

D I A L O G U E

BREAKING PRECEDENT: SCOTUS IN THE MIDST OF A PANDEMIC

SUMMARY

In *County of Maui v. Hawaii Wildlife Fund*, the U.S. Supreme Court held, 6-3, that the Clean Water Act requires a national pollutant discharge elimination system permit “when there is the functional equivalent of a direct discharge.” The Court also decided *Atlantic Richfield Co. v. Christian*, holding, 7-2, that landowners adjacent to a Superfund site were potentially responsible parties under the Comprehensive Environmental Response, Compensation, and Liability Act. Both of these decisions surprised many, particularly given the coalition of Justices who formed the majorities. Other cases were delayed or postponed, and for the first time, the Court heard oral arguments via teleconference due to the ongoing coronavirus pandemic. On June 12, 2020, the Environmental Law Institute hosted a panel of experts that discussed what this term’s decisions and the Court’s new way of operating might bode for the upcoming term. Below, we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Davina Pujari (moderator) is a Partner at Hanson Bridgett. **John Cruden** is a Principal at Beveridge & Diamond PC, and formerly Assistant Attorney General of the Environment and Natural Resources Division of the U.S. Department of Justice.

Richard Lazarus is the Howard and Katherine Aibel Professor of Law at Harvard Law School.

Sambhav Sankar is Senior Vice President of Programs at Earthjustice.

Davina Pujari: Welcome to this Breaking News panel. In its recent *County of Maui* decision,¹ the U.S. Supreme Court held that the Clean Water Act (CWA)² requires a national pollutant discharge elimination system (NPDES) permit for direct discharges or “when there is the *functional equivalent of a direct discharge*.”³ The opinion noted that many factors may be relevant to determining whether a particular discharge is the functional equivalent of one directly into navigable waters. Time and distance will be the most important factors in most cases, the Court said, but other relevant factors may include the nature of the material through which the pollutant travels and the extent to which the pollutant is diluted or chemically changed as it travels.

The Supreme Court specifically noted that other courts will need to provide additional guidance in decisions in individual cases. In addition, the underlying statutory

objectives can also provide guidance, the Court said, and the U.S. Environmental Protection Agency (EPA) can provide administrative guidance. Today, we will talk about the *Maui* decision and the factors set forth by the Court, as well as the uncertainty created by the Court’s decision.

The Supreme Court also recently decided the case of *Atlantic Richfield Co. v. Christian*,⁴ holding that landowners adjacent to a Superfund site were potentially responsible parties (PRPs) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁵ and, thus, need EPA approval to take remedial action. Because arsenic and lead are hazardous substances and had “come to be located”⁶ on the landowners’ properties, the landowners are now CERCLA PRPs. The Court said that interpreting PRPs to include owners of polluted property reflects CERCLA’s objective to develop a comprehensive environmental response to hazardous waste pollution.

Both of these decisions surprised many in the environmental bar, particularly given the coalition of Justices who banded together to form the majority. Today, we will hear from leading experts regarding their views of the decisions and what the decisions might mean for cases already heard by the Supreme Court but not yet decided. For example, in February, the Supreme Court heard arguments in the consolidated cases of *U.S. Forest Service v. Cowpasture River Preservation Ass’n* and *Atlantic Coast Pipeline, LLC v. Cowpasture River Preservation Ass’n*.⁷

The consolidated *Atlantic Coast Pipeline* case relates to the construction of the Atlantic Coast Pipeline, a 600-mile-long underground pipeline intended to deliver natural gas

Editor's Note: This Dialogue went to print before the passing of Justice Ruth Bader Ginsburg on September 18, 2020.

1. *County of Maui, Hawaii v. Hawaii Wildlife Fund*, No. 18-260, 50 ELR 20102 (Apr. 23, 2020).
2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
3. *County of Maui*, slip op. at 15.

4. No. 17-1498, 50 ELR 20101 (Apr. 20, 2020).
5. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.
6. 42 U.S.C. §9601(9)(B).
7. Nos. 18-1584 and 18-1587, 50 ELR 20148 (June 15, 2020).

from operations in West Virginia to coastal Virginia and eastern North Carolina. The pipeline is expected to cost more than \$7 billion and is being developed by Dominion Energy and Duke Energy, along with Piedmont Natural Gas and Southern Gas Company.

The pipeline is opposed by numerous environmental groups, including plaintiff Cowpasture River Preservation Association and the Sierra Club. The question for the Court is whether the U.S. Forest Service has the authority to grant rights-of-way under the Mineral Leasing Act (MLA) through lands traversed by the Appalachian Trail within national forests. The MLA permits the Secretary of the Interior to grant rights-of-way through any federal lands for natural gas pipelines except lands in the National Park System. Thus, the key issue for the Court to decide is whether the Appalachian Trail constitutes lands in the National Park System as that phrase is defined in the MLA.

With that introduction, let me now introduce our esteemed panel. First, we have John Cruden, a principal at Beveridge and Diamond and the former assistant attorney general of the Environment and Natural Resources Division (ENRD) at the U.S. Department of Justice (DOJ). President Barack Obama nominated John to be the assistant attorney general of ENRD in 2013 and he was sworn in January 2015. During his ENRD service, John supervised all federal civil environmental litigation involving agencies of the United States. He personally litigated and led settlement negotiations in numerous environmental cases. Of note, John oversaw the historic settlements with BP in the *Deepwater Horizon* oil spill matter and with Volkswagen in the emissions “defeat device” case.⁸

Before becoming assistant attorney general, John served as the chief of ENRD’s Environmental Enforcement Section and later as deputy assistant attorney general. John has also served as the president of the Environmental Law Institute. Today, John will focus on the *Atlantic Richfield* decision.

Next, we have Sam Sankar. Sam is the senior vice president of programs in Washington, D.C., for Earthjustice, the largest public interest environmental law firm in the nation and perhaps in the world. Earthjustice is a pioneer in environmental law, having filed the 1971 lawsuit that led to the Supreme Court’s decision in *Sierra Club v. Morton*.⁹ Back then, Earthjustice comprised a couple of lawyers who called themselves the Sierra Club Legal Defense Fund. Today, Earthjustice is an accomplished team of lawyers, lobbyists, and communications experts that handles more than 600 matters on behalf of clients ranging from local citizen groups to the nation’s largest environmental non-governmental organizations.

Sam helped lead former President Obama’s National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling. Sam also worked at ENRD, where he was lead counsel in dozens of precedent-setting cases that sought to protect natural resources and public health. Sam

has also worked with the Environmental Council of the States, The Nature Conservancy, General Electric, and WilmerHale. He clerked for several federal court judges including Justice Sandra Day O’Connor. Finally, Sam brings a technical perspective to the discussion as an environmental engineer. Sam will discuss the *Mauui* decision.

Third, we have Prof. Richard Lazarus. Richard teaches environmental law, natural resources law, Supreme Court advocacy, and torts at Harvard Law School. He has represented the United States, state and local governments, and environmental groups in the Supreme Court in 40 cases and has presented oral arguments in 14 of those cases. His primary areas of legal scholarship are environmental and natural resources law with particular emphasis on constitutional law and the Supreme Court.

Richard was also the principal author of *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*,¹⁰ which is the report to the president of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling for which he served as the executive director. Prior to joining the Harvard Law School faculty, Richard was the Justice William J. Brennan Jr. Professor of Law at Georgetown University, where he also founded the Supreme Court Institute. Richard will discuss the *Atlantic Coast Pipeline* case.

