N.D. Ohio 1998) 7 F.Supp.2d 948, 951.)

To establish a claim for cost recovery under CERCLA, a claimant must prove not only that the site in question was a “facility” and that a “release” or threatened release of a hazardous substance occurred, but must also show that the defendant falls within a category of “liable parties” as set forth in title 42 United States Code section 9607(a) and that the release or threatened release caused the claimant to incur “necessary costs of response.” (*ABB Industrial*

*Systems v. Prime Technology, Inc.* (2d Cir. 1997) 120 F.3d 351, 356; *U.S. v. Poly-Carb, Inc.* (D.Nev. 1996) 951 F.Supp. 1518, 1522; see 42 U.S.C. § 9607(a)(4)(B).) The four categories of “liable parties” as outlined in title 42 United States Code section 9607(a) are: (1) present owners and operators of a facility; (2) past owners and operators of a facility at the time of disposal; (3) arrangers for disposal or treatment; and (4) transporters. (See *U.S. v. CDMG Realty Co.* (3d Cir. 1996) 96 F.3d 706, 713.) Noticeably absent from this list are manufacturers or distributors of products, the \*234 entities most likely to end up as defendants in a product liability lawsuit where personal injury is involved.”

It is clear that CERCLA was and is primarily concerned with improper disposal and dumping of hazardous materials by end users and those with whom they contract. Entities that manufacture and distribute useful but potentially toxic products were not part of the problem Congress set out to solve in 1980 when CERCLA and the definitional provisions it contains were enacted. Nor was Congress concerned at that time with individual attempts to recover for personal injury. Since that is the case, appellants’ contention that Congress intended by its choice of language in title 42 United States Code section 9601(22)(A) to give exposed workers an opportunity to “assert[] toxic tort claims against third party manufacturers” makes no sense. Congress could not have defined “release” with an eye toward permitting employees who suffer personal injury from occupational exposure to chemicals to pursue claims against manufacturers and distributors when those entities were not intended to play a part in the original CERCLA statutory scheme, and personal injury claims were not addressed in the original statute.

We are equally unsatisfied, however, with respondents’ suggestion that the language in section 9601(22)(A) is clear evidence that Congress intended to exclude exposure in the workplace from the reach of CERCLA and section 9658. As discussed in *Covalt v. Carey Canada Inc.* (7th Cir. 1988) 860 F.2d 1434 - the case on which respondents primarily rely - the language of the exclusion is ambiguous in several respects. The words “with respect to a claim which [a person exposed within a workplace] may assert against the employer of such persons” (§ 9601(22)(A)) may be intended as an oblique reference to workers’ compensation law.” But since workers’ compensation claims are not, strictly speaking, claims “against the employer,” it could conceivably mean just the opposite and apply only where the employee has no workers’ compensation option but brings a claim directly against the employer. Moreover, since the exclusion applies only if the exposed persons “may assert” a claim against their employer, there is some doubt about whether it would apply where any such claim would be unsuccessful. In \*235 *Covalt*, for example, the plaintiff was exposed to asbestos in his place of

employment-Proko Industries-between 1963 and 1971, but did not become ill until 1986. By that time, he argued, he did not have a viable remedy against Proko because he could not collect any judgment entered against it. The court acknowledged the “possibility” that “the exception deals with kinds of claims-for example, workplace injuries to employees that ordinarily are covered by workers’ compensation programs-without depending on the employee’s ability to collect in the given case.” (*Id.* at p. 1436.) The court did not “pursue this possibility” because it rejected plaintiff’s contention on another ground, concluding that “[a] place where work is being carried out is not the ‘environment’ for purposes of [CERCLA].” (*Ibid.*)

Analyzing the question of whether exposure to asbestos on the job constitutes a release into the “environment,” the court stated: “It is lexically possible to treat the ‘environment’ as everything pertaining to the planet Earth, so that the instant a container of asbestos is opened it is released ‘into [the local portion of] the environment’ . Such a global treatment erases ‘released into the environment’ as a limitation, however, by ensuring that it is always satisfied. No substance, except perhaps an injected drug, harms anyone unless it was at least for an instant in an ‘environment’ . A reading of this sort trivializes statutory language. The text makes more sense if read to refer to more widespread releases that affect strangers: asbestos wafting out of Proko’s plant and contaminating a nearby meadow, or shaken loose from insulation Proko installed in a school; asbestos left behind as a contaminant when Proko closes its plant; fluids leaching into the water supply from a plant, and so on. [¶] Doubtless some of the language in the United States Code is meaningless. No institution can fill 20 linear feet of shelving with tiny type and commit no redundancies. Yet it is hard to believe that ‘released into the environment’ is an empty phrase. The focus and structure of CERCLA itself show that it has force. Asbestos encountered at work is not a toxic waste, and the Superfund Act is about inactive hazardous waste sites.” (*Covalt v. Carey Canada Inc., supra*, 860 F.2d at pp. 1436-1437.) Nor did the court believe the 1986 amendments changed the meaning of the term: “SARA, the source of the text under consideration, does not change the focus or structure of CERCLA.... Nothing in either the 1986 Amendments or their legislative history hints that EPA [the agency empowered to investigate sites it believes are contaminated with hazardous waste and establish a Superfund for cleaning them up] is to muscle in on the territory of the Department of Labor, which administers programs dealing with workplace safety.” (*Id.* at p. 1437.)

The court in *Covalt* was heavily influenced by the study conducted under the authority of title 42 United States Code section 9651(e), which investigated the adequacy of existing common law and statutory remedies in \*236 providing legal redress for injury caused by the release of

hazardous substances and preceded the SARA amendments. The study had stated: “ ‘Instances when hazardous substances may be released in other than waste form-i.e., the application of pesticides regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)-are expressly exempted from the enforcement provisions of the [Superfund] Act. Thus, the emphasis of this report, similar to the emphasis of CERCLA, is on remedying the adverse consequences of improper disposal, improper transportation, spills, and improperly maintained or closed disposal sites.’ ” (*Covalt v. Carey Canada Inc., supra*, 860 F.2d at p. 1438.)

Given this legislative history, the court in *Covalt* was not persuaded by the argument that “applying [section 9658] to substances encountered at work as part of ongoing operations would have deterrent and compensatory effects.” (*Covalt v. Carey Canada Inc., supra*, 860 F.2d at p. 1439.) “Courts do not strive for ‘more’ of all legislative objectives ...; laws have both directions and limits, and each must be scrupulously honored.... Giving [section 9658] its broadest possible meaning not only preempts wide sweeps of state law-something we do not lightly attribute to Congress-but also thrusts CERCLA into the domain of other federal rules expressly dealing with employees’ safety, another thing we do not lightly attribute to Congress.” (*Covalt*, at p. 1439.)

We agree with the Seventh Circuit’s analysis. Clearly, Congress intended section 9658 to have impact beyond actions for recovery of expenses incurred in cleaning up toxic waste sites. It applies by its terms to individual lawsuits for “personal injury, or property damages,” not just “necessary costs of response,” (*ibid.*) and can be invoked regardless of whether the defendants meet the statutory definition of “liable party” under title 42 United States Code section 9607(a). Equally obvious, however, is the fact that section 9658 was never meant to extend to all state court lawsuits for personal injury and property damage arising from exposure to toxic substances. By retaining the requirements that the exposure result from “release” into the “environment” from a “facility” as those terms are used for purposes of a CERCLA cost recovery action, Congress expressed its intent to limit the statute’s scope.

We find further support for our position in the decisions of the other federal courts which have agreed with the Seventh Circuit that an exposure limited to a few persons inside an enclosed space is not covered by either section 9658 or CERCLA in general. In *Knox v. AC & S, Inc.* (S.D.Ind. 1988) 690 F.Supp. 752, the decedent was exposed to the defendants’ asbestos-containing thermal insulation products during the course of his employment as an insulation mechanic. The issue was whether the state’s statute of \*237 repose, which put an upper limit on the time within which a lawsuit could be filed without regard to the date the injury was discovered, was

preempted by section 9658. The court agreed with the plaintiff that “[t]he release of the asbestos fibers from the asbestos-containing insulation products at [the decedent’s] work sites would seem capable of characterization as a CERCLA release, in that the fibers were ‘emitted’ or ‘discharged’ from the insulation.” (*Knox*, at pp. 756-757.) But the court could not agree that it constituted a release into the “environment”: “Although ‘environment’ is defined in terms of ambient air, an evaluation of the term environment in terms of the overall purpose and scope of CERCLA indicates that the case at bar is not properly considered within the purview of CERCLA and more specifically, the discovery statute of limitations established in § 9658.” (*Knox*, at p. 757.)

*Knox* was followed in *Electric Power Bd. of Chattanooga v. Westinghouse* (E.D.Tenn. 1988) 716 F.Supp. 1069. As set forth in the statement of facts, an explosion occurred in a penthouse vault located atop a building in downtown Chattanooga. The vault was being utilized by the Electric Power Board of Chattanooga. The explosion occurred while a three-man maintenance crew was performing service work on equipment located in the vault. Two transformers in the vault were damaged by the explosion and discharged “toxic dielectric fluid containing PCB’s.” (*Id.* at p. 1072.) The manufacturers of those transformers were sued by the board for cost of repair and cleanup. A statute of limitations defense was raised based on the date the transformers were purchased and put into use, nearly 20 years prior to the explosion. The board “submitted evidence that PCB’s were leaked or released into the penthouse vault and subsequently tracked about the general area by persons extinguishing the fire.” (*Id.* at p. 1080.) The court, however, “d[id] not believe that the leaking of a relatively small quantity of dielectric fluid from a damaged transformer, within the confines of a penthouse containing electrical equipment, is the type of ‘release into the environment contemplated or intended by the CERCLA.’ ” (*Id.* at p. 1081.)

The court in *Electric Power Bd.* was also persuaded of section 9658’s inapplicability by another exclusion contained in one of the key definitional provisions. The definition of “facility” excludes “any consumer product in consumer use ....” (42 U.S.C. § 9601(9).) The court believed that “the ... transformers containing ... dielectric fluid are consumer products in consumer use. The transformers were not, therefore, ‘facilities.’ ” (*Electric Power Bd. of Chattanooga v. Westinghouse*, *supra*, 716 F.Supp. at p. 1080.)

The Ninth Circuit Court of Appeals rejected *Electric Power Bd.*’s interpretation of “facility” in \*238 3550 *Stevens Creek Assoc. v. Barclays Bank*, *supra*, 915 F.2d 1355 and *People of State of Cal. v. Blech* (9th Cir. 1992) 976 F.2d 525 (*Blech*), where the issue was whether the costs incurred in the voluntary removal of asbestos could be recovered from a current or prior building owner. The

district court in *Blech* had ruled that asbestos building material is a consumer product in consumer use. The Ninth Circuit expressed its disapproval: “[W]e recognized in *Stevens Creek* that ‘the term “facility” has been broadly construed by the courts, such that “in order to show that an area is a ‘facility,’ the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there. “ ‘ [Citation.] The logical reading of the discussion in *Stevens Creek* is that we would have held an asbestos-containing *building* to be a facility had the issue been presented. To the extent there may be ambiguity in *Stevens Creek*, we now hold that structures containing asbestos building material as distinguished, for example, from containers of such materials for consumer use, satisfy the broad definition of ‘facility’ in CERCLA ....” (*Blech*, *supra*, 976 F.2d at p. 527, fn. 1.)<sup>10</sup>

The court agreed, however, with the interpretation of environment advocated by the Seventh Circuit in *Covalt*: “[T]here is no basis for inferring an intention by Congress to create a private cause of action under CERCLA for recovery of the cost of removing asbestos building materials from a structure when no release of hazardous substances outside the structure is alleged.” (*Blech*, *supra*, 976 F.2d at p. 527; accord, 3550 *Stevens Creek Assoc. v. Barclays Bank*, *supra*, 915 F.2d at p. 1360, fn. 9 [“Although not contested in this proceeding, courts which have addressed [the] language [defining environment] have determined that the escape of asbestos fibers within a building falls outside the intended objectives of CERCLA.”]; *G.J. Leasing Co., Inc. v. Union Elec. Co.* (7th Cir. 1995) 54 F.3d 379, 385 [“[T]he release of asbestos inside a building, with no leak outside ... is not governed by CERCLA.”].)

In the cases which appellants cite in support of a contrary interpretation of release into the environment-*State of Vt. v. Staco, Inc.* (D.Vt. 1988) 684 F.Supp. 822 and \*239 *Kowalski v. Goodyear Tire and Rubber Co.* (W.D.N.Y. 1994) 841 F.Supp. 104 -the workers carried substantial quantities of hazardous substances outside the workplace in the form of dust covering their clothing. Third parties were exposed to these hazardous substances, and the environment outside the workplace was significantly impacted. Appellants attempt to bring themselves within the purview of these decisions by contending in their briefs that some Safety-Kleen liquid or vapors clung to their skin or clothing and were inhaled or released into the ambient air outside their places of employment. No such allegations were contained in appellants’ complaints or their oppositions to the summary judgment motions. Even had they been included, we do not believe that such de minimis exposure transforms these occupational exposure actions into CERCLA claims. The plaintiffs in *State of Vt.* presented evidence that the air in the workers’ homes had elevated levels of mercury and that their septic tanks contained an amount of mercury which was capable of

leaching into the water supply. (*State of Vt.*, 684 F.Supp. at p. 836, fn. 8.) The claim in *Kowalski* arose when the worker's wife allegedly developed cancer from handling his contaminated clothing and from the spread of the dangerous chemical throughout their home. (*Kowalski*, 841 F.Supp. at p. 105.) Accepting appellants' contention that a few drops of solvent on their clothing constitutes a release into the environment for purposes of CERCLA would result in the trivializing of the statutory language which the courts have sought to avoid by restricting the definition of the term.

Finally, *Tragarz v. Keene Corp.* (7th Cir. 1992) 980 F.2d 411, which appellants cite for the proposition that "an occupational exposure to asbestos causing the latent development of mesothelioma constituted a release into the environment" is inapposite because it involved the interpretation of an Illinois joint and several liability statute. The Illinois statute contained similar language to CERCLA-requiring a "discharge into the environment"-and defendants sought to rely on *Covalt*, arguing that "the reasoning in *Covalt* applies to the interpretation of the Illinois joint and several liability provision ...." (*Tragarz v. Keene Corp.*, *supra*, at p. 427.) The court acknowledged that "in *Covalt* we held that release into the environment from a facility under SARA did not include releases into the internal workplace environment, at least where a worker is the injured party ... because such a reading would trivialize this term." (*Tragarz*, at p. 427.) But the court believed that the case before it and the issues in *Covalt* were not "as similar as the defendants paint them." (*Tragarz*, at p. 427.) Although the "similar phraseology" in the Illinois statute "should not be interpreted in a manner that makes it devoid of meaning," it did not follow that the phraseology "ha[d] the same meaning under Illinois's joint and several liability statute and CERCLA" because they were "two very different statutes." (*Ibid.*) "CERCLA, a federal statute, focuses on the national concern of public health \*240 and environment while Illinois's joint and several liability statute focuses on individual, personal injury and property claims. With this change in focus may come a change in the meaning of the term environment." (*Id.* at p. 428.)

