

# Reading Remedially: What Does *King v. Burwell* Teach Us About Modern Statutory Interpretation, and Can It Help Solve the Problems of CERCLA § 113(h)?

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## INTRODUCTION

*If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.*<sup>1</sup>

—Karl Llewellyn

In the latter half of the twentieth century, Congress drafted a law to solve a problem. As decades passed, that problem became increasingly complex. In the new millennium, Congress became increasingly polarized,<sup>2</sup> and increasingly unproductive.<sup>3</sup> In the face of that inaction, the executive branch decided to rely on a provision of that earlier law to address a modern facet of that earlier problem. Or litigants decided to ask a court to rely on a provision of that earlier law to address a modern facet of that earlier problem. The Congress that drafted the law might not have understood this modern application, the law's legislative history might be vague and confusing, and this modern interpretation might have important consequences for the overall evil that the earlier law was meant to remedy. What's a court to do?

This issue—what to do when the broad purpose of the law is evident, but the applicability in a particular scenario is less than clear—is an increasing problem that the Supreme Court will address in coming terms.<sup>4</sup> An example of seemingly clear purpose in the midst of confusing

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1. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 400 (1950).

2. See, e.g., Christopher Ingraham, *A Stunning Visualization of Our Divided Congress*, WASH. POST: WONKBLOG (Apr. 23, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/04/23/a-stunning-visualization-of-our-divided-congress/> [<https://perma.cc/DRT7-SK9X>].

3. See Mark Murray, *Congress on Track To Be Least Productive in Modern History*, NBC NEWS (July 31, 2014, 10:21 AM), <http://www.nbcnews.com/politics/first-read/congress-track-be-least-productive-modern-history-n169546> [<https://perma.cc/2VAL-6GM2>].

4. Two examples of such issues that were bound for the Supreme Court *before* the election were the interpretation of Title IX in the context of transgender discrimination and the interpretation of the Clean Air Act in the context of the Clean Power Plan. Title IX states that “[n]o person . . . shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016). The agency in charge of implementing this provision, the Department of Education (“DOE”), issued a regulation in 1980 stating that “[a] recipient [of federal funds] may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33 (2017). In 2015, the DOE issued an “opinion letter,” which clarified that schools “generally must treat transgender students consistent with their gender identity.” *G.G.*, 822 F.3d at 715. The immediate legal issue for those challenging the DOE’s policy concerns the limits of *Auer* deference—that agencies should be given deference when interpreting their own regulations. See *id.* at 719. But ultimately, this is a matter of statutory interpretation in the face of clear policy goals and changed circumstances. In other words, the drafters of Title IX most likely did not consider discrimination against transgender

legislative history confronted the Court in *King v. Burwell*.<sup>5</sup> *King* is a striking example of this issue because the litigation did not revolve around an obscure provision of a decades-old law, but rather on an obscure provision of a less-than-a-decade old law.<sup>6</sup> Yet the contentious nature of modern legislating still left a confused record regarding the applicability of a particular provision and left the Court with a choice: effectuate the broad purpose of the law, or hold the drafters to their words.<sup>7</sup> This Note will address this issue through the lens of a topic less controversial than the Affordable Care Act: an obscure jurisdiction-stripping provision of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).<sup>8</sup> Specifically, this Note will propose that judges read a word entirely out of CERCLA,<sup>9</sup> just as

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students when they wrote “on the basis of sex.” “Gender identity disorder,” now “gender dysphoria,” was not included in the American Psychiatric Association Diagnostic and Statistical Manual until 1980. See Eve Glicksman, *Transgender Today*, AM. PSYCHOL. ASS’N MONITOR ON PSYCHOL. (Apr. 2013), <http://www.apa.org/monitor/2013/04/transgender.aspx> [https://perma.cc/MQ3A-MTNZ]. But if “sex” is now understood as referring to a student’s preferred gender, a literal (or perhaps originalist) reading of Title IX would not necessarily effectuate the policy goals inherent in Title IX—to eliminate discrimination on the basis of sex in educational institutions. After granting cert on the Fourth Circuit case, the Trump administration DOE rescinded the guidance, and the Supreme Court has instead sent the case back to the 4th Circuit. Amy Howe, *Justices Send Transgender Bathroom Case Back to Lower Courts*, SCOTUSBLOG (Mar. 6, 2017), <http://www.scotusblog.com/2017/03/justices-send-transgender-bathroom-case-back-lower-courts/> [https://perma.cc/KF7R-D9ND]. Litigation surrounding the Clean Power Plan presented a similar issue. The Clean Power Plan’s regulation of CO2 emissions for existing power plants rests on Section 111(d) of the Clean Air Act. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,710 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60 *et seq.*). That provision has a particularly tortured legislative history: for instance, two conflicting amendments to section 111(d) were passed simultaneously by Congress in 1990. See Avi Zevin, *Dueling Amendments: The Applicability of Section 111(d) of the Clean Air Act to Greenhouse Gases 4* (Inst. for Policy Integrity, Working Paper No. 2014/5, 2013). Section 111(d) has a fairly straightforward purpose: to provide the EPA with the ability to regulate pollutants from existing sources once it has begun regulating that pollutant when emitted from new sources. See *id.* at 10. Congress almost certainly did not consider section 111(d) as a vehicle through which the EPA would regulate the entire electricity generation industry’s emission of CO2. See Brief for Petitioners at 6, *West Virginia v. United States Env’tl. Prot. Agency*, No. 15-1363 (D.C. Cir. Feb. 19, 2016) (“Congress did not intend and could not have imagined such a result when it passed the provision more than 45 years ago.”). But if it is read literally (or at least if the version in the U.S. Code is read literally) it in fact *compels* the EPA to do just that.

5. See generally *King v. Burwell*, 135 S. Ct. 2480 (2015).

6. See *infra* Part I for an explanation of the basics of *King v. Burwell*. The Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), was passed in 2010, and the litigation that led to *King* was based on an IRS rule from 2012 that interpreted a provision of that law. See Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (codified at 26 C.F.R. pt. 1).

7. See *infra* Part I; see also *infra* Section III.C.

8. 42 U.S.C. §§ 9601–9675 (2012).

9. This Note actually considers a provision of the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986). But that provision, like most of SARA, amended a section of CERCLA, and thus this Note does propose reading a word

the Court read four words out of the Affordable Care Act.<sup>10</sup> In doing so, this Note will highlight, and question, three possible reasons for such a drastic remedial reading: (1) that Congress has failed to fix the statute and, as such, judges must do so; (2) that judges should read statutes differently when presented with a “major question”; and (3) that judges should employ such drastic remedial reading when the intent of the legislature is particularly clear.

Part I will orient the reader with the issue in *King v. Burwell*, as well as show how this Note understands the remedial purposes canon. Part II will discuss the nature of the jurisdiction-stripping problem in CERCLA in the context of CERCLA’s legislative history. As Part II will demonstrate, CERCLA and particularly the Superfund Amendments and Reauthorization Act (“SARA”) are excellent examples for exploring the remedial purposes canon, as they are both paragons of remedial statutes. Part III will address the solution of applying the remedial purposes canon, and whether the possible reasons for reading around the words of a statute distinguish the Affordable Care Act from CERCLA.

### I. JUST JIGGERY-POKERY?:

#### THE BASICS OF *KING V. BURWELL* AND REMEDIAL READING

The following Part will give the reader the background of *King v. Burwell* and the nature of the problem that confronted the Court: whether to read around the plain language of a statute in order to effect the assumed purpose of the enacting Congress. This Part will then explain how this Note understands the remedial purposes canon and the concept of remedial reading.

#### A. *The Basics of King v. Burwell*

*King v. Burwell*,<sup>11</sup> on its face, was a standard case of statutory interpretation.<sup>12</sup> An agency interpreted four words in a statute to mean one thing; the Petitioners argued that they meant another.<sup>13</sup> Ever since the initial filings, this case carried with it a common narrative: clear

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entirely out of what is now CERCLA. See *infra* Part II for an explanation of the history of CERCLA and the passage of SARA.

10. See *infra* Parts I, III.

11. 135 S. Ct. 2480 (2015).

12. See, e.g., Stephen Wermiel, *SCOTUS for Law Students: Interpreting Statutes*, SCOTUSBLOG (Feb. 18, 2015, 12:47 PM), <http://www.scotusblog.com/2015/02/scotus-for-law-students-interpreting-statutes/> [<https://perma.cc/3KS6-VFRM>].

13. See *King*, 135 S. Ct. at 2488.

language versus clear intent.<sup>14</sup> That is, the language at issue was supposedly clear and unambiguous, but the intention of Congress, which was supposedly just as clear and unambiguous, was diametrically opposed to that language.<sup>15</sup>

The immediate legal issue in *King* was fairly straightforward. The Patient Protection and Affordable Care Act<sup>16</sup> (“ACA”) provides individuals with tax subsidies to offset the cost of insurance. The ACA makes these subsidies available only if the individual purchases insurance on an insurance exchange “established by the State.”<sup>17</sup> An insurance exchange is essentially a government-operated insurance marketplace.<sup>18</sup> In 2012, the IRS published a regulation stating that exchanges established by the federal government qualify as exchanges “established by the State,” and individuals who purchase insurance on a federally established exchange are equally capable of receiving tax credits as those who purchased insurance on a state-established exchange.<sup>19</sup> This regulation was challenged as an impermissible interpretation in several courts.<sup>20</sup> Ultimately, after two appellate courts came down on different sides of the issues on the same day,<sup>21</sup> the Supreme Court granted certiorari.<sup>22</sup>

A ruling by the Court invalidating the IRS regulation would have effectively ended the Affordable Care Act. To understand why, one needs to understand some basic premises of the health insurance market. Health insurers, like all insurers, calculate risk and charge more for riskier behavior—home insurance for a home in a floodplain costs more than home insurance for a home on dryer land; car insurance is higher for people with poorer driving records; and health insurers

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14. Compare, e.g., Elizabeth B. Wydra, *The Law’s Intent Is Clear*, US NEWS: DEBATE CLUB (Mar. 3, 2015, 12:24 PM), <http://www.usnews.com/debate-club/should-the-supreme-court-strike-down-obamacare-subsidies-in-king-v-burwell/the-laws-intent-is-clear> [https://perma.cc/4PAJ-KAVD] (arguing the law’s intent is clear), with Jackie Bodnar, *The IRS Can’t Write Its Own Laws*, US NEWS: DEBATE CLUB (Mar. 3, 2015, 12:24 PM), <http://www.usnews.com/debate-club/should-the-supreme-court-strike-down-obamacare-subsidies-in-king-v-burwell/the-irs-cant-write-its-own-laws> [https://perma.cc/S5KL-NGBT] (arguing language is clear).

15. Again, this was a common perception, not necessarily the reality.

16. Pub. L. No. 111-148, 124 Stat. 119 (2010).

17. See 26 U.S.C. § 36B(b)(2)(A) (2012).

18. See *King*, 135 S. Ct. at 2485.

19. See Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (codified at 26 C.F.R. pt. 1).

20. See, e.g., *Halbig v. Sebelius*, 27 F. Supp. 3d 1 (D.D.C. 2014); *King v. Sebelius*, 997 F. Supp. 2d 415 (E.D. Va. 2014); *Oklahoma ex rel. Pruitt v. Burwell*, 51 F. Supp. 3d 1080 (E.D. Okla. 2014).

21. See *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014) (upholding the IRS interpretation); *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014) (vacating the IRS interpretation).

22. See *King v. Burwell*, 135 S. Ct. 475 (2014).

would like to charge more for people who get sick more often, or in more catastrophic ways. This basic principle led to health insurers failing to provide affordable health insurance to people with serious medical problems, arguably the very people who most needed health insurance.<sup>23</sup> One could correct this problem by requiring health insurers to provide insurance to everyone, regardless of their health status, a mechanism known as “guaranteed issue.”<sup>24</sup> But a guaranteed issuance of health insurance does not address the problem of cost—health insurers would provide health insurance to those who are already sick, but they would charge accordingly, presumably at a rate that many sick people would not be able to afford.<sup>25</sup> One could correct *that* problem by prohibiting health insurers from charging higher premiums to sick people, a mechanism known as “community rating.”<sup>26</sup> But if health insurers were forced to provide insurance to sick people and could not charge them more for the increased risk that the health insurer was taking on, customers would be incentivized to wait until they were sick to purchase health insurance.<sup>27</sup> This would result in a “death spiral” where the health insurer is paying more and more in healthcare costs for their sick customers, and receiving less and less from healthy people paying premiums.<sup>28</sup> One could fix *that* problem by requiring that everyone purchase health insurance regardless of their health status, a mechanism known as an “individual mandate.”<sup>29</sup> But not everyone can afford health insurance.<sup>30</sup> This last problem can be

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23. See, e.g., Randi Kaye, *Too Sick for Comprehensive Health Insurance?*, CNN MONEY (Oct. 5, 2009, 11:14 AM), [http://money.cnn.com/2009/10/02/pf/too\\_sick\\_for\\_health\\_care/](http://money.cnn.com/2009/10/02/pf/too_sick_for_health_care/) [<https://perma.cc/U5X8-DZW8>]; Christine Lagorio, *When Health Coverage Doesn't Hold Up*, CBS NEWS (May 24, 2007, 4:55 PM), <http://www.cbsnews.com/news/when-health-coverage-doesnt-hold-up/> [<https://perma.cc/KE82-6T6P>]. It should be noted that the problems with health insurance in America are extremely varied and complex. To explain the basics of the ACA, this Note focuses on one facet for the sake of simplicity.

