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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: ALAN MEGHRIG, ET AL., Petitioners v. KFC  
WESTERN, INC.  
CASE NO: 95-83  
PLACE: Washington, D.C.  
DATE: Wednesday, January 10, 1996  
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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   ALAN MEGHRIG, ET AL.,                   :

4                   Petitioners                   :

5                   v.                   :   No. 95-83

6   KFC WESTERN, INC.                   :

7   - - - - -X

8                   Washington, D.C.

9                   Wednesday, January 10, 1996

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:04 a.m.

13   APPEARANCES:

14   JOHN P. ZAIMES, ESQ., Los Angeles, California; on behalf  
15                   of the Petitioners.

16   JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor  
17                   General, Department of Justice, Washington, D.C.; on  
18                   behalf of the United States, as amicus curiae,  
19                   supporting Petitioners.

20   DANIEL ROMANO, ESQ., Santa Monica, California; on behalf  
21                   of the Respondent.

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1 PROCEEDINGS

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 95-83, Alan Meghrig v. KFC Western, Inc.

5 Mr. Zaimes, you may proceed whenever you're  
6 ready.

7 ORAL ARGUMENT OF JOHN P. ZAIMES

8 ON BEHALF OF THE PETITIONERS

9 MR. ZAIMES: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 This case, after all the briefing on a wide  
12 range of issues, remains a statutory interpretation case,  
13 and the guidance that this Court has previously given on  
14 how to resolve such cases, particularly where Congress has  
15 provided strict -- excuse me -- direct indications of its  
16 intent in several ways, we think charts a very clear path  
17 for how the case should be resolved.

18 Let me digress for just a moment to talk about  
19 the facts in this case that are at this stage undisputed.  
20 They are -- this is still a pleading case, notwithstanding  
21 the many twists and turns that it has been through.

22 The case concerns a small commercial property  
23 located on a street corner in Los Angeles that was owned  
24 by petitioners from 1963 to 1975. The petitioners sold  
25 the property to respondent in 1975. Respondent had been a



1     tenant on the property for about 10 years before that,  
2     since 1965, and had operated a Kentucky Fried Chicken  
3     store on the property.

4             In 1988 respondent decided that it would  
5     bulldoze that Kentucky Fried Chicken store and bulldoze  
6     also the strip mall that was alongside it and put a brand  
7     new store on the property -- it was going to be a two-  
8     story, art deco, specially designed store -- and in the  
9     course of that work discovered contamination on the  
10    property by refined petroleum product. That was in  
11    October 1988.

12            The respondent fully cleaned up the  
13    contamination in a matter of months, by March 1989, and  
14    gave notice to petitioners under the Resource Conservation  
15    and Recovery Act, what we call RCRA in shorthand, in May  
16    1990.

17            It was not, though, until December 1991, more  
18    than 3 years after the contamination had been discovered,  
19    that respondent commenced its first action in State court  
20    alleging in toto 10 different causes of action, most of  
21    them sounding in common law, but two under State statutes.

22            QUESTION: Was the cleanup done pursuant to an  
23    order of the municipality?

24            MR. ZAIMES: It was done pursuant to -- it was  
25    done under the supervision of the County of Los Angeles,

1 Department of Health Services. I don't believe that there  
2 was an order in effect at the time that the cleanup was  
3 done, but they had general oversight --

4 QUESTION: Had a building permit been  
5 conditioned on the cleanup?

6 MR. ZAIMES: I believe it had. I believe it  
7 had.

8 The --

9 QUESTION: So, the respondent was under really a  
10 legal duty to clean up the property, at least if the  
11 building permit were going to be granted.

12 MR. ZAIMES: I'm not sure if that is an  
13 allegation of the complaint, but I believe that that would  
14 have been the state of facts at the time that the cleanup  
15 was done.

16 After two successful demurrers by petitioners,  
17 that case went up on appeal to the State court and this  
18 action was filed in the Federal district court in LA  
19 alleging a single cause of action under the Resource  
20 Conservation and Recovery Act. That was in May 1992.

21 Now, it is Congress' intent in the citizen  
22 supervision of that statute that we are here to determine,  
23 and we believe that the congressional intent derives from  
24 several sources, including the plain words of the  
25 jurisdictional statement of the statute, other related

1 sections of the statute, the legislative history of the  
2 statute itself --

3 QUESTION: Well, Mr. Zaimes, there are two  
4 potential questions that I guess we might resolve, and I'm  
5 not sure if we have to resolve them both or not.

6 One has to do with the statutory requirement  
7 that an imminent and substantial endangerment be alleged.

8 MR. ZAIMES: Yes.

9 QUESTION: And that may possibly be decisive for  
10 our purposes of this case.

11 The other has to do with what's recoverable,  
12 assuming there is a valid claim made, and the extent of a  
13 court's equitable authority. What does that cover?

14 Are you going to address both those issues?

15 MR. ZAIMES: I am going to address both of those  
16 issues.

17 QUESTION: And do we need to decide both in your  
18 view?

19 MR. ZAIMES: I believe you do need to decide  
20 both, and the primary reason that you need to decide both  
21 is that part of the way that this case has come to this  
22 Court is that there is a conflict in the circuits. The  
23 Ninth Circuit has fundamentally determined that as to the  
24 second issue, what type of relief is available under the  
25 statute, that a cost recovery action may be pursued. The

1 Eighth Circuit has determined precisely the opposite.

2 QUESTION: That's the question on which there is  
3 a split of authority.

4 MR. ZAIMES: That is the question on which there  
5 is a split of authority. It is less clear that there's a  
6 split on the imminent and substantial endangerment.

7 QUESTION: Doesn't the Ninth Circuit create the  
8 split?

9 MR. ZAIMES: I'm sorry, Justice Breyer?

10 QUESTION: Doesn't the Ninth Circuit create the  
11 split on the question of when the endangerment had to take  
12 place?

13 MR. ZAIMES: My recollection of -- the Ninth  
14 Circuit says the endangerment can be in the past or in the  
15 present.

16 QUESTION: Right.

17 MR. ZAIMES: Now, I'm not sure that the Eighth  
18 Circuit reached the issue of whether it has to be past or  
19 present directly. It relied more on the Cort v. Ash  
20 analysis of whether there was an implied right of action  
21 for damages in the case.

22 In addition to the words of the statute, we have  
23 legislative history --

24 QUESTION: I'm sorry. I'm just not quite clear  
25 on your -- why you answered that we must decide both



1 because if we say that the Ninth Circuit was wrong about  
2 when the endangerment must be, if we say it is an  
3 imminent, yet-to-be-realized danger, why do we have to  
4 answer any other question? The Ninth Circuit is then  
5 reversed and your client has no responsibility.

6 MR. ZAIMES: Well, that resolves the situation,  
7 Justice Ginsburg, for my client I agree. I'm not sure  
8 that that resolves the remainder of the Ninth Circuit's  
9 decision. If you were to only reverse --

10 QUESTION: We can decide this controversy only.  
11 We decide a live case or controversy. And your  
12 controversy is over once you prevail on the point that  
13 there was at the time this action was taken, that the suit  
14 was brought, no imminent danger of any kind.