Based on the weight of authority and the persuasiveness of the Seventh Circuit's analysis in *Covalt*, we hold that section 9658 does not apply in the present situation.<sup>11</sup>

## V

In a supplemental brief, appellants contend that determination of the date the statute of limitations accrued under California law must be reconsidered in light of the Supreme Court's 1999 decision in *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71 [86 Cal.Rptr.2d 846, 980 P.2d 398], which, they assert, stands for the proposition that accrual does not occur under California

law until the claimant identifies the particular hazardous substance that caused his injury. In *Bockrath*, the plaintiff contracted multiple myeloma while working at Hughes Aircraft Company from January 1973 to March 1994. His suit named approximately 55 defendants, including the manufacturers of such common items as WD-40 and rubber cement. The court was primarily concerned with "overbroad litigation." (*Id.* at p. 81.) According to the court: "The law cannot tolerate lawsuits by prospecting plaintiffs who sue multiple defendants on speculation that their products may have caused harm over time through exposure to toxins in them, and who thereafter try to learn through discovery whether their speculation was well-founded." (*Ibid.*) "[I]t is sharp practice to implead defendants in a products liability suit alleging long-term exposure to multiple toxins unless, after a reasonable inquiry, the plaintiff actually believes that evidence has been or is likely to be found raising a reasonable medical probability that each defendant's product was a substantial factor in causing the harm ...." (*Id.* at p. 82.) "A cancer-afflicted plaintiff suing every manufacturer of an airborne substance found in the Los Angeles basin probably would be exposed to sanctions for the suit, even if certain defendants eventually were found to have made a product that was a substantial factor in the onset of the plaintiff's cancer." (*Id.* at p. 83.) \*241

The plaintiff's complaint, which was "poorly drafted" and "internally inconsistent," appeared to be "attempting to allege" that "defendants' products cause cancer, he was exposed to them, and they migrated to his internal organs and caused his multiple myeloma." (*Bockrath v. Aldrich Chemical Co.*, *supra*, 21 Cal.4th at p. 79.) The court concluded the allegations were "insufficient" because they did not allege "that each defendant's product was a substantial factor ... in causing his multiple myeloma." (*Id.* at pp. 79-80.) Due to the multitude of defendants named and products identified, the pleaded facts did not show plainly the connection between cause and effect or give rise to an inference of causation that was more than theoretical. The court remanded in order to give the plaintiff the opportunity to assert the following specific allegations: "(1) Plaintiff must allege that he was exposed to each of the toxic materials claimed to have caused a specific illness. An allegation that he was exposed to 'most and perhaps all' of the substances listed is inadequate. [¶] (2) He must identify each product that allegedly caused the injury. It is insufficient to allege that the toxins in defendants' products caused it. [¶] (3) He must allege that as a result of the exposure, the toxins entered his body. [¶] (4) He must allege that he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness. [¶] (5) Finally, ... he must allege that each toxin he absorbed was manufactured or supplied by a named defendant." (*Id.* at p. 80, fn. omitted.)



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within a workplace which are covered by worker's compensation.”

- 10 Compare *CP Holdings v. Goldberg-Zoino & Associates* (D.N.H. 1991) 769 F.Supp. 432, 439, where the court read the “commercial products” exclusion to the definition of facility in a way which supports both the workplace exclusion and the restricted interpretation of environment: “The legislative history ... indicates that the consumer products limitation was likely a result of fears that without such a limitation, businesses that routinely use hazardous substances in everyday operations could be held liable under CERCLA for injuries to workers or those exposed to the substances within the confines of the building. It is clear, then, that the limitation on the definition of ‘facility’ excluding ‘consumer products in consumer use’ was designed to limit CERCLA so as not to cover exposure or release of hazardous substances from a consumer product solely within a building.” (Fn. omitted.)
- 11 We do not, therefore, reach the question of whether the federal statute and the California discovery rule are divergent. (See *Angeles Chemical Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 123 [51 Cal.Rptr.2d 594] [“Where a state does not apply the discovery rule to claims for property damage caused by toxic contamination, CERCLA mandates that the state statute of limitations begin to run when the plaintiff discovers, or should have discovered, the injury and its cause. [Citations.] In contrast, where a state applies the discovery rule, such that the statute of limitations commences on the same date under both state law and CERCLA, there is no federal preemption.”].)

# Tab D

60 Cal.App.4th 37, 70 Cal.Rptr.2d 62, 97 Cal. Daily Op. Serv. 9512, 97 Daily Journal D.A.R. 15,239

SDC/PULLMAN PARTNERS, Plaintiff and Appellant,

v.

TOLO INCORPORATED et al., Defendants and Respondents.

No. G016212.

Court of Appeal, Fourth District, Division 3, California.

Dec. 18, 1997.

### SUMMARY

A lessor brought an action to enforce a toxic substance clause in a lease of land to an aerospace manufacturer, alleging that the lessee was obligated to clean up trace amounts of certain substances that would have been toxic in larger quantities. The trial court directed a verdict for the lessee. (Superior Court of Orange County, No. 684137, Richard O. Frazee, Sr., Judge.)

The Court of Appeal affirmed the judgment. The court held that the toxic substance clause was not triggered by the presence of de minimis amounts of certain substances that would have been toxic in larger quantities. It was clear from the toxic substance clause itself, and from the circumstances under which the lease was made, that the parties intended that the lessee would be allowed to continue its normal manufacturing operations and to use toxic materials incidental to those operations. Although the lease required the lessee to clean up "any" toxic materials "found" on or under the property resulting from the lessee's use, a literal, absolutist reading was inconsistent with the textual context and was unreasonable under the circumstances. The lessee's use of the property was already ongoing when the lessor bought the property, and the lessor knew the lessee was an aerospace manufacturer that could not conduct even the cleanest operations without some use of toxic substances. The court also held that the trial court's ruling was proper in light of the policy expressed in six judicially developed factors used in the context of compliance with laws clauses. The court further held that although the lease evidenced a purpose to protect the lessor from liability under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), and CERCLA liability theoretically can be imposed for de minimis discharge of toxic substances, under the circumstances of this lease, only real CERCLA liability, or at least a "realistic threat" of it, as opposed to speculative liability, could reasonably trigger the lessee's cleanup duty. In the event that a government agency were to require the lessor to pay for cleanup of the property, the

indemnity clause would still be available to it to recover those sums from the lessee. (Opinion by Sills, P. J., with Sonenshine and Rylaarsdam, JJ., concurring.)

### HEADNOTES

#### Classified to California Digest of Official Reports

(<sup>1</sup>)  
Landlord and Tenant § 15--Leases--Interpretation--Text as Presumptively Controlling.  
When presented with a dispute over a clause in a lease, the court begins its analysis with the text itself, which is presumptively controlling.

(<sup>2</sup>)  
Landlord and Tenant § 65--Possession and Use of Premises--Tenant's Covenant to Repair--Cleanup of Toxic Substances.

A toxic substance clause in a lease of land to an aerospace manufacturer, which obligated the lessee to clean up toxic and hazardous substances on the property, was not triggered by the presence of de minimis amounts of certain substances that would have been toxic in larger quantities. It was clear from the toxic substance clause itself, and from the circumstances under which the lease was made, that the parties intended that the lessee would be allowed to continue its normal manufacturing operations and to use toxic materials incidental to those operations. Although the lease required the lessee to clean up "any" toxic materials "found" on or under the property resulting from the lessee's use, a literal, absolutist reading was inconsistent with the textual context. Most of the clause was predicated on the idea that the lessee would use toxic materials, but that such use would have to be regulated to ensure that the lessor incurred no legal liability under applicable environmental law because of that regulated use. Also, an absolutist reading was unreasonable under the circumstances of this lease. The lessee's use of the property was already ongoing when the lessor bought the property. The lessor knew the lessee was an aerospace manufacturer and could not conduct even the cleanest operations without some use of toxic substances. Moreover, a rule of reason must be used in explicating what is hazardous, and the lessor was unable to point to any health hazard.

(<sup>3</sup>)  
Landlord and Tenant § 65--Possession and Use of Premises--Tenant's Covenant to Repair--Cleanup of Toxic Substances--"Compliance With Laws" Clauses--Risk Allocation Factors.

A toxic substance clause in a lease of land to an aerospace manufacturer, which obligated the lessee to clean up toxic

and hazardous substances, was not triggered by de minimis amounts of certain substances that would have been toxic in larger quantities, in light of the policy expressed in six judicially developed factors used in the context of compliance with laws clauses. Factor one (cost of curative action as a proportion of total rent received) reveals that the law disfavors allocation of curative burdens in a grossly disproportional way. The cost of eliminating every molecule otherwise toxic in larger quantities is necessarily prohibitive. The next four factors conveyed roughly the same idea: the term of the lease (factor two), the relation between the benefit to the tenant and benefit to the landlord (factor three), the structural or nonstructural nature of the curative action (factor four), and the degree of interference with the tenant's enjoyment of the premises (factor five). As for the likelihood that the parties contemplated the application of the particular law involved (factor six), the strong implication from the continual reference to compliance with applicable environmental statutes was that the actual application of such laws would serve as the trigger for the tenant's cleanup duties.

[See 6 Miller & Starr, Cal. Real Estate (2d ed. 1989) § 18:106.]

(<sup>4</sup>)  
Landlord and Tenant § 65--Possession and Use of Premises--Tenant's Covenant to Repair--Cleanup of Toxic Substances--Based on Potential Liability Under CERCLA.

A toxic substance clause in a lease of land to an aerospace manufacturer, which obligated the lessee to clean up toxic and hazardous substances, was not triggered by de minimis amounts of certain substances that would have been toxic in larger quantities, notwithstanding that the lease evidenced a purpose to protect the lessor from liability under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). It is true that under federal law, in theory, CERCLA liability can result from even a de minimis discharge of toxic substances. However, in light of the circumstances under which the lease was made, and the clear contemplation of the parties that the property would be used for aerospace manufacturing, only real CERCLA liability, or at least a "realistic threat" of it, as opposed to speculative liability, could reasonably trigger the lessee's cleanup duty. In the event that a government agency were to require the lessor to spend sums to clean up the property, the indemnity clause would still have been available to it to recover those sums from the lessee.

(<sup>5</sup>)  
Evidence § 62--Documentary Evidence--Parol Evidence Rule--Integration.  
In an action by a lessor to enforce a toxic substance cleanup clause in a lease of land to an aerospace

manufacturer, in which the trial court properly directed a verdict for the lessee, parol evidence was not available to add or otherwise vary the terms of the lease, since the lease was an integrated agreement. It would have been error for the trial court to have admitted evidence of negotiations prior to the signing of the agreement, and there was no need for parol evidence to explicate an ambiguity in the agreement. The text of the agreement was not reasonably susceptible to the lessor's interpretation. Accordingly, it was not error for the trial judge to exclude the testimony of a principal of the lessor as to what the parties really meant by the toxic substance clause. Nor was it error to exclude the testimony of the lessor's environmental expert to the effect that three lost buyers were reasonable in not proceeding to buy the property. While the buyers may have acted reasonably in being scared away from buying the property, that fact was not relevant.

COUNSEL

Allen, Matkins, Leck, Gamble & Mallory, Patrick E. Breen, Lee A. Shirani and Michael R. Farrell for Plaintiff and Appellant.

Hanley & Patch, Grant & Laubscher and William B. Hanley for Defendants and Respondents.

SILLS, P. J.

## I

This case centers on a toxic substance clause in a lease of land to an aerospace manufacturer. The former lessee, defendant Tolo Incorporated, manufactured fusion reactors, particle accelerator parts and radar antennas, among other things. Tolo occupied the property, which is just off the Costa Mesa Freeway, from the late 1960's to the mid-1990's. It began leasing the land from plaintiff SDC/Pullman Partners in 1985 after a sale-leaseback deal. The lease was renewed in July 1989. It is that lease<sup>1</sup> which contains the clause in question.

Quite remarkably-for an aerospace manufacturer-the land in question is not the subject of any cleanup actions on the part of any government entities, local, state or federal. Unlike some of Tolo's neighbors,<sup>2</sup> the property has suffered no groundwater pollution; levels of toxic and hazardous substances \*41 in the soil have not been high enough to trigger any cleanup order. Perhaps the most remarkable fact to emerge from the trial exhibits is that in one sampling of soil from five feet beneath a fenced drum storage area near one of the buildings, some tetrachloroethene (PCE) was indeed found-but at a level, 5 parts per billion, which is *only slightly above that found in chocolate sauce*, which is 3.6 parts per billion. In the same vein, another expert report dryly opined, in a risk assessment of the soils at the Tolo site, that if a person contacted and "ingest[ed]" soil from the property 350 days a year for 30 years the additional risk of cancer

would be 0.007 in 1,000,000.<sup>3</sup>

The case comes to us after the trial judge directed a verdict for defendant Tolo. The plaintiff and drafter of the toxic substance clause, SDC/Pullman Partners, appeals from the ensuing judgment, arguing that the toxic substance clause in the lease obligated Tolo to clean up *all* toxic and hazardous substances at the property, and therefore the presence of detectable amounts of various chemicals, particularly in the oakite processing area of the facility, precluded the directed verdict. According to SDC, it makes no difference that the amounts of toxic or hazardous substances have not warranted governmental legal action; Tolo must still spend whatever is necessary to clean up even the trace amounts that *do* exist, and is in breach of its lease if it hasn't.

We disagree. The toxic substance clause here must be examined in light of the circumstances under which it was made and in light of principles articulated by our Supreme Court in the analogous cases of *Brown v. Green* (1994) 8 Cal.4th 812 [35 Cal.Rptr.2d 598, 884 P.2d 55] and *Hadian v. Schwartz* (1994) 8 Cal.4th 836 [35 Cal.Rptr.2d 589, 884 P.2d 46]. When it is, it is clear that the mere presence of de minimis amounts of certain substances otherwise toxic in larger quantities does not trigger the clause's cleanup obligation.

## II

(<sup>11</sup>) As this case is fundamentally a dispute over a clause in a lease, we begin our analysis with the text itself, which, as the *Hadian* court said, is "presumptively controlling." (*Hadian v. Schwartz, supra*, 8 Cal.4th at pp. 844-845.) The toxic substance clause itself is a block of text arranged into one densely worded paragraph of over four hundred words. Rather than set forth the entire text all at once, we will exegete the language sentence by sentence.

