No. _____

In The
Supreme Court of the United States

LIVINGSTON COUNTY ROAD COMMISSION,

Cross-Petitioner,

v.

GOULD ELECTRONICS, INC.,

Cross-Respondent.

On Conditional Cross-Petition For Writ Of Certiorari From The United States Court Of Appeals For The Sixth Circuit

LIVINGSTON COUNTY ROAD COMMISSION'S RULE 12(5) CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

PAUL E. BURNS
Counsel of Record
JEFFREY D. ALBER
LAW OFFICE OF PAUL E. BURNS
133 W. Grand River Rd.
Brighton, Michigan 48116
Burns Ph. (517) 861-9547
Alber Ph. (734) 369-1009
burns@peblaw.net
alber@peblaw.net

Counsel for Cross-Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The questions for this Court are:

1. How is the term "due care" defined for purposes of the 42 U.S.C. §9607(b)(3) "third-party defense" in relation to "reasonable steps" in the substantially similar "innocent contiguous landowner defense" of 42 U.S.C. §9607(q). In other words, can two substantially similar statutory defenses have widely disparate standards of care?

2. Is an intragovernmental real estate transaction strictly for budgetary purposes a transaction contemplated by the 42 U.S.C. §9607(q) "innocent contiguous landowner defense" resulting in the defense being lost?

3. How is the "due care" standard defined for purposes of a 42 U.S.C. §9613(f) equitable allocation under the *Gore* factors in light of the cross-referenced due care standards set forth in 42 U.S.C. §9607(b)(3) and 42 U.S.C. §9607(q) statutory defenses?

4. Should the standards of care in the 42 U.S.C. §9607(q) "third-party defense," the 42 U.S.C. §9607(q) "innocent contiguous landowner defense," and the 42 U.S.C. §9613(f) equitable allocation through the *Gore* factors, be uniform, as all three concepts are substantially similar in scope and intended result?

QUESTIONS PRESENTED—Continued

Gould owned property directly adjacent to property owned by LCRC where it manufactured pistons and connecting rods for small engines using Trichloroethylene ("TCE") as a degreaser. Gould systematically dumped an enormous quantity of TCE on the ground in locations close to the LCRC property line over the course of fifteen (15) years during the 1960s and 1970s. In 2017, after nearly three decades of scientific investigation and analysis—none of which ever implicated LCRC as a source of contamination—the Michigan Department of Environmental Quality ("MDEQ," now known as the Department of Environment, Great Lakes, and Energy ("EGLE")), determined that there was no evidence indicating a release on the LCRC property. The district court came to the same conclusion, which was affirmed by the Sixth Circuit. The specific conclusion was that:

> [T]here is no evidence demonstrating that there were any deposits of TCE onto the soils on the LCRC Property.
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> * * *
>
> [The] evidence is sufficient to establish that no disposal of TCE occurred on the LCRC Property. . . . Thus, the evidence demonstrates that Gould Inc., and not LCRC, generated the TCE contamination, which migrated onto the neighboring properties, including the LCRC Property.

(R. 265, PageID 83258).

QUESTIONS PRESENTED—Continued

Despite concluding that LCRC was 100% innocent of causing the contamination the district court, as affirmed by the Sixth Circuit, simultaneously concluded that LCRC was 5% responsible for past and future costs of remediation for failure to engage in sufficient groundwater investigation, despite spending approximately $1.2 million in public funds on scientific investigation and analysis. This conclusion was reached in clear defiance of the evidence and the law, which indicated respectively that the MDEQ investigation was an improperly overbroad fishing expedition and that no groundwater investigation or remediation systems need to be utilized by innocent landowners contaminated through passive groundwater migration.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Livingston County Road Commission ("LCRC") has no corporate affiliations. The LCRC is a Michigan road commission established pursuant to Michigan's County Road Law, MCL §224.1, *et seq*. The LCRC is a reporting entity to the Livingston County Board of Commissioners. The LCRC board is appointed by the County Board. "The board of county road commissioners shall act as an administrative board only and the function of the board shall be limited to the formulation of policy and the performance of official duties imposed by law and delegated by the county board of commissioners." MCL §224.9(2).

Conditional Cross-Respondent, Gould Electronics, Inc. ("Gould"), is a shell corporation organized under the laws of Arizona employing three (3) people, and existing for the sole purpose of suing neighbors of contaminated properties owned by its former alter egos.

An abridged version of Gould's corporate history from the record is as follows:[1]

1. Gould, Inc., based in Ohio, operated the Gould Property from 1961 through 1976, during which time the Court found that it

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[1] *See* R. 189-21, PageID 64457-64460, 64465-64466, 64474-64475, 64488-64489, 64495-64497, 64526, 64528-64529, 64532-64534, 64536-64538, 64546-64547, 64550-64551, 64553, 64555, 64565, 64586-64587 (T. Rich); R. 260, PageID 82446, Lns. 23-25 (J. Callahan); R. 249, PageID 91666 (J. Cronmiller).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT—Continued

dumped copious amounts of industrial waste, including TCE, onto the ground, for which it is 100% responsible. Gould, Inc. abandoned to Gould Property and only returned to accept liability for its contamination when sued by Michigan National Bank in 1988.

2. By 1994, Gould, Inc. was a wholly owned subsidiary of Nippon Mining U.S., Inc., which itself was s subsidiary of Japan Energy Corporation, a Japanese Corporation.

3. On January 31, 1994, Gould, Inc., and Nippon Mining U.S., Inc., underwent a corporate restructuring resulting in the sale of assets and liabilities Gould, Inc. and Nippon Mining to Gould Electronics, Inc., an Ohio Corporation, and wholly owned subsidiary of Japan Energy Corporation.

4. In 1997, Gould, Inc. attempted to walk away from cleanup activities on the Gould Property, but the MDEQ declined as significant TCE contamination remained on the property.

5. Another corporate restructuring took place in 2003 when Gould Electronics, Inc. of Ohio sold its assets and liabilities to Nikko Materials USA, Inc. Gould Electronics, Inc. of Ohio was dissolved in December 2003.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT—Continued

6. Nikko Materials USA, Inc. laid off all its employees, ceased operations, and changed its name to Gould Electronics, Inc., an Arizona Corporation, in 2006. Remaining manufacturing business of Nikko Materials was transferred to a new company, Nikko Metals, leaving Gould, Inc. liabilities with the newly named Gould Electronics, Inc., Arizona.

7. Gould Electronics, Inc. of Arizona, Plaintiff/Counter-Defendant in this case, is a subsidiary of JX Nippon Mining and Metals Corp, a Japanese Corporation.

8. JX Nippon Mining and Metals Corp., which is a subsidiary of JX Holdings, Inc. is a publicly traded Japanese corporation. At the time of trial JX Holdings had been renamed JTXG Holdings, Inc.

See R. 189-21, PageID 64457-64460, 64465-64466, 64474-64475, 64488-64489, 64495, 64497, 65426, 64528-64529, 64532-64534, 64536-64538, 64546-64547, 64550-64551, 64553, 64555, 64565, 64586-64587 (T. Rich); R. 260, PageID 82446, Lns. 23-25 (J. Callahan); R. 249, PageID 91666 (J. Cronmiller).