John Cruden: This is a great time to be talking about the Supreme Court. It’s extraordinary what has happened over the course of the term that started in October. If you remember, this is a term that started with the Supreme Court saying for the first time that advocates were to be allowed two minutes of uninterrupted presentations. That by itself fundamentally changed oral advocacy. I assure you that every moot court I’m involved in concentrates on those first two minutes. Then, this year, for the very first time since the Spanish flu pandemic of 1918, we faced the Supreme Court delaying oral arguments for a considerable period of time due to the coronavirus. Then, when they started back up, we heard oral arguments from people’s bedrooms and kitchens, including the now-famous toilet-flushing episode. Those events alone make this Supreme Court term a fascinating one to look at.

There were 71 cases accepted in this term, and at this time, 38 have been decided. The Court has reversed 63% of the decided cases. They are on track to do very much what has been done in other terms. The question I enjoy asking when I am lecturing is this: which Justice right now is the “leader,” the “decider” in close cases? There’s only one Justice who has been in the majority on every one of the cases decided thus far, and that’s Chief Justice John Roberts, making this the Roberts Court in so many different ways.

Also, we often look at how Justices are “paired,” that is, deciding the same way on opinions. Without question, the pairing most often so far is our newest Justice, Brett

8. In re: Volkswagen “Clean Diesel” Marketing, Sales Prac., and Prods. Liab. Litig., MDL No. 2672 CRB (JSC), 2016 WL 6442227 (N.D. Cal. Oct. 25, 2016).

9. 405 U.S. 727, 2 ELR 20192 (1972).

10. DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (2011), available at <https://www.govinfo.gov/content/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>.

Kavanaugh, who didn't come into the Court until October 2018, and the Chief Justice. Ninety-eight percent of the time, they have been on the same side of an opinion. The only time that they split was in the 5-4 First Amendment decision in which Chief Justice Roberts sided with the Court's liberal bloc in upholding the state's rights to impose limits on churches to slow the spread of COVID-19.¹¹ The Chief Justice was in the majority. Justice Kavanaugh was in dissent. That's the only time they have split so far, although there are a number of contentious cases on the horizon, including those dealing with the president's finances, the Louisiana abortion law, and LGBTQ rights.

The end of the term is in about one month. Today, we will examine the cases that have been decided, as well as other cases coming up later. The Court put off some arguments until the October term that will start this fall. The cases we're going to talk about today are the ones that have been argued, two of them decided, and one waiting yet.

I'm going to discuss *Atlantic Richfield*, the latest of the Supreme Court CERCLA cases. Many of the other most recent CERCLA cases were written by Justice Clarence Thomas. This is the first CERCLA decision authored by the Chief Justice. It is in many ways an old issue, examining the interaction between state and federal law. In short, after a Superfund remedy is chosen at a site by EPA, what other state law remedy options exist? This case highlights the nature and extent of the often-litigated CERCLA §113(h) bar on judicial review of some EPA decisions. The case arises in one of the original Superfund sites designated in 1983 and involves the well-known Anaconda Copper smelter. Atlantic Richfield bought out Anaconda—probably not a good decision to buy this particular future Superfund site—and Atlantic Richfield has been cleaning up the site for about 35 years, covering 300 square miles. The amount of money that Atlantic Richfield has spent already cleaning up the site is well over \$400 million. EPA has selected a final remedy and the work will need to continue for many years.

In the middle of this gigantic site, somewhere close to 100 landowners wanted approximately \$50 million more in cleanup for their particular properties. As EPA had already selected the remedy, they brought their case in state court seeking only state-law remedies. The case ultimately went to the Montana Supreme Court through a writ of supervisory control. Atlantic Richfield argued that CERCLA §113(h) bars this kind of case. And, while I was the assistant attorney general for ENRD at DOJ, we filed an amicus case in the state supreme court also arguing the landowners' new effort to get more cleanup was barred. However, the Montana Supreme Court disagreed, ruled for the landowners, and remanded the case. In particular, the court found that the landowners were not CERCLA PRPs as they had not been so designated in the past by EPA, the statute of limitations had run, and "Put simply,

the PRP horse left the barn decades ago."¹² It was this decision that went to the Supreme Court.

Atlantic Richfield sought certiorari in April 2018 and DOJ filed a somewhat unusual brief on October 2018 in which they argued against certiorari, saying the case was interlocutory in nature, but that if the Court did grant review, that the Montana Supreme Court was wrong. The Court granted review anyway in June 2019 and heard oral argument in December 2019.

The position of the parties was quite clear from the outset, the company arguing that CERCLA preempted further cleanup and that landowners could not bring state challenges and have their own piecemeal cleanups. Montana, on the other hand, argued that the Supreme Court lacked jurisdiction over the case, because it was non-final and just remanded for trial. If the Court did take jurisdiction, they should affirm because CERCLA does not bar state actions and that the landowners were not PRPs.

From the outset of argument, it was clear that many of the Justices were not accepting either of the primary arguments. Justice Elena Sotomayor asked the first question, debating with the company whether CERCLA was a ceiling or floor, then said "What's wrong with a ruling that's just that basic that says you can get more if you can prove the EPA will give you more, as simple as that?"

Later, when DOJ was arguing, Justice Ruth Bader Ginsburg asked: "If we say the landowners are PRPs and they have to get EPA permission for any restoration that they want to do, if the Court said that, then I don't see that the further questions in this case need to be answered. And I don't see any reason to get into preemption."

The DOJ solicitor general representative agreed, and, as the saying goes, that was the ballgame.

Writing for the majority, Chief Justice Roberts found that the Montana Supreme Court had jurisdiction, but that the court was wrong in finding that the landowners were not PRPs. Accordingly, the landowners had to seek EPA approval for any additional work. "That approval process," Justice Roberts opined, "if pursued, could ameliorate any conflict between the landowners' restoration plan and EPA's Superfund cleanup, just as Congress envisioned."¹³ Concurring and dissenting, Justice Samuel Alito did not believe the Montana Supreme Court had jurisdiction, and lamented that "CERCLA Section 113(h) is like a puzzle with pieces that are exceedingly difficult, if not impossible, to fit together."¹⁴ Also concurring and dissenting, Justices Neil Gorsuch and Thomas would have upheld the state remedy, concluding that "CERCLA sought to add to, not detract from, state law remedial efforts."¹⁵

Like all of the other CERCLA Supreme Court decisions of the past, this one will need to age and be reviewed in context to understand its full impact. It is, however, hard to imagine that the decision will not spur additional state

11. *South Bay United Pentecostal Church v. Newsom*, No. 19A1044 (May 29, 2020).

12. *Atlantic Richfield Co. v. Montana* Second Jud. Dist. Ct., 408 P.3d 515, 522, 48 ELR 20000 (2017).

13. *Atlantic Richfield Co. v. Christian*, No. 17-1498, slip op. at 22, 50 ELR 20101 (Apr. 20, 2020).

14. *Id.* at 3 (Alito, J., dissenting).

15. *Id.* at 11 (Gorsuch, J., dissenting).

court challenges. While this case was narrowly about seeking additional cleanup/restoration damages, there are many other ways landowners could pursue state remedies. In a footnote, the Court made clear that “Atlantic Richfield concedes that the Act preserves landowners’ claims for other types of compensatory damages under Montana law, including loss of use and enjoyment of property, diminution of value, incidental and consequential damages, and annoyance and discomfort.”¹⁶ For the skilled attorney, those broad terms give ample opportunity to seek state-law claims, even if the landowner is a PRP.