15 MR. ZAIMES: That would resolve this case fully.  
16 And the reason --

17 QUESTION: Or alternatively, we could attack it  
18 from the other direction and could determine that there's  
19 no cause of action for money damages. --

20 MR. ZAIMES: That is true.

21 QUESTION: And, therefore, it doesn't matter  
22 whether or not this thing was prior or not.

23 MR. ZAIMES: You could resolve it that way also.

24 My answer to Justice O'Connor was that because  
25 there is the conflict -- I was keying off of --

1 QUESTION: The second way is -- the second point  
2 is the one on which there is the conflict.

3 MR. ZAIMES: The second point is the one on  
4 which there is the clear conflict, yes.

5 Now, in addition, I will say that this case has  
6 engendered a considerable amount of activity just since  
7 the Ninth Circuit came down. This is -- and I am speaking  
8 outside the record, but as a matter of policy, if the  
9 Court wanted to resolve the issue of the -- of what RCRA  
10 entitles a person to do, it could reach both issues for  
11 the reason that if it only resolves imminent and  
12 substantial endangerment, then the likelihood of there  
13 being recurring issues on what type of relief is available  
14 is going to be great.

15 But the fundamental reason is there is a  
16 conflict in the circuit but, Justice Scalia --

17 QUESTION: What if we had a case where there is  
18 an imminent and substantial endangerment alleged and the  
19 plaintiff says, I want an injunction and I want an order  
20 that the defendant will pay the costs of future cleanup?  
21 Is that within the court's equitable power?

22 MR. ZAIMES: This is before -- this is an order  
23 that the defendant would clean it up now or the order  
24 would say, plaintiff, you may clean it up and we are going  
25 to order defendant to pay that?

1 QUESTION: Either way.

2 MR. ZAIMES: Either way?

3 In the first instance, if the order were simply  
4 defendant -- plaintiff will clean it up and defendant will  
5 reimburse, I don't believe that they're -- that the court  
6 is entitled to issue that sort of order because what the  
7 statute says is the district court may restrain or order  
8 such person to take such other action. What is  
9 contemplated by that is that the defendant is going to  
10 undertake the cleanup, not that some money damage award is  
11 going to issue. And that's the fundamental basis of our  
12 position in the case.

13 QUESTION: What if the court makes exactly such  
14 an order and says, defendant, stop what you're doing now,  
15 clean up? And the defendant doesn't either because the  
16 defendant can't get its hands on the money to pay for it  
17 or is just contumacious and whatnot.

18 Can the plaintiff at that point come in and say,  
19 all right, you've made a perfectly proper order here, but  
20 nothing is getting done? Authorize me to, in effect, take  
21 whatever steps I can take to abate and to clean up simply  
22 to discharge the responsibility which is ultimately upon  
23 this other party. Under those circumstances, could the  
24 plaintiff get -- and the court says, yes, all right, go  
25 ahead. Under those circumstances, could the plaintiff get

1       restitution?

2               MR. ZAIMES:   I'm not -- I don't believe that it  
3       could under this statute.   Now, bear in mind this is one  
4       statute and this is one remedy in a broad array of  
5       remedies that are available, so while we're focusing on  
6       this statute and what it provides --

7               QUESTION:   But you would still win the case if  
8       that were the rule here, wouldn't you, if we accept your  
9       position on --

10              MR. ZAIMES:   I --

11              QUESTION:   You'd still win the case if that were  
12       the rule here.

13              MR. ZAIMES:   Justice Souter, I believe that I  
14       would win on the RCRA claim.   I believe that I would lose  
15       on several other claims.   I would lose on the State -- any  
16       of several State law claims.

17              QUESTION:   But we're not adjudicating them.

18              MR. ZAIMES:   I understand that.

19              QUESTION:   We're talking about RCRA, and under  
20       the RCRA claim, you would win, would you not, on my  
21       assumption?

22              MR. ZAIMES:   The way this statute is framed, I  
23       believe that I would win in that sort of situation  
24       because --

25              QUESTION:   So, you want a broader rule than the



1 rule that it would take you to win the case.

2 MR. ZAIMES: Well, I'm seeking in some -- and we  
3 touched on this in the context of the imminent and  
4 substantial endangerment. The imminent and substantial  
5 endangerment issue disposes of my case, but --

6 QUESTION: But I assume you're here arguing your  
7 client's case, not bringing interesting issues to us.

8 MR. ZAIMES: That's right.

9 QUESTION: And your client would win on the  
10 position that I have suggested, wouldn't it?

11 MR. ZAIMES: It would.

12 QUESTION: And that would end this lawsuit.

13 MR. ZAIMES: It would.

14 QUESTION: But you're trying to take the high  
15 ground, as I understand it.

16 (Laughter.)

17 QUESTION: You think that the more defensible  
18 principle is a principle that not only lets your client  
19 win, but let's some other people win. -- That's --

20 MR. ZAIMES: Well, I'm taking fundamentally the  
21 position that I win on either one. I win on the imminent  
22 and substantial and I also win on what the scope of relief  
23 is that a court --

24 QUESTION: You not only want to win, you want to  
25 win on the basis of a correct principle, which is what

1     you're arguing.

2             MR. ZAIMES: Absolutely correct, Justice Scalia.

3             QUESTION: Then to go to the correct principle,  
4     how could you in fact interpret this statute to say that a  
5     plaintiff could never get monetary damages?

6             Suppose the gasoline station next to you is in  
7     fact right now leaking gasoline through your wall killing  
8     your chickens or whatever, and what you do is you have to  
9     put up a barrier to stop it. And at the same time, you  
10    run into court and you say enjoin it. So, the court says,  
11    enjoin it. You say I've spent \$50,000 on the gasoline  
12    barrier to keep my chickens safe, and I'd like to be  
13    reimbursed for that.

14            Are you saying that that wouldn't be necessary  
15    to give you the little extra money that you needed in  
16    order to take immediate action within a few hours in order  
17    to stop all your livestock from dying or whatever? I  
18    mean, normally in equity I think that kind of restitution  
19    would be normal.

20            So, what's the argument on the merits that this  
21    statute wouldn't give you that, even though that's not in  
22    this case at all, a totally hypothetical?

23            MR. ZAIMES: With all those assumptions, the  
24    argument is that that is the way this statute is  
25    structured.

1 QUESTION: The word in the statute is  
2 "necessary," and how would you say that that kind of  
3 normal equitable relief, which is the principle you want  
4 to argue for, never could be necessary?

5 MR. ZAIMES: Well, with all due respect, Justice  
6 Breyer, the wording of the statute is "order such person  
7 to take such other action as may be necessary" --

8 QUESTION: And it may be -- why isn't it  
9 necessary in the circumstance, given the history of  
10 equity, et cetera, to make at least the monetary  
11 restitution necessary to clear up the absolute immediate  
12 emergency action that the plaintiff took in order to save  
13 the lives of his livestock?

14 MR. ZAIMES: Fundamentally because our argument  
15 is that that is not what Congress intended. Congress  
16 intended to --

17 QUESTION: Why not?

18 MR. ZAIMES: Why? Because in the broader scheme  
19 of things, the citizen suit remedy in this statute, as in  
20 its predecessors, is designed to afford limited relief to  
21 plaintiffs and not to have plaintiffs coming in with all  
22 sorts of money damages claims --

23 QUESTION: I agree with that. That's why I say  
24 -- you were arguing for the proposition never, and that's  
25 what's bothering me. Never.