Since trial Gould has filed a Disclosure of Corporate Affiliations and Financial interest with this Court listing Gould as "an indirect subsidiary of Eneos Corp. (formerly JTXG)" while also listing "Nippon Oil and

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT—Continued

Energy Corp., a publicly-traded company in Japan" as a company with financial interest in the outcome of the appeal.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit, Case Nos. 20-2257 & 20-2267, *Gould Electronics, Inc. v. Livingston County Road Commission*, judgment entered on May 10, 2022.

U.S. District Court for the Eastern District of Michigan, Case No. 2:17-cv-11130-MAG-DRG, *Gould Electronics, Inc. v. Livingston County Road Commission*, final judgment entered November 19, 2020.

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DECISIONS BELOW

The district court's opinion and order following the bench trial in this matter and its final judgment memorializing the findings therein are reprinted in the Appendix ("App.") at App. 26-166. The Sixth Circuit's opinion and judgment affirming the district court's opinion in whole are reprinted at App. 1-26.

STATEMENT OF JURISDICTION

On May 10, 2022, the Sixth Circuit issued its opinion affirming the district court's conclusion that LCRC's statutory defenses failed, and apportioning LCRC 5% of past and future costs of remediation despite also finding LCRC 0% responsible for causing the contamination. The lower courts had jurisdiction under 42 U.S.C. §9601 *et seq.*, 28 U.S.C. §1331, and 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The two primary statutory defenses within CERCLA are found in 42 U.S.C. §9607(b)(3) (the "third-party defense"), and 42 U.S.C. §9607(q) (the "innocent contiguous landowner defense").

42 U.S.C. §9607(b)(3) states in relevant part:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> * * *
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions;

42 U.S.C. §9607(q) is quite lengthy, but states in relevant part:

> (q) Contiguous properties.

(1) Not considered to be an owner or operator.

(A) In general. A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if—

(iii) the person takes reasonable steps to—

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(B) Demonstration. To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

> (D) Ground water. With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

The May 24, 1995, U.S. EPA Policy Toward Owners of Property Containing Contaminated Aquifers incorporated by reference into 42 U.S.C. §9607(q)(1)(D) states in relevant part:

> Not only is groundwater contamination difficult to detect, but once identified, it is often difficult to mitigate or address without extensive studies and pump and treat remediation. Based on EPA's technical experience and the Agency's interpretation of CERCLA, EPA has concluded that the failure by such an owner to take affirmative actions, such as conducting groundwater investigations or installing groundwater remediation systems, is not, in the absence of exceptional circumstances, a failure to exercise "due care" or "take precautions" within the meaning of Section 107(b)(3).

* * *

> [I]t is the Agency's position that where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement action against the owner of such property to require the performance of response actions or the payment of response costs.

INTRODUCTION

I. CERCLA: "You may ask yourself: 'well? how did I get here?'"[2]

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") (42 U.S.C. §9601, *et seq.*), "was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those *responsible* for the contamination." *Burlington N. & Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 602 (2009); *see also Metro. Water Reclamation Dist. v. North Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007). ("The purpose of CERCLA is (1) to 'abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites,' and (2) to 'shift the costs of cleanup to the parties responsible for the contamination.'"); *United States v.*

[2] Talking Heads, "Once in a Lifetime," *Remain in Light*, Sire Records, 1980.

A&N Cleaners & Launderers, 854 F.Supp. 229, 239 (S.D.N.Y. 1994) (CERCLA's liability scheme was intended to ensure that those who were responsible for, and who profited from, activities leading to property contamination, rather than the public at large, should be responsible for the costs of the problems that they had caused.); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 716 (2d Cir. 1993); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) ("Congress intended [through passage of CERCLA] that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.").

The cases above clearly indicate that the cornerstone of CERCLA is fundamental fairness. However, LCRC contends that the fairness notion has vanished in the labyrinth of CERCLA and corresponding caselaw.

While the general environmental spirit of CERCLA is pure, its application has proven to be more idealistic than realistic. As such, CERCLA is considered "[a] hastily drafted piece of legislation, rushed through Congress upon minimal debate following the Presidential election of 1980, CERCLA is now viewed nearly universally as a failure." *United States v. A&N Cleaners & Launderers*, 854 F.Supp. 229, 239 (S.D.N.Y. 1994).

The legislative history of the statute is an unmitigated disaster. As vibrantly explained in *CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc.*, 769 F.Supp. 432, 435 (D.N.H. 1991):

> [T]hose courts which have attempted to unravel CERCLA's definitions have found no solace in either the 'plain meaning' of the statute or the reams of legislative history. Instead, in an attempt to glean legislative intent, courts seem to resort to a sort of 'Purkinje phenomenon,' hoping that if they stare at CERCLA long enough, it will burn a coherent afterimage on the brain.[3]

A description of the unreasonable task of interpreting CERCLA written by John Copeland Nagle, published in the William and Mary Law Review while he was a professor at Seaton Hall University School of Law, is apropos:

> The circumstances of CERCLA's enactment present formidable challenges to any theory of statutory interpretation. You favor a textualist theory that examines the statutory language alone? "CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage."[4] You rely on canons of construction

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[3] Cases criticizing CERCLA's impracticality are legion. *See* John Copeland Nagle, *CERCLA's Mistakes*, 38 Wm. & Mary L. Rev. 1405. fn. 3 (1997).

[4] John Copeland Nagle, *CERCLA's Mistakes*, 38 Wm. & Mary L. Rev. 1405, 1406-1407 (1997); *quoting Rhodes v. County*

from which to glean statutory meaning? "Because of the inartful crafting of CERCLA . . . reliance solely upon general canons of statutory construction must be more tempered than usual."[5] You prefer to rely on the legislative history of a statute's enactment? "[T]he legislative history of CERCLA gives more insight into the 'Alice-in-Wonderland'-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature."[6] You seek to implement congressional intent? "[C]ongressional intent may be particularly difficult to discern with precision in CERCLA."[7] You try to interpret statutes to promote good public policy? CERCLA 'can be terribly unfair in certain instances in which parties may be required to pay huge amounts for damages to which their acts did not contribute'."[8] You consider the current attitude toward a statute? "CERCLA is now viewed nearly universally as a failure."[9]

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of Darlington, 833 F.Supp. 1163, 1174 (D.S.C. 1992), *quoting Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988).

[5] *Id.*; *quoting Tippins Inc. v. USK Corp.*, 37 F.3d 87, 93 (3d Cir. 1994).

[6] *Id.*; *quoting HRW Sys. Inc. v. Washington Gas Light Co.*, 823 F.Supp. 318, 327 (D. Md. 1993).

[7] *Id.*; *quoting Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993).

[8] *Id.*; *quoting Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*, 875 F.Supp. 1545, 1568 (S.D. Ala. 1995).

[9] *Id.*; *quoting United States v. A&N Cleaners and Launderers, Inc.*, 854 F.Supp. 229, 239 (S.D.N.Y 1994).