The first sentence opens with the words, "except as provided below," and then sets out a blanket prohibition on the presence of any toxic material on \*42 the property without prior written permission.<sup>4</sup> This thought is immediately followed by a requirement that if the tenant<sup>5</sup> wants to use toxic substances, it must comply with all applicable laws and, further, show evidence of such compliance "reasonably" acceptable to the landlord.<sup>6</sup> The next two sentences give the landlord the right to require a detailed explanation of the use of any toxic substances<sup>7</sup> as well as obtain any copies of documents turned over to any governmental authorities regulating the use of toxic substances.<sup>8</sup> Then follows a blanket and absolute prohibition on the storage of any toxic materials in an underground tank.<sup>9</sup> The sixth sentence requires that the tenant obtain approval from the local fire department for

the use of any toxic substances and that there be a label on the exterior of the premises as to what chemicals or toxic substances are "located within the premises."<sup>10</sup>

The next sentence—one of the two mainly relied on by SDC here—states that if "any such wastes, substances or materials" are "found" on or under the property resulting from the tenant's use, the tenant will spend all \*43 necessary sums to "cause the same to be cleaned up"; at the same time the landlord is to be absolutely not liable for those cleanup costs.<sup>11</sup> Then comes a requirement that the tenant be in "compliance" with all environmental laws, after which there is listed a compendium of environmental statutes.<sup>12</sup>

The ninth sentence in the clause deals with the tenant's duties in the event that the tenant receives notice of violation of any environmental laws, which duties include immediately curing the "deficiency or complained of matter" and giving the landlord proof of that curing.<sup>13</sup> Sentence No. 10 affords the landlord the "right but not the duty" to step in and cure—but at the tenant's expense—any default or failure of performance by the tenant under the clause.<sup>14</sup>

The penultimate sentence provides for the indemnification of the landlord by the tenant by reason of the tenant's failure to perform its obligations \*44 under the clause.<sup>15</sup> Finally, the last sentence allows the landlord to enter the premises anytime, without notice, to ascertain whether the tenant is "in compliance" with the requirements of the paragraph.<sup>16</sup>

In the 1994 *Brown* and *Hadian* cases, our Supreme Court was confronted with the construction of certain lease clauses operationally similar to the toxic substance clause at issue here. Both cases involved "compliance with laws" clauses which regulated the tenant's use of the property, and which, ostensibly, could be read to require that the tenant bear the cost of expensive capital improvements mandated by a governmental agency. In *Brown* the question involved asbestos cleanup; in *Hadian* it was earthquake retrofitting. In reaching different results for each case (in *Brown*, the tenant had to pay, in *Hadian* it was the landlord) the high court emphasized that not only must there be "a close consideration ... of the terms of the lease but of the circumstances surrounding its making." (*Brown v. Green, supra*, 8 Cal.4th at p. 825.) In particular, the nature of the tenant's *use* of the property as contemplated by the parties is extremely important (see *id.* at pp. 821, 823, each time discussing *Glenn R. Sewell Sheet Metal, Inc. v. Loverde* (1969) 70 Cal.2d 666 [75 Cal.Rptr. 889, 451 P.2d 721]), as well as six judicially developed factors which serve as "clues" or indicators of the risks and burdens which the parties intended to establish. (See *Brown, supra*, 8 Cal.4th at p. 829.)

We need only note here that emphasis placed by the *Brown* and *Hadian* courts on the circumstances of the lease could hardly have been unexpected. Since as early as 1872 California statutory law has admonished judges that the circumstances under which a contract is made is necessary to its proper construction. (See Code Civ. Proc., § 1860; Civ. Code, § 1647.)

<sup>(2)</sup> In the present case, we affirm the trial court's judgment because the terms and circumstances of the toxic substance clause, confirmed by the \*45 policy expressed in the judicially developed factors used in *Brown* and *Hadian*, all point to the conclusion that the toxic substance clause was intended to protect the landlord against *actual* liability-or at least the realistic threat of actual liability-from the tenant's noncompliance with environmental law, not require the tenant to spend potentially enormous sums to extract trace and de minimis amounts of certain molecules to avoid purely speculative environmental liability.

### III

If one thing is clear from the toxic substance clause here, particularly in light of the circumstances under which the lease was made, it is that the parties certainly intended that Tolo would be allowed to continue its normal, high-tech manufacturing operations, and would be allowed to use toxic materials incidental to those operations. Taken as a whole, the entire toxic substance clause here is devoted to *conditioning* and *regulating* Tolo's use of "toxic" materials, not blanketly prohibiting their use. Most of the sentences in the clause revolve around the need for precautions to be taken and Tolo's responsibilities if precautions are not. The only real ironclad prohibition is of toxic materials in underground storage tanks.

If there is any doubt from the text, the circumstances of the lease are dispositive. At the time the lease was made Tolo was engaged, as it had been for about 20 years, in the manufacture of parts for the aerospace industry. There is no way that such parts can be made without using toxic materials; radar antennas and such things, if we may be forgiven for making the point facetiously, are not made of tofu and sprouts. The idea therefore, which permeates SDC's brief, that in 1989 the parties were starting from ground zero and that Tolo was going to have to obtain written permission every time any toxic materials came onto Tolo's plant after 1989, even if such materials were part of its normal manufacturing processes, is untenable. SDC reads the first sentence in a way which would have frustrated the purpose of the lease, forcing Tolo to go out of business altogether.

SDC places great stress on the need for written

permission, and asks what purpose could those words have if not to first establish a blanket prohibition on the use of toxic substances, subject to the written permission requirement. SDC argues that the lease could hardly have contemplated that (a) Tolo would have blanket permission to use toxic materials but (b) would have to obtain permission if it wanted to use them in such a way as to violate environmental law. One would be left with the proposition that the lease would have contemplated the use of toxics *in violation of law* if written permission had first been obtained. \*46

The argument, however, relies on a false dichotomy. The parties may have contemplated that Tolo should continue to do what it had been doing; they did not necessarily contemplate that Tolo could change its manufacturing operations and subject the landlord to a substantially increased risk of environmental liability without written permission. The company could not, for example, have converted its plant to the local equivalent of Lockheed's famous "Skunkworks," and manufactured, say, the (apparently very toxic) coating of stealth aircraft without first obtaining written permission. Even though such manufacturing per se might not *necessarily* violate any antipollution law, there certainly would be an increased risk of a spill on the property.

That leaves sentence number seven, with its statement that if "any" toxic wastes, substances or materials are "found" on or under the property resulting from the tenant's use, the tenant will spend all necessary sums to "cause the same to be cleaned up." If read in literal isolation, that is, apart from the balance of the clause and the circumstances under which the lease was made, and if one interprets the word "any" in an extreme and absolutist way, one can indeed conclude that Tolo was required to spend untold sums of money to eliminate every last vestige of any toxic substance "found" anywhere on the property.

But contract terms cannot be read in isolation. (Civ. Code, § 1641.) They must be read as a consistent whole, so that some effect will be given to all clauses, consistent with the general intent and purpose of the instrument. (Civ. Code, § 1652.) The words of a contract may be explained by reference to the circumstances under which the contract was made. (Civ. Code, § 1647.) In fact, literal language of a contract does not control if it leads to absurdity (Civ. Code, § 1638) or if it is wholly inconsistent with the main intention of the parties (Civ. Code, § 1653). And if these rules are not enough, the language of a contract should be "interpreted most strongly" against the party who caused the uncertainty to exist (Civ. Code, § 1654), in this case SDC, as it is undisputed its in-house counsel wrote the document. In light of these rules, there are three reasons we reject the absolutist reading of "any" in the seventh sentence

proffered by SDC.

First, such a reading is inconsistent with textual context. The balance of the toxic substance clause—important because the very first words of the opening line indicate that some use of toxics *is* being provided for—contradicts SDC’s proffered interpretation. As we have already indicated, most of the clause is predicated on the idea that Tolo *would* use toxic materials, but such use would have to be regulated to ensure that SDC incurred no legal liability under applicable environmental law because of \*47 that regulated use. Sentence after sentence points the reader to applicable environmental law, the implication being that it would serve as a benchmark.

Second, an absolutist reading of the seventh sentence is unreasonable under the circumstances of *this* lease. This is not a residential lease. Tolo’s use of the property was already ongoing when SDC bought the property and became a landlord with a tenant already in place. SDC knew that Tolo was an aerospace manufacturer and could not conduct even the cleanest operations without some use of toxic substances.<sup>17</sup> Obviously, in such circumstances, Tolo had to be cut a little slack as far as the containment of those substances was concerned. “[S]afe,” as the United States Supreme Court noted in *Industrial Union Dept. v. American Petrol. Inst.* (1980) 448 U.S. 607, 642 [100 S.Ct. 2844, 2864, 65 L.Ed.2d 1010], “is not the equivalent of ‘risk-free.’” The “*nature* of the lessee’s use of the property” (see *Brown, v. Green, supra*, 8 Cal.4th at p. 823) meant that at least a few molecules on the list of hazardous substances might escape into the environment and on to the ground.

Third, an absolutist reading of the seventh sentence is unreasonable from the standpoint of actual hazard or toxicity. The list of hazardous substances found in appendix A to section 302.4 of title 40 of the Code of Federal Regulations contains a number of common materials which are not “toxic” in de minimis or infinitesimal concentrations. The list contains zinc and chromium, for example, which one can obtain at health food or vitamin stores, and cadmium, which is contained in stainless steel cutlery. Nickel and silver are also listed, even though no one would ever think that collections of silver coins were “hazardous.” Another example is acetone. Acetone is formed in the human liver when fats are metabolically broken down (see Stryer, *Biochemistry* (Freeman and Company, 3d ed. 1988) pp. 478-479 [discussing formation of ketone bodies in the liver from acetyl coenzyme if fat breakdown predominates]), as, for example, in exercise. And, as this very record shows, another listed hazardous substance, tetrachloroethene, naturally occurs in chocolate.

It would be ludicrous to hold that, say, a buried bag of silver coins constituted a “hazardous substance.”

Obviously, a rule of reason must be used in explicating what is hazardous. (See *Industrial Union Dept. v. American Petrol. Inst., supra*, 448 U.S. 607 [affirming lower court refusal to enforce occupational safety and health standard requiring reduction of benzene in air from 10 parts per million to 1 part per million].) SDC, however, \*48 is unable to point to any health hazard.<sup>18</sup> Indeed, the evidence is quite the contrary: If you can eat the soil 350 days a year for 30 years and incur an increased cancer risk of only *0.007 in 1,000,000* you don’t really have “any” “toxic” substances in any sane or intelligent sense at all.

#### IV

(<sup>13</sup>) In addition to basic contract interpretation rules, our conclusion is confirmed by reference to the six judicially developed factors actually used in the context of compliance with laws clauses as explicated in *Brown* and *Hadian*. Those six factors are: (1) the relationship of the cost of curative action to the rent reserved; (2) the term for which the lease was made; (3) the relationship of the benefit to the lessee to that of the reversioner; (4) whether the curative action is structural or nonstructural in nature; (5) the degree to which the lessee’s enjoyment of the premises will be interfered with while the curative action is being undertaken; and (6) the likelihood that the parties contemplated the application of the particular law or order involved. (*Brown v. Green, supra*, 8 Cal.4th at pp. 830-833; *Hadian v. Schwartz, supra*, 8 Cal.4th at pp. 847-849.)

Preliminarily, of course, we should note that the six factors were not developed to explicate toxic substance clauses, and do not readily lend themselves to rote, mechanical application to such clauses. Even so, the factors are instructive because their *very existence* indicates a judicial policy to take a common sense, rather than absolutist, approach to contractual risk allocation between landlords and tenants.

Thus, the first factor (cost of curative action as a proportion of total rent received) reveals that the law disfavors the allocation of curative burdens in a grossly disproportional way. Yet the elimination of pollution is subject to the law of diminishing returns. The cost of eliminating every last molecule otherwise toxic in larger quantities is necessarily prohibitive. (Cf. *Industrial Union Dept. v. American Petrol Inst., supra*, 448 U.S. at p. 628 [100 S.Ct. at pp. 2856-2857] [discussing occupational benzene standard].)

The Supreme Court illustrated the importance of disproportionality by self-consciously contrasting the results it reached in *Brown* and *Hadian*. Thus in *Brown*, the absolute cost of the curative action was high (about

\*49 \$250,000), but constituted less than 5 percent of the reserved rent. The costs were to be borne by the tenant. (See *Brown v. Green*, *supra*, 8 Cal.4th at pp. 830-831.) In *Hadian*, by contrast, the cost of curative action was smaller (\$23,400), but amounted to almost 145 percent of the cost of the entire rent reserved over the term of the lease. (*Hadian v. Schwartz*, *supra*, 8 Cal.4th at p. 847.) The costs in that case were to be borne by the landlord.<sup>19</sup>

The next four factors used in *Brown* and *Hadian* convey roughly the same idea: The shorter the term of the lease (2), the less likely it is that the parties contemplated the allocation of a relatively expensive burden on the tenant. The same idea courses through the relation between the benefit to the tenant and benefit to the landlord (3), the structural or nonstructural nature of the curative action (4), and degree of interference with the tenant's enjoyment of the premises (5). The harsher the burden on the tenant in relation to what it receives from the lease, the less likely the parties intended that the curative action be visited on the tenant.

The sixth *Brown* and *Hadian* factor—the contemplation of the specific application of the particular law—is especially relevant. If there is a drumbeat theme in this toxic substances clause here, it is reference to existing environmental laws and assurance of compliance with those laws. The enumerated environmental statutes were very much in the mind of the parties in entering into the lease agreement. Again, as we have noted above, the strong implication from the continual reference to compliance with applicable environmental statutes is that the actual application of such laws would serve as the trigger for the tenant's cleanup duties.

## V

(<sup>41</sup>) We must now confront the problem of the energuminal lengths to which the definition of “hazardous substance” under the federal environmental law known as CERCLA<sup>20</sup> has been taken. It is true that as a matter of liability under CERCLA, some federal courts have held there is no “threshold concentration requirement.” (*U.S. v. Alcan Aluminum Corp.* (3d Cir. \*50 1992) 964 F.2d 252, 259; accord, *Amoco Oil Co. v. Borden, Inc.* (5th Cir. 1989) 889 F.2d 664, 669.) Unlike our approach above to the lease terms here, these federal courts have adopted an absolutist reading of what is “hazardous”: If the *substance* is found in one of the designated categories set forth in 42 United States Code section 9601(14), it is hazardous, without regard to quantity. (E.g., *Alcan Aluminum*, *supra*, 964 F.2d at p. 260.) Thus we must ask, as SDC would have us ask, if “hazardous substance” is read without regard to quantity under CERCLA, why should it not be read without regard to quantity in the lease term here?

We are merely a state intermediate appellate court charged, in this appeal, with interpreting terms in a lease of real property under state contract law, and so the issue of how CERCLA should be interpreted is not before us. If federal courts have insisted on reading a federal law without any reference to reason or common sense, that is their business. However, our conclusion is not necessarily inconsistent with those federal decisions. There is a significant difference between liability in a CERCLA action and a private cleanup duty pursuant to a lease.

*U.S. v. Alcan Aluminum Corp.*, *supra*, 964 F.2d 252 is instructive, because there the court had the intellectual honesty to confront the *reductio ad absurdum* inherent in an absolutist definition of hazardous substance. In *Alcan Aluminum*, an aluminum manufacturer used an emulsion in the processing of aluminum ingots which consisted of 95 percent water and 5 percent mineral oil. In the process, some small fragments of copper, chromium, cadmium, lead and zinc were absorbed into the emulsion. All of those substances qualify as “hazardous” under CERCLA. Interestingly enough, the levels of each metal in the emulsion were “orders of magnitude *below ambient or naturally occurring background levels.*” (*U.S. v. Alcan Aluminum Corp.*, *supra*, 964 F.2d at p. 256, italics added.) About 2,300,000 gallons of the emulsion were deposited in an old mine shaft, along with other hazardous wastes from other producers, by a licensed waste processor in the late 1970's, but in 1985 some of the wastes in the mine shaft got into the Susquehanna River. The federal government sued 20 defendants, all contributors to the stuff in the mine shaft, for its costs of cleaning up the spill. All settled except for the aluminum company—after all, its waste contained *less* copper, chromium, cadmium, lead and zinc than *clean dirt!* (*Id.* at p. 259.) The federal district court, reasoning that quantity makes no difference under CERCLA, granted summary judgment to the government.