This case will also present new challenges for the federal government attempting to resolve by settlement a long-term extensive remedial cleanup with either a single PRP or, more commonly, a group of PRPs, all of whom may be willing to contribute significant funds or do the actual work, so long as they are being released from future liability, except that required by statute. Leaving open the possibility of future state claims for more money or more work decreases the finality sought by the parties.

Sambhav Sankar: I’m going to talk about the *Maui* case. The *Maui* case is a classic example of a case where the facts are really critical to the outcome that the Court reached. Fact number one: Kahekili Beach on the west coast of Maui was affected by the discharge in this case. I’ll talk a bit more about that.

As a result of some of the activities that were at issue in the case, the coral reef over the years has been impacted by nutrient pollution. If you add nitrogen and phosphorus to the area, it will favor the growth of algae. The algae outcompetes the corals. The algae grow over it and the next thing you know, you don’t have a coral reef anymore.

A sewage treatment plant was at issue in this case. That plant is not very far from the reef, a quarter-mile or so from the ocean itself. In most cases, sewage treatment plants discharge to navigable waters of some type. Very often, those discharge outfalls go to the rivers. They go to large water bodies, like the Great Lakes, or they go to the ocean.

Typically, when you discharge to the ocean, you install what’s called a deepwater outfall, which is designed to diffuse the discharge, or you place it in an area that has relatively low sensitivity to the pollutants that are discharged. Like most sewage treatment plants, this one has pretreatment in place. But what comes out of it is nevertheless partially treated sewage. It still has a lot of nutrients in it.

The special feature of this treatment plant that the county of Maui installed is that the discharges here happened through four pumps that discharge water into wells. Normally, we think of wells as being something that draws water out of the ground. In this case, these are injection wells. So, the partially treated sewage is injected downwards, several hundred feet into the groundwater.

And I should say that that’s done in the order of millions of gallons per day. One of the facts that I think proved super important in this brief was that it was undisputed and absolutely clear that the sewage was reaching the

ocean. Nobody could really argue about that. EPA went in years ago and did a dye tracer study. They injected fluorescent dye into the discharged wastewater and watched to see where that dye came out. Those dyes are very potent, so you can see them in very small concentrations. You can map them both in the groundwater and in the offshore areas as well.

The study showed where the plume of wastewater was going. It was going down to the groundwater table and then, because this area is so close to the ocean, it was essentially sloshing back and forth with the tide and was rather quickly going out into the ocean. A large percentage of that discharged water was reaching Kahekili Beach.

In most cases, sewage treatment plants need to get permits under the NPDES. So, when you’re discharging to navigable water, you have to get a permit from EPA. That permit typically spells out the conditions that you’re required to follow in order to make the discharge happen. In this case, the sewage plant didn’t have a permit. We were suing them to get that permit.

The district court found that the plant had to get a permit because there were actually discrete fissures and there was wastewater that was more or less directly traveling through them to the ocean. We won on that theory in the district court, but on appeal, the U.S. Court of Appeals for the Ninth Circuit went with a different theory. The Ninth Circuit said, yeah, you do need a permit in this case because the pollutants are “fairly traceable from the point source[, the wells in this case,] to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.”¹⁷

The county had argued that discharges to groundwater that flow out in this way—through groundwater—are not in fact covered by the CWA. They’re not directly disposed. But the Ninth Circuit disagreed. At that point, it set up a circuit split with a couple of other courts, and the Supreme Court took the case.

The plaintiffs in this case included a series of environmental groups in that area of Maui. David Henkin was our lead counsel. The Court had to look at the text of the CWA that was at issue. This is like a classic law school case. I’m sure Richard will be teaching this case for years to come because unlike the usual environmental case that has acres of regulatory materials to go through, here, we have a relatively small bit of text. So, this was a case that the Court really dug into, not just the text of the Act, but also the facts.

The case came out our way, which is to say the plaintiffs’ way. The court concluded, quoting Justice Anthony Breyer, “We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.”¹⁸ That language very much traces the Ninth Circuit’s language. It rejected a much more conser-

16. *Id.* at 6, n.2.

17. *Hawaii Wildlife Fund v. County of Maui*, 881 F.3d 754, 765, 48 ELR 20016 (9th Cir. 2018).

18. *County of Maui, Hawaii v. Hawaii Wildlife Fund*, No. 18-260, slip op. at 15, 50 ELR 20102 (Apr. 23, 2020).

vative language that both the federal government and the county proffered.

The federal government in particular argued that any discharge to groundwater of any kind is not covered by the NPDES no matter how clearly that discharge ends up in surface water. This set up the factual rub of the case because, on one hand, you could have the obvious loophole that the majority noted—which is that if you discharge just a few feet short of the navigable water and it reaches the water, well, saying that discharge isn't covered doesn't seem right. On the other hand, the facts were tricky on the other end too, for example, if you have septic tanks far away and some very small amount of those discharges reach navigable water, that seems problematic to regulate. The Court ended up going our way.

There are a couple of interesting features about this case that we can talk about. First, the Court did some old-time statutory interpretation. This is like a decision you would have expected 20 years ago. While the dissents were hypertechnical and focused on “ofs” and “tos” and trying to parse commas, the majority really tried to do the best they could to have it all make sense. In fact, having clerked for Justice O'Connor, I would say this almost looks like a Justice O'Connor opinion. There were a lot of factors, they did the best they could, and they tried to give some guidance but left it to lower courts to really work it out based on some broad guidelines. That was largely the critique of the dissent, saying, look, this isn't a standard, it's something that every court is going to have to figure out for itself.

There are a lot of implications to this case. They are already showing up. We're seeing decisions and actions by government agencies that are reflecting this. It's one of the most important CWA cases of recent years in addition to the “waters of the United States” cases. I will leave it at that and let Richard take over.

Richard Lazarus: I'm going to talk about the third case, the *Atlantic Coast Pipeline* case. Unlike the ones that Sam and John talked about, this one is not yet decided.¹⁹ It was argued on February 24, and it was one of the last cases argued in the Supreme Court before the building closed. All the argument sessions after this one were held telephonically.

These are two consolidated cases, *U.S. Forest Service v. Cowpasture River Preservation Ass'n* and *Atlantic Coast Pipeline, LLC v. Cowpasture River Preservation Ass'n*. The issue in both cases is the same: the question of whether the Forest Service can authorize a pipeline under the Appalachian Trail, which is administered by the National Park Service. I want to discuss several things: background on the relevant facts in the law, why you might care about this case, what happened to oral argument, and what to look for in

the Court's opinion, which we should get by the end of the month and maybe as soon as next week.

Here are the background facts. The Atlantic Coast Pipeline company wants to build a 564-mile pipeline from West Virginia into southeast Virginia that will go off in two directions, eastern Virginia and then down to southern North Carolina. It will carry a lot of natural gas. This pipeline is obviously an expression of a broader phenomenon we're all familiar with, and that is the explosion of natural gas fracking in West Virginia and Pennsylvania. You see the natural gas increasing dramatically in Virginia, too, and North Carolina. It's all part of the fracking industry and it shows how coal is being basically displaced.

To build a pipeline like this—and this is a pipeline where the majority of it is a 42-inch-diameter pipeline—you need to build about a 125-foot right-of-way. It's going to be a very disruptive process to construct this pipeline. You will make some people very happy to get the natural gas and some people very unhappy when their property is disrupted by the construction and maintenance of the pipeline.