John Copeland Nagle, *CERCLA's Mistakes*, 38 Wm. & Mary L. Rev. 1405, 1406-1407 (1997).

Well? How did *we* get here? As the song goes: "letting the days go by; water flowing underground."[10] According to the lower courts, LCRC did not exercise due care with respect to pollution caused solely by Gould that had passively migrated onto LCRC's property through groundwater thus allowing groundwater pollution to migrate further than it may have if LCRC had installed groundwater remediation systems. As will be discussed in detail below, the lower courts clearly erred as the CERCLA statutory defenses provide a modified "due care" standard property is polluted through passive groundwater migration alone, in which case "due care" does not require groundwater investigation or remediation systems to utilized.

This case provides a perfect example of how the application of CERCLA often leads courts to issue puzzlingly unfair results. First, under the CERCLA burden-shifting framework, LCRC, as defendant, is guilty until proven innocent. Second, despite both the MDEQ and the lower courts both finding no evidence that LCRC contributed to the TCE contamination at issue, notions of fundamental fairness were eventually lost in CERCLA's labyrinth; LCRC—a taxpayer-funded public entity that was found 0% guilty three times over—is now forced to help foot the bill for

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[10] Talking Heads, "Once in a Lifetime," *Remain in Light*, Sire Records, 1980.

Gould—a shell company subsidiary of a Japan-based conglomerate—which was found to be 100% guilty.

In light of the nebulous history of CERCLA analysis outlined above, troubling rulings are simply "same as it ever was."[11] Nevertheless, LCRC is asking this Court to cut through the labyrinth by applying: (1) the statutorily defined uniform due care standard for parcels polluted by passive migration of groundwater, only; and (2) fundamental principles of fairness on which our justice system is founded which, though hidden within the jumble and unfortunately bastardized by countless conflicting opinions attempting to wade through it, is baked into the black letter law of CERCLA. In doing so, the Court would not only be effectively administering justice in *this* case but would also be setting a clear precedent for the lower courts to follow leading them to a more fair and uniform application of CERCLA's true intent.

STATEMENT OF THE CASE

The district court did a masterful job parsing through the voluminous record. LCRC incorporates the district court's narrative by reference, barring any assertion the LCRC failed to comply with regulatory agencies.

[11] Talking Heads, "Once in a Lifetime," *Remain in Light*, Sire Records, 1980.

In short, Gould owned property directly adjacent to property owned by LCRC where it manufactured pistons and connecting rods for small engines using Trichloroethylene ("TCE") as a degreaser. Gould systematically dumped an enormous quantity of TCE on the ground in locations close to the LCRC property line. In 2017, after nearly three decades of investigation and analysis, the Michigan Department of Environmental Quality ("MDEQ", now known as the Department of Environment, Great Lakes, and Energy ("EGLE")), determined that there was no evidence indicating a release on the LCRC property. The district court came to the same conclusion also finding that Gould was 100% responsible for the release, and that the release occurred on the Gould property, only. As such, the only contamination located on the LCRC is in aquifer, which became contaminated through passive migration from the Gould release.

LCRC respectfully disagrees with the following conclusions of the district court as affirmed by the Sixth Circuit: (1) that LCRC did not exercise due care under the third-party defense (42 U.S.C. §9607(b)(3)), and the innocent contiguous landowner defense (42 U.S.C. §9607(q)); (2) that an intra-county governmental transfer for budgetary purposes destroyed LCRC's contiguous landowner defense; and (3) the court's 5% allocation of costs to LCRC, which it found 100% innocent of wrongdoing.

The Sixth Circuit improperly affirmed these points. In particular, both the district court and the Sixth Circuit exaggerate the extent to which LCRC

relies upon the 1995 U.S. EPA Policy Toward Owners of Property Containing Contaminated Aquifers, and fail to acknowledge: (1) that the policy is incorporated into the statutory "innocent contiguous landowner defense"; (2) effectively restates the content of 42 U.S.C. §9607(q)(1)(D); (3) cross-references due care language found in the 42 U.S.C. §9607(b)(3) "third-party defense"; and (4) that said policy has remained in place for over thirty-seven (37) years. As LCRC's arguments present a fundamental yet novel argument, there is little supporting caselaw. Given the good faith novelty of the argument, the Sixth Circuit improperly found that a lack of caselaw was detrimental to the position.

The Sixth Circuit improperly conflates apportionment of response costs pursuant to the *Gore* factors under 42. U.S.C. §9613(f) with the statutory defenses in §9607. These statutory provisions represent separate and distinct questions, with an analysis of §9613(f) apportionment occurring only after the §9607 statutory defenses fail. LCRC should have prevailed on its defenses rendering its §9613(f) counterclaim moot.

Finally, in affirming the district court, the Sixth Circuit effectively ruled that the CERCLA statutory defenses have no practical application.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's affirmance of the district court effectively renders CERCLA's statutory defenses useless. This case presents the Court with an ideal opportunity to set a clear precedent regarding the proper analysis of CERCLA's defenses to promote a more fair and uniform application of the inherently confusing statute.

As noted above in the Introduction, CERCLA was drafted in such a perplexing manner that lower courts have frequently interpreted it in a multitude of conflicting ways. As such, the statute is considered to be a failure. This case is a perfect example of how CERCLA interpretation leads to fundamental unfair results. Thus, the Court is now presented with an ideal opportunity to set a precedent unscrambling the statute to promote a more fair and uniform application of the law nationwide.

A. The lower courts clearly erred in their determination that LCRC was not an innocent third-party under 42 U.S.C. §9607(b) for failure to exercise due care. LCRC exercised due care considering all relevant facts and circumstances as defined in the statute's substantially similar, cross-referenced "third-party" and "contiguous landowner" defenses.

1. The due care standard in the "third-party defense," the "innocent contiguous landowner defense" and the 1995 EPA policy referenced therein all cross-reference each other thus circuitously defining "due care."

Please refer to "Pertinent Constitutional Provisions and Statutes," pp. 1-3, *infra*, for relevant text of laws and policies discussed below.

In typical confusing CERLCA fashion, §9607(q)(1)(D) of the "innocent contiguous landowner defense" references "reasonable steps" to be taken regarding pollution. The "reasonable steps" language is substantially similar to the "due care" standard in the §9607(b)(3) third-party defense, which itself is substantially similar in content and affect to §9607(q). Furthermore, the §9607(q) innocent contiguous landowner defense cites and incorporates an EPA policy regarding the "reasonable steps" to be taken, and that EPA policy then specifically cites and relates to the "due care" standard in the §9607(b)(3) third-party defense. Though the path

is circuitous, the text of CERCLA does contain a definition of due care.

In short, all the cross-references state the following: if a parcel is only polluted by passive migration of groundwater of hazardous substances leaching from a release on a contiguous parcel caused solely by a third party, then the owner of the "innocent" parcel is absolved of liability (i.e., truly innocent parties are truly innocent).