1 MR. ZAIMES: I'm arguing for the proposition  
2 never under this statute.

3 QUESTION: Mr. Zaimes, your second -- I mean, we  
4 may be unfair to you in severing the two points as though  
5 they don't overlap. As I understand it, part of your  
6 argument with regard to the damages point hinges upon your  
7 assertion that this is a statute that is only intended to  
8 prevent future harm. It is not intended to remedy for  
9 past harm.

10 MR. ZAIMES: That is true.

11 QUESTION: And in the hypothetical that Justice  
12 Breyer just posed to you, what you were doing is  
13 reimbursing the plaintiff for that past damage that he's  
14 incurred for putting up the barrier. And there's no doubt  
15 that he would not be able to get that if we take the first  
16 point in the case. There's no doubt that he would not be  
17 able to get that.

18 Once -- although he's put up the barrier, once  
19 all of the oil pollution next door has been eliminated, he  
20 has no cause of action at all, neither for putting up the  
21 barrier nor for anything else.

22 And part of your argument is that these two  
23 halves go together. When you understand that the statute  
24 is only intended to remedy for future harm, there's no  
25 sense in allowing a court to give damages for something



1 that happened in the past.

2 MR. ZAIMES: That is part of the argument and  
3 that is what the statute provides, and that's  
4 fundamentally --

5 QUESTION: But suppose that the court ordered  
6 the previous owner to clean up under this statute with  
7 proper notice and the owner is contumacious. He does not  
8 obey the court's order. And the plaintiff then, giving  
9 due notice again of his intent, undertakes to clean up the  
10 -- and stop the waste himself.

11 As an ordinary measure of contempt of court  
12 sanctions, is not the plaintiff entitled to recover the  
13 cost that he expended to avoid the harm that the  
14 defendant, in contempt of the court's order, refused to  
15 undertake on his own?

16 MR. ZAIMES: Well, perhaps as a matter of  
17 contempt. And I'm glad you raised that, Justice Kennedy,  
18 because I was contemplating that when Justice Souter asked  
19 a similar question earlier.

20 But, again, a statute -- this particular statute  
21 provides a limited array of remedies, and while in the  
22 situation you've described if the contumacious defendant  
23 does not clean up, there may be a remedy available under  
24 sanctions principles and that may get the plaintiff to the  
25 same point he would otherwise be, but --

1 QUESTION: Well, aren't there cases holding that  
2 courts retain equitable authority not specifically taken  
3 away by Congress?

4 MR. ZAIMES: There are those cases. Those cases  
5 have been cited by respondent.

6 QUESTION: Right, and you recognized the  
7 validity of that notion.

8 MR. ZAIMES: The court does retain equitable  
9 power, and the limits on that equitable power are  
10 circumscribed by the particular statute at issue. And  
11 fundamentally where we part company with respondents in  
12 the line of cases that starts from Porter and traces its  
13 way through Franklin v. Wynnnette is that we are faced with  
14 a much different statute than was at issue either in  
15 Porter or --

16 QUESTION: But in my hypothetical case, you  
17 cannot get the power of the court to order that limited  
18 measure of damages from the phrase "take such other action  
19 as may be necessary?"

20 MR. ZAIMES: Well, again, since the phrase is  
21 actually "order such person to take such other action,"  
22 the phrase seems to be even more limited than the part  
23 that you're quoting, Justice Kennedy, in all due respect.  
24 And it seems to aim more at requiring somebody to  
25 undertake acts as opposed to requiring a payment of some

1 sort.

2 QUESTION: I thought your argument was that  
3 given your position on the first point as to whether the  
4 statute is directed only to the prevention of future harm,  
5 extant threats, that the phrase "as may be necessary" must  
6 reasonably be read to mean as may be necessary to achieve  
7 the purpose of this statute, which is not to reimburse for  
8 past expenses but to prevent future harms.

9 MR. ZAIMES: It can be read that way.

10 QUESTION: Now, if you --

11 QUESTION: Is that your reading?

12 MR. ZAIMES: Well, my reading is that the  
13 statute has a limited --

14 QUESTION: But Justice Scalia just set out a  
15 position. Is -- I thought -- at one point I thought that  
16 was the way you read it. Is that the way you read it?

17 MR. ZAIMES: The way I read the statute -- and I  
18 was taking Justice Scalia's comments in the context of  
19 Justice Kennedy's question, but fundamentally the way I  
20 read the statute is the statute says that you can address  
21 an imminent harm. You can take steps to prevent future  
22 harms, and that is what is afforded --

23 QUESTION: And that is what circumscribes the  
24 court's power as a court of equity to make orders and  
25 provide remedies. Isn't that correct?

1 MR. ZAIMES: Yes, that is true.

2 QUESTION: All right. If that is the -- I  
3 didn't mean to take your question away from you. I'm  
4 sorry.

5 QUESTION: Go ahead. Take it.

6 QUESTION: If that is the case, then why  
7 shouldn't your answer to my first question be different?  
8 Because the assumption in my first question is we have in  
9 fact a situation which is presenting imminent harm here.  
10 The court says, stop it. Stop doing what you're doing.  
11 Clean up enough so that there is no further imminence of  
12 harm. The threat will be gone. The defendant says no or  
13 simply does not do it.

14 All the plaintiff wants is to get to that point  
15 which the court had every authority to order the defendant  
16 to reach. And so, the plaintiff says, let me clean up and  
17 then give me restitution for doing what you had the  
18 authority to order the defendant to do. Why doesn't a  
19 court have that authority?

20 QUESTION: Take it, Mr. Zaimes. Take it.

21 MR. ZAIMES: I'm about to.

22 QUESTION: Good.

23 MR. ZAIMES: I think the court does because  
24 you're starting from a point where the court exercises its  
25 jurisdiction initially consistent with the statute. And



1 another way to look at it is that the court is simply  
2 following up on something that initiated under the  
3 jurisdiction that was given it -- given to it originally.

4 QUESTION: And once you say that, then aren't  
5 you back into a line drawing problem. The statute doesn't  
6 give a damages remedy. That's true. But a statute may  
7 give a remedy to require a person to pay money to the  
8 plaintiff insofar as that's an equitable action related to  
9 the basic cleaning up of the spill. I mean, I don't know  
10 exactly how to draw that line, but the line between the  
11 equitable remedy for money, which is ancillary to the  
12 injunction, and damages action would seem the right line,  
13 do you think?

14 MR. ZAIMES: Not necessarily because where I --  
15 the way I get to the ability to award damages in the  
16 hypothetical posed first by Justice Souter and then by  
17 Justice Kennedy is the jurisdiction is invoked initially  
18 pursuant to the statute to remedy a future harm or an  
19 imminent endangerment. And then damages are awarded in  
20 furtherance of that. The jurisdiction has already been  
21 exercised. So, the example you're giving, Justice Breyer,  
22 is a lot broader and does enter into some line drawing  
23 problems.

24 QUESTION: Do you have an answer to the, I  
25 think, main criticism of your reading which is that it

1 encourages delay on the part of the person on the spot?  
2 It says to that person, don't clean it up because if you  
3 do, it's going to be out of your own pocket. Instead, let  
4 the contamination increase and go sue somebody else.

5 MR. ZAIMES: I have three very brief answers to  
6 that.

7 Number one, we as parties litigating and the  
8 court are limited by what Congress has provided, number  
9 one, and the scheme that Congress has provided provides a  
10 90-day notice provision and then by implication in some  
11 situations would require a plaintiff to wait.