As a result, environmental groups are opposed to this pipeline. But it's not just environmental groups. There are some very powerful landowners in Virginia and North Carolina who are upset by it, too. If you try to build a pipeline like this for 564 miles, you're going to trigger a lot of environmental laws along the way—the National Environmental Policy Act (NEPA),²⁰ Clean Air Act,²¹ CWA §404, the wetlands provisions in particular, National Forest Management Act (NFMA),²² Endangered Species Act (ESA),²³ and others. All get triggered. This pipeline is being built along a lot of very fragile ecosystems because it's a very mountainous area with a fair amount of wetlands along the way.

The U.S. Court of Appeals for the Fourth Circuit ruled that the Forest Service had violated NEPA and the NFMA.²⁴ When one reads the opinion in the case, it's quite clear the Fourth Circuit is looking at the Forest Service with a skeptical eye because the Forest Service under the Obama Administration had expressed a lot of skepticism about this pipeline and the work being done by the Federal Energy Regulatory Commission audit. They pretty much flipped during the Donald Trump Administration.

So, the Fourth Circuit panel ruled it violated the NFMA and NEPA. It also ruled that it violated the MLA. That's important because that's the issue that the United States and Atlantic Coast Pipeline company took to the Supreme Court. They did not appeal their losses on NEPA. They did not appeal their losses on the NFMA. Those were losses they're having to deal with on remand regardless in this case. For the environmental groups, in the first instance, everything's not at stake before the Supreme Court because the government in the *Atlantic Coast Pipeline* case basi-

19. *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n*, No. 18-1584, 50 ELR 20148 (June 15, 2020). [Editor's Note: On June 15, 2020, the Supreme Court held, 7-2, that the Forest Service had authority under the MLA to issue a special use permit granting a right-of-way for a segment of the Atlantic Coast Pipeline to be constructed beneath the Appalachian Trail in George Washington National Forest.]

20. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.

21. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

22. 16 U.S.C. §§1600-1687, ELR STAT. NFMA §§2-16.

23. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

24. *Cowpasture River Preservation Ass'n v. Forest Serv.*, 911 F.3d 150, 48 ELR 20204 (4th Cir. 2018).

cally acquiesced in a major part of their loss in the Fourth Circuit. They lost on several distinct grounds before that appellate court and sought Supreme Court review on only one of those grounds, leaving the others undisturbed.

Thus, this case is all about the MLA. The Fourth Circuit ruled the Forest Service had no power to build a pipeline under the Appalachian Trail. Why? Because the Appalachian Trail is administered by the National Park Service; therefore, according to the Fourth Circuit, the trail is part of the National Park System and the MLA bars pipelines in the National Park System. The Fourth Circuit also gratuitously closed its opinion by citing the *Lorax*²⁵ and how the Forest Service does not speak for the trees.²⁶ I think that was a bad idea if one is trying to get readers to take your legal analysis seriously.

So, why care about this case? A lot of pipelines are currently being built across the country. That's a huge industry, pipeline construction. And there are a lot of scenic hiking trails all over the country. If, as the Fourth Circuit ruled was the case for the Appalachian Trail under the MLA, all those other trails served as barriers to pipeline construction, that would be a major problem for the pipeline industry.

What were the arguments before the Supreme Court? The environmental groups had a very strong textual argument. It said, look, if the Appalachian Trail is land in the National Park Service, no one can dispute—and no one did dispute—that that is true, then the Forest Service cannot permit a pipeline under it. The MLA is absolutely clear on its face: there cannot be a pipeline in the National Park System on federal land. So, the question is, is this Park System land or not?

Then, the environmental groups said, look, the National Trails System Act²⁷ provides that the National Park Service administers the Appalachian Trail. Here again, there is no dispute. There's no question the Appalachian Trail is administered by the National Park Service. The National Park Service Organic Act,²⁸ the third statute here, provides that any land administered by the National Park Service is part of the National Park System. So, one statute says it's part of the National Park System, another says it's administered by the National Park Service, and the third says you can't do it because it's part of the National Park System. You put those together and the strong textual argument is that you can't do it.

What the case boils down to is whether the Appalachian Trail is land or not, whether it's land in the National Park System or whether it's something different from land. The Forest Service and the Atlantic Coast Pipeline company both say it's not land, it's a footpath, which is distinct from land. A footpath is not land and, therefore, the MLA doesn't apply. That is on balance a fairly weak textual argument. Obviously, what is a path but land? So, they have that as a plausible textual hook, but the real argument is something different. More of a policy argument than a tex-

tual argument. That is, it'd be a really extreme result if pipelines across the country stop at trails.

The federal government and industry also argue that the environmentalists' characterization of the role of the Park Service in administering the Appalachian Trail has no basis in the trail's actual day-to-day administration. They argue that the Park Service doesn't really do anything with these trails, that it's all done by the Forest Service, and that it would be absurd to think that the Appalachian Trail is part of the National Park System. Because where does the Appalachian Trail go? It goes for instance right through downtown Hanover in New Hampshire. If you walk right down Main Street in Hanover, New Hampshire, that's the Appalachian Trail. Is that really part of the National Park System?

The environmentalists in this case are relying on a very strong textual argument. To some extent, this is not unlike the *Mauui* case, where the environmental groups had a very strong textual argument and the other side did not. What we were all looking for last February during oral argument was whether our textualists, Justice Gorsuch and Justice Kavanaugh, would be there or not. They are after all very famous for saying you go with the text, that you don't worry about the policy implications, that you just read the text and nothing more.

Well, by the time the environmental groups stood up—they were the respondents in the case—the United States had already stood up and argued and the Atlantic Coast Pipeline representatives had already stood and argued. It was fairly clear that the environmental respondents were likely to lose this case because neither Justice Kavanaugh nor Justice Gorsuch asked a single question of the petitioners in the case. They didn't challenge them at all on the text of the statute in the case. They had no interest in it. And when the environmental attorneys stood up, all the Justices like Kavanaugh and Gorsuch talked about were the practical effects of ruling that the Appalachian Trail blocked the pipeline—the kinds of policy concerns one would more readily expect non-textualists to make.

If you look at the number of questions asked during the oral argument, which is always a pretty good predictor of who is going to win and who is going to lose, the environmental groups were asked 51 questions. The two lawyers combined for the government and the industry were asked 35 questions. Justice Gorsuch asked nine questions of the respondents. He asked zero questions of the petitioners, the United States, and the industry.

So, it looks pretty clear what's going to happen in this case. We could be surprised by oral argument and then what the Court does. But I don't expect a surprise here. I expect the environmental respondents will probably lose this case and the only question will be what's the final vote in the case—by how many votes.

Davina Pujari: Thanks, everyone. We have a question from the audience. It relates to *Mauui*. The question is how significant is the Court's decision to incorporate technology into the courtroom?

25. Dr. Seuss, *The Lorax* (1971).

26. *Cowpasture River Preservation Ass'n*, 911 F.3d at 183.

27. 16 U.S.C. §§1241 et seq.

28. 16 U.S.C. §§1 et seq.

Sambhav Sankar: I don't think that one is specifically about *Maui*, but I can tell you that now, as a result of the COVID-19 pandemic, it is everywhere. Some courts had already been doing it. The Ninth Circuit, for example, was already hearing oral arguments remotely. Now, we're actually doing summary judgment hearings and even evidentiary proceedings remotely.