The lower courts failed to acknowledge the cross-references and erroneously created and applied an impossibly high due care standard whereby LCRC was found 100% innocent of polluting yet, was somehow unable to prove *by a preponderance of the evidence* that it exercised "due care."[12] This result is clearly contrary to the intended "polluters pay" and fundamental fairness principles of CERCLA.

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[12] "A finder of fact may conclude that a fact has been proven by a preponderance of the evidence if it finds that the scales tip, however slightly, in favor of the party with the burden of proof as to that fact." *Ostrowski v. Atlantic Mut. Ins. Cos*., 968 F.2d 171, 187 (2d Cir. 1992). LCRC not only tipped the scale but pushed it all the way to the ground in being found 100% innocent.

2. Once the lower courts found that Gould was 100% responsible for the release, and that TCE was only found in LCRC Property groundwater through passive groundwater migration from the Gould release, LCRC must be found innocent and absolved of liability for costs.

The district court explicitly ruled that:

> [T]here is no evidence demonstrating that there were any deposits of TCE onto the soils on the LCRC Property.
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> * * *
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> [The] evidence is sufficient to establish that no disposal of TCE occurred on the LCRC Property. . . . Thus, the evidence demonstrates that Gould Inc., and not LCRC, generated the TCE contamination, which migrated onto the neighboring properties, including the LCRC Property.

(R. 265, PageID 83258).

Therefore, once LCRC was concluded to be 100% innocent, under the cross-referenced due care standards within 42 U.S.C. §9607, LCRC is *fully* innocent. To reach a contrary result has no basis in the law. LCRC not only proved its innocence by a preponderance but proved its innocence (*beyond*) beyond a reasonable doubt.

Furthermore, the MDEQ came to the same conclusion on June 14, 2017, when it issued a letter stating

that "there is no indication that a release of chlorinated solvents to the unsaturated site soils occurred, and no releases of chlorinated solvents . . . are demonstrated to be directly attributable to the LCRC's historic operations." (R. 201-12). On June 23, 2017, the MDEQ issued another letter reiterating the language of the June 14 letter, and further stating:

> Regarding the DEQ's expectations relative to the [June 14, 2017] Letter, the DEQ is not requesting the performance of more sampling or report submittals by the LCRC concerning the origin of the TCE contamination on the [LCRC Property]. Based on the data and information submitted and currently available to the DEQ, and the May 11, 2017, technical meeting, the DEQ has no further regulatory interest in the origin of the TCE contamination on [the LCRC Property].[13] (R. 201-13).

Timothy O'Brien, a gubernatorial appointee and former Vice President of Ford Motor Company, acting as Senior Advisor to the MDEQ Director, testified that the conclusion was reached in conjunction with Sue Leeming, Division Chief for the Remediation and Redevelopment Division, and C. Heidi Grether, Executive Director of the MDEQ, based on the extensive investigation of both the Gould and LCRC properties and the

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[13] The reports, sampling, data, response activity plans and other documents submitted by the LCRC, and Gould considered by the MDEQ in reaching its conclusion is the same body of investigative work that was presented at trial by both LCRC and Gould.

record accumulated during those investigations, in which there was no evidence that LCRC contributed to the TCE plume. (R. 261, PageID 82706-82715 (O'Brien); R. 262, PageID 82746-82762 (Leeming)).[14]

Therefore, LCRC was not required to conduct groundwater investigations or to install groundwater remediation systems as a precondition of "due care," and once it was found 100% innocent two times, should be completely absolved of liability. Affirming the lower courts erroneous and impossibly high due care standard would eviscerate the cross-referenced standard to be applied to innocent parties aggrieved by passive groundwater migration as set forth in the black letter law of CERCLA.

Despite having no obligation to do so, LCRC nevertheless engaged in extensive soil and groundwater

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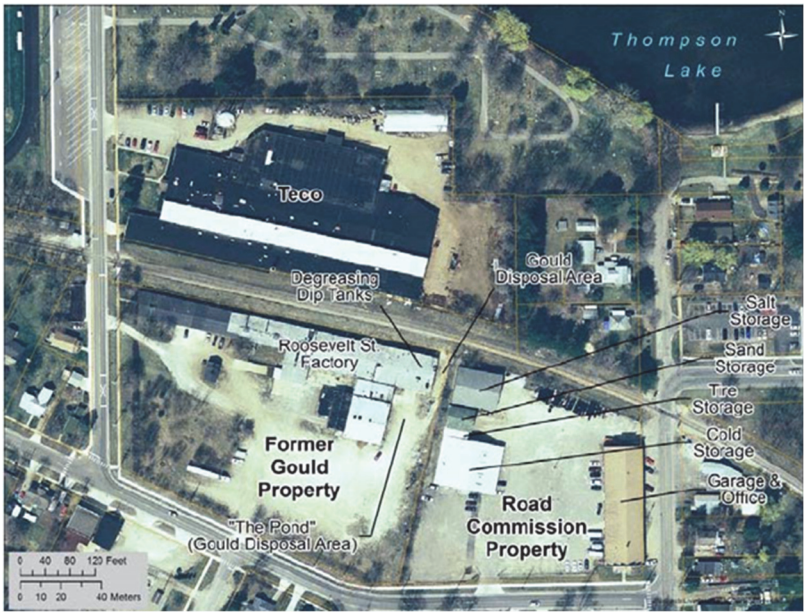
[14] Given the considerable body of evidence considered by the MDEQ, the MDEQ's institutional knowledge of environmental matters, and the fact that the Tolling Agreement was executed in part because "the Parties and Court discussed the likely advantages of deferring the trial . . . until after the MDEQ has been provided the opportunity to consider and respond" to LCRC's submissions, this was a reasonable case to afford the MDEQ's conclusion significant deference. "Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations, 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron, U.S.A., Inc. v NRDC, Inc.*, 467 U.S. 837 (1984).

investigations and analysis relative to this matter in conjunction with the MDEQ, culminating in a comprehensive and voluminous Response Activity Plan (RAP) detailing these efforts being submitted to the MDEQ in 2016, which includes thousands of pages of investigation data and expert scientific analysis of source, fate, and transport of TCE relative to the LCRC Property. (R. 170-172-17). LCRC's scientific investigation and analysis cost roughly $1.2 million of taxpayer funds and was relied upon by both the MDEQ and the lower courts in finding LCRC 100% innocent of causing the pollution.

This case presents a prime example of how the muddled CERCLA framework can lead to patently unfair results with no basis in American jurisprudence.

i. Summary of all relevant facts and circumstances: From the very beginning the circumstances obviously indicated LCRC was innocent.



(R. 265, PageID 83194 (Opinion)).

1. Gould Electronics, Inc., an Arizona corporation, and its predecessors and affiliated companies Gould, Inc., a Delaware Corporation, Gould Electronics, Inc., an Ohio corporation, Nikko Materials USA, Inc., and Nippon Mining US, Inc., owned and operated a factory at 325 North Roosevelt Street in Howell, Michigan (the "Gould Property") from 1961 through 1976. (R. 189-21, PageID 64457-64458 (Rich Dep)).