24. See *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015).

25. This is because there is a theoretical price at which an insurer would be willing to provide health insurance to anyone—namely the cost of that person’s medical care—but a prospective insurance consumer cannot afford the cost of that medical care, otherwise they would not purchase insurance.

26. See *King*, 135 S. Ct. at 2485. “Community rating” means that the health insurer will charge the same for everyone in a given community, “regardless of their health status.” *Health Insurance Glossary*, HEALTHINSURANCE.ORG, <https://www.healthinsurance.org/glossary/community-rating/> (last visited Feb. 7, 2017) [<https://perma.cc/7FUM-MP7B>].

27. See *King*, 135 S. Ct. at 2485; Jonathan Gruber, *Health Care Reform Is a “Three-Legged Stool,”* CTR. FOR AM. PROGRESS 1, 2 (Aug. 2010), [https://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing\\_reform.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing_reform.pdf) [<https://perma.cc/9NTC-SK2N>].

28. See *King*, 135 S. Ct. at 2485.

29. See *id.* at 2486; *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012).

30. See Gruber, *supra* note 27, at 3 (“[M]any families cannot afford health insurance at those community-rated prices.”).

fixed by providing tax credits to people who cannot afford health insurance.<sup>31</sup> And hence you have the “three-legged stool” upon which the ACA is built: (1) “new rules that prevent insurers from denying coverage or raising premiums based on preexisting conditions,” (the guaranteed issue and community rating requirements), (2) “requirements that everyone buy insurance” (the individual mandate), and (3) “subsidies to make that insurance affordable.”<sup>32</sup>

The three prongs are interdependent: requiring health insurers to provide everyone with insurance without requiring that healthy people buy insurance would lead to a “death spiral.”<sup>33</sup> Requiring everyone to buy insurance without forcing insurers to provide that insurance would be meaningless, as would requiring everyone to buy insurance without making it affordable, and so on.<sup>34</sup> The permissibility of the IRS regulation affected the third leg of the stool: tax credits to make insurance affordable. At the time *King* came before the Court, only fourteen states had set up their own exchanges.<sup>35</sup> This meant that the majority of people who had purchased health insurance on an exchange had done so on a federally established exchange under the assumption that they would receive tax credits.<sup>36</sup> Therefore, if the Court decided to hold the IRS regulation to be an impermissible interpretation of the law—that is, if there were no tax credits on a *federal* exchange—the third leg would have collapsed. By one estimate, if the Court had ruled in favor of the Petitioner’s interpretation, over six million people would have lost tax credits, equivalent to almost \$2 billion.<sup>37</sup>

Ultimately, Chief Justice Roberts, writing for the majority, upheld the IRS’ interpretation that “established by the State” was

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31. *Id.*

32. *Id.* at 2.

33. *See King*, 135 S. Ct. at 2485.

34. *See* Raman Khanna, *The Affordable Care Act, Part 3. The Three Legged Stool*, J. AM. MED. ASS’N INTERNAL MED. BLOG (May 15, 2014), <https://internalmedicineblog.jamainternalmed.com/2014/05/15/the-affordable-care-act-part-3-the-three-legged-stool/> [<https://perma.cc/75DM-TR4L>] (explaining, through hypotheticals, why the three legs of the stool are interdependent).

35. Including the District of Columbia. *See Health Insurance Marketplaces 2015 Open Enrollment Period: March Enrollment Report*, DEP’T HEALTH & HUM. SERVS. 2–3 (Mar. 10, 2015), [https://aspe.hhs.gov/sites/default/files/pdf/83656/ib\\_2015mar\\_enrollment.pdf](https://aspe.hhs.gov/sites/default/files/pdf/83656/ib_2015mar_enrollment.pdf) [<https://perma.cc/QTN4-KLLJ>].

36. The majority of people purchased insurance on the Federal Exchange because the majority of states did not set up state exchanges. *See id.* Those who purchased insurance on the Federal Exchange assumed they would receive tax credits because that was the law as interpreted by the IRS. *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (codified at 26 C.F.R. pt. 1).

37. *State-by-State Effects of a Ruling for the Challengers in King v. Burwell*, KAISER FAM. FOUND. (June 2, 2015), <http://kff.org/interactive/king-v-burwell-effects/> [<https://perma.cc/9AF2-B4R7>].

meaningless and that individuals who purchased insurance on the Federal Exchange could receive tax credits.<sup>38</sup> Roberts essentially read four words out of the statute on the reasoning that Congress did not intend those four words to be there, or at least to mean what they apparently say.<sup>39</sup>

Roberts's analysis was fairly simple. The language at issue comes from section 1401 of the ACA, now codified at 26 U.S.C. § 36B. As Roberts read it, "The amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through 'an Exchange established by the State under section 1311 of the [ACA].'"<sup>40</sup> Roberts broke section 36B's language into three parts.<sup>41</sup> To receive tax credits, a person must have purchased insurance on (1) "an Exchange," (2) "established by the State," and (3) "under § 1311."<sup>42</sup> Step one was relatively easy. Section 1311 implores states to set up "an American Health Benefit Exchange . . . for the State," and section 1333 provides that, if a state fails to set up an exchange, the Secretary of Health and

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38. See *King*, 135 S. Ct. at 2495–96.

39. See *id.*

40. *Id.* at 2487. The press coverage of this case suggested that this language was clear. See, e.g., Bodnar, *supra* note 14. Justice Scalia contended that "[i]t is hard to come up with a clearer way to limit tax credits to State Exchanges." *King*, 135 S. Ct. at 2497 (Scalia, J., dissenting). But as Roberts correctly stated, the tax credit *amount* depends on whether the taxpayer purchases insurance on an appropriate exchange, not that the issuance of any tax credit at all depends on the type of exchange. See *id.* at 2487. Even Roberts's language, however, belies a fair amount of complexity. The ACA calculates the amount of tax subsidies owed to an individual, the "premium assistance credit amount," by determining a "premium assistance amount," and the "premium assistance amount" is in turn determined by adding together the cost of a person's premiums for each "coverage month," defined as a month in which a person is covered by a plan they enrolled in through "an Exchange established by the State." 26 U.S.C. § 36B(b) (2012). In other words, the law does not so much *state* that subsidies are only available through state exchanges, as provide a tiered calculation for determining subsidies that would always add up to zero for those who purchase insurance on a Federal Exchange. See *King v. Burwell*, 759 F.3d 358, 368 (4th Cir. 2014) ("Under the plaintiffs' construction, the premium credit amount for individuals purchasing insurance through a Federal Exchange would always be zero."). This is not exactly "plain language." Cf. Brief of Amicus Curiae Judicial Watch, Inc. in Support of Petitioners, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), 2014 U.S. S. Ct. Briefs LEXIS 4583, at \*6 ("Section 36B plainly states that only an individual who purchases health insurance coverage 'through an Exchange established by the State under section 1311 of the [ACA]' is eligible to receive refundable tax credits." (citations omitted) (emphasis added) (second alteration in original)). In *Halbig v. Sebelius*, 27 F. Supp. 3d 1 (D.D.C. 2014), it took Judge Friedman five paragraphs and nearly an entire page of his opinion to explain the connection between "established by the State" and tax credit availability. See 27 F. Supp. 3d at 18. In fact, this section of the law is confusing enough to have possibly stymied a Federal Court of Appeals judge: in Judge Gregory's otherwise excellent summary of the law he states that "the premium assistance amount is the sum of the monthly premium assistance amounts for all 'coverage months,'" when in fact the premium assistance *credit* amount is the sum of the monthly premium assistance amount for all coverage months. See *King*, 759 F.3d at 368.

41. See *King*, 135 S. Ct. at 2489.

42. *Id.*



Human Services will set up “*such* Exchange,” implying that federal and state established exchanges are functionally equivalent.<sup>43</sup>

The second step was the ambiguity *vel non* of § 36B’s “established by the State” language. That is, federal and state exchanges may be functionally the same, but § 36B nevertheless expressly mentions who established the exchange as a qualifier for who gets tax credits.<sup>44</sup> As evidence that this qualifying language does not mean what it apparently says, Chief Justice Roberts relied on the “qualified individual” conundrum.<sup>45</sup> The Act defines a “qualified individual” as an individual who “resides in *the* State that established the Exchange,”<sup>46</sup> but also “provides that all Exchanges shall make available qualified health plans to qualified individuals.”<sup>47</sup> Read literally, this would appear to mean that a federally established exchange has to provide health insurance plans, even if it has no eligible customers to whom it can provide such plans.<sup>48</sup> For Chief Justice Roberts, this was evidence that “established by the State” may not mean what it seems to say.

Step three, determining whether the phrase “under § 1311” could apply to a federal exchange, was the thorniest step. The Act provides two sections for setting up exchanges: section 1311 for state

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43. *Id.* at 2489–90. At least Roberts seemed to think this step was relatively easy. He claimed that both parties “agree[d] that a Federal Exchange qualifies as ‘an Exchange’ for purposes of Section 36B.” *Id.* at 2489. However, to support this assertion Roberts cited the Petitioner’s brief, and it is not apparent that they would agree with his “such Exchange” argument. *See* Brief for Petitioners, *King*, 135 S. Ct. at 2480 (No. 14-114), 2014 WL 7386999, at \*22 (“The word ‘such’ cannot bear this weight.”). Furthermore, Scalia does not readily concede this point. *King*, 135 S. Ct. at 2500 (Scalia, J., dissenting) (“The word ‘such’ does not help the Court one whit.”).

44. *See id.* at 2498 (Scalia, J., dissenting). It is perhaps telling that Roberts reinvoles the “statutory scheme” instruction from *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), here. *Id.* at 2490.

45. *See id.*

46. 42 U.S.C. § 18032(f)(1)(A) (2012) (emphasis added); *King*, 135 S. Ct. at 2490.

47. *King*, 135 S. Ct. at 2490 (quotations and citations omitted).

48. *Id.*; *see also* *King v. Burwell*, 758 F.3d 358, 370 (4th Cir. 2014). The counterargument to this “qualified individual” conundrum is that § 1312(a), which defines “qualified individual,” states that “[a] qualified individual *may* enroll in any qualified health plan.” 42 U.S.C. § 18032(a)(1) (2012) (emphasis added); *Halbig v. Burwell*, 758 F.3d 390, 404 (D.C. Cir. 2014), and not that “*only* a qualified individual may enroll in such a plan.” *Halbig*, 758 F.3d at 404. This counterargument, however, has a plain (if not fatal) flaw: read in this manner, the Act would allow anyone, from *any state*, to purchase health insurance on federal exchanges in *any state*. That is, this reading would effectively allow interstate insurance purchases, something the Act clearly only envisioned as occurring under explicit interstate compacts. *See* 42 U.S.C. § 18053; *see also* Richard Cauchi, *Out-of-State Health Insurance—Allowing Purchases*, NAT’L CONF. STATE LEGISLATURES <http://www.ncsl.org/research/health/out-of-state-health-insurance-purchases.aspx> (last updated Jan. 3, 2017) [<https://perma.cc/7UKF-HGFR>]; Avik Roy, *Will Buying Health Insurance Across State Lines Reduce Costs?*, FORBES (May 11, 2012, 11:52 AM), <http://www.forbes.com/sites/theapotheary/2012/05/11/will-buying-health-insurance-across-state-lines-reduce-costs/> [<https://perma.cc/4YJ5-UA46>].

exchanges and section 1321 for a federal exchange.<sup>49</sup> How could an exchange established under section 1311 be an exchange established under section 1321?<sup>50</sup> For Chief Justice Roberts, the answer lay in the ACA's definitional section.<sup>51</sup> The ACA defines "Exchange" as an "Exchange established under section [1311]."<sup>52</sup> So when section 1321 provides that the Secretary may set up "such Exchange," that is an "Exchange established under section [1311]."<sup>53</sup>

Chief Justice Roberts did not appear to be particularly concerned with some of the more obvious arguments against his interpretation.<sup>54</sup> After briskly considering these three steps he simply stated that "[t]he upshot of all this is that the phrase . . . is properly viewed as ambiguous,"<sup>55</sup> and chalked the whole issue up to an instance of "inartful drafting."<sup>56</sup> Chief Justice Roberts's opinion can ultimately be read as follows: the policy ramifications of reading this passage literally would be catastrophic for this law,<sup>57</sup> and there is *just enough* ambiguity to justify reading around the problematic language;<sup>58</sup> therefore, we will read four words out of this statute,<sup>59</sup> and "Exchange established by the state" will operate as "Exchange."

This holding was essentially a dramatic employment of the remedial purposes canon. To effect the overall goals of the statute, Chief Justice Roberts read four words out of the statute. This Note will proceed to discuss whether this type of remedial reading could be warranted with respect to an obscure provision of CERCLA. But first, it will define the remedial purposes canon.

### *B. What is the Remedial Purposes Canon?*

Canons of construction have been defined as "[t]he system of fundamental rules and maxims which are recognized as governing the

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49. 42 U.S.C. §§ 18031, 18041 (2012); *see King*, 135 S. Ct. at 2498 (Scalia, J., dissenting).