12 Secondly, the -- by giving notice, there is some  
13 likelihood that particularly with a serious endangerment,  
14 that the EPA or the State or the alleged contaminator are  
15 going to come in and do some action. So, the argument  
16 advanced by respondents that we are going to have  
17 hazardous waste sites that are continuing to damage the  
18 environment and damage human health isn't necessarily so.

19 And thirdly, within the statute itself -- and  
20 the statute is contained in the appendix to respondent's  
21 brief -- there is a provision and it's within the notice  
22 provision. The notice says 90 days to the EPA, to the  
23 State, and to the contaminator. There is a provision that  
24 says, except where there is an allegation of a violation  
25 of subchapter 3 of the statute, and subchapter 3 is the

1 portion of the statute that deals with hazardous waste.  
2 So, presumably in a situation where you have hazardous  
3 waste, the plaintiff need not wait the 90 days if it is  
4 going in to remedy a hazardous waste situation.

5 So, those are my three responses to that  
6 argument.

7 Mr. Chief Justice, may I reserve time on the  
8 remainder?

9 QUESTION: Yes, you may, Mr. Zaimes.

10 Mr. Minear, we'll hear from you.

11 ORAL ARGUMENT OF JEFFREY P. MINEAR

12 ON BEHALF OF THE UNITED STATES

13 AS AMICUS CURIAE, SUPPORTING PETITIONERS

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

16 The initial and controlling issue in this case  
17 is whether a citizen plaintiff may seek relief under  
18 section 7002(a)(1)(B) of RCRA if there is no current  
19 endangerment at the time of suit. We think the answer is  
20 clearly no.

21 Section 7002(a)(1)(B) provides that for judicial  
22 relief in response to specific activities, namely, the  
23 treatment, storage, and disposal of waste, that, quote,  
24 may present an imminent and substantial endangerment, end  
25 quote.

1           The statute's use of the term "may present"  
2     indicates there must be a current endangerment at the time  
3     the suit is filed. That construction is born out by  
4     section 7002(b)(2)(A), the so-called notice provision,  
5     which requires the plaintiff to provide notice to the  
6     defendant and also to the other government agencies of the  
7     endangerment before filing suit.

8           Respondent attempts to avoid that construction  
9     by arguing that the limiting clause requiring endangerment  
10    actually refers to a description of the hazardous waste  
11    and not to the antecedent activities. The statute,  
12    however, will not afford that construction.

13           Section 7002(b)(2)(B), which appears at the  
14    bottom of appendix page 3 of respondent's red brief,  
15    states that a citizen suit is precluded if the EPA is  
16    taking action in response to, quote, activities that may  
17    present the alleged endangerment. For that reason, it is  
18    clear that Congress was referring to the activities and  
19    not the waste when using the term "endangerment."

20           QUESTION: What again is your reference there,  
21    Mr. Minear?

22           MR. MINEAR: That is at appendix page 3 of the  
23    red brief.

24           QUESTION: And what section?

25           MR. MINEAR: It is 7002(b)(2)(B).

1 QUESTION: Thank you.

2 MR. MINEAR: This -- the construction that we  
3 urge here is not only consistent with the statutory terms,  
4 but it is also consistent with the overall design of the  
5 statute which is structured to abate existing hazards.

6 For example, the statute makes reference to  
7 prospective remedies. It also provides a notice  
8 provision, as I discussed before, which provides for the  
9 elimination of the hazard and the avoidance of the suit.  
10 It also contains no statute of limitations respecting any  
11 damage claims that would thereby prevent any stale damage  
12 claims.

13 In addition, the legislative history supports  
14 the construction that we urge. For example, House Report  
15 198 describes the section 7002(a)(1)(B) remedy as a  
16 limited abatement remedy.

17 If you agree with us that the -- a citizen must  
18 show a imminent and substantial endangerment at the time  
19 of suit, then the Court need go no further in this case.  
20 The respondent did not show a current endangerment, and  
21 the court of appeals decision should be reversed on that  
22 basis alone.

23 QUESTION: Well, we didn't take this case to get  
24 rid of the case. We took the case principally I think --  
25 at least I did -- to resolve the circuit conflict, which



1 doesn't exist on this point but rather exists on the  
2 second point.

3 Why isn't it perfectly valid to attack the  
4 second point as to whether money damages are recoverable?  
5 And in the course of -- I -- at least I think that in  
6 order to decide that second point correctly, you have to  
7 incidentally reach the first point.

8 MR. MINEAR: Well, I think there are two answers  
9 to that.

10 First, I think it's important for this Court to  
11 recognize that the preconditions for suit must be  
12 satisfied before we get to the issues of remedy. Now,  
13 obviously, they are related, but I think it is -- it puts  
14 the Court in a difficult position to address the question  
15 of remedies where no such remedy could be afforded in this  
16 particular case.

17 Second, if you do resolve the case on the first  
18 issue, I think that might well cause the court of appeals  
19 to reconsider its reasoning with regard to the second  
20 issue, and it may well be that the circuit conflict that  
21 currently exists will dissipate as a result of your ruling  
22 on the first issue.

23 In any event, I think that it is important for  
24 the Court --

25 QUESTION: The opinion doesn't read that way,

1 Mr. Minear. I think that's quite unlikely. I think maybe  
2 we ought to wade into it and find out what it is that the  
3 court can do in the way of damages.

4 MR. MINEAR: Your Honor --

5 QUESTION: Do you argue that the statute  
6 authorizes the court to award past cleanup costs as a  
7 remedy or that it just doesn't prohibit it?

8 MR. MINEAR: It doesn't expressly address the  
9 issue, but it does provide -- allow the court to allow  
10 relief that is necessary.

11 QUESTION: Well, do you say that actual money  
12 damages for past cleanup costs fits within that statutory  
13 description?

14 MR. MINEAR: We think in certain circumstances a  
15 monetary remedy can be necessary to fulfill the purposes  
16 of the statute. The purpose of the statute here is to  
17 allow the courts to compel a responsible party that has  
18 created a current endangerment to abate that endangerment,  
19 and it will be in some circumstances necessary to apply a  
20 restitutionary type remedy to ensure that that purpose is  
21 fulfilled.

22 For example, suppose that the -- a plaintiff  
23 brings a suit and during the notice period asks the  
24 defendant to clean up the site. The defendant will have a  
25 powerful incentive not to take any action to clean up the

1 site and to try to force the endangered community to  
2 assume those costs if it knows that the court will be  
3 unable to award any damages in those circumstances. I do  
4 not believe that's what Congress had intended in this  
5 situation.

6 Moreover, the position that we take is  
7 consistent with the general view this Court has expressed  
8 with regard to a court's equitable powers. This Court has  
9 noted in various circumstances that a court may include a  
10 restitutionary remedy together with other equitable  
11 relief.

12 QUESTION: But this isn't a broad grant of  
13 equitable jurisdiction. It's a much more circumscribed  
14 grant of part of a court of equity's powers.