2. It is uncontested that from at least 1961 until 1976 Gould, Inc. operated a piston and connecting rod manufacturing facility at 425 Roosevelt Street in Howell, Michigan. (The "Gould Property"). Gould used chlorinated solvents to degrease the pistons and rods at the conclusion of the manufacturing process. Employees recalled that the degreasing solvent was TCE, and assessment with which Gould expert agrees. (Feenstra, R. 264, PageID 83138- 83139; Taylor, R. 259, p. 82288).

3. LCRC is a Michigan road commission established pursuant to Michigan's County Road Law, MCL §224.1, *et seq*. The LCRC is a reporting entity to the Livingston County Board of Commissioners. The LCRC board is appointed by the County Board. "The board of county road commissioners shall act as an administrative board only and the function of the board shall be limited to the formulation of policy and the performance of official duties imposed by law and delegated by the county board of commissioners." MCL §224.9(2). (Craine, R. 260, PageID 82490).

4. LCRC is does not manufacture anything and is solely in the business of constructing roads and bridges, maintaining roads and bridges, and plowing and salting roads in the winter. LCRC is funded solely by tax revenue and financial contributions from constituent municipalities. (Craine, R. 260, PageID 82490-82492).

5. The LCRC, along with many infrastructure organizations, is underfunded. As a result, the LCRC has had to close several bridges due to lack of funding for appropriate maintenance. The largest single project expenditure made by the LCRC was roughly $4 million. (Craine, R. 260, PageID 82495-82496, 82504-82505).

6. Between 1981 and 1991 LCRC took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions to the best of its ability under the circumstances. Such precautions included, but are not limited to, contracting with Safety-Kleen and Ever Clean to deliver and remove containerized solvents, connection drains within the LCRC garage to the sanitary sewer and installing a collection tank prior to the effluent reaching the sanitary sewer, and contouring water flow to ensure that fuel or chemical spills would not reach the storm sewer. (Craine, R. 261, PageID 82568-82572).

7. The MDEQ began investigating the Gould Property in 1988, when the property was in foreclosure and controlled by Michigan National Bank. Mike Craine, the Managing Director of the LCRC from 1981-2019, was present while the Michigan National Bank excavations of the Gould Property directly adjacent to the LCRC property, which uncovered buried

drums and contaminated soils. Mr. Craine attended meetings with MNB personnel and cooperated with its remediation. (Craine, R. 261, PageID 82572-82577).

8. In 1991 while installing groundwater monitoring wells relative to an unrelated underground fuel storage tank remediation, LCRC got a hit of TCE in the groundwater in the northwest corner of the LCRC Property immediately adjacent to what was obviously, and would later be determined to be, the main Gould dumping area. LCRC has no records of purchasing any TCE. (Craine, R. 261, PageID 82623-82650). Being an under-funded public entity, LCRC did not want to unnecessarily spend public funds on an investigation that by that time had already clearly implicated Gould.

9. Gould began investigating the Gould Property in 1994. In 1997 Gould discovered TCE over one billion parts per billion in area directly adjacent to the LCRC salt barn. In 2001 Gould excavated five hundred (500) cubic yards of contaminated soil on the Gould Property in that area. (Browning, R. 258, Page ID 82088, 82095, 82099).

10. In 2007 the LCRC was notified by the LCRC that it was designated as a "facility." LCRC then engaged in extensive review of its own files. It also filed records requests with the MDEQ to review the

roughly 13 years of data regarding TCE contamination that had been submitted by Gould.

11. In 2009, Gould filed suit against LCRC in the Eastern District of Michigan, Southern Division. During discovery it was learned that between 1994 and 2006, the Gould companies went through several corporate restructurings. Once a substantial manufacturing company, in its current form, Gould Electronics, Inc. is merely a shell corporation with three (3) employees and no assets or income.[15]

12. In 2012, the Parties executed a tolling agreement and order of dismissal without prejudice as the "Parties and Court discussed the likely advantages of deferring the trial . . . until after the MDEQ has been provided the opportunity to consider and respond."

13. Between 1989 and 2020, over 310 soil borings were advanced on the Gould, Property, the LCRC Property, and downgradient properties, with 156 borings advanced on the LCRC property alone. Many of the borings and wells sampled

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[15] This pattern of complex corporate maneuvering during which all of Gould's records were lost was unmistakably calculated to insulate foreign parent corporations from CERCLA liability incurred by the ghosts of Gould's former alter-egos. "History is philosophy teaching by example[.]" Abraham Lincoln, *Speech to the Springfield Scott Club*, August 14, 1852, in Collected Works of Abraham Lincoln, Vol. II, p. 148, Rutgers University Press (1953).

between 2007 to 2020 were split samples between LCRC and Gould. Between 2012 and 2016 LCRC advanced roughly thirty (30) borings targeted at areas Gould alleged TCE was dumped on the LCRC Property. No TCE is found in the soil on the LCRC Property. TCE is only present in groundwater. (Travers, R. 262, PageID 82907-82909, R. 261, PageID 82619-82620; Taylor, R., 259, PageID 82287-82288).

14. In 2016 LCRC submits a 6,000+ page Response Activity Plan to the MDEQ. (R. 170-172-17).

15. In 2017, Gould reinitiated its suit against LCRC in federal court. (R. 1).

16. On June 14, 2017, the MDEQ issued a letter stating in part that:

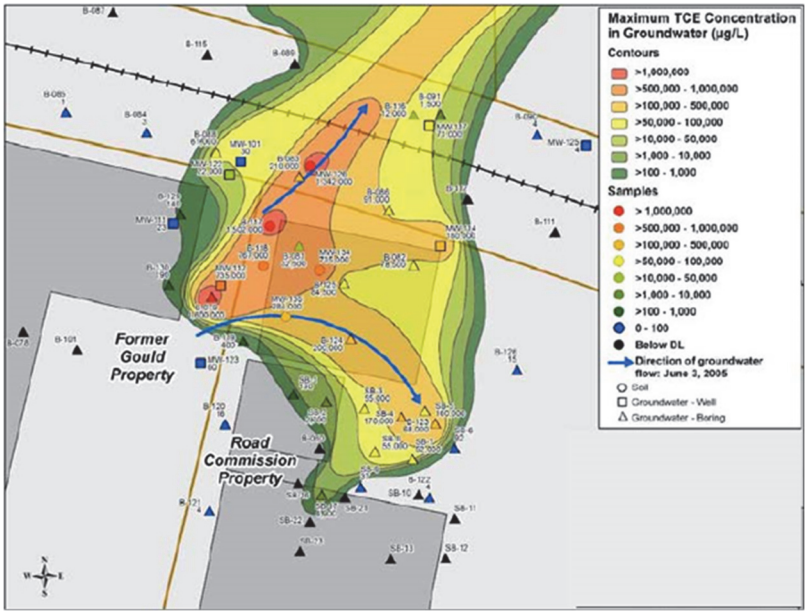
[T]he DEQ agrees with the LCRC that there is no indication that a release of chlorinated solvents to unsaturated site soils occurred, and no releases of chlorinated solvents in LCRC property site soils are demonstrated to be directly attributable to LCRC's historic operations. (R. 201-12).