I think in a way the Supreme Court is not breaking new ground here. The ground has already been broken by lower courts and the Supreme Court is catching up. What do I think it will mean for advocacy? I think it is certainly tougher in the same way that I am speaking to just four people as opposed to an audience and not actually the audience that I am intended to be speaking to. I think it's tougher as an advocate to do it this way, but I actually don't think it's fundamentally going to change outcomes. That's for sure. It may change the way the Justices interact with each other. I think that's probably the most salient thing.

Richard Lazarus: I think Sam is right. The question is alluding to the telephonic arguments the Supreme Court held in May. Here's my quick reaction to that. They can't wait to get back to what they did before. I think they did the telephonic arguments because they felt a need to do an oral argument. I cheer them for doing that, to offer counsel and the general public a semblance that things are still happening in a normal way, pandemic notwithstanding. But the telephonic oral arguments were a shadow of a real oral argument in front of the Supreme Court. This idea of going one at a time for two minutes is very inefficient. What happens in a real oral argument is they build on each other's questions. They capture how you respond to one by pinning you with the next.

So, they went through the motions, but it really wasn't a very effective argument. It was a series of speeches like in a congressional hearing. It was sort of one speech after another by Justices. Oral arguments are great in the Supreme Court because the Justices actually deliberate together. They ask questions of each other and work through the answers. The deliberations during argument are greater than deliberations in conference a few days later, and they missed all of that.

I don't think they enjoyed it. They went through it. I thought some of the Justices asked different questions than they would have asked during a real argument because it was being done live. I give them two cheers for what they did, but I don't think there's any lessons to be learned other than the fact it's not as effective as a real oral argument.

John Cruden: I would join in Richard's comment that they want to come back to where they were as soon as they can. On the other hand, since I've been involved in moot courts, trying to practice those, it's a different moot court because of getting Justices one at a time and sometimes it's very hard to figure out who is asking the question. So, they stood up, the sort of seniority game of asking questions. Now, we're getting questions by Justice Thomas. Who would have thought that?

Richard Lazarus: And that was great. I would say that was the one positive thing. Justice Thomas doesn't ask questions. He's always saying he doesn't like being part of that hurly-burly and interrupting. It turns out he was telling the truth about that. As long as it's one at a time, he asked questions. He asked good questions. I think that was a positive development.

Sambhav Sankar: I think we have to put it in context of the overall importance of the oral arguments period at the Supreme Court and really at other courts as well. What's interesting is that we have two cases, at least, that we talked about here where oral argument may actually have been important. But that's in my view. The others may disagree. Oral argument is a piece of Supreme Court advocacy, but it's definitely not the most important piece. It's often a relatively inconsequential piece of the presentation of the case.

John Cruden: I want to ask Richard a question because he's been before the Supreme Court arguing so many times. I like the two minutes that you can ask uninterrupted. What do you think?

Richard Lazarus: They introduced that at the beginning of the term in October. They'll continue to do that. I thought that was a really good innovation. I don't disagree with Sam. The only amendment I would give about the value of oral argument is that I think its value is significant. The value of the oral advocate is less. In other words, the argument really is the first time the Justices deliberate or discuss a case together. They have a tradition of not talking about the case until they get to the oral argument. Then, they talk about it really among themselves for an hour. That's longer than they're going to talk about it in conference.

The oral argument's greatest value is that it provides an opportunity for the Justices to deliberate together. You get to watch them think about it and see what the other Justices' views are. If in fact the advocates are really skilled, they can participate in an effective way in the conversation. But I always view the oral arguments as sort of one hour of deliberations on the case in public among the Justices and I do think they learn from each other. If they learn from their advocate, so much the better, but they do learn a lot from each other.

John Cruden: I do believe that we have two cases, both *Maui* and *Atlantic Richfield*, in which the ultimate decision was not what was argued in either of the parties' briefs. The decisions could be seen being developed in response to the oral argument and the various questions by the judges. While this is more true in the *Atlantic Richfield* case than *Maui*, oral argument clearly made a difference in both cases.

Richard Lazarus: I didn't follow *Atlantic Richfield* the way I followed the *Maui* case. In the *Maui* case I thought the advocate, David Henkin for Earthjustice, did a terrific job. This was a case the Court took with the clear expectation of ruling against the Hawaii Wildlife Fund. This

was not a case they took to affirm. They took it to reverse. They did in *Atlantic Richfield* what we thought they were going to do. They did not do what people expected them to do in *Maui*. That was because of really good advocacy by Earthjustice in this case: how they shifted their position, how they made their arguments more pragmatic, and how, accordingly, they made their legal position more acceptable to the Court.

Earthjustice's briefing evolved over time. The Earthjustice attorneys knew they were no longer in the Ninth Circuit arena. They were now in the Supreme Court. They had to count to five with the Justices they had, and they did so. They also did a very good job of getting the other side to embrace, by contrast, an extreme unreasonable position. That allowed Earthjustice to offer what became a sort of more reasonable, pragmatic, contextual position. As Sam said, they embraced a Justice O'Connor middle ground approach to it. Nominally, the judgment was vacated, but the test the Court adapted is very friendly to the Hawaii Wildlife Fund. They'll do really well on remand in that case and all the environmental cases. But that was done because they didn't stick strictly to the Ninth Circuit's view. It was a really effective job of advocacy. That came through during the oral argument. I thought Henkin did a great job.

Sambhav Sankar: I would throw two notes in there. First, a factual bit that you two will appreciate: the current position of the county is that we should settle the case, return the decision about whether to issue a permit back to the Hawaii regulatory authority. In return for them doing that, we should dismiss our case with prejudice and dismiss our claim for fees. I wish the county's lawyers could see two of the foremost environmental lawyers in the country laughing off that position.

Richard Lazarus: As you know, Sam, the great thing about this case is that the county of Maui and their supporters in industry were so confident of a big win that they rejected an offer to settle by the Hawaii Wildlife Fund, which basically agreed to capitulate to end the case in the Supreme Court. They were so confident of winning that they turned that down. Then, they got their head handed to them. So, they truly were embarrassed and the law firm that represented them should be incredibly embarrassed for not taking that offer before.

Sambhav Sankar: I want to add one more fact that helped us a lot, and that is that the text was pretty good for us. The U.S. Congress wrote a very clear and very strong statute. I will be blunt and say that this is an example of the textualists on the Court being uninterested in the text. They twisted the text toward the result that they wanted to get. I think anybody who reads their dissenting opinions and watches Justice Breyer cut up those textual arguments in his majority opinion can't help but see that the textualists did not go where you might have thought the text would lead. At the very least, I think the text was favorable to us.

But it turns out that textualism doesn't necessarily always get you where the textualist wants to go.

John Cruden: I have one other comment on *Maui*. DOJ completely changed its position during the course of the litigation. While I was assistant attorney general of ENRD during the Obama Administration, we filed a brief in this case in support of requiring a permit utilizing what was then called the "direct discharge" theory long advocated by EPA. This Administration obviously did not agree and came up with a new position, after seeking notice and comment, then concluding that no permit was necessary. The Supreme Court in its majority opinion, however, blew right by that new EPA position; they gave no countenance whatsoever to the now-changed position of the government. And, you search in vain for any reference to the firmly established *Chevron* doctrine²⁹ in any briefs, as that would normally be a key argument for the government, seeking deference for their interpretation. DOJ did not seek deference and of course they absolutely did not get any.

Davina Pujari: Our next question from the audience is what are some of the notable cases you are watching that have not yet been argued?