15 MR. MINEAR: Well, we think that the primary  
16 circumspection or limitation on the court's power is  
17 really the requirement of the current endangerment. Once  
18 there is a current endangerment, then it becomes -- it  
19 behooves the court to take those steps that are necessary  
20 to abate the endangerment and also to assure that the  
21 responsible --

22 QUESTION: Well, do you think that the language  
23 to "restrain any person," et cetera and then to "order  
24 such person to take such a" is the sum and substance of  
25 the -- what would be granted if the courts -- if the

1 statute said the court shall have equitable jurisdiction?

2 MR. MINEAR: Yes, we think it is. We think that  
3 it gives the same general grant of power with regard to  
4 any order that may be necessary. Equity -- equitable  
5 principles are circumscribed by the requirement of  
6 necessity, that the court's power must -- the court must  
7 step in to prevent an injustice in a particular case. And  
8 we do think that the --

9 QUESTION: Well, it seems to me not just an  
10 injustice, but an injustice that is related to eliminating  
11 a -- an extant threat to the environment.

12 MR. MINEAR: That is correct. Yes, I would  
13 agree with that.

14 QUESTION: As I hear you now and as I heard Mr.  
15 Zaimes' concession in oral argument, I don't think you're  
16 disagreeing with Mr. Zaimes on this point anymore, as you  
17 seemed to be originally. That is, he seemed to be taking  
18 the position in the briefs that you couldn't get money,  
19 period. Now I think he's acknowledged that you can get  
20 money so long as it is in connection with an order for  
21 somebody to remedy a threat to the environment.

22 MR. MINEAR: If Mr. Zaimes has made that  
23 concession, then we are in substantial agreement on that  
24 point.

25 QUESTION: But I thought you went somewhat

1 further, and let's take this case exactly, what the dates  
2 were. The contamination was discovered in October.  
3 Suppose the plaintiff had immediately given notice to the  
4 defendant, but during the 90-day period itself under  
5 pressure, say, from town authorities, plaintiff starts  
6 cleaning up and then has to wait those 90 days to bring  
7 the suit. So, by the time we get to -- what would it be?  
8 February? From October to February. The plaintiff has  
9 already incurred a substantial sum. Then from the time  
10 the suit begins in February until March when the cleanup  
11 is done, plaintiff incurs further expenses.

12 Is it your position that all of the expenses  
13 during the 90-day period plus after suit commences are  
14 reimbursable or only after the suit commences?

15 MR. MINEAR: It's our view that all of them may  
16 be reimbursable, but there are several other conditions  
17 that we would recognize.

18 First of all, they have to be expenses that were  
19 reasonably necessary to abate the danger that was  
20 presented by the hazard that was proposed.

21 There also had to be notice to the defendant  
22 with regard to these expenses and a decision by the  
23 defendant not to take -- undertake them.

24 And the reason why these expenses are assessable  
25 is because they are necessary to ensure that the statute



1 works the way that Congress intended, namely, that it  
2 would encourage the responsible party to clean up the site  
3 and eliminate the need for a suit. If the party refuses  
4 to do so, then it faces the additional costs that will be  
5 associated with reimbursing the plaintiff, in addition to  
6 the equitable order that might require the defendant to  
7 complete the cleanup of --

8 QUESTION: I don't see how that's necessary to  
9 achieve the purpose of the statute. The money -- the  
10 cleanup that has been done with money already spent?  
11 Those are some costs. That cleanup has been done. You  
12 don't achieve anything by paying the person for that.

13 MR. MINEAR: Well, Congress does not simply see  
14 -- wishing to see that the sites be cleaned up. They're  
15 also interested in seeing that the responsible parties  
16 would bear those expenses.

17 QUESTION: Not in this statute. Not in this  
18 statute because you acknowledge that so long as the entire  
19 cleanup has been done before suit is lodged, you get none  
20 of your money back. Or at least before the 90-day notice  
21 is given. You draw the line at the 90-day notice. You  
22 acknowledged that if I do somebody else's cleanup and  
23 complete it entirely so that there's no more harm to the  
24 environment, I cannot get anything under this statute.

25 MR. MINEAR: May I answer that question?

1 QUESTION: Yes.

2 MR. MINEAR: We draw a different distinction  
3 with regard to that line that Congress drew, and that is  
4 that it was concerned with directing the court's resources  
5 to imminent hazards, those that required immediate  
6 abatement. And once you cross that threshold, the court  
7 has its full equitable power.

8 Thank you.

9 QUESTION: Thank you, Mr. Minear.

10 Mr. Romano, we'll hear from you.

11 ORAL ARGUMENT OF DANIEL ROMANO

12 ON BEHALF OF THE RESPONDENT

13 MR. ROMANO: Thank you, Your Honor. Mr. Chief  
14 Justice Rehnquist, may it please the Court:

15 I think that in light of the concessions that  
16 were made by counsel for the petitioner, I believe that  
17 about one-half of my argument is no longer necessary. As  
18 I understand the petitioners' viewpoint now, assuming that  
19 we've complied with the statute, then we are entitled to  
20 seek equitable restitution under the statute if the  
21 reimbursement cost and the cleanup action that we took  
22 was, quote, necessary under the statute. We don't  
23 disagree with that.

24 QUESTION: No, I don't think that was the  
25 concession. I think the concession was that the court

1 could issue an order which tells you to clean it up and  
2 requires the other party to pay you for your cleanup.  
3 That's not here. No, he hasn't conceded that he owes you  
4 any money.

5 MR. ROMANO: The court --

6 QUESTION: What he conceded is that a court  
7 could issue an order allowing the party now in possession  
8 of the property to clean up the hazard, the extant hazard,  
9 and saying, when you clean it up, you will be paid for --  
10 it will be paid for by the other party. But that's not  
11 this case.

12 MR. ROMANO: In other words, availability of  
13 restitutionary remedies is present in the statute, and  
14 this is about one-half of our argument.

15 Now, how do we go about --

16 QUESTION: Well, I'm not sure. He can tell us  
17 later, because he's reserved time, what he conceded and  
18 what he didn't.

19 I think you should address the argument of  
20 whether or not the statute permits the award of what in  
21 essence are monetary damages. The Government cites rent  
22 control cases where there was restitution, the Moore case  
23 and I think the Porter case.

24 MR. ROMANO: That's correct.

25 QUESTION: Those were decided well before our

1 opinion in Cort v. Ash.

2 MR. ROMANO: That's correct, Your Honor. I  
3 believe that the opinion in Cort v. Ash really does not  
4 address the issue over here. The opinion in Cort v. Ash  
5 dealt with whether or not the court should imply a private  
6 cause of action from a statute.

7 What we have over here, we have a cause of  
8 action which was presumed to exist under the statute in  
9 light of the Porter decisions and Franklin decision which  
10 Congress is presumed to have known about at the time that  
11 it enacted the statute.

12 The language of the statute in Porter and the  
13 Franklin cases and in this case are virtually identical.  
14 They grant the court to -- authority to issue such other  
15 order as may be necessary. This language has been held by  
16 this Court in the precedent that we cited to include all  
17 available equitable relief.

18 QUESTION: Well, there's nothing implied about  
19 the cause of action here, is there? --

20 MR. ROMANO: No. It's explicit.

21 QUESTION: Any person may commence a civil  
22 action on his own behalf. It's just a question of what he  
23 -- when he can do it and what he can get as a result of  
24 that.