17. On June 23, 2017, the MDEQ issued another letter reiterating the statement in paragraph 29, and further stating that:

Regarding the DEQ's expectations relative to the [June 14, 2017] Letter, the DEQ is not requesting the performance of more sampling or report submittals by the LCRC

concerning the origin of the TCE contamination on the [LCRC Property]. Based on the data and information submitted and currently available to the DEQ, and the May 11, 2017, technical meeting, the DEQ has no further regulatory interest in the origin of the TCE contamination on [the LCRC Property]. (R. 201-13; O'Brien, R. 261, PageID 82706-82715; Leeming, R. 262, PageID 82746-82762).

18. In July 2020, the district court held a 7-day bench trial via Zoom during which substantially the same evidence was presented on which the MDEQ used to reach its conclusion. The district court concluded that Gould was 100% responsible for causing the TCE pollution which contaminated LCRC's property through passive groundwater migration but pinned 5% of past and future remediation costs on LCRC. (R. 265).



(R. 265, PageID 83240 (Dist. Ct. Opinion)).

ii. Notwithstanding LCRC's 100% innocence under the statute, the lower courts ignored substantial evidence that LCRC acted in good faith, made assumptions unsupported by the record, and cited irrelevant cases to find LCRC 5% guilty.

First, despite spending nearly $1.2 million dollars of public funds on unnecessary scientific investigation and evaluation, which led MDEQ upper management to conclude that LCRC was innocent, the lower courts found that LCRC did not cooperate with the MDEQ stated in part that "[Senior Advisor to the Director of

the MDEQ Tim] O'Brien did not testify that the scope of investigation required by EGLE [MDEQ] with respect to the LCRC Property was inappropriate." However, Mr. O'Brien testified on that subject as follows:

> In my experience and in this case, I have encountered career staff in the DEQ organization to be substantively competent, but often times very narrowly focused and certainly not focused necessary on the principal mission of the DEQ which was to protect the environment and citizens of this state and so they can get caught up in the technical search for absolute knowledge, absolute uncontroverted knowledge. Very few of these cases are that clear cut and I feel we could have been on a, at DEQ, a perpetual search for evidence [to] effect the objective of trying to prove a negative and that more and more testing would not [have] changed the results. There had been extensive [testing] and that's the culture as I saw it, sort of endless search for a fact and at some point you have to make a decision based on the facts that you have. Certainly Sue [Leeming] and I and Heidi Grether [MDEQ Director] felt that [at] this point we have overwhelming factual record to make the decision that we did.
>
> * * *
>
> We felt that DEQ resources had been if anything over-expended here, but should not be further expended, that LCRC had spent extensive resources. You know, that's not directly our concern, but obviously they'd made

> a substantial effort to help us determine the facts. . . .

(O'Brien, R. 261, PageID 82714-82715).

Though he did not come out and directly say "the investigation was inappropriate," he eloquently stated that he disagreed with the route taken by his staff in language becoming of his position.[16] For years, the MDEQ applied the same impossible burden of proof that the lower courts erroneously applied.

Second, the lower courts made the unsupported assumption that "EGLE's change of course in 2017 may well be explained by the fact that the contamination was already being fully addressed [by Gould], rendering further action by LCRC unnecessary." (R.265, p. 80). However, there is no evidence in the record to support this assumption. In fact, there is significant testimony by MDEQ upper management to the contrary. In addition to Tim O'Brien's testimony cited above, Mr. O'Brien further testified that:

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[16] Mr. O'Brien held several high-profile positions with Ford Motor Company throughout his storied career, retiring after serving as the Duty Chief of Staff to the Chairman and CEO. During his tenure at Ford, he managed worldwide environmental affairs of 160 manufacturing facilities in twenty-eight (28) countries and managed the Ford real estate portfolio worth hundreds of billions. He was asked to be the Director of the MDEQ, but declined, eventually accepting an appointment by Governor Snyder to function as Senior Advisor to the Director. In that capacity he helped draft the legislative amendments to Part 201 (NREPA), Michigan's state counterpart to CERCLA. (R. 261, PageID 82688-82698).

[T]his matter had been under review by our staff for a very long time. There had been extensive testing required of the LCRC to determine whether or not they had contributed in any way to the contamination and despite those years of research and testing and expended resources both financial and personnel both at DEQ and LCRC certainly, we were not able to identify any specific source of contribution from the LCRC to this contamination plume . . .

* * *

Putting this in much plainer terms we essentially both had the same view, which was look, [this] has gone on for a very long time, we have no evidence despite extensive investigation to indicate that LCRC contributed to the chlorinated solvent contaminants. It also appeared from the record as presented by LCRC and undisputed by our staff that LCRC actually had negligible, minimal use of chlorinated solvents in any capacity cumulatively over a period of many, many years and that in contrast, there was a very substantial record of substantial use of chlorinated [solvents by Gould].

* * *

[The June 23, 2017 "no further regulatory interest" letter] does not equivocate or complicate the basic finding of the DEQ management that we had no further regulatory interest in this, we did not believe there were data gaps and that as far as we were

> concerned, LCRC . . . had not been demonstrated after years of testing and expended resources by both the LCRC and the DEQ, there had been no evidence to demonstrate that LCRC had contributed to the source of contamination.

(O'Brien, R. 261, PageID 82706-82707, 82711).

Third and finally, the district court cited cases regarding the due care standard which involved facts and circumstances entirely inapplicable to this case. The cases cited and an explanation of why they are inapplicable here is as follows:

1. *United States v. A&N Cleaners & Launderers*, 854 F.Supp. 229 (S.D.N.Y 1994): this case involved a set of defendants in a contractual relationship where lessor knew or had reason to know that a tenant had previously dumped hazardous chemicals down drains and had prior knowledge of soil contamination on the defendant's own property.

2. *Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534 (6th Cir. 2001): this case involved delayed remediation of soil contamination that continued to leach into groundwater.

3. *United States v. Domestic Lombardi Realty, Inc.*, 290 F.Supp.2d 198 (D.R.I. 2003): This case also involved failure to timely remediate soil contamination causing pollutants to leach into groundwater, and

failure to notify tenants or visitors of the contamination as ordered by governmental agencies.

4. *Interfaith Comm. Org. v. Honeywell Int'l, Inc.*, 263 F.Supp.2d 796 (D.N.J. 2003): This case involved Honeywell, as a liable corporate successor to Mutual Chemical Company of America, which for many decades deposited approximately one million (1,000,000) tons of chromium ore processing residue onto land now owned and controlled by Honeywell. The chromium contamination was in the soils and was actively leaching into groundwater that was migrating offsite. Honeywell investigated the contamination for twenty (20) years without a permanent remedy.