John Cruden: There are actually a number of them. There are what I think of as state water cases that pit one state against another. These cases are fascinating, because under the U.S. Constitution, a state-versus-state issue goes directly to the Supreme Court, and not through intermediate courts. One case is already scheduled, *New Mexico v. Texas*,³⁰ involving the correct allocation of water under the Pecos River compact. The case was originally scheduled to be argued in April, but was then one of the delayed cases now scheduled for argument on October 5, 2020, in the new Supreme Court term. So, that's coming up.

Another of the state-to-state cases that I expect to return to the Supreme Court next term is *Florida v. Georgia*,³¹ which deals with the allocation of waters of the Apalachicola-Chattahoochee-Flint River Basin. The case was previously argued and remanded in 2018, and a new special master rendered a report in December 2019 that is currently being reviewed by the parties and is likely to come back to the Supreme Court next term.

There is also a Freedom of Information Act case³² that we're following. This case comes out of an environmental background, concerning EPA regulations for cooling water intake structures that power plants use to cool down their facilities. The CWA requires the cooling regulations and they have been enormously controversial. In this case, the cooling structures had the potential to adversely impact some ESA-listed species, and EPA requested formal consultation with the wildlife agencies. Plaintiffs then sued seek-

29. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 14 ELR 20507 (1984).

30. *Texas v. New Mexico*, No. 22065 (filed June 27, 1974).

31. *Florida v. Georgia*, 138 S. Ct. 2502, 48 ELR 20107 (2018).

32. *Sierra Club, Inc. v. U.S. Fish and Wildlife Serv.*, 925 F.3d 1000 (9th Cir. 2019).

ing draft documents used in preparation of a final report. The district court ordered the release of a number of the drafts and the court of appeals agreed in a divided panel decision. The Supreme Court granted the government's petition for certiorari in March 2020, and the case is now set for argument next term in November.

By next term, we might see some of the cases involving climate change. The Ninth Circuit is currently considering plaintiffs request for en banc review in the well-publicized *Juliana* case in which 21 children sought relief from the government for climate change activities. The Ninth Circuit reversed the district court's interlocutory orders scheduling trial, finding the claims not to be redressable. We await the en banc decision now, and that is a case that could come before the Supreme Court. There are also a number of cases by plaintiffs, including the city of Baltimore, challenging industry actions that they allege contributed to climate change, and they are filing these actions in state courts. Industry routinely seeks to move them into federal court. Now, we have both the Fourth Circuit and Ninth Circuit holding that state courts are the proper forum, and cert petitions have been filed. Those are the ones that I'm looking at right now, but I'll ask Sam and Richard for others.

Richard Lazarus: There is only one that I can think of, and that's *McGirt v. Oklahoma*.³³ This is a Native American case that was argued in May. It's a very, very big case for Indian law. It looks at the scope of the criminal jurisdiction of the Native American courts over activity on the reservations. The Supreme Court is considering a ruling. We don't know what they're going to do, but a potential ruling would basically supplant the authority of the tribes. There are a lot of criminal prosecutions on reservations. That's a big issue. The others are all the ones that John talked about.

John Cruden: *McGirt* is a hugely important case. Depending on how the Court rules, about one-half of eastern Oklahoma could turn into tribal land, including Tulsa, the state's second largest city. This is a case that was argued before, but the Court was unable to decide when there were just eight Justices. Now, it's nine. Justice Gorsuch recused himself the first time, but not now. It has enormous land and treaty issues, and arises in a criminal case where state court jurisdiction of a tribal member is challenged. A tribal victory would put at issue a number of current state laws, including environmental statutes.

Sambhav Sankar: Many law students out there don't understand how important Indian law is to environmental issues. I will put in a plug here for students or people who are looking to learn more about environmental law to recognize the importance of Indian law and the sovereignty of tribes over that land as being a critical feature of environmental law. In fact, John supervised a tremendous amount of that sort of litigation while he was at DOJ.

33. *McGirt v. Oklahoma*, No. 18-9526 (July 9, 2020). [Editor's Note: On July 9, 2020, the Supreme Court held, 5-4, that land Congress had reserved to the Creek Nation in the 19th century remained Indian country for purposes of the Major Crimes Act.]

Davina Pujari: The next question from the audience is in the *Atlantic Richfield* case, do you see any negative effects for neighboring communities with land that has been impacted by local industry? Will they find themselves as PRPs in the future compounding the remedial problems?

John Cruden: Probably not, because ordinarily, those off-site landowners are not considered PRPs. The reason why the landowners became PRPs in this case is that they were owners of land right on the Superfund site. I think most of us who have practiced CERCLA would have said that the Atlantic Richfield landowners were PRPs to begin with. And of course, we all understand the PRP status does not make anyone per se liable; it is simply a status. Neighboring communities who do not own portions of a Superfund site are unlikely to be swept into PRP designation.

The other question is can they bring a state court action? As I mentioned, state action is still a possibility. For example, a claim of lost use of property under state law might well be a case that could go through the state court because it doesn't interfere with a remedy. Such an action doesn't have the same implications for CERCLA §113(h). The Supreme Court was clearly leaving an opening to go to state court. They agreed that the Montana Supreme Court had jurisdiction. They just thought Montana was wrong on the PRP issue.

Davina Pujari: John, just a follow-up on that. Let's say you have landowners that are right outside the boundary of a Superfund site, but the contamination has extended to their property. They're seeking some sort of remedial or restoration action for their own property. Your view is that they would not be PRPs because they're not within the existing boundary of the Superfund site?

John Cruden: It isn't the boundary that would govern, but rather whether the landowners fall into one of the four categories of CERCLA liable parties: owner, operator, generator, or transporter. There's long been an issue of landowners with contaminated groundwater that has migrated under or on their property. That's different than the landowner outside of a Superfund site that has no contamination whatsoever on or under their property. The landowner in your question could be a PRP, but that requires a very factually specific review and EPA has guidance on its website concerning those issues.

Davina Pujari: Our next question is can any of the panelists comment on how the environmental decisions of this term reflect on the Court's broader environmental jurisprudence?

Richard Lazarus: I don't see this as a particularly telling term except for the obvious issue, and that is whether or not we're going to find out that Justices Gorsuch and Kavanaugh are committed textualists. This is a term that has tested that. Justice Antonin Scalia early on, in the first 15 years, was a pretty committed textualist. If in a case the environmental groups had a very strong textual argu-

ment, he would often go with us and we would win the case as we would write the opinion. He loved it. He loved to show that he stuck to the text even if he didn't like the policy implication of it. Later in his career on the Court, I thought he became more result-oriented than he was in the beginning and not such a committed textualist.

Both Justices Kavanaugh and Gorsuch trumpeted themselves as committed textualists. Whatever the policy implications of it, be damned, they follow the text. It's how Justice Gorsuch portrayed himself in the lower courts, how he portrayed himself in his writings. That got put to the test in both the *Maui* case and the pipeline case. We don't know what's happened in the second one yet, but I would suggest that the early indications are that they're not as principled pure textualists as they've suggested. Instead, they look like they're more result-oriented, and that's disappointing.

John Cruden: I would say one thing about this term that I believe is now crystal clear. We used to state that the Justice that Sam clerked for, Justice O'Connor, was the swing vote in 5-4 decisions. Then, for a while, the Court looked like it was really a Justice Kennedy Court because more often than not, Justice Kennedy was the swing vote. This term, this is Chief Justice Roberts' Court. As I said at the outset, statistically, he was the only Justice in 100% of all of the majority decisions, the swing vote in every 5-4 decision.