25 MR. ROMANO: Precisely, Your Honor. That's why

1 we say we're dealing here with an explicit grant of  
2 jurisdiction and authorization for any person, citizen, to  
3 commence an action on his own behalf against all of the  
4 named defendants under the conditions stated in the  
5 statute. So, we don't have to deal with Cort v. Ash, and  
6 this is where the Eighth Circuit was wrong.

7 Now, we say that under the words of the statute,  
8 the court can do a number of things. They can issue a  
9 prohibitory injunction. It can issue an mandatory  
10 injunction ordering in fact the cleanup of the property by  
11 the defendant, and this point is considered by the  
12 defendants. We say it is a very small step from there to  
13 allow the court to say under the circumstances of the  
14 case, if appropriate and if necessary, you, plaintiff, go  
15 out, clean the property, and then you will obtain  
16 reimbursement from this defendant.

17 QUESTION: Yes, after the case is pending. But  
18 that -- you know, after the case is pending and there is  
19 still cleanup to be done, the court could order that. I  
20 tend to agree with you. But that's not what happened  
21 here. The cleanup was done years ago before the suit was  
22 filed.

23 MR. ROMANO: Justice Scalia, let me respond to  
24 some comments you made which bear on this point. Earlier  
25 you stated I believe that it was your view of the statute



1 that it applies to prevent future contamination.

2 But if -- in fact if you look at the statutory  
3 objectives stated in RCRA itself, section -- 42 U.S.C.  
4 6902(b), the Congress said it is the intent -- the  
5 national policy of the United States -- and I'm skipping  
6 ahead over here -- to minimize the present and the future  
7 threat to human health and the environment. This is what  
8 we did in this case.

9 So, the only issue is --

10 QUESTION: But not to remedy -- not to shift  
11 money around with respect to past threats. Present and  
12 future, but not past.

13 MR. ROMANO: The issue is that is presented  
14 before this Court is what should a property owner do upon  
15 the discovery of contamination on his property. Now, he  
16 can do one of two things.

17 And we have to assume, in the context of this  
18 decision, that that contamination presents an imminent  
19 hazard condition. Now, what does that mean?

20 It means he has a -- drums of toxic waste  
21 leaking to the groundwater. It means that there is a  
22 condition whereby there is a discharge into the soil where  
23 children are playing. It may be that there is a potential  
24 explosive conditions that need to be abated.

25 Would you rather have a plaintiff take care of

1 those conditions and then seek his response later, or  
2 would you like him to go to court? The answer to this --  
3 provides --

4 QUESTION: I might have enacted a different  
5 statute. Is that what you're asking? Would I have  
6 enacted this one or a different one?

7 MR. ROMANO: No, Your Honor. I believe that  
8 this is precisely what Congress has enacted by --

9 QUESTION: Then why didn't they use the same  
10 words, encompassing words, that were used in CERCLA? I  
11 think you're asking us to interpret this provision of RCRA  
12 with the same breadth as the CERCLA provision.

13 MR. ROMANO: Justice Ginsburg, this is a very  
14 different statute from CERCLA, and in fact it is unique.  
15 No other statute is found in the environmental laws of the  
16 United States which allows a citizen to proceed and file  
17 and deal with an imminent hazard condition. CERCLA  
18 doesn't have that. A citizen --

19 QUESTION: I'm talking about what you can  
20 recover. The provision for reimbursement for cleanup  
21 costs is broad in CERCLA, is it not?

22 MR. ROMANO: Yes.

23 QUESTION: And here there is no similar  
24 provision that says for what you've done to clean it up,  
25 you can recover.

1 MR. ROMANO: We believe that Congress --  
2 Congress could have put the imminent hazard/endangerment  
3 provision in CERCLA. It did not. It put it in RCRA so  
4 that the broadest possible remedies will be available to  
5 deal with conditions of imminent and hazard endangerments.

6 Now, if Congress put that statute in CERCLA, it  
7 would only apply, Justice Ginsburg, to substances covered  
8 by CERCLA which is hazardous substances. Congress well  
9 understood that environmental contamination which may lead  
10 to imminent and hazardous conditions may arise not only  
11 from hazardous substances, but also from solid waste and  
12 hazardous waste, substances which are not covered by  
13 CERCLA. Moreover, Congress has understood that petroleum  
14 contamination is not covered by CERCLA, yet may present an  
15 imminent hazard condition. We believe that's why Congress  
16 put that statute in RCRA not in CERCLA. There was a  
17 reason for why Congress did that.

18 QUESTION: Well, what's your position, Mr.  
19 Romano, with respect to a situation where a property owner  
20 discovers the hazard, goes ahead and cleans it up so that  
21 there's no longer any imminent or substantial  
22 endangerment, and then goes to court? What can he recover  
23 in the way of a monetary award?

24 MR. ROMANO: Well, I believe that under the  
25 proper circumstances this particular individual may

1 recover his -- may obtain equitable restitution of his  
2 environmental cleanup costs, those costs that were  
3 necessary, in the words of the statute --

4 QUESTION: So, you say then he doesn't have to  
5 present an imminent and substantial endangerment to  
6 health.

7 MR. ROMANO: We don't believe that the condition  
8 of imminent and substantial endangerment has to be present  
9 at the time of the filing of the lawsuit. Now, we believe  
10 that the statute supports us on this issue.

11 When Congress wanted to put a limitation on the  
12 timing of the filing of the lawsuit in this statute, it  
13 imposed them in section B of the statute. Congress said  
14 no action may be commenced until several things have  
15 happened. One, you could provide notice to the State, to  
16 the EPA, and to all the responsible parties, and then if  
17 within a period of 90 days the EPA or the State does not  
18 commence any remedial activities, then you may go to court  
19 and file a lawsuit.

20 QUESTION: It's -- but in 2, which is what says  
21 what the court can do, it refers to the endangerment.  
22 Surely that's referring back to an imminent and  
23 substantial endangerment.

24 MR. ROMANO: Which? That -- the limitation of  
25 the endangerment is not temporal. For sure an

1     endangerment has to exist at the time of the cleanup,  
2     otherwise we will not be here.

3             But assuming that an endangerment exists at some  
4     point in time, then should the person at that time file  
5     legal proceedings, send notice? In many cases there are  
6     literally hundreds of defendants that are --

7             QUESTION: Well, but that may be a good  
8     argument, as one of my colleagues said, for a different  
9     statute, but it seems to me that this statute does require  
10    an imminent and substantial endangerment at the time you  
11    bring the lawsuit.

12            MR. ROMANO: Your Honor, the only words that  
13    even hint on that is the language "may present" which,  
14    granted, is in the present tense. We think that --

15            QUESTION: Wait a minute. Now, what about  
16    subsection 1 which you say sets forth the conditions?  
17    What about 1(B)? It seems to me 1(B) makes no sense  
18    except on the assumption that this is a statute which  
19    deals with pending threats. That is, it says, no action  
20    may be commenced under section (a)(1)(A): A, prior to 60  
21    days, or B, no action may be commenced if the  
22    Administrator or State has commenced and is diligently  
23    prosecuting a civil or criminal action in a court of the  
24    United States to require compliance with such permit,  
25    standard, regulation, condition, requirement,



1 prohibition --

2 MR. ROMANO: Your Honor --

3 QUESTION: Why would you eliminate somebody's  
4 cause of action for past damages so long as a State is  
5 pursuing a remedy to enjoin any future violation? It  
6 makes no sense.