The Third Circuit held that the trial court was correct on the definition of hazardous substance. (See *U.S. v. Alcan Aluminum Corp.*, *supra*, 964 F.2d at pp. 261-264.) But the court was not totally oblivious to the obvious implications of its position. The company had pointed out that “virtually \*51 everything in the universe would constitute a hazardous substance” under CERCLA without a minimal quantity requirement, including federally approved drinking water. (See *id.* at p. 260; see also *id.* at p. 267.) The court, to its credit, recognized that the point had “considerable strength.” (*Id.* at p. 267.)<sup>21</sup>

The *reason* the *Alcan Aluminum* court then rejected the point about the absurdity of defining hazardous substances without regard to quantity was the possible *cumulative effect* of small amounts of waste to a larger whole by many contributors. Essentially, the court,

perhaps not realizing it, borrowed the rationale of *Wickard v. Filburn* (1942) 317 U.S. 111, 125 [63 S.Ct. 82, 89, 87 L.Ed. 122], in which it was held that a small farmer's individual wheat sales might not affect interstate commerce themselves, but the sales of many other similarly situated farmers would, and therefore the individual farmer's sales could be regulated under the interstate commerce clause. In *Alcan Aluminum*, the court reasoned that an individual's contribution of an emulsion might be insignificant by itself, but taken together with the contribution of other similarly situated individuals, could have a toxic effect. In declining to read a minimum concentration requirement into CERCLA, the *Alcan Aluminum* court was worried that CERCLA's purposes would be thwarted if persons who contributed only de minimis amounts of substances otherwise toxic could not be held liable under CERCLA, because a site which *did* "warrant remediation" might be composed of pollution from many small contributors, each of whom, individually, might be able to claim that its "particular contribution" did *not* warrant remediation. (964 F.2d at pp. 267-268, quoting *U.S. v. Western Processing Co.* (W.D.Wash. 1990) 734 F.Supp. 930, 937.)

We need not comment on the degree to which the *Wickard v. Filburn* rationale actually made sense in the context of the facts in *Alcan Aluminum*, because that rationale has no application beyond, as the *Alcan Aluminum* court itself put it, the "multi-generator context." (964 F.2d at p. 267.) This is not a case where a court might think it necessary to torture common sense to avoid a result which would allow a small polluter to get off the hook completely. This is not a case where the land has been used as a dump as a result of the tiny contributions of many producers. It is, rather, a case where there is only one producer, and one parcel of land, and no necessity of cleanup.

## VI

We now come, if we may be forgiven the pun, to the real nitty gritty of the case. SDC is clearly afraid of any potential liability under CERCLA, and argues that the lease clause in the present case should be read in an absolute \*52 manner so as to give effect to the lease's evident purpose of protecting the landlord from potential CERCLA liability.

SDC's fear is not wholly unreasonable. If a landowner wants to read something really scary, he or she might want to consider this passage from *Templeton Coal Co., Inc. v. Shalala* (S.D.Ind. 1995) 882 F.Supp. 799, 824, footnote 13: "Under CERCLA, any release of materials defined as hazardous waste under the statute, no matter how small the release and no matter when it occurred, can result in joint and several liability for the entire cost of

cleaning up the site where the release occurred. In other words, even the release of a *de minimis* amount of hazardous waste, done years before, can result in a party's liability under CERCLA for millions of dollars in cleanup costs."

But while SDC's fears are not wholly unfounded, they are answered by the difference between *actual* CERCLA liability and *speculative* CERCLA liability. Using an absolutist definition of hazardous substance, there probably isn't a person in the United States—at least over age 10—who could not in theory be tagged for some sort of cleanup cost somewhere. Anyone who has ever painted anything, who ever put on or took off fingernail polish, who ever used an insecticide, drove a car, changed its oil or had oil changed, smoked a cigarette or changed the toner in a photocopy machine, or who has so much as thrown away a small battery into the trash, could be theoretically held liable for expensive cleanup costs. Yet to base an interpretation of a contract on such theoretical liability is self-evidently absurd. It would reify an unreasonable fear into an actuality.

An analogous area of law is the federal doctrine of standing which denies litigants the ability to challenge as facially unconstitutional certain statutes when the application of those statutes *to them* is only speculative. One of the best known examples of that doctrine may be found in the famous Supreme Court case of *Bowers v. Hardwick* (1986) 478 U.S. 186 [106 S.Ct. 2841, 92 L.Ed.2d 140].

Most law students are familiar with the *Bowers* decision, which upheld the legality of Georgia's criminal antisodomy statute as against a challenge brought by a man who was, as the Supreme Court described him, "a practicing homosexual." (*Bowers v. Hardwick, supra*, 478 U.S. at p. 188 [106 S.Ct. at p. 2842].) What students sometimes forget, however, is that the case also involved, at the trial level, an anonymous married couple who themselves attacked the Georgia statute on the ground that *they* were "chilled and deterred" by the very existence of the law. (See *Hardwick v. Bowers* (11th Cir. 1985) 760 F.2d 1202, 1204.) The federal district court, \*53 however, ruled that the married couple had no standing to challenge the constitutionality of the statute, a decision which was affirmed on appeal.

What was dispositive for the appellate court in *Hardwick* was the lack of even an allegation that the married couple "faced a serious risk of prosecution." They had filed nothing to show they faced any "realistic threat" of prosecution. Therefore they had no standing under *Younger v. Harris* (1971) 401 U.S. 37 [91 S.Ct. 746, 27 L.Ed.2d 669], a Supreme Court case which had held that a group of California professors had no standing to challenge a state "syndicalism" statute which, they

claimed, inhibited their right to espouse socialism because their fears were “imaginary” and “speculative.” (See *Hardwick v. Bowers*, *supra*, 760 F.2d at pp. 1206-1207 and *Younger*, *supra*, 401 U.S. at p. 42 [91 S.Ct. at pp. 749-750].)

In light of the circumstances under which the lease in the case before us was made and the clear contemplation of the parties that the property would continue to be used for aerospace manufacturing, we hold that only real CERCLA liability-or at least a “realistic threat” of it-can reasonably trigger a tenant’s cleanup duty. Anything else merely perpetuates phantasms.

Of course, in the event that a government agency *were* to require SDC to spend sums to clean up the property, the indemnity clause would still be available to it to recover those sums from Tolo. Our decision here would certainly not be *res judicata* on the operation of the indemnity clause in the context of *real* CERCLA liability. Indeed, nothing in this opinion is meant to minimize SDC’s right to recover costs from Tolo in such an eventuality.

## VII

The trial judge’s reading of the toxic substance clause was thus correct, and the directed verdict based on that reading was therefore correct as well. Since SDC could not show a breach of the lease, the balance of its causes of action which are predicated on the idea that Tolo polluted the property must fall as well.

<sup>(5)</sup> The lease was an integrated agreement and thus parol evidence was not available to add to or otherwise vary its terms. (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225 [65 Cal.Rptr. 545, 436 P.2d 561].) It would have been error for the court to have admitted evidence of negotiations prior to the signing of the agreement. (E.g., *Weisenburg v.*

### Footnotes

- 1 Actually, there are three identical leases for three contiguous parcels of property.
- 2 For example, ACL Technologies, Inc., which had a leaky underground storage tank problem, is down the road. (See *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773 [22 Cal.Rptr.2d 206].)
- 3 Though someone who ate the dirt at even the cleanest aerospace plant 350 days a year would probably get sick of something other than cancer long before 30 years passed.
- 4 Here is the text:  
“56. Toxic or Hazardous Substances. Except as provided below, Lessee shall not use, store or permit toxic waste or other toxic or hazardous substances or materials on the Premises during the term of this Lease, without prior written notice to Lessor.”
- 5 “Lessor” and “lessee” would be a little more exact than “landlord” and “tenant,” but not as readily understandable. As with “insurer” and “insured,” when there are only a few letters which differentiate key terms, it is generally better to use easily differentiated synonyms, e.g., “insurance company” and “policyholder.” Our use of “tenant” is generic.
- 6 Here is the text:

*Thomas* (1970) 9 Cal.App.3d 961, 965 [89 Cal.Rptr. 113].)

Nor was there any need for parol evidence to explicate an ambiguity in the agreement. As shown above, the text of the agreement was not reasonably \*54 susceptible to SDC’s interpretation. Accordingly, it was not error for the trial judge to have excluded the testimony of James C. Watson, an SDC principal, as to what the parties really meant by the clause.

It was also not error to exclude the testimony of SDC’s environmental expert, Anthony F. Severini, to the effect that the three lost buyers were reasonable in not proceeding to buy the property. What we have already said about the difference between speculative and real CERCLA liability addresses that concern. Yes, the buyers may have acted reasonably in being scared away from buying the property. No, that fact was not relevant.

Our determination on the point obviates any need to consider Tolo’s cross-appeal, which is based on the idea that Tolo’s president, defendant James Lockshaw, was entitled to a judgment of nonsuit after SDC’s opening statement.

The judgment is affirmed.

Sonenshine, J., and Rylaarsdam, J., concurred.

A petition for a rehearing was denied January 13, 1998.  
\*55

SDC/Pullman Partners v. Tolo Incorporated et al.

"In the event, Lessee desires to use or store toxic or hazardous substances on the Premises (including but not limited to petroleum based fuels), Lessee shall comply with all applicable laws, and shall provide evidence of such compliance reasonably acceptable to Lessor. At the written request of Lessor, Lessee shall provide a detailed explanation (in writing) of the types of chemicals/substances which Lessee uses, the location and manner of storage of same, and the manner of disposition of such chemicals/substances or by-products or remains thereof."

7 Here is the text:

"At the written request of Lessor, Lessee shall provide a detailed explanation (in writing) of the types of chemicals/substances which Lessee uses, the location and manner of storage of same, and the manner of disposition of such chemicals/substances or by-products or remains thereof."

8 Here is the text:

"Lessee shall deliver to Lessor at Lessor's written request, copies of all studies, reports and other information submitted by Lessee to any governmental entity or agency regulating the use of such substances and materials."

9 Here is the text:

"In no event shall Lessee store any chemicals/substances in underground tanks."

Tolo did have an underground tank on the premises *prior* to the 1989 lease, but it is undisputed that the tank was not *used* after the lease. The tank has since been dug up and found not to have leaked.

10 Here is the text:

"The use of such chemicals/substances shall be approved, if necessary, by the local fire department and the exterior of the Premises shall clearly set forth a label as to the chemicals/substances located within the Premises."

11 Here is the text:

"In the event that any such wastes, substances or materials are hereafter found on, under or about the Premises and such are a result of Lessee's occupancy and/or use of the demised premises, whether during the term of this Lease or any prior occupancy except as expressly allowed under this Lease, or by Lessor, then Lessee shall take all necessary and appropriate actions and shall spend all necessary sums to cause the same to be cleaned up and immediately removed from the Premises, and Lessor shall in no event be liable or responsible for any costs or expenses incurred in so doing."

12 Here is the text:

"Lessee shall at all times observe and satisfy the requirements of, and maintain the Premises in compliance with, all federal, state and local environmental protection, occupational, health and safety and similar laws, ordinances, restrictions, licenses and regulations, including but not limited to, the Federal Water Pollution Control Act (33 U.S.C. Section 1251 et seq.), Resource Conservation and Recovery Act (42 U.S.C. Section 6901 et seq.), Safe Drinking Water Act (42 U.S.C. Section 3000(f) [sic] et seq.), Toxic Substances Control Act (15 U.S.C. Section 2601 et seq.), Clean Air Act (42 U.S.C. Section 7401 et seq.), Comprehensive Environmental Response of Compensation and Liability Act [sic] (42 U.S.C. Section 9601 et seq.), California Health and Safety Code (Section 25100 et seq., Section 39000 et seq.), California Water Code (Section 13000 et seq.)."

13 Here is the text:

"Should Lessee at any time receive any notice of violation of any laws, including those aforementioned, or be given a citation with respect thereto, Lessee shall (i) immediately notify Lessor of such violation or citation, (ii) provide Lessor with a copy of same, (iii) immediately begin to diligently cure the deficiency and continuously pursue such cure to completion and (iv) immediately provide Lessor with proof of the curing of such deficiency or complained of matter."

14 Here is the text:

"Should Lessee at any time default in or fail to perform or observe any of its obligations under this Addendum Paragraph 56, Lessor shall have the right, but not the duty, without limitation upon any of the Lessor's rights pursuant hereto, to perform the same, and Lessee agrees to pay to Lessor on demand, all costs and expenses incurred by Lessor in connection therewith, including without limitation, attorneys' fees, together with interest from the date of expenditure at the current market rate."

15 Here is the text:

"Lessee hereby indemnifies Lessor and agrees to defend with counsel selected by Lessor and hold Lessor harmless for any loss incurred by or liability imposed on Lessor by reason of Lessee's failure to perform or observe any of its obligations or agreements under this Addendum Paragraph 56, including but not limited to any damage, liability, fine, penalty, punitive damage, cost or expense (including without limitation all clean up and removal costs and expenses) arising from or out of any claim, action, suit or proceeding for personal injury (including sickness, disease or death), tangible or intangible property damage, compensation for lost wages, business income, profits, or other economic loss, damage to the natural resources or the environment, nuisance, pollution, contamination, leak, spill, release or other adverse effect on the environment."

16 Here is the text:

"Lessor may enter the Premises at any time, without notice for the purpose of ascertaining compliance by Lessee with the

requirements of this Addendum Paragraph 56.”

- 17 It is probably impossible for *any* office to conduct operations without some “use” of toxic materials. This court, for example, uses great amounts of toner in its photocopying machines and computer printers.
- 18 SDC’s best evidence was one sample in the open drum storage area which yielded 4,400 parts per billion of 1,1,1 trichloroethane (TCA). While 1,1,1 trichloroethane is a substance which, as we noted in *People v. Hale* (1994) 29 Cal.App.4th 730, 737 [34 Cal.Rptr.2d 690], has been routinely classified as hazardous, SDC’s own expert report described it as “not a suspected human carcinogen.” For the moment we need only note that 4,400 parts per *billion* here is somewhat less than the 23,000 parts per *million* found toxic in *Hale*.
- 19 Here, while the parties have not addressed the respective cost of curative action in relation to the total reserved rent, the very fact that disproportionality is an important factor favors Tolo’s reading of the subject clause. And we note the irony, in that regard, that a proposal obtained by SDC proposed to do no more than clean up the soil to 15 parts per billion or less, which is a level of pollution *higher* than most of the soil samplings at the site anyway.
- 20 The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. § 9601 et seq.) was passed by a lame-duck Congress in 1980. As one commentator has noted, courts routinely blame the act’s poor drafting on the haste of the act’s passage. (See Nagle, *A Twentieth Amendment Parable* (1997) 72 N.Y.U. L.Rev. 470, 490; for a compendium of federal decisions criticizing CERCLA’s drafting, see *id.* at p. 490, fn. 94.)
- 21 Elsewhere it said that the argument had “some force.” (964 F.2d at p. 261, fn. 13.)