50. *See King*, 135 S. Ct. at 2498 (Scalia, J., dissenting).

51. *Id.* at 2490 (majority opinion).

52. *Id.* (citing 42 U.S.C. § 300gg-91(d)(21) (2012)).

53. *Id.*

54. The simplest argument against this logic is the canon against surplusage: why would the drafters have explicitly included "established by the State" in section 36B if it did not matter, *see id.* at 2498 (Scalia, J., dissenting), especially considering that the Act uses less qualified language throughout, *see id.* at 2499 (Scalia, J., dissenting)? Roberts spent a single paragraph addressing this single argument out of the many made by the petitioner and dissent. *See id.* at 2492.

55. *Id.* at 2491.

56. *Id.* at 2492.

57. *See id.* at 2486–87.

58. *See id.* at 2489–92.

59. *See id.* at 2496.

construction of written instruments.”<sup>60</sup> The remedial purposes canon is the rule that a statute should be read to address the “mischief” which it sought to address.<sup>61</sup> Therefore, a court must theoretically “first decide whether the statute is ‘remedial’ in nature” before employing the canon.<sup>62</sup> This Note does not discuss the remedial purpose canon in so strict a fashion. Virtually all statutes are designed to remedy some problem.<sup>63</sup> Thinking of the remedial purposes canon as a discrete tool rather than a generally assumed understanding of statutory language grew out of a time when common law predominated.<sup>64</sup> At a time when American law was predominantly nonpositive, statutes were necessary only when legislators meant to supersede the common law, and judges were supposed to read such statutes with their specific purposes in mind.<sup>65</sup> The general “statutorification” of American law has changed that calculus.<sup>66</sup> Statutes are no longer looked upon as unique ways of filling in gaps in the common law, but instead are seen as the primary method of lawmaking.

Therefore, this Note considers “the remedial purposes canon” broadly—as the general interpretative strategy of reading statutory language so as best to deal with the “evil” that the law sought to address. That is not to say that said “evil” is always clearly defined, which is especially true when the interpretative task is to define the meaning of a specific provision in a deeply complex law. The broader the lens, the easier the “remedial purpose” is to discern, and vice versa. It is relatively uncontroversial, for instance, to suggest that the “purpose” of the ACA was to “increase the number of Americans covered by health insurance and decrease the cost of health care.”<sup>67</sup> Chief Justice Roberts, in *King*, seemed to read the statutory language at issue to further that general goal.<sup>68</sup> What was decidedly more controversial was to assume that Congress did not intend to withhold tax credits to people who purchased health insurance on an exchange established by

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60. Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 208 (1996) (quoting BLACK’S LAW DICTIONARY 207 (6th ed. 1990)).

61. *See id.* at 229 (“The remedial purpose canon grew out of the ‘mischief rule’ of Heydon’s Case.”).

62. *Id.* at 233.

63. *See* Llewellyn, *supra* note 1, at 400 (“If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.”); Watson, *supra* note 60, at 233.

64. *See* Watson, *supra* note 60, at 229–32.

65. *See id.* at 229.

66. *Id.*

67. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

68. *See* King v. Burwell, 135 S. Ct. 2480, 2492–94 (2015).

the federal government, because that would not, at the time the issue came before the Court, further the general purpose of the ACA. With this understanding of the remedial purposes canon, as well as the background of the ACA and *King*, this Note now proceeds to discuss a provision of a different law with a clear purpose, passed in an odd and contentious manner, and containing a provision that perhaps should not be read to mean what it clearly says.

## II. A REMEDY FOR REMEDIES: THE HISTORY OF CERCLA AND THE NATURE OF THE § 113(H) PROBLEM

In 1945, Jesse Cannon entered into a six-month lease with the War Department, allowing it to test weapons on his property with one condition: that the Army clean up whatever mess it made.<sup>69</sup> Over sixty years later, in 2005, Jesse Cannon's grandsons were still trying to keep the government to its word and were suing in federal court in an attempt to make the government clean up that mess.<sup>70</sup> The Cannons were unable to procure a remedy, however, because Congress wanted to make sure that the Environmental Protection Agency ("EPA") was not slowed down in its cleanup efforts of toxic sites.<sup>71</sup>

In 1989, a group of New Jersey citizens worried that a cleanup plan chosen by the EPA for a particular site would have significant adverse health effects for the public.<sup>72</sup> Armed with the testimony of various doctors and specialists, these citizens contended that the Agency was acting with a dangerous lack of information.<sup>73</sup> But, because Congress wanted to make sure that the EPA was not stymied by frivolous lawsuits filed by polluters, the court denied the citizens' request for a new plan.<sup>74</sup>

These counterintuitive outcomes are the result of an extraordinarily broad and "unusual"<sup>75</sup> jurisdiction-stripping provision in the 1986 Superfund Amendments and Reauthorization Act ("SARA").<sup>76</sup> This provision, section 113(h), limited the jurisdiction of federal courts over suits regarding the Comprehensive Environmental

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69. Cannon v. Gates, 538 F.3d 1328, 1330 (10th Cir. 2008).

70. *Id.* at 1330–32.

71. *See id.* at 1333–36 (holding that CERCLA's section 113(h), which the court stated was enacted to prevent delay, denied jurisdiction to the Cannons).

72. *See* Neighborhood Toxic Cleanup Emergency v. Reilly, 716 F. Supp. 828, 829 (D.N.J. 1989).

73. *See id.*

74. *See id.* at 837.

75. *See* ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE 169 (1991).

76. Pub. L. No. 99-499, 100 Stat. 1613; 42 U.S.C. § 9613(h) (2012).

Response, Compensation and Liability Act (“CERCLA”).<sup>77</sup> Section 113(h) deals with the timing of review for challenges to removal actions—actions taken in immediate response to a release of hazardous materials—and remedial actions—longer term actions designed to remedy the damage caused by a spill.<sup>78</sup> Section 113(h) prevents federal courts from taking jurisdiction over “any challenges to removal or remedial action,” except under certain specific conditions, including various actions to recover costs.<sup>79</sup> Challenges to remedial actions were probably not the immediate harm that Congress was worried about when passing this amendment,<sup>80</sup> but this language effectively bars any litigant, including those engaged in a traditional citizen suit, to challenge the EPA’s remedial actions until they are completed<sup>81</sup>—a process that may take decades.<sup>82</sup>

The following Section will briefly address the history of CERCLA’s passage in more detail, and then the history behind, and reasons for, Congress’s inclusion of the jurisdiction-stripping provision in the SARA amendments. This Section will make the case that the enacting Congress did not intend for this jurisdiction-stripping provision to be read as broadly as the above examples suggest that it is.

### A. CERCLA: A Remedial Statute

CERCLA is an ideal statute to use as a vehicle for analyzing the theoretical bounds of the remedial purposes canon because it is both an evidently remedial law and one with particularly confusing legislative history.<sup>83</sup> Most legislation of the “environmental decade” fits the first

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77. See generally Margot J. Pollans, *A “Blunt Withdrawal”? Bars on Citizen Suits for Toxic Site Cleanup*, 37 HARV. ENVTL. L. REV. 441 (2013).

78. See 42 U.S.C. § 9601(23)–(24) (2012); see also *infra* Section II.A.3 for more information about the difference between remedial and removal actions.

79. See 42 U.S.C. § 9613(h) (2012).

80. See *infra* Section II.B.

81. In fact, the language of the statute seems to suggest that there could be no challenges, aside from the explicit exceptions, to removal or remedial actions ever. That is, there is nothing in the statute that explicitly permits federal jurisdiction to challenges once removal or remedial actions are completed. Still, commentators seem to think such challenges would be acceptable. See Pollans, *supra* note 77, at 451 (“Polluters would have to wait until cleanup was done to bring challenges.”). And so did the enacting Congress. See H.R. REP. NO. 99-962, at 224 (1986) (Conf. Rep.) (stating that 113(h)(4), the section allowing citizen suits to proceed in limited circumstances, was “not intended to preclude judicial review until the total response action is finished”).

82. See Pollans, *supra* note 77, at 442 (noting that “[t]oxic site cleanup is . . . [p]ainfully slow,” and that “[t]he average cleanup takes twelve years and some take much longer.”).

83. See Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 2 (1982) (“In the instance of the “Superfund” legislation, a hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law.”).

criteria. Commonly understood environmental problems were the impetus for our major “media based” statutes (e.g., the Clean Air Act and the Clean Water Act) as well as other targeted “issue” statutes (e.g., CERCLA’s sister statute, the Resource Conservation and Recovery Act (“RCRA”). What makes CERCLA a somewhat better vehicle for analyzing the remedial purposes canon, and for comparison with the ACA, is that while the issue the statute attempted to remedy was obvious, Congress passed the bill in a particularly pressured, fly-by-night way. As a result, Congress left a legislative history that muddies the statute’s otherwise clear remedial purpose.<sup>84</sup> This Section will briefly discuss the primary impetus for the legislation as well as its rushed passage.

### 1. The Love Canal Impetus

CERCLA was passed in response to public fears about environmental disasters, but particularly in response to the “Love Canal” catastrophe, “one of the most appalling environmental tragedies in American history.”<sup>85</sup> The story of Love Canal is terrible but fairly simple. The remains of a failed canal project were used as a chemical dumpsite for several decades.<sup>86</sup> In 1953, Hooker Chemical Company covered the dump and sold the land to the city of Niagara Falls, New York.<sup>87</sup> Ultimately, over one hundred homes and a school were built above the contaminated site.<sup>88</sup> After unusually intense rain and snowfall, the “environmental time bomb [went] off,” and a toxic soup of chemicals began to leach out of the ground and into the community.<sup>89</sup>

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84. There are several parallels to the ACA. The issues that the ACA aimed to address were fairly clear to most American voters after the 2008 election. See Robert J. Blendon et al., *Voters and Health Reform in the 2008 Presidential Election*, NEW ENG. J. MED. (Nov. 6, 2008), <http://www.nejm.org/doi/full/10.1056/NEJMs0807717#t=article> [<https://perma.cc/36CJ-GM6V>] (noting that voters “ranked health care third as an election issue”). And the mechanisms for solving those issues had been debated by wonks and legislators for decades. See, e.g., Stuart M. Butler, *Assuring Affordable Health Care for All Americans*, HERITAGE FOUND. (Oct. 1, 1989), <http://www.heritage.org/research/lecture/assuring-affordable-health-care-for-all-americans> [<https://perma.cc/WJE8-LBM9>] (proposing an insurance mandate). But the complexity and rushed passage of the bill left a confusing and easily manipulated legislative history. See generally John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 L. LIBR. J. 131 (2013).

85. Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17 (1979), <http://www2.epa.gov/aboutepa/love-canal-tragedy> [<https://perma.cc/GY59-5FCU>].

86. *Id.*

87. *Id.*

88. See *Love Canal: Public Health Time Bomb, A Special Report to the Governor and Legislature*, OFF. PUB. HEALTH 3 (Sept. 1978), [https://www.health.ny.gov/environmental/investigations/love\\_canal/ctimbmb.pdf](https://www.health.ny.gov/environmental/investigations/love_canal/ctimbmb.pdf) [<https://perma.cc/2NGB-X3ES>].

89. *Id.*

This was not a purely local issue. In New York State's Health Department Report to the Governor on the disaster, the authors wrote that "Niagara Falls . . . has again become the focus of international attention," and this time for something beyond its proximity to a waterfall.<sup>90</sup> That report described Love Canal as "a major human and environmental tragedy without precedent and unparalleled in New York State's history."<sup>91</sup> The horrors of Love Canal, which involved "deadly chemicals oozing through the ground . . . burning children and pets and . . . causing birth defects and miscarriages," led President Jimmy Carter to declare an environmental emergency in the area in 1978.<sup>92</sup>

## 2. A "Whirlwind Adoption"

With a relatively environmentally friendly Congress,<sup>93</sup> this seemed like a great time not to let a tragedy go to waste.<sup>94</sup> On the other hand, a general mood against perceived government overregulation was working to change the status quo both in Washington and across the country.<sup>95</sup> The result was a lame duck Congress that wanted to quickly pass a statute to deal with environmental disasters like Love Canal before Reagan took office in 1981.<sup>96</sup> The final year of Carter's presidency thus saw the "whirlwind adoption"<sup>97</sup> of what became CERCLA. To make

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90. *Id.*

91. *Id.*

92. Anthony DePalma, *Love Canal Declared Clean, Ending Toxic Horror*, N.Y. TIMES (Mar. 18, 2004), <http://www.nytimes.com/2004/03/18/nyregion/love-canal-declared-clean-ending-toxic-horror.html> [<https://perma.cc/2A7B-VPXA>].

93. See LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT 1–2* (1982) ("[N]o politician could afford to ignore the demands being made by the [environmental] movement [in the 1970s].").

94. See Grad, *supra* note 83, at 1–2 (describing how Congress had been attempting to pass toxic waste cleanup legislation for several years before the passage of CERCLA); *id.* at 7 (noting that the committee report for S. 1480, which eventually became CERCLA, "[paid] particular attention to Love Canal" and that "[i]t is not insignificant that the national election which changed the composition of the Congress took place on November 4, 1980 [twenty days before the first version of the bill was considered on the floor]").