7 MR. ROMANO: If I understand Your Honor's  
8 question, it deals with violation of standards or permit  
9 conditions or so forth. This is not what we're dealing in  
10 this lawsuit.

11 The RCRA citizen supervision is divided into two  
12 parts. Part (a)(1)(A) which deals with lawsuits commenced  
13 by citizens to enjoin violations which are alleged to --  
14 against defendants which are alleged to be in violation.  
15 This is a lawsuit which is similar to many other statutes  
16 found throughout the environmental laws, and they are  
17 aimed into enforcement of the regulatory aspect of the  
18 statute.

19 The statute we're dealing with today is a very  
20 different species of citizen supervision. It is unique  
21 and it is a liability statute. And it says now under --  
22 it allows a party to initiate proceedings when the  
23 conditions of imminent and substantial endangerment exist.

24 So, the question is, does the "may" language,  
25 "may present" language -- is it a language which is

1 temporal in it or is it really something else? We believe  
2 it's something else. It is necessary to limit the whole  
3 universe of solid and hazardous waste, about the broadest  
4 universe of substances you can imagine, to those ones  
5 which may present an imminent and substantial  
6 endangerment.

7 QUESTION: But that's just bad English. We do  
8 not assume that Congress uses bad English. I mean, to  
9 convey the thought you've just expressed, they would have  
10 said may exist or may have existed. What you're saying  
11 may exist means -- simply there's a possibility. There is  
12 or was a possibility. But that's not how we say that in  
13 English. The way we say that in English is may exist or  
14 may have existed.

15 MR. ROMANO: Your Honor --

16 QUESTION: When we say may exist, we mean --  
17 what we mean is may exist, now.

18 MR. ROMANO: I understand that there is for sure  
19 -- for sure there is an ambiguity in the way the statute  
20 is written, and we believe that our reading of the  
21 statute --

22 QUESTION: You missed my point. My point is  
23 there is no ambiguity, not if you're speaking English.  
24 May exist or may have existed is the meaning you say may  
25 exist conveys. It does not convey that meaning.

1 MR. ROMANO: Your Honor, we believe that when  
2 Congress wanted to put limitations on when such lawsuits  
3 should be filed, it put them under the actions prohibited  
4 section. That language is not found over there.

5 What the petitioners are arguing is take some  
6 language which we believe is out of context. It's a  
7 descriptive language defining the type of waste that  
8 presents the hazard conditions and reading that into the  
9 jurisdictional section of the statute which comes later  
10 on.

11 QUESTION: Well, would you say the same thing  
12 about (a) (1) (B)'s list of potential defendants like a  
13 present generator or something, that those are just kind  
14 of illustrative and you could bring an action against lots  
15 of other people too?

16 MR. ROMANO: You can bring an action under the  
17 terms of the statute against all past and present owners  
18 -- not owners, transporters, basically all the group of  
19 defendants which are alleged to have contributed in some  
20 fashion to the contamination of the property. And  
21 Congress has clearly stated that under the statute it is  
22 the desire of Congress to have all of these defendants  
23 share equitably in the cleanup of the contamination.

24 If I may, Your Honor, any other reading of the  
25 statute, the reading urged by the petitioners in this

1 case, will lead to what we believe will be perverse  
2 results because the bottom line is you have a property  
3 owner which is -- has discovered a condition of imminent  
4 and substantial endangerment of his property. What you  
5 want him to do to preserve his legal rights, he will not  
6 really have absolutely no incentive to do any cleanup  
7 activities whatsoever on the property.

8 QUESTION: Well, I thought your client made the  
9 cleanup because ordered to do so by the City of Los  
10 Angeles. I didn't think this was some voluntary thing.

11 MR. ROMANO: Your Honor, there was actually  
12 never an order. What the city --

13 QUESTION: But the city said you had to do it.

14 MR. ROMANO: The city said if you want to build  
15 your restaurant on this property, you better take care of  
16 that problem. And what my client did is voluntarily go  
17 out and investigate the nature of the problem, only to  
18 find out that the extent of -- that, A, the problem was  
19 petroleum contamination, but to make matters worse, it --  
20 the bottom pile of petroleum actually hit the groundwater  
21 beneath the property. That's what we believe contributed  
22 to the conditions of imminent and substantial  
23 endangerment.

24 At that time the court has to ask ourself, what  
25 should -- that is the critical point in time here.

1 QUESTION: Well, you still have some State  
2 causes of action here presumably.

3 MR. ROMANO: Your Honor, our experience in this  
4 case is that we actually do not. We are now pending for  
5 the second time in the court of appeals before the State  
6 of California, and we don't think the State remedies are  
7 -- have much meaning.

8 But even if they did, the statute does not  
9 specifically state that a citizen may proceed an action  
10 under this section without regard to any other available  
11 remedies. There's a savings clause. The legislative  
12 history specifically says you do not -- plaintiff does not  
13 need to exhaust all other remedies before it commences a  
14 lawsuit under this section.

15 QUESTION: That's -- isn't that make sense?  
16 That is to say, I take it the reason you lost in State  
17 court is because the State court found that the Meghrigs  
18 never undertook any acts which caused gasoline  
19 contamination on the property. And so, if you want a  
20 damages action, perhaps you should have to go against the  
21 people who caused the problem. But if you want a cleanup  
22 action, perhaps it's a better idea to get a broader  
23 category of people --

24 MR. ROMANO: That's correct, Your Honor.

25 QUESTION: -- which would argue then against



1 using this statute simply to try to get damages for  
2 something that's over and done with in the past.

3 MR. ROMANO: That's correct, Your Honor. We  
4 agree with that.

5 QUESTION: But then how would you win? Because  
6 you're trying to sue against something that happened in  
7 the past. So, I mean, maybe I don't understand it, but  
8 you're trying to get -- you're trying to go against some  
9 people whom the State found didn't cause the contamination  
10 but, nonetheless, they did handle the gasoline in the past  
11 and it all was a problem in the past. But you want to get  
12 damages from them now, don't you?

13 MR. ROMANO: No, we do not. We do not want  
14 damages.

15 QUESTION: What you're calling restitution, but  
16 I mean, you want to be reimbursed from them who didn't  
17 cause the problem for your expenditure. And it sounds to  
18 me as if it would make sense to let you get the  
19 reimbursement from a person who did cause the problem,  
20 which is what the State court would allow, but not  
21 necessarily to get reimbursement for a past event from  
22 people who are basically innocent, which is what you want  
23 to interpret the Federal statute to allow.

24 MR. ROMANO: Your Honor, the issue as to whether  
25 or not in fact we are relying -- we are entitled to obtain

1 restitution from the Meghrips is really not before the  
2 Court today. If the Court in fact agrees with us and the  
3 case is remanded to the district court, the district court  
4 may, using equitable principles, decide whether or not  
5 we're entitled to restitution.

6 QUESTION: May I ask another question that you  
7 could answer that's not strictly before us? Why was there  
8 no effort to sue anybody until after the cleanup was done?  
9 That's one question.

10 And the other is, are you telling us that unlike  
11 State law, the Meghrips, even if they had nothing to do  
12 with the contamination, are responsible under the Federal  
13 statute?

14 MR. ROMANO: Your Honor, in response to the  
15 second question, we believe that the Meghrips are  
16 responsible under State law, and in fact that's why we  
17 took an appeal from that order that was attached to -- as  
18 an exhibit -- an appendix to the petitioner's brief.