# Tab E

133 S.Ct. 1863  
Supreme Court of the United States

**CITY OF ARLINGTON, TEXAS, et al.,**  
Petitioners

v.

**FEDERAL COMMUNICATIONS COMMISSION et al.**

Cable, Telecommunications, and Technology  
Committee of the New Orleans City Council,  
Petitioner

v.

Federal Communications Commission et al.  
Nos. 11–1545, 11–1547. | Argued Jan. 16, 2013. |  
Decided May 20, 2013.

### Synopsis

**Background:** Two cities petitioned for review of declaratory ruling of the Federal Communications Commission (FCC) establishing reasonable time frames under the Telecommunications Act for a state or locality to act on wireless facility siting applications. The United States Court of Appeals for the Fifth Circuit, Owen, Circuit Judge, 668 F.3d 229, denied the petitions in part and dismissed the petitions in part. Certiorari was granted in part.

**Holdings:** The Supreme Court, Justice Scalia, held that:

<sup>[1]</sup> a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's jurisdiction, and

<sup>[2]</sup> *Chevron* deference applied to FCC declaratory ruling.

Affirmed.

Justice Breyer filed an opinion concurring in part and concurring in judgment.

Chief Justice Roberts filed a dissenting opinion in which Justices Kennedy and Alito joined.

West Headnotes (6)

- <sup>[1]</sup> **Administrative Law and Procedure**  
☞Plain, literal, or clear meaning; ambiguity  
**Administrative Law and Procedure**  
☞Permissible or reasonable construction

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions: first, applying ordinary tools of statutory construction, court must determine whether Congress has directly spoken to precise question at issue, and if intent of Congress is clear, that is the end of the matter, for court, as well as agency, must give effect to unambiguously expressed intent of Congress; but if statute is silent or ambiguous with respect to specific issue, question for court is whether agency's answer is based on a permissible construction of statute.

12 Cases that cite this headnote

- <sup>[2]</sup> **Administrative Law and Procedure**

☞Plain, literal, or clear meaning; ambiguity

Under *Chevron* doctrine, statutory ambiguities will be resolved, within bounds of reasonable interpretation, not by courts but by administering agency.

6 Cases that cite this headnote

- <sup>[3]</sup> **Administrative Law and Procedure**

☞Deference to agency in general

**Administrative Law and Procedure**

☞Plain, literal, or clear meaning; ambiguity

A court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns scope of agency's statutory authority, that is, its jurisdiction; no matter how it is framed, question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether agency has stayed within bounds of its statutory authority.

17 Cases that cite this headnote

- <sup>[4]</sup> **Federal Courts**

☞Judicial Power of United States; Power of Congress

Congress has the power, within limits, to tell courts what classes of cases they may decide, but not to prescribe or superintend how they decide those cases.

<sup>151</sup>

**Courts**

☞ In general; nature and source of judicial authority

**Judgment**

☞ Erroneous or Irregular Judgment

A court's power to decide a case is independent of whether its decision is correct, which is why even an erroneous judgment is entitled to res judicata effect; put differently, a jurisdictionally proper but substantively incorrect judicial decision is not ultra vires.

1 Cases that cite this headnote

<sup>161</sup>

**Administrative Law and Procedure**

☞ Carriers and public utilities

**Telecommunications**

☞ Judicial review or intervention

*Chevron* deference applied to Federal Communications Commission's (FCC) declaratory ruling establishing reasonable time frames under Telecommunications Act for state or locality to act on wireless facility siting applications, where Congress had unambiguously vested the FCC with general authority to administer the Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority. Telecommunications Act of 1996, 47 U.S.C.A. § 332(c)(7)(B)(ii).

4 Cases that cite this headnote

**\*1864 Syllabus\***

The Communications Act of 1934, as amended, requires state or local governments to act on siting applications for wireless facilities "within a reasonable period of time after the request is duly filed." 47 U.S.C. § 332(c)(7)(B)(ii). Relying on its broad authority to implement the Communications Act, see 47 U.S.C. § 201(b), the Federal Communications Commission (FCC) issued a Declaratory Ruling concluding that the phrase "reasonable period of time" is presumptively (but rebuttably) 90 days to process an application to place a new antenna on an existing tower and 150 days to process all other applications. The cities of Arlington and San Antonio, Texas, sought review of the Declaratory Ruling in the Fifth Circuit. They argued that the Commission lacked authority to interpret § 332(c)(7)(B)'s limitations. The Court of Appeals, relying on Circuit precedent holding that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, applies to an agency's interpretation of its

own statutory jurisdiction, applied *Chevron* to that question. Finding the statute ambiguous, it upheld as a permissible construction of the statute the FCC's view that § 201(b)'s broad grant of regulatory authority empowered it to administer § 332(c)(7)(B).

*Held* : Courts must apply the *Chevron* framework to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (*i.e.*, its jurisdiction). Pp. 1867 – 1875.

(a) Under *Chevron*, a reviewing court must first ask whether Congress has directly spoken to the precise question at issue; if so, the court must give effect to Congress' unambiguously expressed intent. 467 U.S., at 842–843, 104 S.Ct. 2778. However, if "the statute is silent or ambiguous," the court must defer to the administering agency's construction of the statute so long as it is permissible. *Id.*, at 843, 104 S.Ct. 2778. Pp. 1867 – 1868.

(b) When a court reviews an agency's interpretation of a statute it administers, the question is always, simply, whether the agency has stayed within the bounds of its statutory authority. There is no distinction between an agency's "jurisdictional" and "nonjurisdictional" interpretations. The "jurisdictional-nonjurisdictional" line is meaningful in the judicial context because Congress has the power to tell the courts what classes of cases they may decide—that is, to define their jurisdiction—but not to prescribe how they decide those cases. But for agencies charged with administering congressional statutes, both \*1865 their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires. Because the question is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out an arbitrary subset of "jurisdictional" questions from the *Chevron* framework. See, *e.g.*, *National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.*, 534 U.S. 327, 333, 339, 122 S.Ct. 782, 151 L.Ed.2d 794. Pp. 1868 – 1871.

(c) This Court has consistently afforded *Chevron* deference to agencies' constructions of the scope of their own jurisdiction. See, *e.g.*, *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675; *United States v. Eurodif S. A.*, 555 U.S. 305, 316, 129 S.Ct. 878, 172 L.Ed.2d 679. *Chevron* applies to statutes designed to curtail the scope of agency discretion, see *Chemical Mfrs. Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 123, 105 S.Ct. 1102, 84 L.Ed.2d 90, and even where concerns about agency self-aggrandizement are at their apogee—*i.e.*, where an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme, see *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S.Ct. 1291, 146

L.Ed.2d 121. Pp. 1871 – 1873.

(d) The contention that *Chevron* deference is not appropriate here because the FCC asserted jurisdiction over matters of traditional state and local concern is meritless. These cases have nothing to do with federalism: The statute explicitly supplants state authority, so the question is simply whether a federal agency or federal courts will draw the lines to which the States must hew. P. 1873.

(e) *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292, requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. But *Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking. There is no case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field. A general conferral of rulemaking authority validates rules for *all* the matters the agency is charged with administering. It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority. Pp. 1873 – 1874.

668 F.3d 229, affirmed.

SCALIA, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment. ROBERTS, C.J., filed a dissenting opinion, in which KENNEDY and ALITO, JJ., joined.

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#### Opinion

Justice SCALIA delivered the opinion of the Court.

We consider whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

#### I

Wireless telecommunications networks require towers and antennas; proposed sites for those towers and antennas must be approved by local zoning authorities. In the Telecommunications Act of 1996, Congress "impose[d] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities," *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005), and incorporated those limitations into the Communications Act of 1934, see 110 Stat. 56, 151. Section 201(b) of that Act empowers the Federal Communications Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions." Ch. 296, 52 Stat. 588, codified at 47 U.S.C. § 201(b). Of course, that rulemaking authority extends to the subsequently added portions of the Act. See *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377–378, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

The Act imposes five substantive limitations, which are codified in 47 U.S.C. § 332(c)(7)(B); only one of them, §

332(c)(7)(B)(ii), is at issue here. That provision requires state or local governments to act on wireless siting applications “within a reasonable period of time after the request is duly filed.” Two other features of § 332(c)(7) are relevant. First, subparagraph (A), known as the “saving clause,” provides that nothing in the Act, *except* those limitations provided in § 332(c)(7)(B), “shall limit or affect the authority of a State or local government” over siting decisions. Second, \*1867 § 332(c)(7)(B)(v) authorizes a person who believes a state or local government’s wireless-siting decision to be inconsistent with any of the limitations in § 332(c)(7)(B) to “commence an action in any court of competent jurisdiction.”

In theory, § 332(c)(7)(B)(ii) requires state and local zoning authorities to take prompt action on siting applications for wireless facilities. But in practice, wireless providers often faced long delays. In July 2008, CTIA—The Wireless Association,<sup>1</sup> which represents wireless service providers, petitioned the FCC to clarify the meaning of § 332(c)(7)(B)(ii)’s requirement that zoning authorities act on siting requests “within a reasonable period of time.” In November 2009, the Commission, relying on its broad statutory authority to implement the provisions of the Communications Act, issued a declaratory ruling responding to CTIA’s petition. *In re Petition for Declaratory Ruling*, 24 FCC Rcd. 13994, 14001. The Commission found that the “record evidence demonstrates that unreasonable delays in the personal wireless service facility siting process have obstructed the provision of wireless services” and that such delays “impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996.” *Id.*, at 14006, 14008. A “reasonable period of time” under § 332(c)(7)(B)(ii), the Commission determined, is presumptively (but rebuttably) 90 days to process a collocation application (that is, an application to place a new antenna on an existing tower) and 150 days to process all other applications. *Id.*, at 14005.

Some state and local governments opposed adoption of the *Declaratory Ruling* on the ground that the Commission lacked “authority to interpret ambiguous provisions of Section 332(c)(7).” *Id.*, at 14000. Specifically, they argued that the saving clause, § 332(c)(7)(A), and the judicial review provision, § 337(c)(7)(B)(v), together display a congressional intent to withhold from the Commission authority to interpret the limitations in § 332(c)(7)(B). Asserting that ground of objection, the cities of Arlington and San Antonio, Texas, petitioned for review of the *Declaratory Ruling* in the Court of Appeals for the Fifth Circuit.

Relying on Circuit precedent, the Court of Appeals held that the *Chevron* framework applied to the threshold question whether the FCC possessed statutory authority to

adopt the 90- and 150-day timeframes. 668 F.3d 229, 248 (C.A.5 2012) (citing *Texas v. United States*, 497 F.3d 491, 501 (C.A.5 2007)). Applying *Chevron*, the Court of Appeals found “§ 332(c)(7)(A)’s effect on the FCC’s authority to administer § 332(c)(7)(B)’s limitations ambiguous,” 668 F.3d, at 250, and held that “the FCC’s interpretation of its statutory authority” was a permissible construction of the statute. *Id.*, at 254. On the merits, the court upheld the presumptive 90- and 150-day deadlines as a “permissible construction of § 332(c)(7)(B)(ii) and (v) ... entitled to *Chevron* deference.” *Id.*, at 256.

We granted certiorari, 568 U.S. —, 133 S.Ct. 524, 184 L.Ed.2d 252 (2012), limited to the first question presented: “Whether ... a court should apply *Chevron* to ... an agency’s determination of its \*1868 own jurisdiction.” Pet. for Cert. in No. 11-1545, p. i.

## II

### A

<sup>11</sup> As this case turns on the scope of the doctrine enshrined in *Chevron*, we begin with a description of that case’s now-canonical formulation. “When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions.” 467 U.S., at 842, 104 S.Ct. 2778. First, applying the ordinary tools of statutory construction, the court must determine “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.*, at 842-843, 104 S.Ct. 2778. But “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.*, at 843, 104 S.Ct. 2778.

<sup>12</sup> *Chevron* is rooted in a background presumption of congressional intent: namely, “that Congress, when it left ambiguity in a statute” administered by an agency, “understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.” *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740-741, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). *Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. See *Iowa Utilities Bd.*, 525 U.S., at 397, 119 S.Ct. 721. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.

**B**

<sup>131</sup> The question here is whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction). The argument against deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations—the big, important ones, presumably—define the agency's "jurisdiction." Others—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has. That premise is false, because the distinction between "jurisdictional" and "nonjurisdictional" interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*

<sup>141</sup> <sup>151</sup> The misconception that there are, for *Chevron* purposes, separate "jurisdictional" questions on which no deference is due derives, perhaps, from a reflexive extension to agencies of the very real division between the jurisdictional and nonjurisdictional that is applicable to courts. In the judicial context, there *is* a meaningful line: Whether the court decided *correctly* is a question that has different consequences from the question whether it had the power to decide *at all*. Congress has the power (within limits) to tell the courts what classes of cases they may decide, see *Trainmen v. Toledo, P. & W.R. Co.*, 321 U.S. 50, 63–64, 64 S.Ct. 413, 88 L.Ed. 534 (1944); \***1869** *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330, 58 S.Ct. 578, 82 L.Ed. 872 (1938), but not to prescribe or superintend how they decide those cases, see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–219, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). A court's power to decide a case is independent of whether its decision is correct, which is why even an erroneous judgment is entitled to res judicata effect. Put differently, a jurisdictionally proper but substantively incorrect judicial decision is not *ultra vires*.

That is not so for agencies charged with administering congressional statutes. Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*. Because the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as "jurisdictional."

An example will illustrate just how illusory the proposed

line between "jurisdictional" and "nonjurisdictional" agency interpretations is. Imagine the following validly-enacted statute:

COMMON CARRIER ACT

SECTION 1. The Agency shall have jurisdiction to prohibit any common carrier from imposing an unreasonable condition upon access to its facilities.

There is no question that this provision—including the terms "common carrier" and "unreasonable condition"—defines the Agency's jurisdiction. Surely, the argument goes, a court must determine *de novo* the scope of that jurisdiction.

Consider, however, this alternative formulation of the statute:

COMMON CARRIER ACT

SECTION 1. No common carrier shall impose an unreasonable condition upon access to its facilities.

SECTION 2. The Agency may prescribe rules and regulations necessary in the public interest to effectuate Section 1 of this Act.

Now imagine that the Agency, invoking its Section 2 authority, promulgates this Rule: "(1) The term 'common carrier' in Section 1 includes Internet Service Providers. (2) The term 'unreasonable condition' in Section 1 includes unreasonably high prices. (3) A monthly fee greater than \$25 is an unreasonable condition on access to Internet service." By this Rule, the Agency has claimed for itself jurisdiction that is doubly questionable: Does its authority extend to Internet Service Providers? And does it extend to setting prices? Yet Section 2 makes clear that Congress, in petitioners' words, "conferred interpretive power on the agency" with respect to Section 1. Brief for Petitioners in No. 1545, p. 14. Even under petitioners' theory, then, a court should defer to the Agency's interpretation of the terms "common carrier" and "unreasonable condition"—that is to say, its assertion that its "jurisdiction" extends to regulating Internet Service Providers and setting prices.