95. See WENNER, *supra* note 93, at 33 (discussing how "[l]ater years [of the 1970s] were filled with more critical debate over [various environmental policies]"); Joseph DiMento, *Asking God to Solve Our Problems: Citizen Environmental Suit Legislation in the Western States*, 2 UCLA J. ENVTL. L. & POL'Y 169, 184 (1982) (describing the 1970s as an "environmental decade" and suggesting that perhaps the courts would be less amenable to environmental regulation in the 1980s); Kenneth T. Walsh, *The Most Consequential Elections in History: Ronald Reagan and the Election of 1980*, U.S. NEWS (Sept. 25, 2008, 11:57 AM), <http://www.usnews.com/news/articles/2008/09/25/the-most-consequential-elections-in-history-ronald-reagan-and-the-election-of-1980> [<https://perma.cc/J6YA-H7DX>].

96. See Grad, *supra* note 83, at 2–5.

97. *Columbia River Serv. Corp. v. Gilman*, 751 F. Supp. 1448, 1452 (W.D. Wash. 1990).

an extremely complicated story short, the Senate ultimately presented a bill in front of the House “on a take-it-or-leave-it basis, [and] the House took [it] . . . groaning all the way.”<sup>98</sup> The House’s acquiescence to the Senate’s final version is the primary reason that the Senate Report has become such an important tool for determining the legislative history of CERCLA.<sup>99</sup> This aspect of CERCLA’s passage also presents an important similarity with the Affordable Care Act: that roughly one-half of Congress opposed the final legislation.<sup>100</sup> CERCLA and the Affordable Care Act differ considerably in terms of their political contentiousness, but they both, to a degree, present the same problem regarding legislative history. The overall impetus behind each statute is readily discernable, but is that the same as “legislative intent”? In other words, can we really determine the intent of *the* legislature, when in fact a legislature is a group of people with disparate needs, wants, constituencies, or understandings of specific provisions?<sup>101</sup> CERCLA’s rushed passage resulted in many confusing provisions and statutory gaps, but the principal problem this Note will address is the statute’s failure to deal with the delay caused by preliminary challenges to EPA action.

### 3. Removals and Remedies: The Two Steps for a Mess

CERCLA “establish[ed] a two-level response mechanism” for toxic-site cleanups consisting of “removal” actions and “remedial” actions.<sup>102</sup> A removal action is the immediate action taken at a site after

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98. Grad, *supra* note 83, at 1.

99. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 n.12 (2d Cir. 1985). See generally S. REP. NO. 96-848 (1980).

100. No Republicans voted for the ACA. See *Final Vote Results for Roll Call 165*, CLERK.HOUSE.GOV, <http://clerk.house.gov/evs/2010/roll165.xml> (last visited Feb. 7, 2017) [<https://perma.cc/Y38D-2R5L>]; *U.S. Senate Roll Call Votes 111th Congress-1st Session*, U.S. SENATE (last visited Feb. 7, 2017), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00396](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396) [<https://perma.cc/6CM3-2RKQ>]. Admittedly, this interpartisan disagreement is different than the intercameral disagreement that accompanied the passage of CERCLA. But it still poses the same problems for determining a single, unified “legislative intent.”

101. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 376 (2012) (“[T]hat the legislature even *had* a view on the matter at issue . . . is pure fantasy. In the ordinary case, most legislators could not possibly have focused on the narrow point before the court [and] the few who did undoubtedly had varying views.”).

102. See 42 U.S.C. § 9601(23)–(24) (2012); Grad, *supra* note 83, at 11. *But see* Jerry L. Anderson, *Removal or Remedial? The Myth of CERCLA’s Two-Response System*, 18 COLUM. J. ENVTL. L. 103 (1993) (arguing that, while Congress intended a clear two-part process of immediate removal action followed by longer-term remedial action, in practice the difference between “removal” and “remedial” is often unclear).



a release or threatened release.<sup>103</sup> They “have generally been thought of as short-term, interim actions taken to prevent imminent harm and to keep a release of contaminants from getting worse.”<sup>104</sup> Removals, in other words, were considered emergency response actions—something authorities would need to do quickly in order to get a spill under control.<sup>105</sup> These are actions that were never intended to last long, and whose delay could result in immediate harm to affected populations.<sup>106</sup>

Remedial actions are longer-term actions designed to create a permanent remedy at the contaminated site.<sup>107</sup> By statutory definition, these actions can include a variety of intensive methods.<sup>108</sup> In addition to being time and labor intensive, remedial actions can be remarkably complex.<sup>109</sup> CERCLA itself does provide *some* guidance for how the EPA should decide which remedial actions to take. For instance, the statute compels the EPA to produce “remedial investigations and feasibility studies,” known as “RI/FS.”<sup>110</sup> But the statute provides virtually no guidance as to what an RI/FS should entail.<sup>111</sup> These types of studies, used both to determine the impact of an action on the environment and to develop alternatives, are familiar to practitioners and students of environmental law. They are reminiscent of an Environmental Impact Study (“EIS”) mandated by the National Environmental Policy Act (“NEPA”),<sup>112</sup> the bill that began the “environmental decade.”<sup>113</sup>

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103. 42 U.S.C. § 9601(23).

104. Anderson, *supra* note 102, at 103.

105. S. REP. NO. 96-848, *supra* note 99, at 54 (“‘Removal’ refers to actions which must proceed without delay.”).

106. *Id.* at 52 (“Removal may continue if *immediately* required to prevent, limit or mitigate an emergency; there is an *immediate* risk; and such assistance *on a timely basis* will not otherwise be provided.” (emphasis added)).

107. See 42 U.S.C. § 9601(24); S. REP. NO. 96-848, *supra* note 99, at 52 (“Remedial actions may be undertaken *after* removal actions have consumed 6 months . . . .” (emphasis added)); Anderson, *supra* note 102, at 103 (“Remedial action . . . refers to the permanent remedy for a site, which generally comprises long-term treatment or containment of the hazardous substances.”). Despite Anderson’s claim that the line between removal and remedial actions is blurry, EPA internally continues to stand by the idea that remedial actions are “permanent.” See *RCRA Corrective Action Training Program: Getting to YES!*, EPA 9 (Nov. 2009), <https://www.epa.gov/sites/production/files/2016-04/documents/mod5.pdf> [<https://perma.cc/WVK7-WFN8>].

108. See 42 U.S.C. § 9601(24) (“The term includes . . . perimeter protection using dikes . . . dredging or excavations . . . onsite treatment or incineration . . .”).

109. See, e.g., C.N. Mulligan et al., *Remediation Technologies for Metal-Contaminated Soils and Groundwater: An Evaluation*, 60 ENGINEERING GEOLOGY 193 (May 30, 2001), <http://www.sciencedirect.com/science/article/pii/S0013795200001010> [<https://perma.cc/4HWY-26CS>].

110. See 42 U.S.C. § 9616(d) (2012).

111. See *Frey v. U.S. EPA*, 937 F. Supp. 2d 964, 965 (S.D. Ind. 2013) (“CERCLA does not define nor describe what should be included in an RI/FS.”).

112. Pub. L. No. 91-190, 83 Stat. 852 (1970).

113. See 42 U.S.C. § 4332 (2012); WENNER, *supra* note 93, at 1.

Ordinarily, agency actions of such consequence as determining a potentially decades-long remediation process<sup>114</sup> would be open to challenges that the agency had not considered alternatives or conducted proper research. The later section 113(h) amendment, however, precludes not only review of an RI/FS, but also a challenge to any EIS the EPA may have made.<sup>115</sup>

*B. A Remedy for the Remedies? The SARA Amendments and 113(h)*

If CERCLA is a classically remedial statute,<sup>116</sup> then the SARA is perhaps the ultimate remedial statute: in 1986, Congress acted specifically to fix certain problems of a statute that was itself designed specifically to fix certain problems. One of several issues left unresolved after the hurried passage of CERCLA was the timing of litigation. Essentially, CERCLA drafters sought to allow the EPA the discretion to quickly and adequately respond to environmental disasters,<sup>117</sup> but challenges to EPA action in the courts had the potential to seriously delay response times.<sup>118</sup> Legislators were thus faced with creating a remedy for the remedies—that is, a statutory remedy for the problem that confronted the EPA’s remedial action at contaminated sites. The then-recent, horrible incident in Bhopal, India, made rapid response a primary goal when Congress drafted and passed the SARA amendments.<sup>119</sup> In response to the perceived dangers of delayed EPA action, Congress included section 113(h) in the SARA amendments,

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114. See Pollans, *supra* note 77.

115. *Id.* at 454 (discussing how section 113(h) has been applied inter-statutorily).

116. See Watson, *supra* note 60, at 271–72 (describing how CERCLA “approximates the ‘best-case scenario’ for the [remedial purposes] canon’s application”).

117. One of the “basic elements of the bill” was “providing ample Federal response authority to help clean up hazardous chemical disasters.” Grad, *supra* note 83, at 8–9 (citing S. REP. NO. 96-848, *supra* note 99, at 13).

118. See McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 329 (9th Cir. 1995) (“Section 113(h) protects the execution of a CERCLA plan . . . from lawsuits that might interfere with the expeditious cleanup effort.”).

119. See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, Vol. 2 (1986), reprinted in COMM. ON ENV’T & PUB. WORKS, 101ST CONG. 2D SESS., A LEGISLATIVE HISTORY OF THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, at 409 (1990) (statement of Sen. Lautenberg) (“The recent tragedy in Bhopal, India, raises several critical issues relevant to the reauthorization of Superfund.”); see also *id.* at 515 (questions prepared by Sen. Simpson for Assistant Attorney General Henry Habicht) (“EPA has emphasized the need for rapid clean-up as a primary goal. You have also suggested that anything that slows clean-up, no matter how well-intended, could inadvertently increase the risk to public health that led the nation to decide to undertake the Superfund in the first place.”). For more background on the Bhopal disaster, see Alan Taylor, *Bhopal: The World’s Worst Industrial Disaster, 30 Years Later*, ATLANTIC (Dec. 2, 2014), <http://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/> [https://perma.cc/K6NW-9ZWG].

intending it to be a comprehensive firewall for litigation prior to the completion of cleanups by the EPA.<sup>120</sup>

Section 113(h) states that “[n]o Federal court shall have jurisdiction under federal law . . . to review any challenges to removal or remedial action selected [by the EPA] or to review any order [requiring a private party to engage in removal or remedial action], in any action,” except under certain specific conditions, including various actions to recover costs.<sup>121</sup> This provision has been read as broadly as possible to prevent any challenges to EPA action until all clean up efforts, including removal *and* remedial actions, have ended.<sup>122</sup> This Note explores the possibility that judges read around the apparently plain language preventing challenges to remedial actions, and instead read the statute as: “[n]o Federal court shall have jurisdiction under federal law . . . to review any challenges to *removal action* selected [by the EPA].”<sup>123</sup> Admittedly, the plain language of the statute suggests that Congress intended this provision to be a firewall against challenges to removal *or remedial* actions. But the plain language of CERCLA is not always clear.<sup>124</sup> And the legislative history of section 113(h) suggests that there may have been some competing interpretations.<sup>125</sup>

There are at least two reasons to think that Congress did not intend for section 113(h) to be expansive enough to bar any litigation regarding a cleanup until the EPA was completely done. First, it is likely that Congress simply did not understand how long remedial actions would take. At the time that SARA was passed, Love Canal had been undergoing cleanup efforts for roughly six years, and the EPA had officially been working at the site under the authority of CERCLA for just three years.<sup>126</sup> It would be another *thirteen* years before “remedy construction” was completed.<sup>127</sup> Remedy construction “is the phase in

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120. See *Cabot Corp. v. U.S. EPA*, 677 F. Supp. 823, 827 (E.D. Pa. 1988) (quoting comments by Sen. Thurmond in the legislative history).

121. See *id.* (discussing how section 9613(h) covers the EPA’s cleanup activities that comply with SARA).

122. See Pollans, *supra* note 77, at 443 (explaining that federal courts decline to hear citizen suits that are barred by CERCLA).

123. 42 U.S.C. § 9613(h) (2012) (emphasis added).

124. See *infra* Section II.C (discussing interpretation of seemingly plain language in CERCLA).

125. See LIGHT, *supra* note 75, at 25 (discussing the comments of Rep. Glickman regarding Sen. Stafford’s interpretations of 113(h)); *id.* at 170 (“The legislative history of [113(h)] is extremely controversial.”).

126. *EPA Superfund Program Profile: Love Canal, Niagara Falls, NY*, EPA, <https://cumulis.epa.gov/supercpad/cursites/csinfo.cfm?id=0201290> (last visited Aug. 30, 2016) [<https://perma.cc/35YX-WYWJ>].

127. See *id.*

Superfund site cleanup where the actual remedy . . . is built”<sup>128</sup>—it is not even necessarily the end of “remedial action,” the point at which section 113(h) would theoretically allow for litigation to proceed.<sup>129</sup> Love Canal was not delisted from the National Priorities List, an event that surely would mark the end of “remedial action,” until 2004—*twenty-six* years after Jimmy Carter first declared the site to be an environmental disaster, and eighteen years after Congress passed SARA.<sup>130</sup> The federal government had not engaged in this type of environmental disaster remediation before, at least on this scale, and the congressmen who wrote and passed SARA may not have understood just how long remediation would take.