Whatever we think about the *Maui* decision, it was a result of Chief Justice Roberts and Justice Kavanaugh—voting as a pair, as they have done so far this term 96% of the time. We spend a lot of time talking about the two newest Justices, Gorsuch and Kavanaugh, because they don't have a complete track record. But this is Chief Justice Roberts' Court.

Richard Lazarus: One thing interesting about that is that during oral argument, as I'm sure Sam remembers, Justice Breyer sort of raised the idea of a functional equivalent as a possible legal test. The Chief Justice in argument said, what's that mean? You can't possibly have the test be that. I don't know what that means. Well, that is what he said when the case was argued, but only a few days later, the Chief Justice's thinking clearly shifted. After the conference vote, the Chief Justice, as the senior Justice in the majority, assigned the opinion of the Court to Justice Breyer. He didn't have to do that. He could've given it to himself, but he gave it to Justice Breyer. He gave it to the very Justice who came up with this theory that the Chief Justice sort of dumped all over. That was interesting to me, that he reached out and gave Justice Breyer the assignment, suggesting that whatever concerns the Chief Justice had a few days earlier about Justice Breyer's functional equivalence test had since dissipated.

John Cruden: I thought that was interesting. But I do remember during the very beginning of the oral argument when the Chief Justice asked the question of the Maui

counsel about how the pollution arrives to the ocean. From his opening questions, it appeared clear he was not going to support Maui's most aggressive position. And neither was Justice Kavanaugh, who at one stage said in response to Maui's argument that it sounded just like the argument Justice Scalia rejected in the *Rapanos* decision.

Sambhav Sankar: Walking into that case, I think everyone expected us to lose. Walking out of the argument, I think many people started seeing the case the way we did. I won't tell you what our internal odds-making was, but it certainly went up from oral argument as well. I think it was interesting when you look at the briefs. The briefs are mostly about the text. Then, at the back end, they start talking a little bit about what does this mean. There's a lot of federalism stuff in the briefs, but what the Court cared about was the practical stuff. There was almost no discussion about the text other than some short sort of law school batting around.

Richard Lazarus: Sam's right. I had students study this case for about four weeks in the fall. Before the oral argument, their predictions were uniformly that Earthjustice would lose. After the argument, it was more mixed, 50-50. I had them predict the outcome, and the vote, and the breakdown. I had one student who nailed it. She got the exact breakdown and she said Justice Breyer would write the opinion.

John Cruden: I will say one thing about the opinion on a practical level, and that is so many CWA practitioners are still living with the aftermath of the *Rapanos*³⁴ decision and the infamous Justice Kennedy concurrence requiring there to be a "significant nexus" for CWA jurisdiction, a term that was made up at that stage, and we have been litigating its meaning ever since. Now, we have added the term "functional equivalent" to the CWA lexicon, a term that is impossible to find in the statute. For those of us in private practice, it's going to provide a lot of litigation opportunities. It is a classic situation where better statutory language would have helped.

Richard Lazarus: Actually, since you bring up *Rapanos*, the question at oral argument the Chief Justice asked in the *Maui* case, which John and Sam alluded to, is what if they take the pipe and they have like one inch of land before it goes in? It's a mirror image. It's always a question the Chief Justice asks. He asks the same question in all cases. He asked the same question in the *Rapanos* case. There, the question was what is and is not a navigable water when there's a significant hydrologic nexus? He asked it of Paul Clement who was arguing for EPA. Would one drop be a significant nexus and would two drops be? He always asks the boundary question. In the *Maui* case, the government and industry stumbled on that. It was almost game over at that point when industry admitted that under its legal the-

34. *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006).

ory a business could have its discharge pipe stop one inch from the navigable waterway and avoid a CWA permit.

John Cruden: Your comment reminds me about a very special oral argument moment this term. At the end of the *Atlantic Coast Pipeline* case, when all the arguments were done, the Chief Justice turned to Paul Clement who was arguing for the pipeline and said, I'm going to take a minute and honor the fact that this is your 100th argument. Paul had been solicitor general of the United States and is a great oral advocate. It was good of the Court to recognize what a milestone that is. There can't be that many people who have achieved that amazing level of oral advocacy and longevity.

Richard Lazarus: Larry Wallace certainly argued more. He beat John W. Davis. He was in the 150s when he was still there. Those who are active lawyers, I think it's the two of them. Interesting now to see Clement in environmental law; that has been the development in the past decade. Industry now goes to the Supreme Court experts often for their cases. They go to Clement. They go to Carter Phillips. They went to Mary Mahoney. They no longer rely on the same lawyers to handle the cases in the lower courts. They bring in the big luminaries of the Supreme Court.

Sambhav Sankar: Some environmental groups do the same.

Richard Lazarus: Right. Michael Kellogg, a terrific lawyer, was brought in the *Atlantic Coast Pipeline* case from Kellogg-Huber. Kellogg worked closely with the Southern Environmental Law Center (SELC) to produce fabulous written briefs in the case, and Kellogg presented the oral argument. Actually, Kellogg and his law firm also wrote the amicus brief for SELC in the *Maui* case. Kellogg did that pro bono. I think probably one of the attractions of the Kellogg firm was that was the firm hired Justice Gorsuch after his clerkship on the Supreme Court where he worked as an associate and became a partner before he went on the federal bench. I think there might have been some thinking that maybe, as a result, he'd be a little more receptive to the arguments.

Sambhav Sankar: I want to put in one final point, a meta-point. What's the case we're talking about the most by far? We're talking about the *Maui* decision. I think that's likely to be the case of the term. It may be the case of a couple of terms unless we get a CWA jurisdictional decision.

Richard Lazarus: I agree absolutely.

Sambhav Sankar: From Earthjustice's point of view, it's super important for the coal ash litigation, the second largest waste stream in the country and one of the largest sources of toxic pollution to the waterways. We had a case

held on this.³⁵ It's being rebriefed now. The U.S. Court of Appeals for the Sixth Circuit asked for a new briefing. It's a very different case than it was a year ago.

Davina Pujari: There is a question actually on that point, about the *Maui* decision and potential impacts on the Waters of the United States Rule³⁶ in the panelists' view.

John Cruden: I don't see *Maui* having much of an impact on ongoing "waters of the United States" litigation, which appears to be endless. That litigation involves both the Obama-era rule as well as the new Administration rules, and the Supreme Court several terms ago held that those CWA rules had to first be considered by district courts. Not surprising, those courts are coming up with competing injunctions and different views about the various rules. When I teach about the litigation, it requires a map of the United States, showing which rule applies in which jurisdiction. The "waters of the United States" jurisdictional litigation is another example of an important case that could return to the Supreme Court, but not for quite a while.

Sambhav Sankar: A little bit on the *Rapanos* decision. Justice Scalia in his concurrence tried hard to restrict the geographic scope of navigable waters. Because he wanted to restrict the actual scope, he had to create that window for discharges that go to, say, wetlands, which he didn't want to consider part of the geographic scope. So, he knew, if you have a pipe dumping into a wetland, and the discharge wasn't covered by the Act, he'd have an untenable factual situation. It would look really bad. So, he said look, if it gets to navigable waters from non-navigable waters, well, that would be covered. It's that recognition that Justice Kavanaugh seizes on and that was certainly part of his thinking on the matter.