In the first case, by contrast, petitioners' theory would accord the agency no deference. The trouble with this is that in both cases, the underlying question is *exactly the same*: Does the statute give the agency authority to regulate Internet Service Providers and cap prices, or not? \***1870** The reality, laid bare, is that there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its "jurisdiction") and its exceeding authorized application of authority that it unquestionably has. "To exceed authorized application is to exceed authority. Virtually any administrative action can be

characterized as either the one or the other, depending on how generally one wishes to describe the ‘authority.’ ” *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) (SCALIA, J., concurring in judgment); see also Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 29 (1983) (“Administrative application of law is administrative formulation of law whenever it involves elaboration of the statutory norm.”).

This point is nicely illustrated by our decision in *National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.*, 534 U.S. 327, 122 S.Ct. 782, 151 L.Ed.2d 794 (2002). That case considered whether the FCC’s “jurisdiction” to regulate the rents utility-pole owners charge for “pole attachments” (defined as attachments by a cable television system or provider of telecommunications service) extended to attachments that provided both cable television and high-speed Internet access (attachments for so-called “commingled services”). *Id.*, at 331–336, 122 S.Ct. 782. We held, sensibly, that *Chevron* applied. 534 U.S., at 333, 339, 122 S.Ct. 782. Whether framed as going to the *scope* of the FCC’s delegated authority or the FCC’s *application* of its delegated authority, the underlying question was the same: Did the FCC exceed the bounds of its statutory authority to regulate rents for “pole attachments” when it sought to regulate rents for pole attachments providing commingled services?

The label is an empty distraction because every new application of a broad statutory term can be reframed as a questionable extension of the agency’s jurisdiction. One of the briefs in support of petitioners explains, helpfully, that “[j]urisdictional questions concern the *who*, *what*, *where*, and *when* of regulatory power: which subject matters may an agency regulate and under what conditions.” Brief for IMLA Respondents 18–19. But an agency’s *application* of its authority pursuant to statutory text answers the same questions. *Who* is an “outside salesman”? *What* is a “pole attachment”? *Where* do the “waters of the United States” end? *When* must a Medicare provider challenge a reimbursement determination in order to be entitled to an administrative appeal? These can all be reframed as questions about the scope of agencies’ regulatory jurisdiction—and they are all questions to which the *Chevron* framework applies. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. —, —, —, 132 S.Ct. 2156, 2162, 2165, 183 L.Ed.2d 153 (2012); *National Cable & Telecommunications Assn., supra*, at 331, 333, 122 S.Ct. 782; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123, 131, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); *Sebelius v. Auburn Regional Medical Center*, 568 U.S. —, —, —, 133 S.Ct. 817, 821, 826–827, 184 L.Ed.2d 627 (2013).

In sum, judges should not waste their time in the mental acrobatics needed to decide whether an agency’s

interpretation of a statutory provision is “jurisdictional” or “nonjurisdictional.” Once those labels \*1871 are sheared away, it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency’s assertion of authority, or not. See H. Edwards & L. Elliott, *Federal Standards of Review* 146 (2007) (“In practice, it does not appear to matter whether delegated authority is viewed as a threshold inquiry.”). The federal judge as *haruspex*, sifting the entrails of vast statutory schemes to divine whether a particular agency interpretation qualifies as “jurisdictional,” is not engaged in reasoned decisionmaking.

### C

Fortunately, then, we have consistently held “that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.” 1 R. Pierce, *Administrative Law Treatise* § 3.5, p. 187 (2010). One of our opinions explicitly says that no “exception exists to the normal [deferential] standard of review” for “ ‘jurisdictional or legal question[s] concerning the coverage’ ” of an Act. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830, n. 7, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984). A prime example of deferential review for questions of jurisdiction is *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986). That case involved a CFTC interpretation of 7 U.S.C. § 18(c), which provides that before the Commission takes action on a complaint, the complainant must file a bond to cover “any reparation award that may be issued by the Commission against the complainant *on any counterclaim* by respondent.” (Emphasis added.) The CFTC, pursuant to its broad rulemaking authority, see § 12a(5), interpreted that oblique reference to counterclaims as granting it “the power to take jurisdiction over” not just federal-law counterclaims, but state-law counterclaims as well. *Schor, supra*, at 844, 106 S.Ct. 3245. We not only deferred under *Chevron* to the Commission’s “eminently reasonable ... interpretation of the statute it is entrusted to administer,” but also chided the Court of Appeals for declining to afford deference because of the putatively “ ‘statutory interpretation-jurisdictional’ nature of the question at issue.” 478 U.S., at 844–845, 106 S.Ct. 3245.

Similar examples abound. We have afforded *Chevron* deference to the Commerce Department’s determination that its authority to seek antidumping duties extended to uranium imported under contracts for enrichment services, *United States v. Eurodif S. A.*, 555 U.S. 305, 316, 129 S.Ct. 878, 172 L.Ed.2d 679 (2009); to the Interstate Commerce Commission’s view that courts, not the Commission, possessed “initial jurisdiction with respect to the award of reparations” for unreasonable shipping charges, *Reiter v. Cooper*, 507 U.S. 258, 269,

113 S.Ct. 1213, 122 L.Ed.2d 604 (1993) (internal quotation marks and ellipsis omitted); and to the Army Corps of Engineers' assertion that its permitting authority over discharges into "waters of the United States" extended to "freshwater wetlands" adjacent to covered waters, *Riverside Bayview Homes, supra*, at 123–124, 131, 106 S.Ct. 455. We have even deferred to the FCC's assertion that its broad regulatory authority extends to pre-empting conflicting state rules. *City of New York v. FCC*, 486 U.S. 57, 64, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984).<sup>3</sup>

\*1872 Our cases hold that *Chevron* applies equally to statutes designed to curtail the scope of agency discretion. For instance, in *Chemical Mfrs. Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 123, 105 S.Ct. 1102, 84 L.Ed.2d 90 (1985), we considered a statute prohibiting the Environmental Protection Agency from "modify[ing] any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list." The EPA construed the statute as not precluding it from granting variances with respect to certain toxic pollutants. Finding no "clear congressional intent to forbid EPA's sensible variance mechanism," *id.*, at 134, 105 S.Ct. 1102, we deferred to the EPA's construction of this express limitation on its own regulatory authority, *id.*, at 125, 105 S.Ct. 1102 (citing *Chevron*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694); see also, e.g., *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 226, 232–234, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986).

The U.S. Reports are shot through with applications of *Chevron* to agencies' constructions of the scope of their own jurisdiction. And we have applied *Chevron* where concerns about agency self-aggrandizement are at their apogee: in cases where an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme. In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000), the threshold question was the "appropriate framework for analyzing" the FDA's assertion of "jurisdiction to regulate tobacco products," *id.*, at 126, 132, 120 S.Ct. 1291—a question of vast "economic and political magnitude," *id.*, at 133, 120 S.Ct. 1291. "Because this case involves an administrative agency's construction of a statute that it administers," we held, *Chevron* applied. 529 U.S., at 132, 120 S.Ct. 1291. Similarly, in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 224, 229, 231, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994), we applied the *Chevron* framework to the FCC's assertion that the statutory phrase "modify any requirement" gave it authority to eliminate rate-filing requirements, "the essential characteristic of a rate-regulated industry," for long-distance telephone carriers.

The false dichotomy between "jurisdictional" and "nonjurisdictional" agency interpretations may be no more than a bogeyman, but it is dangerous all the same. Like the Hound of the Baskervilles, it is \*1873 conjured by those with greater quarry in sight: Make no mistake—the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the "jurisdictional" card in every case. See, e.g., *Cellco Partnership v. FCC*, 700 F.3d 534, 541 (C.A.D.C.2012). Some judges would be deceived by the specious, but scary-sounding, "jurisdictional"/"nonjurisdictional" line; others tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands. The effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts.<sup>4</sup> We have cautioned that "judges ought to refrain from substituting their own interstitial lawmaking" for that of an agency. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980). That is precisely what *Chevron* prevents.

### III

#### A

<sup>161</sup> One group of respondents contends that *Chevron* deference is inappropriate here because the FCC has "assert[ed] jurisdiction over matters of traditional state and local concern." Brief for IMLA Respondents 35. But this case has nothing to do with federalism. Section 332(c)(7)(B)(ii) explicitly supplants state authority by requiring zoning authorities to render a decision "within a reasonable period of time," and the meaning of that phrase is indisputably a question of federal law. We rejected a similar faux-federalism argument in the *Iowa Utilities Board* case, in terms that apply equally here: "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew." 525 U.S., at 379, n. 6, 119 S.Ct. 721. These lines will be drawn either by unelected federal bureaucrats, or by unelected (and even less politically accountable) federal judges. "[I]t is hard to spark a passionate 'States' rights' debate over that detail." *Ibid.*

#### B

A few words in response to the dissent. The question on which we granted certiorari was whether "a court should apply *Chevron* to review an agency's determination of its own jurisdiction." Pet. for Cert. i.<sup>3</sup> Perhaps sensing the

incoherence of the “jurisdictional-nonjurisdictional” line, the dissent does not even attempt to defend it, see *post*, at 1864, but proposes a much \*1874 broader scope for *de novo* judicial review: Jurisdictional or not, and even where a rule is at issue and the statute contains a broad grant of rulemaking authority, the dissent would have a court search provision-by-provision to determine “whether [that] delegation covers the ‘specific provision’ and ‘particular question’ before the court.” *Post*, at 1882 – 1883.

The dissent is correct that *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001), requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. No one disputes that. But *Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking. What the dissent needs, and fails to produce, is a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency’s substantive field. There is no such case, and what the dissent proposes is a massive revision of our *Chevron* jurisprudence.

Where we differ from the dissent is in its apparent rejection of the theorem that the whole includes all of its parts—its view that a general conferral of rulemaking authority does not validate rules for *all* the matters the agency is charged with administering. Rather, the dissent proposes that even when general rulemaking authority is clear, *every* agency rule must be subjected to a *de novo* judicial determination of whether *the particular issue* was committed to agency discretion. It offers no standards at all to guide this open-ended hunt for congressional intent (that is to say, for evidence of congressional intent more specific than the conferral of general rulemaking authority). It would simply punt that question back to the Court of Appeals, presumably for application of some sort of totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent. Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*. The excessive agency power that the dissent fears would be replaced by chaos. There is no need to wade into these murky waters. It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.

\* \* \*

Those who assert that applying *Chevron* to “jurisdictional” interpretations “leaves the fox in charge of the henhouse” overlook the reality that a separate category of “jurisdictional” interpretations does not exist. The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decisionmaking that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies’ authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is “jurisdictional.” If “the agency’s answer is based on a permissible construction of the statute,” \*1875 that is the end of the matter. *Chevron*, 467 U.S., at 842, 104 S.Ct. 2778.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

Justice BREYER, concurring in part and concurring in the judgment.

I agree with the Court that normally “the question a court faces when confronted with an agency’s interpretation of a statute it administers” is, “simply, *whether the agency has stayed within the bounds of its statutory authority.*” *Ante*, at 1879 – 1880. In this context, “the distinction between ‘jurisdictional’ and ‘non-jurisdictional’ interpretations is a mirage.” *Ante*, at 1879 – 1880.

Deciding just what those statutory bounds are, however, is not always an easy matter, and the Court’s case law abounds with discussion of the subject. A reviewing judge, for example, will have to decide independently whether Congress delegated authority to the agency to provide interpretations of, or to enact rules pursuant to, the statute at issue—interpretations or rules that carry with them “the force of law.” *United States v. Mead Corp.*, 533 U.S. 218, 229, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). If so, the reviewing court must give special leeway or “deference” to the agency’s interpretation. See *id.*, at 227–228, 121 S.Ct. 2164.

We have added that, if “[e]mploying traditional tools of statutory construction,” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987), the court determines that Congress has spoken clearly on the disputed question, then “that is the end of the matter,” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The agency is due no deference, for Congress has left no gap for the agency to fill. *Id.*, at 842–

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844, 104 S.Ct. 2778. If, on the other hand, Congress has not spoken clearly, if, for example it has written ambiguously, then that ambiguity is a sign—but not always a conclusive sign—that Congress intends a reviewing court to pay particular attention to (*i.e.*, to give a degree of deference to) the agency’s interpretation. See *Gonzales v. Oregon*, 546 U.S. 243, 258–269, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006); *Mead*, *supra*, at 229, 121 S.Ct. 2164

I say that the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant. (And, given the vast number of government statutes, regulatory programs, and underlying circumstances, that variety is hardly surprising.) In *Mead*, for example, we looked to several factors other than simple ambiguity to help determine whether Congress left a statutory gap, thus delegating to the agency the authority to fill that gap with an interpretation that would carry “the force of law.” 533 U.S., at 229–231, 121 S.Ct. 2164. Elsewhere, we have assessed

“the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.” *Barnhart v. Walton*, 535 U.S. 212, 222, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002).

The subject matter of the relevant provision—for instance, its distance from the agency’s ordinary statutory duties or its falling within the scope of another agency’s authority—has also proved relevant. See *Gonzales*, *supra*, at 265–266, 126 S.Ct. 904. \*1876 See also Gellhorn & Verkuil, *Controlling Chevron-Based Delegations*, 20 *Cardozo L.Rev.* 989, 1007–1010 (1999).

Moreover, the statute’s text, its context, the structure of the statutory scheme, and canons of textual construction are relevant in determining whether the statute is ambiguous and can be equally helpful in determining whether such ambiguity comes accompanied with agency authority to fill a gap with an interpretation that carries the force of law. See *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 239–242, 124 S.Ct. 1741, 158 L.Ed.2d 450 (2004); *Zuni Public School Dist. No. 89 v. Department of Education*, 550 U.S. 81, 98–99, 127 S.Ct. 1534, 167 L.Ed.2d 449 (2007); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000); *Dole v. Steelworkers*, 494 U.S. 26, 36, 110 S.Ct. 929, 108 L.Ed.2d 23 (1990). Statutory purposes, including those revealed in part by legislative and regulatory history, can be similarly relevant. See *Brown & Williamson Tobacco Corp.*, *supra*,

at 143–147, 120 S.Ct. 1291; *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 649, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990); *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 48–49, 127 S.Ct. 1513, 167 L.Ed.2d 422 (2007). See also *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 412–413, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (BREYER, J., concurring in part and dissenting in part).