19 QUESTION: What about under the Federal statute  
20 that says, has contributed or who is contributing? These  
21 are people who say -- let's assume for the moment that  
22 what they say is correct -- we didn't -- during our period  
23 of ownership, we didn't have a clue that there was any  
24 petroleum involved.

25 MR. ROMANO: That in fact we believe is

1 incorrect. Now, we're talking about facts, Your Honor,  
2 which are outside of the record and based on discovery  
3 that we obtained in the State court proceedings -- and I'm  
4 happy to talk about those. They're not in this --

5 QUESTION: But just let's assume I said that  
6 they're correct, that the gas station long preceded their  
7 ownership of this property, that they did not contribute  
8 to the contamination. They were not operating a gas  
9 station. It was a vacant lot while they were owners. Are  
10 they nonetheless contributors?

11 MR. ROMANO: Under State law?

12 QUESTION: No, under this statute.

13 MR. ROMANO: They may well be deemed to have  
14 contributed under the Federal statute if they had  
15 discovered the presence of contamination on the property  
16 and did absolutely nothing about it, which the facts --  
17 that's what the fact show.

18 QUESTION: I thought there was -- discovery  
19 wasn't made until -- that your client wanted to do this  
20 building.

21 MR. ROMANO: Discovery by my client wasn't made,  
22 but we had found that there was -- we believe that  
23 certainly the Meghriks' agents, their father and the  
24 contractor that was managing the property on their behalf,  
25 they are the entities that removed the underground tanks.

1 And we have photographs which showed what that soil looked  
2 like. The soil clearly looked very heavily contaminated.  
3 So, we believe that the Meghriks knew or certainly should  
4 have known about the fact of contamination on the  
5 property. They just never --

6 QUESTION: Then if you can go to my other  
7 question. What impeded you faced with this statute that  
8 says "may present" from beginning suit at the earliest  
9 possible time?

10 MR. ROMANO: We were faced with a situation  
11 where the issue was either go to Federal court and  
12 litigate this for opinion order, at the very minimum 90  
13 days but more likely several months or years down the  
14 line, maybe all the way up to this Court before we could  
15 do anything about the property. Meanwhile my client --

16 QUESTION: Well, not according to the  
17 Government's interpretation. The Government said as long  
18 as you did your cleanup within the 90-day period, as the  
19 Government reads the statute, you would be entitled to  
20 reimbursement. So, my question is why timely suit wasn't  
21 commenced and cleanup commenced instead of saying, we'll  
22 do the whole thing and then we'll attempt to sue for  
23 past --

24 MR. ROMANO: I think that the short answer to  
25 that one, Your Honor, is that at the time that my client

1 found out about the contamination, he was more concerned  
2 about taking care of the problem as opposed to suing  
3 people for recovery of his cleanup costs.

4 QUESTION: That's a good answer.

5 MR. ROMANO: And -- thank you.

6 (Laughter.)

7 QUESTION: It may not win your case.

8 (Laughter.)

9 MR. ROMANO: Well, the Government makes -- the  
10 Government's position is an interesting position because  
11 -- we don't agree with that, obviously, and the reason for  
12 that is, is that the Government says, okay, if you find  
13 contamination, what you do is you have to start providing  
14 notices to people, assuming you can locate all of those  
15 people, before you do any cleanup activities. Only you --  
16 only after you provided notice to all of the defendants  
17 can you then follow with the filing of a lawsuit.

18 We believe that such a reading of the statute  
19 will really contravene the congressional purpose in  
20 enacting the statute which is if you have a condition  
21 which is by definition the worst type of environmental  
22 contamination, what you would want to do is clean it up  
23 and then work out the details as to who is responsible.

24 And I would say that principles of equity which  
25 govern the statute provide all of the necessary



1 restrictions on enlarging this kind of action. A district  
2 court on remand can decide and hold that we acted as an  
3 officious inter-meddlers. A district court can decide  
4 that the costs that we've incurred were not necessary, and  
5 the district court may decide that we set on our rights  
6 and laches is available. Certainly I don't think people  
7 will be bringing those kind of lawsuits without -- if they  
8 didn't have any merit to them when they're facing with an  
9 attorney's fees and cost penalty in the event if they lose  
10 the lawsuit.

11 So, we believe that it is entirely appropriate  
12 for the Court to hold that a plaintiff may, in the limited  
13 circumstances where the contamination presents an imminent  
14 and substantial endangerment to health and the  
15 environment, do whatever is necessary to abate those  
16 conditions, and then sue under this statute to recover his  
17 costs.

18 Thank you very much.

19 QUESTION: Thank you, Mr. Romano.

20 Mr. Zaimes, you have 2 minutes remaining.

21 REBUTTAL ARGUMENT OF JOHN P. ZAIMES

22 ON BEHALF OF THE PETITIONERS

23 MR. ZAIMES: Thank you, Mr. Chief Justice. I'll  
24 cover only three points in that 2-minute time, if I may.

25 First, I had begun to discuss the cases, the

1 line of cases, cited by respondent beginning with Porter  
2 v. Warner Holding and ending up more recently in Franklin  
3 v. Wynnette County. Those cases are cited for the  
4 proposition that there was a broad equitable power in  
5 Federal courts that can be called on in this situation.

6 And if we look at Porter as the beginning of  
7 that line, Porter was a case in which the words of the  
8 statute were much different from those here. Porter had a  
9 statute that allowed the court to issue an injunction or  
10 other order, significantly broader than what we have here.

11 And the court in that case looked at the  
12 legislative history and determined that the legislative  
13 history of that statute, the Emergency Price Control Act,  
14 was consistent with a reading that allowed the court, the  
15 lower court, to order the apartment owner to reimburse  
16 monies collected over the limit set by the Emergency Price  
17 Act.

18 In the Franklin case, there was no congressional  
19 guidance on the limitations of remedies under that  
20 statute. Franklin arose under title 9 and the right of  
21 action had been found to be an implied right of action  
22 under Cannon v. City -- University of Chicago. So, what  
23 the court determined was that there were four remedies  
24 available where Congress has not spoken as to the nature  
25 of the remedies. Since Congress hadn't even expressly

1 indicated the right of action, they hadn't indicated the  
2 remedies either.

3 Here we have an abundance of guidance. We have  
4 the language of the statute. We have legislative history  
5 of this and predecessor statutes and even of the CERCLA  
6 amendments in 1986, all of which point to a very limited  
7 reading -- limited availability of remedies under this  
8 citizen supervision. And we have a comparable statute,  
9 RCRA, which, as Justice Ginsburg notes, has a full  
10 discussion of the kinds of limitations that are placed on  
11 plaintiffs seeking to recover their costs.

12 The second point I want to make with respect to  
13 the contumacious plaintiff example, we must remember that  
14 State law covers those contumacious plaintiffs in  
15 abundance, as does CERCLA in all but petroleum  
16 contamination cases.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Zaimes.

18 The case is submitted.

19 (Whereupon, at 12:02 p.m., the case in the  
20 above-entitled matter was submitted.)  
21  
22  
23  
24  
25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

ALAN MEGHRIG, ET AL., Petitioners  
v. KFC WESTERN, INC.

CASE NO. : 95-83

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY:

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(REPORTER)