Not only is the *Honeywell* case inapplicable to LCRC—it is directly applicable to Gould's conduct in this matter. Cross-Petitioner Gould is the corporate successor to Gould, Inc., which over a period of 15 years dumped thousands of gallons of TCE degreaser onto the soils of the Gould Property. The TCE dumped by Gould, Inc. onto the soils of the Gould Property leached into the groundwater and passively migrated onto the LCRC property through groundwater. For 22 years between 1994 and 2016, Gould investigated the plume and filed suit against LCRC incurring close to $5 million in costs, and only installing its first "pilot phase" pump and treat system in 2016 at a cost of roughly $20,000.00. Throughout those 22 years, TCE Gould dumped on the ground continued to leach into the

groundwater polluting not only the LCRC Property, but several other neighboring properties, including a cemetery, several residential homes, and Thompson Lake. If *Honeywell* was considered to be dilatory in its remediation, then Gould certain has been dilatory as well. LCRC is rightfully incredulous that the district court applauded Gould's effort while chastising and punishing LCRC for its effort.

5. **IN SUMMATION: The lower courts erred in misapplying the statutory due care standard in finding that LCRC could not prove its statutory defenses by a preponderance causing a fundamentally unfair ruling unsupported by law or the "polluters pay" intent of CERCLA.**

Once the lower courts concluded that:

> [T]here is no evidence demonstrating that there were any deposits of TCE onto the soils on the LCRC Property.
>
> * * *
>
> [The] evidence is sufficient to establish that no disposal of TCE occurred on the LCRC Property. . . . Thus, the evidence demonstrates that Gould Inc., and not LCRC, generated the TCE contamination, which migrated onto the neighboring properties, including the LCRC Property.

The law obligated the lower courts to also absolve LCRC of liability to Gould. (R. 265, PageID 83258). Therefore, once the court found LCRC to be 100%

innocent, under the cross-referenced due care standards within 42 U.S.C. §9607, LCRC is *fully* innocent. To reach a contrary result has no basis in the law. LCRC not only proved its innocence by a preponderance but proved its innocence with certainty . . . *twice*, which innocence was affirmed by the Sixth Circuit.

Nevertheless, LCRC unnecessarily expended roughly $1.2 million in public funds to engage in extensive investigation and evaluation of TCE sources, fate and transport—costs that are fully recoverable under CERCLA.

LCRC has clearly established its innocence under the CERCLA statutory defenses. This Court should reverse and remand for a judgment holding Gould 100% responsible for all past and future costs of remediation, while also affirming the award to LCRC of the full amount of investigatory costs unnecessarily incurred. In doing so the Court would not only be properly administering justice in this case but could provide the lower courts with much needed clear and reasonable guidance necessary to avoid patently unfair results in diametric opposition to obvious circumstances of complete innocence by applying the principles of fundamental fairness tucked away in the cross-referenced due care standards.

In addition to being contrary to fundamental tenets of law, the lower courts' rulings are contrary to the basic intent of CERCLA**,** which is a statute "intended to ensure that those who were responsible for, and who profited from, activities leading to property

contamination, rather than the public at large, should be responsible for the costs of the problems that they had caused.); *see also Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) ("Congress intended [through passage of CERCLA] that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.").

B. The lower courts erred in holding that an intra-county real estate transaction made in the best interest of the people caused quashed LCRC's innocent contiguous landowner defense.

Under 42 U.S.C. §9607(q), a person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from real property that is not owned by that person, *shall not be considered to be an owner or operator of a . . . facility under paragraph (1) or (2) of 42 U.S.C. §9607(a)* solely by reason of that contamination, if the person establishes the elements set forth in 42 U.S.C. §9607(q)(1)(A)(i)-(viii) by a preponderance of the evidence.

As discussed above, "third-party defense" and the "innocent contiguous landowner defense" cross reference each other to define due care relative to innocent parties. In short, all the cross-references state the

following: if a parcel only polluted by passive migration of groundwater of hazardous substances leaching from a release on a contiguous parcel caused solely by a third party, then the owner of the "innocent" parcel is absolved of liability (i.e., truly innocent parties are truly innocent). As such, LCRC believes that the lengthy discussion above is sufficient to prove that it met its burden for this both CERCLA statutory defenses.[17]

As the lower courts held that LCRC's innocent contiguous landowner defense failed due to a real estate transaction this section will focus of that element, only. The element on which the district court focused is found in 42 U.S.C. §9607(q)(1)(A)(viii) states:

> (viii) at the time at which the person acquired the property, the person—
>
> (I) conducted all appropriate inquiry within the meaning of section 101(35)(B) [42 USCS §9601(35)(B)] with respect to the property; and
>
> (II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real

[17] *See* LCRC's Post-trial evidentiary objection brief and post-trial proposed findings of fact and conclusions of law, R. 252, PageID 81750-81753 for full discussion of the elements of the innocent contiguous landowner defense.

> property not owned or operated by the person.

By way of background, LCRC is a Michigan road commission established pursuant to Michigan's County Road Law, MCL §224.1, *et seq*. The LCRC is a reporting entity to the Livingston County Board of Commissioners. The LCRC board is appointed by the County Board. "The board of county road commissioners shall act as an administrative board only and the function of the board shall be limited to the formulation of policy and the performance of official duties imposed by law and delegated by the county board of commissioners." MCL §224.9(2). (Craine, R. 260, PageID 82490).

LCRC built a new facility and vacated the LCRC Property in 1991. In 2002, LCRC transferred the LCRC Property to Livingston County. In 2009 Gould initiated this litigation against both Livingston County as then owner, and LCRC as the previous owner. LCRC then agreed to have Livingston County transfer the property back to LCRC after Gould filed suit.

Mike Craine, who was the Executive Director of the LCRC from 1980 to 2019 testified regarding the transaction as follows:

> Q: Subsequently the property was transferred back to the Livingston County Road Commission, was it not?
>
> A: That's correct.

> Q: Could you tell the Court why?
>
> A: It was transferred back to the County [Road Commission] when the Gould litigation began. Initially Gould [sued] both the Road Commission and County government. We had—the County stayed engaged in the litigation up until the point where I believe it was dismissed at some point. We felt that it was not very good use of taxpayer money to have county government saddled with the expenses of this file both on the County Board's side and on the Road Commission's side and suggested that we just re—we take our fee interest back so that they could work toward a dismissal.

(Craine, R. 261, p. 82683).

The transaction was intended only for the good faith purpose of good stewardship of public funds and to protect the public trust. By taking back the property, LCRC ensured that only one arm of county government would incur expenses of litigation rather than duplicating attorney fees and expert expenses and ensured that LCRC would incur the expenses as they owned the subject property at all times relevant to Gould's lawsuit.

The district court faulted LCRC for "fail[ing] to explain the legal significance of [this] fact. Nor has it presented any authority supporting its view that such real estate transactions can be ignored." (R. 265, PageID

83271). Respectfully, the transaction's lack of legal significance seems obvious.

First, the circumstances of this particular transaction are unique to this case. LCRC is unaware of any case that addresses intra-county real estate transfers in this context.