Second, section 113(h) has been read to bar any litigation, including citizen suits, until after all remedial action has been completed.<sup>131</sup> There *is* a specific exception for citizen suits;<sup>132</sup> however, the language does not allow for a challenge to a removal action when remedial action “is to be undertaken at the site.”<sup>133</sup> The enacting Congress was very aware of the utility of citizen suit provisions in environmental enforcement statutes.<sup>134</sup> It appears as though the principal harm that Congress was attempting to address with section 113(h) was the use of abusive litigation by polluters to delay cleanups,<sup>135</sup> not the abusive use of litigation by citizen groups. While

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128. *Glossary for the Superfund Site Profile*, EPA <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=modules.glossary&id=0> (last visited Aug. 30, 2016) [<https://perma.cc/FXW8-YTZL>].

129. *See id.* (defining “remedial action” as “[t]he actual construction or implementation phase of a Superfund site cleanup that follows remedial design”). As noted previously, the literal language of section 113(h) would appear to preclude challenges even after the remedial action is completed. *See supra* note 81.

130. *See* DePalma, *supra* note 92 (reporting that Love Canal was finally declared clean in 2004). The National Priorities List is the official list of priority sites for toxic and hazardous releases. *Superfund: National Priorities List*, EPA, <https://www.epa.gov/superfund/superfund-national-priorities-list-npl> (last visited Feb. 27, 2017) [<https://perma.cc/BG3D-UFTS>].

131. *See* Pollans, *supra* note 77, at 443 (stating that courts have “almost uniformly” construed CERCLA as a bar to suits related to any site where remediation is ongoing).

132. *See* 42 U.S.C. § 9613(h)(1)–(3) (2012) (excepting suits seeking contribution or reimbursement or enforcing orders under other provisions of the title).

133. *Id.* § 9613(h)(4).

134. *See* Stephen Fotis, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U. L. REV. 127, 131–37 (1985) (discussing how Congress’s enactment of the Clean Air Act and Clean Water Act, both passed less than a decade before CERCLA, “embrace[d] [the] tradition of citizen participation as an important tool”); *see also* Pollans, *supra* note 77, at 446–51 (discussing CERCLA’s citizen suit provision in the context of other environmental statute citizen suit provisions).

135. *See* Pollans, *supra* note 77, at 450–51 (explaining that “Section 113(h) codified an approach courts had already begun taking in response to *polluter* recalcitrance” and that in “CERCLA’s early years, polluters often tried to evade liability (or, at least, minimize response

the unintended consequence of barring citizen suits does not compel the judicial revision this Note suggests,<sup>136</sup> shutting the courthouse doors to citizen suits demonstrates that the enacting Congress may not have understood the broad sweep of this provision. The Conference Report, for instance, states that section 113(h)(4), regarding removing jurisdiction in citizen suit challenges, “is not intended to preclude judicial review until the total response action is finished,”<sup>137</sup> something its plain language compels (assuming there is “remedial action . . . to be undertaken at the site”).<sup>138</sup> The enacting Congress’s general naiveté, however, is demonstrated by the fact that the Conference Report added the following caveat: review would be acceptable before the “total response action is finished *if* the response proceeds in distinct and separate stages.”<sup>139</sup> Not only does the enacted language not reflect that caveat, but later cases would demonstrate that determining the exact contours of when a discrete remedial action ends and another begins, or even when a removal action ends and a remedial action begins, is no easy task.<sup>140</sup> In other words, citizen suits were commonly employed in environmental statutes at the time SARA was passed, and the enacting Congress did not seem to want this jurisdiction-stripping provision to prevent citizen suits. But they still wrote a provision that did just that. This context suggests that they may not have carefully considered the literal language of section 113(h).

One very early interpretation of section 113(h) did involve reading around its plain language.<sup>141</sup> *Cabot Corp. v. EPA* held that section 113(h) did apply to both removal and remedial actions, but that the provision allowed an inherent exception for challenges alleging an irreversible harm to human health and the environment, as opposed to citizen suit challenges claiming monetary damages.<sup>142</sup> The judge in

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costs) by challenging government cleanup plans before they were implemented”) (emphasis added)).

136. That is, one could read the statute to allow citizen suits but still bar challenges by PRPs until after removal *or remedial* action is completed.

137. H.R. REP. NO. 99-962, at 224 (1986).

138. 42 U.S.C. § 9613(h)(4); *see also* *Cabot Corp. v. EPA*, 677 F. Supp. 823, 826 (E.D. Pa. 1988) (holding that section 113(h) barred a challenge by a citizen group until all cleanup had ceased at the site).

139. H.R. REP. NO. 99-962, at 224.

140. *See Cannon v. Gates*, 538 F.3d 1328, 1334 (10th Cir. 2008) (holding that the government was still in the process of planning remedial actions at the site decades after they had initially become aware that the site was contaminated). *See generally* Anderson, *supra* note 102 (discussing how Congress has, without providing guidance on how to do so, emphasized the need to distinguish remedial actions from removal actions).

141. *Cabot Corp.*, 677 F. Supp. at 823.

142. *See id.* at 829 (discussing how irreparable harms alleged in a suit should be reviewed promptly).

*Cabot Corp.* read the statute remedially to bar the plaintiffs in that particular action, who were really potentially responsible parties (“PRPs”) suing under “the guise of citizens,” but left open the possibility of allowing a “typical citizen suit.”<sup>143</sup> In *Cabot Corp.*, therefore, the court decided the case according to the letter of the law of section 113(h)—the judge denied jurisdiction over a citizen suit because a removal or remedial action had not been completed at the site.<sup>144</sup> One can wonder, however, what the outcome would have been if the posture of the case had been different—namely, if the plaintiffs *had been* engaged in a typical citizen suit alleging irreparable harm to the environment. In that case, if the judge had held true to his statements that there was an implicit exception for irreversible harm, he would have essentially been employing the same solution this Note considers: that the enacting Congress could not possibly have meant what they said,<sup>145</sup> and therefore a judge should just read around the mistake.

The flexible approach outlined in *Cabot Corp.* has failed to take hold. Section 113(h) has been so strictly applied that it has even prevented the federal government from recovering costs for a cleanup while the cleanup was ongoing<sup>146</sup>—presumably not the outcome the original drafters were intending. One potential reason is the closing of the courthouse doors to citizen suits generally, and primarily through statutory interpretation.<sup>147</sup> This inflexibility has had consequences outside of the realm of potential CERCLA litigation.<sup>148</sup> The broad wording of section 113(h) has led courts to apply the jurisdictional ban to suits under other statutes.<sup>149</sup> That is, litigants who sue the EPA under CERCLA’s companion statute, RCRA, or even under more

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143. *Id.* at 828–29.

144. *Id.* at 829.

145. *See id.* (discussing the legislative history and how certain members of Congress saw a clear difference between more typical citizen suits and citizen suits that are simply a guise for PRPs to challenge agency action).

146. *See United States v. Cordova Chem. Co. of Mich.*, 750 F. Supp. 832, 835–36 (W.D. Mich. 1990) (dismissing a counterclaim because of section 113(h)’s limits on judicial review of EPA actions).

147. *See Pollans, supra* note 77, at 442–43. One possible reason is that judges might be more willing to strictly apply a statutory provision when it helps alleviate their caseload, which, for federal judges at the district court level, has risen at least thirty-nine percent since 1990. *See Caseload Increases Stress Need for New Federal Judgeships*, U.S. COURTS (Sept. 10, 2013), <http://www.uscourts.gov/news/2013/09/10/caseload-increases-stress-need-new-federal-judgeships> [<https://perma.cc/M8UQ-NR3R>].

148. *See Pollans supra* note 77, at 452 (stating that “CERCLA’s preclusion provision is unique because it is not, on its face, limited to causes of action brought under CERCLA itself”).

149. *See id.* at 442–43 (discussing how courts read section 113(h) broadly and apply it regardless of the plaintiff or the underlying cause of action).

disparate legislation such as NEPA, are still barred from getting into court until removal or remedial action is complete.<sup>150</sup>

While the differences between CERCLA and the Affordable Care Act, both in substance and legislative history, are many, there are three important similarities to consider as we compare the Court's approach in *King* to a similar approach regarding section 113(h): (1) both statutes set out to solve clear and publicly understood problems; (2) both employed unclear, or certainly less publicly understood, mechanisms to fix those problems; and (3) both were passed in odd, rushed manners that confuse the legislative record. In this sense, section 113(h) of the SARA amendments is very similar to section 1401 of the ACA: the broad purpose of SARA (and CERCLA generally) is obvious, but the purpose of section 113(h) is less clear. Both SARA section 113(h) and ACA section 1401 raise the same question of whether judges should rely on the broad purpose of the law when confronted with a seemingly anomalous specific provision. Furthermore, CERCLA and SARA make for an excellent foil with which to investigate the limits of remedial reading because the public and courts have long considered them explicitly remedial<sup>151</sup> and because Congress most definitely made some mistakes.<sup>152</sup>

### C. *The Remedial Purposes Canon and CERCLA*

While reading a word entirely out of a statute may seem like a drastic measure, such drastic reworkings of language in CERCLA are actually somewhat commonplace given its history. Environmental legislation generally is easily comprehended as remedial in nature,<sup>153</sup> and CERCLA in particular has been read as “*overwhelmingly remedial*.”<sup>154</sup> Courts have regularly read around seemingly plain language to effect what they believe to be the remedial purpose of the statute.<sup>155</sup> The following two sections briefly describe two such

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150. *See id.* (“[S]ection 113(h) strips federal courts of jurisdiction over claims arising under various other federal laws including the National Historic Preservation Act, the National Environmental Policy Act, and the Administrative Procedure Act in addition to RCRA and CERCLA.”).

151. *See* Watson, *supra* note 60, at 271–72 (describing how CERCLA “approximates the ‘best-case scenario’ for the [remedial purposes] canon’s application”).

152. *See, e.g., infra* Sections II.C.1 and II.C.2, (demonstrating how courts have construed the statute in accordance with its remedial purpose despite its plain language).

153. *See* Watson, *supra* note 60, at 258 (“[C]ourts have included environmental statutes in the category of remedial legislation.”).

154. *Id.* at 263 (emphasis added) (citing various cases).

155. *See id.* at 266 (describing instances in which use of the remedial purpose canon in CERCLA cases have been justified).

instances when courts have read around the plain language of CERCLA.

### 1. Owners and Operators

CERCLA's remedial purpose can be stated in two parts: "(1) to clean up hazardous waste sites promptly and effectively; and (2) to ensure that those responsible for the problem bear the costs and responsibility for remedying the harmful conditions they created."<sup>156</sup> Crucial to the second part is finding who exactly "those responsible" are. CERCLA lays out four categories of parties who are potentially responsible, the aptly named "potentially responsible parties" or "PRPs."<sup>157</sup> The determination of whether a party is a PRP is immensely important because CERCLA's liability scheme is joint, several, strict, and retroactive.<sup>158</sup> If you are deemed a PRP, you may be on the hook for the entire cost of cleanup operations that can regularly run millions of dollars,<sup>159</sup> even if other parties contributed significantly, and even if the spill was caused decades earlier.<sup>160</sup> If you are not one of the four defined PRPs, you pay nothing.<sup>161</sup>

One might think, considering the importance of the question, that the drafters of CERCLA would have taken special care to precisely define exactly who would fall under the category of a PRP. Not quite. While the language defining PRPs seems clear, Congress, at least

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156. *Id.* at 203 (internal quotations and citations omitted).

157. *See* 42 U.S.C. § 9607(a) (2012) (delineating four circumstances in which one may be liable for certain costs and damages); Owen T. Smith, *The Expansive Scope of Liable Parties Under CERCLA*, 63 ST. JOHN'S L. REV. 821, 822 (1989) (discussing how the EPA usually designates a PRP with "deep pockets" to implement a cleanup).

158. The statutory language of CERCLA regarding its liability is another example of awkward drafting and judicial interpretation. Even though CERCLA liability is universally understood as being joint, several, strict, and retroactive, the law itself does not say so. Rather, "liability" is defined as "the standard of liability which obtains under section 311 of the [Clean Water Act]," 42 U.S.C. § 9601(32) (2012), which *itself* nowhere uses the word "strict." *See* 33 U.S.C. § 1321 (2012). To determine the parameters of liability under CERCLA, then, courts looked to the legislative history, which demonstrates that the general understanding at the time of passage was that Section 311 of the Clean Water Act, pertaining to oil spills, imposed strict liability. *See* *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) ("Congress intended that responsible parties be held strictly liable [and] Congress understood [Section 311 of the Clean Water Act] to impose such liability.").

159. *See* James T. Hamilton & W. Kip Viscusi, *How Costly Is "Clean"? An Analysis of the Benefits and Costs of Superfund Site Remediations*, 18 J. POL'Y ANALYSIS & MGMT. 2, 4 (1999) (average cost of removal operations is five hundred thousand dollars); *id.* at 13 (average cost of remedial operations is \$18.1 million).

160. *See* 42 U.S.C. § 9607(a) (providing liability under CERCLA for PRPs by time or causation).

161. Under CERCLA. *See id.* You may or may not be liable under state tort law.



according to the courts that have interpreted this provision, did a poor job of saying what they meant.