Although seemingly complex in abstract description, in practice this framework has proved a workable way to approximate how Congress would likely have meant to allocate interpretive law-determining authority between reviewing court and agency. The question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently. The judge, considering “traditional tools of statutory construction,” *Cardoza-Fonseca*, *supra*, at 446, 107 S.Ct. 1207, will ask whether Congress has spoken unambiguously. If so, the text controls. If not, the judge will ask whether Congress would have intended the agency to resolve the resulting ambiguity. If so, deference is warranted. See *Mead*, *supra*, at 229, 121 S.Ct. 2164. Even if not, however, sometimes an agency interpretation, in light of the agency’s special expertise, will still have the “power to persuade, if lacking power to control,” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

The case before us offers an example. The relevant statutory provision requires state or local governments to act on wireless siting applications “within a reasonable period of time after” a wireless service provider files such a request. 47 U.S.C. § 332(c)(7)(B)(ii). The Federal Communications Commission (FCC) argued that this provision granted it a degree of leeway in determining the amount of time that is reasonable. Many factors favor the agency’s view: (1) the language of the Telecommunications Act grants the FCC broad authority (including rulemaking authority) to administer the Act; (2) the words are open-ended—*i.e.* “ambiguous”; (3) the provision concerns an interstitial administrative matter, in respect to which the agency’s expertise could have an important role to play; and (4) the matter, in context, is complex, likely making the agency’s expertise useful in helping to answer the “reasonableness” question that the statute poses. See § 151 (creating the FCC); § 201(b) (providing rulemaking authority); *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980–981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) (acknowledging \*1877 the FCC’s authority to administer the Act).

On the other side of the coin, petitioners point to two statutory provisions which, they believe, require a different conclusion—namely, that the FCC lacked

authority altogether to interpret § 332(c)(7)(B)(ii). First, a nearby saving clause says: “Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” § 332(c)(7)(A). Second, a judicial review provision, says: “Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.” § 332(c)(7)(B)(v).

In my view, however, these two provisions cannot provide good reason for reaching the conclusion advocated by petitioners. The first provision begins with an exception, stating that it does *not* apply to (among other things) the “reasonableness” provision here at issue. The second simply sets forth a procedure for judicial review, a review that applies to most government actions. Both are consistent with a statutory scheme that gives States, localities, the FCC, and reviewing courts each some role to play in the location of wireless service facilities. And neither “expressly describ[es] an exception” to the FCC’s plenary authority to interpret the Act. *American Hospital Assn. v. NLRB*, 499 U.S. 606, 613, 111 S.Ct. 1539, 113 L.Ed.2d 675 (1991).

For these reasons, I would reject petitioners’ argument and conclude that § 332(c)(7)(B)(ii)—the “reasonableness” statute—leaves a gap for the FCC to fill. I would hold that the FCC’s lawful efforts to do so carry “the force of law.” *Mead*, 533 U.S., at 229, 121 S.Ct. 2164. The Court of Appeals ultimately reached the same conclusion (though for somewhat different reasons), and the majority affirms the lower court. I consequently join the majority’s judgment and such portions of its opinion as are consistent with what I have written here.

Chief Justice ROBERTS, with whom Justice KENNEDY and Justice ALITO join, dissenting.

My disagreement with the Court is fundamental. It is also easily expressed: A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency’s interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.

## I

One of the principal authors of the Constitution famously wrote that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny.” The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have \*1878 violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.

The administrative state “wields vast power and touches almost every aspect of daily life.” *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. —, —, 130 S.Ct. 3138, 3156, 177 L.Ed.2d 706 (2010). The Framers could hardly have envisioned today’s “vast and varied federal bureaucracy” and the authority administrative agencies now hold over our economic, social, and political activities. *Ibid.* “[T]he administrative state with its reams of regulations would leave them rubbing their eyes.” *Alden v. Maine*, 527 U.S. 706, 807, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (Souter, J., dissenting), quoted in *Federal Maritime Comm’n v. South Carolina Ports Authority*, 535 U.S. 743, 755, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002). And the federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies. Compare Office of the Federal Register, United States Government Manual 1997/1998, with Office of the Federal Register, United States Government Manual 2012. And more are on the way. See, e.g., Congressional Research Service, C. Copeland, New Entities Created Pursuant to the Patient Protection and Affordable Care Act 1 (2010) (The PPACA “creates, requires others to create, or authorizes dozens of new entities to implement the legislation”).

Although the Constitution empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence. As scholars have noted, “no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.” Kagan, Presidential Administration, 114 Harv. L.Rev. 2245, 2250 (2001); see also S. Breyer, Making Our Democracy Work 110 (2010) (“the president may not have the time or willingness to review [agency] decisions”). President Truman colorfully described his power over the administrative state by complaining, “I thought I was the president, but when it comes to these bureaucrats, I can’t do a damn thing.” See R. Nathan, The Administrative

City of Arlington, Texas, v. Federal Communications Commission, et al.

Presidency 2 (1986). President Kennedy once told a constituent, “I agree with you, but I don’t know if the government will.” See *id.*, at 1. The collection of agencies housed outside the traditional executive departments, including the Federal Communications Commission, is routinely described as the “headless fourth branch of government,” reflecting not only the scope of their authority but their practical independence. See, e.g., Administrative Conference of United States, D. Lewis & J. Selin, Sourcebook of United States Executive Agencies 11 (2012).

As for judicial oversight, agencies enjoy broad power to construe statutory provisions over which they have been given interpretive authority. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, we established a test for reviewing “an agency’s construction of the statute which it administers.” 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If Congress has “directly spoken to the precise question at issue,” we said, “that is the end of the matter.” *Ibid.* A contrary agency interpretation must give way. But if Congress has not expressed a specific intent, a court is bound to defer to any “permissible construction of the statute,” even if that is not “the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Id.*, at 843, and n. 11, 104 S.Ct. 2778.

\*1879 When it applies, *Chevron* is a powerful weapon in an agency’s regulatory arsenal. Congressional delegations to agencies are often ambiguous—expressing “a mood rather than a message.” Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L.Rev. 1263, 1311 (1962). By design or default, Congress often fails to speak to “the precise question” before an agency. In the absence of such an answer, an agency’s interpretation has the full force and effect of law, unless it “exceeds the bounds of the permissible.” *Barnhart v. Walton*, 535 U.S. 212, 218, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002).

It would be a bit much to describe the result as “the very definition of tyranny,” but the danger posed by the growing power of the administrative state cannot be dismissed. See, e.g., *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. —, —, 131 S.Ct. 2254, 2266, 180 L.Ed.2d 96 (2011) (SCALIA, J., concurring) (noting that the FCC “has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends”); *Sackett v. EPA*, 566 U.S. —, —, —, 132 S.Ct. 1367, 1374, 182 L.Ed.2d 367 (2012) (rejecting agency argument that would “enable the strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review”).

What the Court says in footnote 4 of its opinion is good, and true (except of course for the “dissent overstates”

part). *Ante*, at 1873, n. 4. The Framers did divide governmental power in the manner the Court describes, for the purpose of safeguarding liberty. And yet ... the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, “in the public interest”—can perhaps be excused for thinking that it is the agency really doing the legislating. And with hundreds of federal agencies poking into every nook and cranny of daily life, that citizen might also understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching.

It is against this background that we consider whether the authority of administrative agencies should be augmented even further, to include not only broad power to give definitive answers to questions left to them by Congress, but also the same power to decide when Congress has given them that power.

Before proceeding to answer that question, however, it is necessary to sort through some confusion over what this litigation is about. The source of the confusion is a familiar culprit: the concept of “jurisdiction,” which we have repeatedly described as a word with “ ‘many, too many, meanings.’ ” *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 81, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009).

The Court states that the question “is whether a court must defer under *Chevron* to an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s statutory authority (that is, its jurisdiction).” *Ante*, at 1868. That is fine—until the parenthetical. The parties, *amici*, and court below too often use the term “jurisdiction” imprecisely, which leads the Court to misunderstand the argument it must confront. That argument is not that “there exist two distinct classes of agency interpretations,” some “big, important ones” that “define the agency’s ‘jurisdiction,’ ” and other “humdrum, run-of-the-mill” ones that “are simply applications of jurisdiction the agency plainly has.” *Ibid.* The argument is instead that a court should not defer to an agency on \*1880 whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue.

You can call that “jurisdiction” if you’d like, as petitioners do in the question presented. But given that the term is ambiguous, more is required to understand its use in that question than simply “having read it.” *Ante*, at 1873, n. 5. It is important to keep in mind that the term, in the present context, has the more precise meaning noted above, encompassing congressionally delegated authority to issue interpretations with the force and effect of law. See 668 F.3d 229, 248 (C.A.5 2012) (case below) (“The issue in the instant case is whether the FCC possessed

statutory authority to administer § 332(c)(7)(B)(ii) and (v) by adopting the 90- and 150-day time frames”). And that has nothing do with whether the statutory provisions at issue are “big” or “small.”

## II

“It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). The rise of the modern administrative state has not changed that duty. Indeed, the Administrative Procedure Act, governing judicial review of most agency action, instructs reviewing courts to decide “all relevant questions of law.” 5 U.S.C. § 706.

We do not ignore that command when we afford an agency’s statutory interpretation *Chevron* deference; we respect it. We give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities “with the force of law.” *United States v. Mead Corp.*, 533 U.S. 218, 229, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); see also Monaghan, *Marbury and the Administrative State*, 83 Colum. L.Rev. 1, 27–28 (1983) (“the court is not abdicating its constitutional duty to ‘say what the law is’ by deferring to agency interpretations of law: it is simply applying the law as ‘made’ by the authorized law-making entity”).

But before a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue. See *ante*, at 1876 (BREYER, J., concurring in part and concurring in judgment) (“The question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently.”). Agencies are creatures of Congress; “an agency literally has no power to act ... unless and until Congress confers power upon it.” *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). Whether Congress has conferred such power is the “relevant question[ ] of law” that must be answered before affording *Chevron* deference. 5 U.S.C. § 706.

## III

### A

Our precedents confirm this conclusion—beginning with *Chevron* itself. In *Chevron*, the EPA promulgated a regulation interpreting the term “stationary sources” in the

Clean Air Act. 467 U.S., at 840, 104 S.Ct. 2778 (quoting 42 U.S.C. § 7502(b)(6)(1982 ed.)). An environmental group petitioned for review of the rule, challenging it as an impermissible interpretation of the Act. 467 U.S., at 841, 859, 104 S.Ct. 2778. Finding the statutory text “not dispositive” and the legislative history “silent on the precise issue,” we upheld the rule. *Id.*, at 862, 866, 104 S.Ct. 2778.

\*1881 In our view, the challenge to the agency’s interpretation “center[ed] on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress.” *Id.*, at 866, 104 S.Ct. 2778. Judges, we said, “are not experts in the field, and are not part of either political branch of the Government.” *Id.*, at 865, 104 S.Ct. 2778. Thus, because Congress had not answered the specific question at issue, judges had no business providing their own resolution on the basis of their “personal policy preferences.” *Ibid.* Instead, the “agency to which Congress ha[d] delegated policymaking responsibilities” was the appropriate political actor to resolve the competing interests at stake, “within the limits of that delegation.” *Ibid.*

*Chevron*’s rule of deference was based on—and limited by—this congressional delegation. And the Court did not ask simply whether Congress had delegated to the EPA the authority to administer the Clean Air Act generally. We asked whether Congress had “delegat[ed] authority to the agency to elucidate a *specific provision* of the statute by regulation.” *Id.*, at 843–844, 104 S.Ct. 2778 (emphasis added); see *id.*, at 844, 104 S.Ct. 2778 (discussing “the legislative delegation to an agency on a *particular question*” (emphasis added)). We deferred to the EPA’s interpretation of “stationary sources” based on our conclusion that the agency had been “charged with responsibility for administering *the provision*.” *Id.*, at 865, 104 S.Ct. 2778 (emphasis added).

### B

We have never faltered in our understanding of this straightforward principle, that whether a particular agency interpretation warrants *Chevron* deference turns on the court’s determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue.

We made the point perhaps most clearly in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990). In that case, the Department of Labor contended the Court should defer to its interpretation of the scope of the private right of action provided by the Migrant and Seasonal Agriculture Worker Protection Act (AWPA), 29 U.S.C. § 1854, against employers who intentionally violated the Act’s motor vehicle safety

provisions. We refused to do so. Although “as an initial matter” we rejected the idea that Congress left a “statutory ‘gap’ ” for the agency to fill, we reasoned that if the “AWPA’s language establishing a private right of action is ambiguous,” the Secretary of Labor’s interpretation of its scope did not warrant *Chevron* deference. 494 U.S., at 649, 110 S.Ct. 1384.

In language directly applicable to the question before us, we explained that “[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority.” *Ibid.* Although “Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate *standards* implementing AWPA’s *motor vehicle provisions*,” we found “[n]o such delegation regarding AWPA’s *enforcement provisions*.” *Id.*, at 650, 110 S.Ct. 1384 (emphasis added). It would therefore be “inappropriate,” we said, “to consult executive interpretations” of the enforcement provisions to resolve ambiguities “surrounding the scope of AWPA’s judicially enforceable remedy.” *Ibid.* Without questioning the principle that agency determinations “within the scope of delegated authority are entitled to deference,” we explained that “it is fundamental ‘that an agency \*1882 may not bootstrap itself into an area in which it has no jurisdiction.’ ” *Ibid.* (quoting *Federal Maritime Comm’n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973)).

Our subsequent cases follow the same approach. In *United States v. Mead Corp.*, *supra*, for example, *Chevron* deference turned on whether Congress had delegated to the agency authority to interpret the statutory ambiguity by a particular means. The Customs Service had issued a “classification ruling,” interpreting the term “diaries” in a tariff schedule to include “day planners” of the type Mead imported, and on that basis subjected the planners to a four-percent tariff. Mead protested the imposition of the tariff, the Customs Service claimed *Chevron* deference for its interpretation, and the controversy made its way to our Court. *Id.*, at 224–226, 121 S.Ct. 2164.

In *Mead*, we again made clear that the “category of interpretative choices” to which *Chevron* deference applies is defined by congressional intent. *Id.*, at 229, 121 S.Ct. 2164. *Chevron* deference, we said, rests on a recognition that Congress has delegated to an agency the interpretive authority to implement “a particular provision” or answer “‘a particular question.’ ” *Ibid.* (quoting *Chevron*, 467 U.S., at 844, 104 S.Ct. 2778). An agency’s interpretation of “a particular statutory provision” thus qualifies for *Chevron* deference only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” 533 U.S.,

at 226–227, 121 S.Ct. 2164.

The Court did not defer to the agency’s views but instead determined that Congress had not delegated interpretive authority to the Customs Service to definitively construe the tariff schedule through classification rulings. Neither the statutory authorization for the classification rulings, nor the Customs Service’s practice in issuing such rulings, “reasonably suggest[ed] that Congress ever thought of [such] classification rulings as deserving the deference claimed for them.” *Id.*, at 231, 121 S.Ct. 2164. And in the absence of such a delegation, we concluded the interpretations adopted in those rulings were “beyond the *Chevron* pale.” *Id.*, at 234, 121 S.Ct. 2164.

*Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006), is in the same line of precedent. In that case, as here, deference turned on whether a congressional delegation of interpretive authority reached a particular statutory ambiguity. The Attorney General claimed *Chevron* deference for his interpretation of the phrase “legitimate medical purpose” in the Controlled Substances Act (CSA) to exclude the prescribing and dispensing of controlled substances for the purpose of assisting suicide. *Id.*, at 254, 258, 126 S.Ct. 904. No one disputed that “legitimate medical purpose” was “ambiguous in the relevant sense.” *Id.*, at 258, 126 S.Ct. 904. Nor did any Justice dispute that the Attorney General had been granted the power in the CSA to promulgate rules with the force of law. *Ibid.*; see *id.*, at 281, 126 S.Ct. 904 (SCALIA, J., dissenting). Nevertheless, the Court explained, “*Chevron* deference ... is not accorded merely because the statute is ambiguous and an administrative official is involved.” *Id.*, at 258, 126 S.Ct. 904. The regulation advancing the interpretation, we said, “must be promulgated pursuant to authority Congress has delegated to the official.” *Ibid.* (citing *Mead, supra*, at 226–227, 121 S.Ct. 2164).