Second, the uniqueness of this transaction appears to fall outside of the spirit and intent of 42 U.S.C. §9607(q)(1)(A)(viii), which is clearly intended to address arms-length transactions. For instance, 42 U.S.C. §9607(q)(1)(A)(viii) incorporates the "all appropriate inquiries" standards defined in 42 U.S.C. §9601(35)(B), which states in relevant part:

> **(i)** All appropriate inquiries.—To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that—
>
> > **(I)** on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and
> >
> > **(II)** the defendant took reasonable steps to—
> >
> > > **(aa)** stop any continuing release;

> **(bb)** prevent any threatened future release; and
>
> **(cc)** prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

As LCRC was the previous owner from at least 1933, LCRC was aware of the previous ownership and uses of the property. LCRC did not propose the intra-county real estate transfer to avoid liability to try creating a defense for itself. Rather, it simply proposed the transaction to do the right thing for the taxpayers.

Once again, 42 U.S.C. §9601(35)(B)(i)(II) referenced in the defense restates verbatim the "reasonable steps" language of the innocent contiguous landowner defense (42 U.S.C. §9607(q)), which of course references and incorporates the lengthy passive groundwater migration due care analysis above.

LCRC again asks this Court to employ principles of fundamental fairness to this transaction considering the totality of unique circumstances presented to properly administer justice. It is clear from the extensive record that LCRC is a fully innocent contiguous landowner as defined by the statute, and that LCRC proved its status not only by a preponderance of the evidence but proved it absolutely on two occasions. To affirm the lower courts would not only be contrary to the "polluters pay" intent of CERCLA, but would set a precedent that, should similar circumstances arise again in Livingston County or in another jurisdiction,

that a governmental entity will either be forced to needlessly duplicate expenses at the expense of the public, or to make the responsible choice on behalf of its constituents at the expense of waiving a statutory defense.

II. This case also presents the Court an opportunity to set precedent on the effect of intragovernmental transfers of a governmental entity's defenses.

A. The lower courts erred applying the *Gore* factors.

For the reasons discussed above LCRC clearly proved its statutory defenses and therefore the lower courts should not have engaged in an analysis of equitable apportionment under the *Gore* Factors.

However, even if the equitable analysis was appropriate, LCRC again respectfully believes that the court again applied an erroneous due care standard in its apportionment analysis.

The *Gore* factors include:

> (1) The ability of the parties to demonstrated that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the

> degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or Local officials to prevent any harm to the public health or the environment.

Envtl. Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 508 (7th Cir. 1992).

The lower courts properly found that Gould was 100% responsible for the release. For the reasons discussed at length above, the district court, affirmed by the Sixth Circuit, erroneously applied an impossibly high due care standard with no basis in the law, and further there is no evidence in the record to support the lower court's conclusion that LCRC failed to exercise reasonable care in its investigation.

Again, the lower courts applied an improper "due care" standard to *Gore* factors Nos. 5 and 6 regarding the degree of care exercised and the degree of cooperating, respectively. The "degree of care" element of the *Gore* factors is substantially similar to the "due care" language in the CERCLA statutory defense. As such, LCRC's analysis and argument of this factor is the same as the analysis of "due care" under the CERCLA defenses discussed above. LCRC again reiterates that there is no evidence in the record that LCRC engaged in any inappropriate investigation, as the MDEQ through its upper management eventually exonerated it of any wrongdoing.

In support of its erroneous conclusion the district court appeared to go out of its way to cite cases that are clearly distinguishable from the instant case:

1. *ASARCO LLC v. Atl. Richfield Co.,* 975 F.3d 859, 870 (9th Cir. 2020) for the proposition that additional costs can be allocated to a party that "repeatedly evaded responsibility for contamination at the Site, flagrantly misled the EPA regarding its releases at the Site and made ongoing misrepresentations throughout the course of . . . litigation." In that case, Asarco owned and operated a lead smelting plant for over 100 years and Atlantic Richfield later leased a portion of the property to operate a zinc fuming plant that created arsenic byproducts. Asacro then bought the zinc fuming plant in 1972 and operated it until 1982. Both parties "deposited numerous hazardous substances into the soil, surface water, and groundwater." *ASARCO LLC v. Atl. Richfield Co.*, 2012 U.S. Dist. LEXIS 170628 (U.S. Dist. Mont. 2012).

    a. Again, the instant case is distinguishable as both the MDEQ and the lower courts found that Gould was 100% liable for the release and that LCRC's property was polluted by passive groundwater migration from the Gould Property, only.

    b. Second, the is no evidence in the record that LCRC engaged in any of the

abhorrent behavior called out by the court in *ASARCO*. The lower courts chose to ignore the testimony of Tim O'Brien and Sue Leeming in favor of relying upon a lower level MDEQ employee who felt aggrieved by the decisions of her superiors.

2. *Agere Sys., Inc. v. Advanced Envtl. Tech Corp.*, 602 F.3d 204, 235 (6th Cir. 2010) for the proposition that a party working with a known illegal polluter could be assessed extra costs for not cooperating with the EPA. A party was held responsible for "relinquish[ing] potent waste acids to a known polluter . . . " who was known to be an illegal dumper, and "for not cooperating with the EPA."

    a. Again, this case sanctions a party reprehensible behavior. There is no evidence in the record to indicate that LCRC engaged in any such reprehensible behavior, and certainly no evidence that LCRC engaged in knowingly providing hazardous waste to a known illegal polluter.

3. *United States v. Consolidation Coal. Co.*, 345 F.3d 409, 414-415 (6th Cir. 2003) for the proposition that a party's allocated costs could be double because of the party's failure to cooperate or participate in remediation. This case involved a landfill seeking contribution from a chemical company who dumped toxic wastewater

sludge in the landfill. The chemical company refused to help remediate pollution caused by dumping the toxic sludge.

a. *Consolidation Coal* involved two parties clearly liable under CERCLA.

b. Again, the instant case is distinguishable as both the MDEQ and the lower courts found that Gould was 100% liable for the release and that LCRC's property was polluted by passive groundwater migration from the Gould Property, only.

4. *Valbruna Slater Steel Corp. v. Joslyn Mfg. Co.*, 298 F.Supp.3d 1194, 1204 (N.D. Ind. 2018): for the proposition that a court can allocate significant response costs to an innocent third party that knowingly purchased polluted property at a discounted price.

a. The circumstances in *Valbruna Slater* are completely inapplicable to the instant matter.

Considering the foregoing, it flies in the face of fundamental principles of fairness for LCRC to be assessed 5% of past and future remediation costs for groundwater pollution that passively migrated onto its property from the Gould property due to hazardous dumping activity done solely by Gould in relation to industrial activity that Gould alone profited from.

There is no basis in the law for finding LCRC 5% guilty after finding it 100% innocent.

CONCLUSION

The Court should grant LCRC's Conditional Petition for Certiorari for the reasons set forth herein.

PAUL E. BURNS
Counsel of Record
JEFFREY D. ALBER
LAW OFFICE OF PAUL E. BURNS
133 W. Grand River Rd.
Brighton, Michigan 48116
Burns Ph. (517) 861-9547
Alber Ph. (734) 369-1009
burns@peblaw.net
alber@peblaw.net

Counsel for Cross-Petitioner