PRPs are defined in section 107, and they come in four varieties: (1) “*the owner and operator*” of a facility where there has been a release of hazardous substances, (2) “any person who . . . owned *or* operated” a facility when there was a release, (3) persons who arranged for the disposal of hazardous waste, and (4) persons who transported the hazardous waste.<sup>162</sup> The boundary between “owner” and “operator” can be quite complex,<sup>163</sup> but for the sake of simplicity we can take it at face value. That is, an owner is a person who owns the facility, and an operator is a person who actually operates the facility on a day-to-day basis. With that distinction in mind, one can see the logic of these four categories. People who arranged for the disposal of, or transported, hazardous substances should be liable when that arrangement or transportation goes poorly. People who owned or operated a facility at which there was a release of hazardous substances should be liable for mismanagement; in this way the harsh liability of CERCLA would serve to incentivize owners (who do not operate facilities) to require better management practices from operators. Lastly, to account for the particularly harsh nature of retroactive liability, the plain language of CERCLA would hold accountable those who operate facilities even for releases that occurred decades before they began operating the site, but only if they are *both* owners *and* operators of that facility.

Beyond this reasonable statutory scheme, the language is quite clear. Not only is “and/or” a particularly well known difference among legal writers,<sup>164</sup> section 107(a)(1) also employs the definite article “the” and singular terms for owner and operator.<sup>165</sup> “Owners and operators” could reasonably be read to mean “either an owner or an operator” (“friends and family,” for example, does not connote only family with whom you are friendly), and early interpreters of the statute seemed to read section 107(a)(1) in that manner.<sup>166</sup> But “*the owner and operator*” strongly suggests a discrete someone who is *both* owner *and* operator. Furthermore, one does not need to employ even the whole act canon—

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162. *Id.* (emphasis added).

163. And well known to Corporate Law students. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 62–66 (1998) (discussing the difficulty in defining what constitutes “operation” and “ownership” for liability purposes under CERCLA).

164. *See, e.g.*, Bryan A. Garner, *Ax These Terms from Your Legal Writing*, A.B.A. J. (Apr. 1, 2014, 8:30 AM), [http://www.abajournal.com/magazine/article/ax\\_these\\_terms\\_from\\_your\\_legal\\_writing/](http://www.abajournal.com/magazine/article/ax_these_terms_from_your_legal_writing/) [<https://perma.cc/CL5C-H3LP>].

165. 42 U.S.C. § 9607(a)(1) (referring to “*the* owner and operator” (emphasis added)).

166. *See* Grad, *supra* note 83, at 9 (“Liability is imposed on owners and operators of vessels or facilities . . .”).

that words or phrases should be read the same way throughout an act<sup>167</sup>—but only the whole *subsection* canon to see that Congress was fully capable of writing “owne[r] or operat[or]” when they meant it.<sup>168</sup> Armed with the clear statutory language and an eminently plausible reason for this statutory structure, you might expect that courts would have stuck to the plain language of section 107(a). You would be wrong.

Courts have universally held that owners *or* operators of a facility are liable for releases of hazardous substances at that facility, at any time, under section 107(a)(1).<sup>169</sup> This understanding of the law was so dominant that an American Bar Association Primer for “Young Lawyers” from 1995 explains that there are four classes of defendants outlined in CERCLA, the first being “present ‘owners or operators,’ ”—a clear misquotation of the statute.<sup>170</sup> Courts were willing to overlook clear language in their search for responsible parties.<sup>171</sup> That is, courts were willing to essentially rewrite a particularly important section of the law in order to give effect to the remedial purpose of the statute. Courts were similarly willing to overlook specific, albeit far less clear, language regarding who can sue for contribution after a cleanup, in order to further a different goal of CERCLA: prioritizing voluntary cleanups of contaminated sites.<sup>172</sup>

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167. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 830 (3d ed. 2001) (discussing how the Supreme Court has adhered to the whole act rule when interpreting statutes since its earliest cases).

168. 42 U.S.C. § 9607(a)(2); *accord* King v. Burwell, 135 S. Ct. 2480, 2499 (2015) (Scalia, J., dissenting) (“It is common sense that any speaker who says ‘Exchange’ some of the time, but ‘Exchange established by the State’ the rest of the time, probably means something by the contrast.”). Furthermore, even the editors of the U.S.C.A. knew when Congress really meant “or,” and they failed to suggest such a change in section 107(a)(1). See 42 U.S.C.A. § 9601(10) (2012) n.1 (West 2015) (suggesting that the original drafters meant to write “or” when they wrote “of”).

169. See *United States v. Argent Corp.*, No. CIV 83-0523 BB, 1984 WL 2567, at \*2 (D.N.M. May 4, 1984), for an early example of this interpretation. See, e.g., *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir. 1992) (“Responsible persons include the current ‘owner’ or ‘operator’ of the facility . . .” (quoting 42 U.S.C. § 9706(a)(1))); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (“Section 9706(a)(1) applies to all current owners and operators . . .”).

170. AM. BAR ASS’N, *YOUNG LAWYERS DIV., CERCLA PRIMER 1* (Susan Wiens & Lisa Keyes eds., 1995).

171. See *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) (“To give effect to . . . congressional concerns, CERCLA should be given a broad and liberal construction. The statute should not be narrowly interpreted to . . . limit the liability of those responsible for cleanup costs . . .”).

172. See *Nurad*, 966 F.2d at 840 (mentioning “CERCLA’s goal of encouraging voluntary cleanup”).

## 2. What's a Contribution?

CERCLA set out to accomplish its supposed task of incentivizing voluntary cleanups with a carrot and a stick. The stick was that government cleanups are generally very expensive, and much more expensive than private cleanups. Therefore, if the government commences an action and sends you the bill, you are probably going to be looking at significantly more costs than if you had commenced the cleanup voluntarily. The carrot was that parties who cleaned up their own mess could seek contribution from other PRPs.<sup>173</sup> Therefore, a person who was in any way responsible for a release of hazardous materials could begin cleaning up the site, thus saving themselves the added cost that would be incurred if the government cleaned up the site, and could then sue other PRPs to recover costs for the operation.<sup>174</sup>

CERCLA originally provided no specific instructions on when a contribution action could be commenced,<sup>175</sup> leaving district courts to determine the parameters of a contribution action after a voluntary cleanup. Many courts determined that, given the generally assumed goal of incentivizing voluntary cleanups, PRPs who voluntarily cleaned up a site could indeed sue other PRPs for contribution.<sup>176</sup> In SARA, Congress specified exactly who could sue for contribution,<sup>177</sup> but did not explicitly ratify the approach taken by district courts prior to 1986. Rather, the Ninety-Ninth Congress added section 113(f)(1), which stated that “[a]ny person may seek contribution from any [PRP], during or following any civil action under section 9606 [actions brought by the government to force cleanups or recover cost] . . . or under section 9607(a) [actions brought by other PRPs].”<sup>178</sup> Then, confusingly, Congress added a savings clause: “Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 . . . or section 9607.”<sup>179</sup>

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173. Or at least, many courts assumed this was possible, and many firms took advantage of this carrot. *See Cooper Indus. v. Aviall Servs., Inc.*, 543 U.S. 157, 162 (2004) (citing various district court cases allowing a party to sue for contribution).

174. *Id.*

175. *See* H.R. Res. 7020, 96th Cong. § 113 (1980) (found on page 147).

176. *See Cooper*, 543 U.S. at 162 (“CERCLA did not mention the word ‘contribution,’ [but many courts held that] such a right arose either impliedly from provisions of the statute, or as a matter of federal common law.”); Ben McIntosh, *When Policy Trumps the Text: How Ambiguous Statutes Allow the Courts An Opportunity to Further Congressional Intent*, 12 MO. ENVTL. L & POL’Y REV. 210, 213 (2005) (“[S]ome district courts interpreted CERCLA to imply a right of action for contribution.”).

177. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

178. 42 U.S.C. § 9613(f)(1) (2012).

179. *Id.*

While courts had broadly agreed that because of the ultimate goal of prompting cleanups, CERCLA must have allowed for some contribution action prior to SARA;<sup>180</sup> after SARA, there was some confusion about who could bring such an action, or when.<sup>181</sup>

There are basically two ways of reading this provision. One is to give the savings clause supremacy over the operative clause, but then the provision is meaningless. It would essentially read: “Any person can sue for contribution during or after an action by the government or a PRP to recover cost, but any person can also sue for contribution at any time.” To give effect to every word of the statute, the only sensible, if strained, reading is that section 113(f)(1) does limit contribution actions to persons during or after specific actions, and the savings clause merely states that section 113(f)(1) does not diminish a person’s general right to contribution that may, or may not, exist outside of section 113(f)(1).<sup>182</sup> This is a relatively simple interpretive issue, and yet, courts were split on what section 113(f)(1) meant.

The reason for this confusion is that the courts read remedially. In the face of even mild ambiguity, many courts found ways to give voluntary PRPs a chance to recover costs through contribution actions because that furthers the generally understood goal of incentivizing voluntary cleanups of hazardous spills.<sup>183</sup> Eighteen years after SARA’s passage, the Supreme Court, in a fairly surprising move, ruled that voluntary PRPs were not able to sue for contribution.<sup>184</sup> And, even after this decidedly nonremedial decision by Justice Thomas, the Court waited only a few years before revisiting the issue and finding a work-around so that voluntary PRPs could recover costs.<sup>185</sup> With “owners or operators” it seems that the Supreme Court has just decided to let the remedial reading stand. In the case of section 113(f)(1), the Supreme Court decided to step in, only to walk back their decision. The impetus to read CERCLA remedially, regardless of the language, seems to be overwhelming.

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180. McIntosh, *supra* note 176, at 213 (“[M]any courts believed that a right of contribution existed under CERCLA, but there was no consensus on where that right came from.”).

181. *Id.* at 214.

182. *See Cooper*, 543 U.S. at 166–67 (discussing how to interpret the statute to avoid rendering it superfluous).

183. *See id.* at 162 (citing cases).

184. *Id.*

185. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 139–40 (2007) (holding that section 9607(a)(4)(B) complemented section 9613(f) and created a cause of action for cost recovery to PRPs).

### III. WHEN TO BE REMEDIAL?: COMPARING THE AFFORDABLE CARE ACT AND CERCLA

This Part will examine the possibility of judges reading “remedial” out of the jurisdiction stripping provision section 113(h), and it will do so by posing a question: What makes such a dramatic interpretation of this law unacceptable if a similarly dramatic interpretation of a statute was acceptable in *King*? Or, put differently, what are the limits of the remedial purposes canon? Having demonstrated that courts have been willing to work around fairly plain language in CERCLA, we can turn to arguments about why they should or should not be so willing when it comes to section 113(h). This Note’s primary goal is to test the limits of remedial interpretation by comparing what the Court did in *King* with what courts may do regarding section 113(h). Therefore, this Part will look to three ostensible differences between the issue in *King* and the issue (or issues) with section 113(h) to see if there are good reasons that a court might follow *King* but not judicially revise section 113(h): (1) that Congress would likely never fix the language in the Affordable Care Act, and might fix section 113(h); (2) that the language in *King* presented a “major question”; and (3) that the language at issue in *King* was more clearly contrary to the intention of the enacting Congress.

#### *A. A Friendly Congress?*

The simplest solution to a congressional mistake, either a mere scrivener’s error or a misunderstanding of policy consequences, is to have Congress fix that mistake. In his dissent in *King*, Justice Scalia presented this solution quite clearly:

If Congress values above everything else the Act’s applicability across the country, it could make tax credits available in every Exchange. If it prizes state involvement in the Act’s implementation, it could continue to limit tax credits to state Exchanges while taking other steps to mitigate the economic consequences predicted by the Court.<sup>186</sup>

It is hard, however, to see Scalia giving this charge with a straight face to a Congress that was famously unproductive and, at least in part, famously anti-ACA.<sup>187</sup> It is possible that Justice Roberts upheld the

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186. *King v. Burwell*, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting); see also Transcript of Oral Argument at 56, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114) (“You really think Congress is just going to sit there while—while all of these disastrous consequences ensue . . . Congress adjusts, enacts a statute that—that takes care of the problem. It happens all the time. Why is that not going to happen here?”).

187. See Murray, *supra* note 3 (highlighting the low productivity of the 113th Congress as measured by the number of public bills enacted into law); Wermiel, *supra* note 12 (discussing the impact of congressional intent on the statutory interpretation question at the center of *King*); see

IRS's interpretation because he was not willing to risk six million people losing tax credits, and a nearly three hundred percent increase in premiums<sup>188</sup> on the possibility that this Congress would "mitigate the economic consequences."<sup>189</sup> Should a judge be more willing to leave a congressional error in place when he believes there is a greater chance of Congress cleaning up their own mess?

As it relates to section 113(h), this question may be moot because it is not exactly clear that the current Congress plans on tackling the jurisdictional problems of 113(h) anytime soon. Commentators have recognized the general problem of the overbroad nature of section 113(h) since shortly after Congress passed the SARA amendments,<sup>190</sup> and calls for congressional action on the issue are just as old.<sup>191</sup> In the nearly three decades since SARA, Congress has amended various provisions of CERCLA several times but has not touched section 113(h).<sup>192</sup> There is little doubt that the ACA was a significantly more contentious piece of legislation than SARA (or CERCLA). But, Congress

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also Jeffrey Toobin, *Did John Roberts Tip His Hand?*, NEW YORKER (Mar. 4, 2015), <http://www.newyorker.com/news/daily-comment/did-john-roberts-tip-his-hand> [<https://perma.cc/Z93G-XQQY>] ("[A]ny half-aware student of the contemporary Congress knows, there is no chance at all—none—that this Congress will amend or improve the Affordable Care Act to save subsidies.").