In the CSA, Congress delegated to the Attorney General the authority to promulgate \*1883 regulations “relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances,” 21 U.S.C. § 821, or “for the efficient execution of his functions under [the CSA],” § 871(b). After considering the text, structure, and purpose of the Act, the Court concluded *on its own* that interpreting “legitimate medical purpose” fell under neither delegation. *Gonzales*, 546 U.S., at 258–269, 126 S.Ct. 904. Because the regulation “was not promulgated pursuant to the Attorney General’s authority, its interpretation of ‘legitimate medical purpose’ d[id] not receive *Chevron* deference.” *Id.*, at 268, 126 S.Ct. 904.

*Adams Fruit, Mead*, and *Gonzales* thus confirm that *Chevron* deference is based on, and finds legitimacy as, a congressional delegation of interpretive authority. An agency interpretation warrants such deference only if

Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner. Whether Congress has done so must be determined by the court on its own before *Chevron* can apply. See H. Edwards, L. Elliott, & M. Levy, *Federal Courts Standards of Review* 168 (2d ed. 2013) (“a court decides *de novo* whether an agency has acted within the bounds of congressionally delegated authority” (citing *Mead*, *supra*, at 226–227, 121 S.Ct. 2164, and *Gonzales*, *supra*, at 258, 126 S.Ct. 904)); Sales & Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L.Rev. 1497, 1564 (2009) (“if delegation really is antecedent to deference, as *Mead* insists, it cannot be that courts should defer to an agency’s views on whether a delegation has taken place”).

In other words, we do not defer to an agency’s interpretation of an ambiguous provision unless Congress wants us to, and whether Congress wants us to is a question that courts, not agencies, must decide. Simply put, that question is “beyond the *Chevron* pale.” *Mead*, *supra*, at 234, 121 S.Ct. 2164

#### IV

Despite these precedents, the FCC argues that a court need only locate an agency and a grant of general rulemaking authority over a statute. *Chevron* deference then applies, it contends, to the agency’s interpretation of any ambiguity in the Act, including ambiguity in a provision said to carve out specific provisions from the agency’s general rulemaking authority. If Congress intends to exempt part of the statute from the agency’s interpretive authority, the FCC says, Congress “can ordinarily be expected to state that intent explicitly.” Brief for Federal Respondents 30 (citing *American Hospital Assn. v. NLRB*, 499 U.S. 606, 111 S.Ct. 1539, 113 L.Ed.2d 675 (1991)).

If a congressional delegation of interpretive authority is to support *Chevron* deference, however, that delegation must extend to the specific statutory ambiguity at issue. The appropriate question is whether the delegation covers the “specific provision” and “particular question” before the court. *Chevron*, 467 U.S., at 844, 104 S.Ct. 2778. A congressional grant of authority over some portion of a statute does not necessarily mean that Congress granted the agency interpretive authority over all its provisions. See *Adams Fruit*, 494 U.S., at 650, 110 S.Ct. 1384.

An example that might highlight the point concerns statutes that parcel out authority to multiple agencies, which “may be the norm, rather than an exception.” Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 S.Ct. Rev. 201, 208; see, e.g., *Gonzales*, 546 U.S., at 250–251, 126 S.Ct. 904

(describing shared authority over the CSA \*1884 between the Attorney General and the Secretary of Health and Human Services); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) (authority to issue regulations implementing the Americans with Disabilities Act “is split primarily among three Government agencies”). The Dodd–Frank Wall Street Reform and Consumer Protection Act, for example, authorizes rulemaking by at least eight different agencies. See Congressional Research Service, C. Copeland, *Rulemaking Requirements and Authorities in the Dodd–Frank Wall Street Reform and Consumer Protection Act 7* (2010). When presented with an agency’s interpretation of such a statute, a court cannot simply ask whether the statute is one that the agency administers; the question is whether authority over the particular ambiguity at issue has been delegated to the particular agency.

By the same logic, even when Congress provides interpretive authority to a single agency, a court must decide if the ambiguity the agency has purported to interpret with the force of law is one to which the congressional delegation extends. A general delegation to the agency to administer the statute will often suffice to satisfy the court that Congress has delegated interpretive authority over the ambiguity at issue. But if Congress has exempted particular provisions from that authority, that exemption must be respected, and the determination whether Congress has done so is for the courts alone.

The FCC’s argument that Congress “can ordinarily be expected to state that intent explicitly,” Brief for Federal Respondents 30 (citing *American Hospital*, *supra*), goes to the merits of that determination, not to whether a court should decide the question *de novo* or defer to the agency. Indeed, that is how the Court in *American Hospital* considered it. It was in the process of “employing the traditional tools of statutory construction” that the Court said it would have expected Congress to speak more clearly if it had intended to exclude an entire subject area—employee units for collecting bargaining—from the NLRB’s general rulemaking authority. *Id.*, at 613, 614, 111 S.Ct. 1539. The Court concluded, after considering the language, structure, policy, and legislative history of the Act on its own—without deferring to the agency—that the meaning of the statute was “clear and contrary to the meaning advanced by petitioner.” *Id.*, at 609–614, 111 S.Ct. 1539. To be sure, the Court also noted that “[e]ven if we *could* find any ambiguity in [the provision] after employing the traditional tools of statutory construction, we would still defer to Board’s reasonable interpretation.” *Id.*, at 614, 111 S.Ct. 1539 (emphasis added). But that single sentence of dictum cannot carry the day for the FCC here.

V

As the preceding analysis makes clear, I do not understand petitioners to ask the Court—nor do I think it necessary—to draw a “specious, but scary-sounding” line between “big, important” interpretations on the one hand and “humdrum, run-of-the-mill” ones on the other. *Ante*, at 1868, 1879. Drawing such a line may well be difficult. Distinguishing between whether an agency’s interpretation of an ambiguous term is reasonable and whether that term is for the agency to interpret is not nearly so difficult. It certainly did not confuse the FCC in this proceeding. Compare *In re Petition for Declaratory Ruling*, 24 FCC Rcd. 13994, 14000–14003 (2009) (addressing the latter question), with *id.*, at 14003–14015 (addressing the former). Nor did it confound the Fifth Circuit. Compare 668 F.3d, at 247–254 (deciding “whether the FCC possessed statutory authority to administer § 332(c)(7)(B)(ii)”), \*1885 with *id.*, at 254–260 (considering “whether the 90– and 150–day time frames themselves also pass muster under *Chevron*”). More importantly, if the legitimacy of *Chevron* deference is based on a congressional delegation of interpretive authority, then the line is one the Court must draw.

The majority’s hypothetical Common Carrier Acts do not demonstrate anything different. *Ante*, at 1880 – 1881. The majority states that in its second Common Carrier Act, Section 2 makes clear that Congress “ ‘conferred interpretative power on the agency’ ” to interpret the ambiguous terms “common carrier” and “unreasonable condition.” *Ante*, at 1880 – 1881 (quoting Brief for Petitioners in No. 1545, p. 14). Thus, it says, under anyone’s theory a court must defer to the agency’s reasonable interpretations of those terms. Correct.

The majority claims, however, that “petitioners’ theory would accord the agency no deference” in its interpretation of the same ambiguous terms in the first Common Carrier Act. *Ante*, at 1880 – 1881. But as I understand petitioners’ argument—and certainly in my own view—a court, in both cases, need only decide for itself whether Congress has delegated to the agency authority to interpret the ambiguous terms, before affording the agency’s interpretation *Chevron* deference.

For the second Common Carrier Act, the answer is easy. The majority’s hypothetical Congress has spoken clearly and specifically in Section 2 of the Act about its delegation of authority to interpret Section 1. As for the first Act, it is harder to analyze the question, given only one section of a presumably much larger statute. But if the first Common Carrier Act is like most agencies’ organic statutes, I have no reason to doubt that the agency would likewise have interpretive authority over the same ambiguous terms, and therefore be entitled to deference in construing them, just as with the second Common Carrier Act. There is no new “test” to worry about, cf. *ante*, at 1885 – 1886; courts would simply apply the normal rules

of statutory construction.

That the question might be harder with respect to the first Common Carrier Act should come as no surprise. The second hypothetical Congress has more carefully defined the agency’s authority than the first. *Whatever* standard of review applies, it is more difficult to interpret an unclear statute than a clear one. My point is simply that before a court can defer to the agency’s interpretation of the ambiguous terms in either Act, it must determine for itself that Congress has delegated authority to the agency to issue those interpretations with the force of law.

The majority also expresses concern that adopting petitioners’ position would undermine *Chevron*’s stable background rule against which Congress legislates. *Ante*, at 1879 – 1880. That, of course, begs the question of what that stable background rule is. See Merrill & Hickman, *Chevron*’s Domain, 89 Geo. L.Rev. 833, 910 (2001) (“Courts have never deferred to agencies with respect to questions such as whether Congress has delegated to an agency the power to act with the force of law through either legislative rules or binding adjudications. Similarly, it has never been maintained that Congress would want courts to give *Chevron* deference to an agency’s determination that it is entitled to *Chevron* deference, or should give *Chevron* deference to an agency’s determination of what types of interpretations are entitled to *Chevron* deference” (footnote omitted)).

VI

The Court sees something nefarious behind the view that courts must decide on \*1886 their own whether Congress has delegated interpretative authority to an agency, before deferring to that agency’s interpretation of law. What is afoot, according to the Court, is a judicial power-grab, with nothing less than “*Chevron* itself” as “the ultimate target.” *Ante*, at 1873.

The Court touches on a legitimate concern: *Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive. But there is another concern at play, no less firmly rooted in our constitutional structure. That is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well.

An agency’s interpretive authority, entitling the agency to judicial deference, acquires its legitimacy from a delegation of lawmaking power from Congress to the Executive. Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive. See *Zivotofsky v. Clinton*, 566 U.S. —, —, 132 S.Ct.

1421, 1428, 182 L.Ed.2d 423 (2012). In the present context, that means ensuring that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is. That concern is heightened, not diminished, by the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power. And it is heightened, not diminished, by the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies.

We reconcile our competing responsibilities in this area by ensuring judicial deference to agency interpretations under *Chevron*—but only after we have determined on our own that Congress has given interpretive authority to the agency. Our “task is to fix the boundaries of delegated authority,” Monaghan, 83 Colum. L.Rev., at 27; that is not a task we can delegate to the agency. We do not leave it to the agency to decide when it is in charge.

\* \* \*

#### Footnotes

- \* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- <sup>1</sup> This is not a typographical error. CTIA—The Wireless Association was the name of the petitioner. CTIA is presumably an (unpronounceable) acronym, but even the organization’s website does not say what it stands for. That secret, known only to wireless-service-provider insiders, we will not disclose here.
- <sup>2</sup> The dissent’s non-answer to this example reveals the hollowness of its theory. It “might,” the dissent claims, be “harder” to interpret the first Act, because it is (somehow) less “clear” than the second Act. *Post*, at 1873 – 1874 (opinion of ROBERTS, C.J.). That it is even *possible* that the two could come out differently under the dissent’s test (whatever it is) shows that that test must be wrong. The two statutes are substantively identical. Any difference in outcome would be arbitrary, so a sound interpretive approach should yield none.
- <sup>3</sup> The dissent’s reliance on dicta in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990), see *post*, at 1881 – 1882, is misplaced. In that case, the Department of Labor had interpreted a statute creating a private right of action for migrant or seasonal farmworkers as providing no remedy where a state workers’-compensation law covered the worker. 494 U.S., at 649, 110 S.Ct. 1384. We held that we had no need to “defer to the Secretary of Labor’s view of the scope of” that private right of action “because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute.” *Ibid.* *Adams Fruit* stands for the modest proposition that the Judiciary, not any executive agency, determines “the scope”—including the available remedies—“of judicial power vested by” statutes establishing private rights of action. *Id.*, at 650, 110 S.Ct. 1384. *Adams Fruit* explicitly affirmed the Department’s authority to promulgate the substantive standards enforced through that private right of action. See *ibid.*
- The dissent’s invocation of *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006), see *post*, at 1882 – 1883, is simply perplexing: The majority opinion in that case expressly lists the Communications Act as an example of a statute under which an agency’s “authority is clear because the statute gives an agency broad power to enforce *all* provisions of the statute.” 546 U.S., at 258–259, 126 S.Ct. 904 (citing 47 U.S.C. § 201(b); emphasis added). That statement cannot be squared with the dissent’s proposed remand for the Fifth Circuit to determine “whether Congress delegated interpretive authority over § 332(c)(7)(B)(ii) to the FCC.” *Post*, at 1875.
- <sup>4</sup> THE CHIEF JUSTICE’s discomfort with the growth of agency power, see *post*, at 1877 – 1879, is perhaps understandable. But the dissent overstates when it claims that agencies exercise “legislative power” and “judicial power.” *Post*, at 1877 – 1878; see also *post*, at 1885 – 1886. The former is vested exclusively in Congress, U.S. Const., Art. I, § 1, the latter in the “one supreme Court” and “such inferior Courts as the Congress may from time to time ordain and establish.” Art. III, § 1. Agencies make rules (“Private cattle may be grazed on public lands X, Y, and Z subject to certain conditions”) and conduct adjudications (“This rancher’s grazing permit is revoked for violation of the conditions”) and have done so since the beginning of the Republic. These activities take

In these cases, the FCC issued a declaratory ruling interpreting the term “reasonable period of time” in 47 U.S.C. § 332(c)(7)(B)(ii). The Fifth Circuit correctly recognized that it could not apply *Chevron* deference to the FCC’s interpretation unless the agency “possessed statutory authority to administer § 332(c)(7)(B)(ii),” but it erred by granting *Chevron* deference to the FCC’s view on that antecedent question. See 668 F.3d, at 248. Because the court should have determined on its own whether Congress delegated interpretive authority over § 332(c)(7)(B)(ii) to the FCC before affording *Chevron* deference, I would vacate the decision below and remand the cases to the Fifth Circuit to perform the proper inquiry in the first instance.

I respectfully dissent.

#### Parallel Citations

81 USLW 4299, 13 Cal. Daily Op. Serv. 4964, 2013 Daily Journal D.A.R. 6323, 24 Fla. L. Weekly Fed. S 189

City of Arlington, Texas, v. Federal Communications Commission, et al.

“legislative” and “judicial” forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the “executive Power.” Art. II, § 1, cl. 1.

- <sup>5</sup> The dissent—apparently with no attempt at irony—accuses us of “misunderstand[ing]” the question presented as one of “jurisdiction.” *Post*, at 1879 – 1880. Whatever imprecision inheres in our understanding of the question presented derives solely from our having read it.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on November 4, 2013, I caused the Appendix to Appellants' Reply Brief in the above-captioned matter to be served upon the parties herein as indicated below:

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DATED this 4th day of November, 2013.

  
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Respectfully submitted,



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