188. See *State-by-State Effects of a Ruling for the Challengers in King v. Burwell*, KAISER FAM. FOUND., <http://kff.org/interactive/king-v-burwell-effects/> [<https://perma.cc/LV82-8F7S>] (estimating the increase in average premium as a result of the tax credit not being available as 287 percent).

189. *King*, 135 S. Ct. at 2506 (Scalia, J., dissenting). Scalia, it seems, would put that pragmatism beyond the ken of a federal judge. In the first two pages of the majority opinion alone, Roberts cites twice to an amicus brief written by economic scholars as well as to a report entitled "The Impact of Guaranteed Issue and Community Rating Reforms on States." See *id.* at 2485–86 (citing Brief for Bipartisan Economic Scholars in Support of Respondents, *King v. Burwell*, 135 S. Ct. 2480 (2015), (No. 14-114), 2015 WL 393821 at \*11–12, \*19–20; Leigh Wachenheim & Hans Leida, *The Impact of Guaranteed Issue and Community Rating Reforms on States' Individual Insurance Markets*, AM.'S HEALTH INS. PLANS 38 (Mar. 2012), [http://www.statecoverage.org/files/Updated-Milliman-Report\\_GI\\_and\\_Comm\\_Rating\\_March\\_2012.pdf](http://www.statecoverage.org/files/Updated-Milliman-Report_GI_and_Comm_Rating_March_2012.pdf) [<https://perma.cc/KAL8-REYV>]). Scalia, on the other hand, did not cite an amicus brief, report, or law review article in his entire opinion.

190. See Michael P. Healy, *Judicial Review and CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning*, 17 HARV. ENVTL. L. REV. 1 (1993) (acknowledging the broad nature of the provision and discussing subsequent attempts by courts to apply its plain meaning).

191. See *id.* at 94 (arguing for a congressional amendment to 113(h)).

192. See, e.g., Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 106-74, tit. IV, § 427, 113 Stat. 1095 (1999); Transportation Laws Codification, Pub. L. No. 104-287, § 6(j)(1), 110 Stat. 3400 (1996); Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, div. A, tit. I, § 101(a), tit. II, § 211(b), tit. IV, § 2502(b), 110 Stat. 3009-41, 3009-464 (1996); Pub. L. No. 100-707, tit. I, § 109(v), 102 Stat. 4710 (1988); Pub. L. No. 103-429, § 7(e)(1), 108 Stat. 4390 (1994); Disaster Relief and Emergency Assistance Amendments of 1988, Pub. L. No. 100-707, 102 Stat. 4689.

has been particularly inactive lately,<sup>193</sup> and that fact may cause a judge to wonder about the feasibility of Congress passing *any* necessary legislation, regardless of the political temperature. Furthermore, the increasingly partisan political climate perhaps makes certain issues that might not have otherwise been considered contentious harder to deal with.<sup>194</sup> One of the central questions regarding the remedial limits of judicial interpretation is how, if at all, congressional inactivity or obstinacy affects those limits. If we are prepared to say that the Supreme Court was reasonable in judicially revising the ACA because sending it back to Congress would be a nonstarter, then we should be prepared to say that, as a result of increasing congressional dysfunction, litigants wishing to challenge EPA decisionmaking with regard to a *remedial* action should have their day in court, contrary to the plain language of section 113(h). Put differently, the recalcitrance *vel non* of Congress may not be a satisfactory way of determining the limits of the remedial purposes canon. In an era of increased polarization and congressional inactivity, if judges were to remedially read around the plain language of a statute simply because Congress would be unlikely to fix their own assumed mistake, then judges would be employing such remedial readings on a very frequent basis.

### *B. A Major Question?*

Chief Justice Roberts, in his majority opinion in *King*, did not state his reasoning as “Congress probably didn’t mean this, they probably wouldn’t fix it, and holding them to their word would be really bad.” He did, however, rely on the “major questions” doctrine.<sup>195</sup> How “major” a question is, or really how “major” the impact would be if a judge held Congress to their word, is, however, a poor criterion for when to read remedially. The doctrine makes some sense in the context of ambiguity, but not in the context of a true congressional error, as the “established by the State” language in the ACA or Section 113(h) in SARA may have been.

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193. See Murray, *supra* note 3 (comparing the productivity of the 113th Congress to that of previous congresses).

194. See Nick Gass, *This Graphic Shows How America’s Partisan Divide Grew*, POLITICO (Apr. 24, 2015, 8:35 AM), <http://www.politico.com/story/2015/04/graphic-data-america-partisan-divide-growth-117312> [<https://perma.cc/H9ZK-7BN8>] (“[Researchers’] biggest concern is that the hyper-partisan environment has stymied the legislative body’s ability to come up with new policy solutions to fix the United States’ problems.”).

195. See *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

The major questions doctrine dates back to the Court's decision in *Brown & Williamson*.<sup>196</sup> In that case, various tobacco companies challenged a Food and Drug Administration ("FDA") rule that defined tobacco as a "drug" and cigarettes as a "device" under the Food, Drug and Cosmetics Act ("FDCA"), and thus subjected cigarettes to regulation.<sup>197</sup> The Court determined that, while Congress delegated the general question of what constitutes a drug or a device to the FDA, the decision to regulate the entire tobacco industry was such a major question that it is unreasonable to think Congress would have delegated it to the agency.<sup>198</sup> To put their decision in the language of *Chevron*,<sup>199</sup> the Court found the terms "drug" and "device" sufficiently ambiguous to suggest that Congress intended the FDA to define those terms, but held that the FDA's definition was so impactful that it was unreasonable to assume Congress delegated a decision of such consequence.<sup>200</sup> The agency's interpretation passed *Chevron* step one, but deference to the agency in *Chevron* step two was a bridge too far.

The question of whether "established by the State" forecloses the provision of tax credits on federally run exchanges was surely a major question, as the lack of tax credits would have led to the collapse of the ACA.<sup>201</sup> On the other hand, access to courts for certain individuals wishing to challenge the procedural soundness of the EPA's choice of remedial actions is much less central to the operation of CERCLA overall. This distinction may be enough for some to suggest that Chief Justice Roberts's revision in *King* was warranted whereas a similar revision in section 113(h) would not be.

This distinction, however, demonstrates the paucity of reasoning regarding the major questions doctrine when the question is one of error and not ambiguity. In *King*, Roberts still followed *Chevron* step one, finding (perhaps miraculously) that "established by the State" is an ambiguous phrase.<sup>202</sup> When a phrase is ambiguous and its

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196. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

197. *Id.* at 126–29.

198. *Id.* at 159–60.

199. *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* provides a basic two-step test for reviewing agency interpretations of statutes: (1) is the language of the statute clear and unambiguous? (2) If not, was the agency's interpretation reasonable? *See Brown & Williamson*, 529 U.S. at 132.

200. *See Brown & Williamson*, 529 U.S. at 159–60. The Court admittedly relied on other evidence of congressional intent as well, such as actions to regulate tobacco that Congress had taken subsequent to the passage of the FDCA (which they presumably would not have done if they had delegated that power to the FDA in the first place). *See id.* at 143 ("The inescapable conclusion is that there is no room for tobacco products within the FDCA's regulatory scheme.").

201. *See supra* Section I.A.

202. *King v. Burwell*, 135 S. Ct. 2480, 2491 (2015).



interpretation carries enormous impact, it is understandable to suggest that the logic of *Chevron* is diminished. That is, we may assume that Congress did not leave such an important question as “who receives tax credits” to the IRS.<sup>203</sup> But if someone is harmed because Congress made a *mistake*—that they really did not want a particular outcome, but wrote the wrong words down—are we really prepared to say that is fair just because only a few people are harmed?

Put differently, if the issue in *King* was a “major question,” then that doctrine loses much of the logical force from *Brown & Williamson*. Instead of a fairly sensible refutation of the logic of *Chevron*, the doctrine becomes: “if a provision of the statute is *really serious* the courts can question whether it is what Congress really meant.” Read in that light, section 113(h) has fairly serious impacts on individual litigants and communities. If we are prepared to say that the Court was right in imparting assumed congressional policy on the language of the ACA because sticking to the plain meaning would have a serious effect, then we should at least consider the acceptability of a court imparting assumed congressional policy on the language of section 113(h).

The presence of a “major question” seems to be a poor limit on the remedial purposes canon. It requires judges to make a judgment about the policy impacts of a particular decision in order to determine whether there even is a major question—a troublesome task. Then, if the judge determines that a particular interpretation presents such a major question, the doctrine presents a logical puzzle: if this provision is so important, why should a judge assume that Congress did not mean what they in fact said? Would it not be more fair to allow more drastic remedial reading of *less* major questions, as those are the provisions of statutes that might commonly receive less attention?

But perhaps the real reason the revision in *King* was acceptable was that the assumed congressional policy was more than assumed—it was clear. That may have been a popular narrative, but even a cursory investigation of the legislative history reveals that Congress’s intent was not exactly a model of clarity.

### *C. Clear Intent?*

Another arguable difference between the language at issue in *King* and the language of section 113(h) is that the enacting Congress

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203. See *Chevron*, 467 U.S. at 843–45 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency . . . is implicit rather than explicit.”).

could not possibly have meant what they said,<sup>204</sup> whereas the language of section 113(h) is plausible, if harsh. Put differently, perhaps judges should be allowed some interpretative wiggle room when the legislative intent is clear, but should defer to the plain language when doing so is at least reasonable. But legislative intent regarding the language at issue in *King* is not exactly as clear as the popular narrative would hold.

The ACA was passed in 2010 in an odd and contentious manner.<sup>205</sup> After decades of reform attempts, a lengthy presidential campaign, years of legislative back-and-forth, and plenty of procedural intrigue, Congress passed a nine-hundred-page bill<sup>206</sup> in 2010 that set out to regulate and restructure the entirety of America's health care and insurance industry. Not only is it beyond the scope of this Note to present a comprehensive legislative history of the ACA, it is not even clear what the parameters of the "legislative history" are.<sup>207</sup> What is more clear, and within the scope of this Note, is that the enacting Congress could have intended to use the qualifying "established by the State" language.

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204. See, e.g., Robert Pear, *Four Words that Imperil Health Care Law Were All a Mistake, Writers Now Say*, N.Y. TIMES (May 25, 2015), <http://www.nytimes.com/2015/05/26/us/politics/contested-words-in-affordable-care-act-may-have-been-left-by-mistake.html> [<https://perma.cc/3SAP-ALBZ>] (quoting Senator Olympia Snowe: "It was never part of our conversations at any point" and Senator Jeff Bingaman: "As far as I know, it escaped everyone's attention"); Sarah Kliff, *Congress Had Lots of Obamacare Fights. Ending Some Subsidies Wasn't One of Them.*, VOX (July 26, 2014, 2:30 PM), <http://www.vox.com/2014/7/26/5937593/obamacare-halbig-gruber-tax-credits/in/5690430> [<https://perma.cc/GEN7-H9T8>] ("Congress never debated whether they would limit the subsidies to states that built their own exchanges. . . . [because] subsidies were seen as so fundamental to making the Affordable Care Act work . . .").

205. Cannan, *supra* note 84, at 133.

206. The ACA's length is a microcosm for the entire law: it is confusing and debated. See *King*, 135 S. Ct. at 2500 (Scalia, J. dissenting) (citing the length as 900 pages); Brief for Amici Curiae Senator John Cornyn et al., *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), 2015 WL 491284, at \*19 (citing the length as 2,400 pages); Warner Todd Huston, *Spin Alert: The House Did Not Vote To Repeal Obamacare 33 Times*, BREITBART (July 16, 2012), <http://www.breitbart.com/big-journalism/2012/07/16/hey-media-the-house-did-not-vote-to-repeal-obamacare-33-times/> [<https://perma.cc/97GX-QXZF>] (citing the length as 2,700 pages); *Amicus: The Storm Arrives*, SLATE, at 20:18 (June 27, 2015) (downloaded using iTunes) (citing the length as approximately two thousand or 2,100 pages).

207. Campaign promises made by Senator Obama three years before signing? See, e.g., *Blueprint for Change: Obama and Biden's Plan for America*, OBAMA FOR AM. 24 (2008), <https://assets.documentcloud.org/documents/550007/barack-obama-2008-blueprint-for-change.pdf> [<https://perma.cc/JN9V-4UC6>] (promising, *inter alia*, a "National Health Insurance Exchange"). Statements of Governor Romney on Massachusetts's health-care system made six years before signing? See Mitt Romney, *My Plan for Massachusetts Health Insurance Reform*, BOS. GLOBE (Nov. 21, 2004), <http://www.bostonglobe.com/lifestyle/health-wellness/2004/11/24/plan-for-massachusetts-health-insurance-reform/d111xFpnfLcQ81pz4nCdpJ/story.html> [<https://perma.cc/8ZNG-5ER9>] (stating that his plan "will not be a government-mandated universal coverage . . . system"). Heritage Foundation proposals written two decades before signing? See Butler, *supra* note 84 (proposing an insurance mandate).

Probably the strongest evidence of congressional intent in favor of the Court's reading is a lack of evidence. That is, Congress did not seem to say anything about limiting the availability of tax credits for customers of the Federal Exchange.<sup>208</sup> This lack of history may have impacted Roberts, not because he mentioned it directly, but because he relied in part on the “elephants-in-mouseholes” canon to justify his policy conclusions.<sup>209</sup> Just as Congress would not have relegated such an important policy decision to a “sub-sub-sub section of the Tax Code,”<sup>210</sup> Roberts reasoned that Congress would not have made such an important policy decision without leaving a paper trail. The elephants-in-mouseholes argument seems to be strong evidence of national understanding, if not congressional intent. As some state officials have noted, they were not under the impression that foregoing the establishment of a state exchange would deny their citizens federal tax subsidies.<sup>211</sup>

In the face of this supposed legislative silence,<sup>212</sup> those that opposed the government's interpretation posited several pieces of evidence to suggest that Congress *did* consider the possibility that tax credits would be unavailable on federally run exchanges.<sup>213</sup> They pointed to both Senator Ben Nelson's stated fear of a national exchange and his importance to the passage of the Act.<sup>214</sup> More convincingly, they pointed to an earlier version of the ACA that explicitly denied tax credits to customers of the Federal Exchange for four years in an attempt to penalize states that did not set up exchanges.<sup>215</sup> But these

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208. See Brief Amici Curiae of Members of Congress and State Legislatures, *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014) (No.14-5018), 2014 WL 5585306, at \*10 (“If . . . members of Congress had intended to use the tax credits to encourage States to set up their own Exchanges, surely someone at some point would have suggested as much.”); *supra* note 204 and accompanying text.

209. *King*, 135 S. Ct. at 2495; see *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

210. See *King*, 135 S. Ct. at 2495; *Whitman*, 531 U.S. at 2001.

211. See Brief Amici Curiae of Members of Congress and State Legislatures, *supra* note 208, at \*5.

212. See *King v. Burwell*, 759 F.3d 358, 371 (4th Cir. 2014) (“The Act's legislative history is also not particularly illuminating on the issue of tax credits.”).

213. For some more pieces of evidence not discussed in this Note, see *Halbig v. Sebelius*, 27 F. Supp. 3d 1, 24 (D.D.C. 2014); Reply Brief in Support of Plaintiff's Motion for Preliminary Injunction at 23, *King v. Sebelius*, 997 F. Supp. 2d 415 (2014) (Civil Action No. 3:13-CV-630) 2013 WL 6079950; Brief for Amici Curiae Senator John Cornyn et al., *supra* note 206, at \*6.

214. *Halbig v. Burwell*, 758 F.3d 390, 409 n.11 (D.C. Cir. 2014).

215. See *id.* at 408. Scalia, interestingly, does not even mention this earlier bill, perhaps because the fact that this version was not adopted speaks as much to the contrary interpretation. Still, even if prior drafts rank low on the legislative history totem pole, this is really the only concrete evidence that any members of Congress ever considered using tax credit availability as a

few examples demonstrate the fickle nature of legislative history. Senator Nelson was afraid of a national exchange, but as Judge Griffith (who ruled for the Petitioner's interpretation in the lower court) pointed out, that fact did not necessarily mean he was afraid of tax credits being issued to Federal Exchange customers.<sup>216</sup> A prior version of the bill does seem to suggest that Congress at least *considered* using tax credits coercively, but the fact that it was a *prior* version could suggest just as strongly that Congress abandoned that idea.<sup>217</sup>

An excellent example of the confusing history surrounding what Congress meant is Jonathan Gruber and his conflicting statements. On January 10, 2012, Gruber, who had worked closely with the Obama Administration in crafting the ACA,<sup>218</sup> spoke at the Jewish Community Center of San Francisco and claimed that if a state did not set up an exchange, they would lose “hundreds of millions of dollars in tax credits.”<sup>219</sup> Ten days later, at the Noblis Technology Conference, Gruber stated that “if you're a state and you don't set up an exchange that means your citizens don't get their tax credits.”<sup>220</sup> Then, roughly one year later, Gruber characterized the idea that tax credits would be unavailable to citizens who purchased insurance on a federal exchange as “nutty.”<sup>221</sup> On July 22, 2014, the day that the Fourth Circuit handed down its decision siding with the government's interpretation, Gruber said of the “established by the State” language: “literally every single

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coercive tool—a cornerstone of Petitioner's argument. See Brief for Petitioners, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No.14-114), 2014 U.S. S. Ct. Briefs LEXIS 4530, at \*11. Yet this prior draft is left out of Petitioner's briefs, and, of all the briefs in the actions below, seems to only be raised in passing by amici Senators. See Brief for Amici Curiae Senator John Cornyn et al., *supra* note 206, at \*6.

216. See *Halbig*, 758 F.3d at 409 n.11.

217. See *supra* note 215.

218. As is the case with everything Gruber has said about the law, even his position and involvement is disputed. Compare Peter Suderman, *Yes, Jonathan Gruber Is An Obamacare Architect*, REASON (Nov. 18, 2014), <http://reason.com/archives/2014/11/18/yes-jonathan-gruber-is-an-obamacare-arch#0rrdnc:EoeB> [<https://perma.cc/5DJS-8DCE>] (emphasizing the role that Gruber played and referring to Gruber as a “key architect”), with *Examining Obamacare Transparency Failures: Hearings Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2014) [hereinafter *Hearings*] (written testimony of Professor Jonathan Gruber), <http://oversight.house.gov/wp-content/uploads/2014/12/Gruber-Statement-12-9-ObamaCare1.pdf> [<https://perma.cc/4U62-Z3U7>] (stating “I was not the ‘architect’ of President Obama's health care plan”).

219. John Sexton, *Jonathan Gruber Once Again Says Subsidies Are Tied to State-Based Exchanges*, YOUTUBE, at 1:19 (July 25, 2014), <https://www.youtube.com/watch?v=LbMmWhfZyEI> [<https://perma.cc/RSM3-QCLH>] (transcribed by the author).

220. NoblisNetwork, *Jonathan Gruber at Noblis—January 18, 2012*, YOUTUBE, at 32:00 (Jan. 20, 2012), <https://www.youtube.com/watch?v=GtnEmPXEPe0> [<https://perma.cc/99RX-ERVG>] (transcribed by the author).

221. Erika Eichelberger, *Conservatives Insist Obamacare Is on Its Death Bed*, MOTHER JONES (Jan. 24, 2013, 6:06 AM), <http://www.motherjones.com/politics/2013/01/obamacare-exchanges-conservative-cato-freedomworks> [<https://perma.cc/8HW2-H3JF>].

person involved in the crafting of this law has said that it's a typo."<sup>222</sup> After his earlier statement to the contrary given at the Noblis conference was posted online,<sup>223</sup> Gruber stated that his earlier statement had been "a mistake."<sup>224</sup> Finally, in December of 2014, at a House Oversight and Government Reform hearing, he alleged that his earlier remarks had been taken out of context.<sup>225</sup> If legislative history is akin to "looking over a crowd and picking out your friends,"<sup>226</sup> then Gruber stands for the proposition that you should be careful that your friends are not schizophrenic.

Hopefully this very brief overview has proved the necessary point: it is not exactly clear what Congress intended in 2010. It seems odd that there would be so little evidence in the legislative history of Congress' intention to withhold tax credits on the Federal Exchange, but then again, they may have failed to realize that so many states would not set up exchanges.<sup>227</sup> If the language means what it plainly says, then the drafting Congress would have reasonably assumed that most states would set up exchanges so as to capture the tax benefits for their citizens. It seems odd that Jonathan Gruber, who was clearly knowledgeable about the workings of the ACA, would claim that tax credits were only available through state exchanges. But, then again, maybe he, and not Congress, was the one making a mistake.<sup>228</sup>

This foggy history should at least call into question the use of seemingly obvious intent as a justification for remedial revision. To be

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222. "Hardball with Chris Matthews" for Tuesday, July 22nd, 2014, NBC NEWS (July 23, 2014, 9:20 AM), [http://www.nbcnews.com/id/55705739/ns/msnbc-hardball\\_with\\_chris\\_matthews/#.VaGJBO1Vikr](http://www.nbcnews.com/id/55705739/ns/msnbc-hardball_with_chris_matthews/#.VaGJBO1Vikr) [<https://perma.cc/7XAL-33LW>].

223. Ryan Radia, *Obamacare Architect Admitted in 2012 States Without Exchanges Lose Subsidies*, COMPETITIVE ENTER. INST. BLOG (July 24, 2014), <https://cei.org/blog/obamacare-architect-admitted-2012-states-without-exchanges-lose-subsidies> [<https://perma.cc/UN5V-D8UF>].

224. Jonathan Cohn, *Jonathan Gruber: "It Was Just a Mistake,"* NEW REPUBLIC (July 25, 2014), <http://www.newrepublic.com/article/118851/jonathan-gruber-halbig-says-quote-exchanges-was-mistake> [<https://perma.cc/248S-XXP3>].

225. *Hearings*, *supra* note 218.

226. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (internal quotation marks omitted).

227. See Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES (Aug. 4, 2012), [http://www.nytimes.com/2012/08/05/us/us-officials-brace-for-huge-task-of-running-health-exchanges.html?\\_r=1](http://www.nytimes.com/2012/08/05/us/us-officials-brace-for-huge-task-of-running-health-exchanges.html?_r=1) [<https://perma.cc/KD62-3GK6>] ("Mr. Obama and lawmakers assumed that every state would set up its own exchange.").

228. The list could go on. Another piece of history relied upon in the courts below was a CBO report from 2009 which calculated anticipated subsidies across all states. CONGR. BUDGET OFFICE, AN ANALYSIS OF HEALTH INSURANCE PREMIUMS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (2009). Judge Friedman, who ruled for the government, relied on this report as evidence of Congress's assumption "that tax credits would be available nationwide." *Halbig v. Sebelius*, 27 F. Supp. 3d 1, 24 (D.D.C. 2014). But in 2009, Congress probably assumed that all states would set up exchanges, see *supra* note 227, and the CBO report may reflect that assumption.

clear, Congress did seem to understand that section 113(h) would serve to bar many litigants from challenging actions.<sup>229</sup> But they seemed to understand that doing so was necessary to prevent delay when cleaning up hazardous substances.<sup>230</sup> It is far from clear that they would have consented to the language of section 113(h) if they had known it would in certain instances allow for greater delay, or deprive citizens, or even industry, of the ability to challenge the EPA's process for determining a course of action that might take decades to complete and cost millions of dollars. Supposedly clear intent, then, is a slippery limit for this type of drastic remedial reading. As discussed above,<sup>231</sup> the "purpose" of a law can be evident from a certain distance, but grows more confused as the reader drills down into specific provisions.

Ultimately, none of these supposed differences between the ACA and CERCLA provide a solid reason for a remedial rewording of one and not the other. If judges are satisfied with the outcome of *King*, then they should be open to similar attempts to work around the plain language of a law that seems to conflict with its goal. They should be willing to employ the remedial purposes canon to read "remedial" out of SARA section 113(h) and allow parties to challenge EPA clean up actions after removal actions have been completed.

## CONCLUSION

Legislatures make mistakes. Sometimes, despite our best efforts, changing circumstances can foil future plans. What is the role of a judge when confronted with such a situation? Based on the ruling in *King*, one might reasonably suggest that the role of a judge is to serve as the faithful interpreter of the law, bringing to life the true intentions of Congress and reading the law so as best to remedy the evil it was intended to confront. If that is true, then why should a court continue to withhold jurisdiction over plaintiffs, such as citizen advocacy groups, who wish to compel cleanups or challenge methods, when a remedial action is planned at a CERCLA site? To be clear, allowing such a challenge to proceed would be nothing less than a judicial revision of section 113(h). But, what was the outcome in *King* if not a judicial revision?<sup>232</sup>

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229. See *supra* notes 117–120 and accompanying text.

230. See *id.*

231. See *supra* Section I.B.

232. See *King v. Burwell*, 135 S. Ct. 2480, 2497 (2014) (Scalia, J., dissenting) ("Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.").

Section 113(h) in some ways is ripe for this type of remedial reading. The purposes of the law overall and the intention behind section 113(h) are generally understood. CERCLA is a paragon of remedial statutes and has already been subject to judicial tinkering, if not outright revision. But, the solution this Note presents and its justifications are a Rorschach test. One may read it and think that *King* was well decided and section 113(h) deserves the same treatment.

Others may see the problems with this type of reading. Employing this extent of remedial reading only in cases where the legislature is unlikely to act presents an odd inquiry for judges—and such cases are quickly becoming the rule and not the exception. Withholding this type of remedial reading only for major questions presents two problems: Are we more willing to let judges resolve questions when they are “major”? And are we willing to let a litigant face injustice due to a congressional mistake just because the question is *not* “major”? Perhaps judges should only employ this remedial reading when the legislative history is obvious, but that may assume too much—namely, that legislative history can ever be obvious.

Ultimately, the reason why such an interpretation of the statutory text is acceptable in *King* and unacceptable for judges grappling with section 113(h) is far from clear. What is clear is the need for such a reason. If none can be found, then what is needed is an admission: that a remedial reading of section 113(h), and a host of other statutory provisions with unintended consequences, is acceptable.

*Benjamin Raker\**

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