Davina Pujari: The next question is I believe for Professor Lazarus. How does a textualist justify breaking from those principles to focus on outcome? What would such a break signal for considering outcomes?

Richard Lazarus: This is going to be great. How do they justify? They find ambiguity. That's how they justify, they look at the text. And even though the text I think is fairly clear, they come up with a meaning no one has ever thought of before. Then, at that point, they go with their policy. I can't justify it. I'm not someone who historically has been a strict textualist and believes in textual readings, but I will say that I'm disappointed when people who claim to be textualists are textualists only when they can read the text the way that you suspect is in accordance with their own policy preference.

Early on when Justice Scalia was in the Court, he was a pure textualist. You could see him in cases go with the result that we knew wasn't as favored, but he went with it.

35. *Prairie Rivers Network v. Dyrnergy Midwest Generation*, 350 F. Supp. 3d 697 (C.D. Ill. 2018).

36. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37053 (June 29, 2015).

He did that in the case I argued before the Court involving the Resource Conservation and Recovery Act.³⁷ He did that involving the Clean Air Act in *Whitman v. American Trucking Ass'n*,³⁸ about whether or not to consider cost in, say, the national ambient air quality standards.

I'm impressed when a textualist actually adheres to the text. I can work with that. What's harder to work is if a judge is someone who is a fair-weather textualist. I'm a little concerned right now that Justices Kavanaugh and Gorsuch may be more contextual textualists than actual textualists.

John Cruden: That makes sense to me, but I would point out again we're still talking about Justices Gorsuch and Kavanaugh, who are relatively new. For Justice Kavanaugh, this is his first full term. As I have stated, he has paired up with Chief Justice Roberts so far this term, which is at some level fascinating and also rather smart for him. But I would say, particularly for Justice Kavanaugh, the jury is still out for him.

Richard Lazarus: I remember there was a case a few years ago involving whether or not EPA could veto a U.S. Army Corps of Engineer permit allowing mountaintop removal mining.³⁹ The trial judge, a President Obama appointee, ruled against EPA. But the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit three-judge panel, all appointed by Republican presidents, reversed in favor of EPA's authority. All three judges just read the text. They concluded, absolutely, EPA has that authority. A major win for environmental protection. Judges Kavanaugh, Henderson, and Griffith all thought the text was controlling. Kavanaugh underscored his commitment to text in that case. He was a textualist. I'm waiting to see what he does now that he is a Justice, but it's too soon to tell. Obviously, in the *Mau'i* case, he did go with the environmental groups.

Sambhav Sankar: I would say that if you watch Justices over the course of their career, they rarely tend toward more rigid forms of decisionmaking. Rarely, do you watch a Justice who early in his or her career is free-wheeling become more and more hidebound over time. While I agree it's early days, I certainly as an environmental advocate wouldn't be sailing in relying solely on the text.

Richard Lazarus: Right. Text will rarely be enough. An advocate will need to stay focused on the policy implications too. In terms of Chief Justice Roberts and Justice Kavanaugh, the next three weeks are going to tell us a lot. The environmental cases, the abortion cases, the docket cases and the President Trump subpoena cases, perhaps the electoral college cases, these are the cases that are going to tell the story of whether or not Justice Kavanaugh and

Chief Justice Roberts are together. I think there's no question the Chief Justice wants Justice Kavanaugh by his side. He doesn't want 5-4s. He wants 6-3s if he can get them in some of these cases. The question is whether Justice Kavanaugh will do that or whether we're going to have a fairly conservative juggernaut of Justices Alito, Thomas, Gorsuch, and Kavanaugh.

John Cruden: Richard's right. We're talking exclusively about environmental cases right now, but the docket has some really big decisions coming up. There's a whole series of qualified immunity cases being considered for certiorari and a grouping of gun-rights Second Amendment cases that have been relisted time and time again. It'd be interesting to see whether or not we have grants on any of those as they would be both significant and contentious, qualified immunity in particular. Add that to immigration rights, a state's abortion law, and the president's finances and there are big cases to consider. So, you're right, we may well see that pair breaking up in the future.

Richard Lazarus: I think you're right that this is more Chief Justice Roberts' Court than before. But, as Sam would know, Chief Justice Roberts is not Justice O'Connor and he's not Justice Kennedy. So, to the extent that he is a middle Justice, this is a far more conservative court than it was a few years ago.

Sambhav Sankar: It's a far more conservative court than we've seen arguably since before the New Deal.

Davina Pujari: This will be the last question. Do you think the Court will allow video streaming of oral arguments in future terms? Would this be the lasting legacy of COVID-19 on the Supreme Court?

John Cruden: Not a chance.

Sambhav Sankar: I honestly think it would be a problem. One of the great things about oral argument at the Supreme Court is there is a certain amount of grandstanding by some of the more flamboyant Justices. Justice Breyer sometimes gets a little flowery, for example. But I think the Court recognizes that this is not something that's meant for show. It's a serious moment. I think they recognize that, if there's a huge audience out there, the argument might become something different. I don't know if you two disagree.

Richard Lazarus: Not at all. I don't think there's anything about recent experience that just makes them more likely to go to video—if anything, less likely to go to video. The current term's arrangement was a necessity. I don't think they view it as a positive experience. And I agree with Sam, I actually think if you had cameras in there, there's tremendous public value to it. But you would undermine the role that oral argument plays for the Justices. It would not be the same. If the cameras are there, I think it would be a far less effective argument.

37. *City of Chicago v. Environmental Def. Fund*, 511 U.S. 328, 24 ELR 20810 (1994); 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.

38. 531 U.S. 457, 31 ELR 20512 (2001).

39. *Mingo Logan Coal Co. v. U.S. Env'tl Prot. Agency*, 714 F.3d 608, 43 ELR 20094 (D.C. Cir. 2013).

You can think of lots of cases. You've got a big case in front of the Court that involves Pepsi-Cola. Pepsi-Cola knows they have to worry what their advocate looks like. They have to worry what the advocate wears. They're going to want their advocate to stand up there and say something nice about Pepsi as they begin. It's just a big moment. The actual work of the Court may well become secondary to the fact that it's being televised and it's a moment of publicity. I think it will affect the Justices and the advocates in many ways that's not positive.

Sambhav Sankar: And the incremental transparency is minimal, right? The Court is already releasing audio recordings of the argument. It's not like it's not transparent.

John Cruden: In Supreme Court parlance, I'm going to concur in part and dissent in part. I completely concur that they're not going to change. I mean nothing could be clearer than they are not going to allow a televised recording. On the other hand, I think they should. Here is why. We're at a time in the history of our country where very fundamental rule of law issues are being challenged and they're being sacrificed almost daily. The public confidence in the executive branch and Congress could not be lower, but we have one branch of government that's actually doing what it is supposed to do.

The Supreme Court works, and it does so in an apolitical fashion. As lawyers, we often have different views about

conservative versus liberal positions and textual versus broad meaning interpretations of statutes. But on balance, I think we would all agree that the Supreme Court as an institution works as it was designed in the Constitution. Oral argument and the staccato-like questions of the Justices is law at its highest moment.

Every case, every argument is its own civil lesson. It's mightily important to portray justice in practice, not just to the U.S. citizenry, but to the rest of the world. For this part of our government is functioning well, decisions are being made in the kind of ways that people should know about and embrace, even when they disagree, because they can honor the process. Video is different than audio. What we watch is more meaningful to us as it is a surrogate for real life. Watching is another use of our senses by which we learn and remember. I wish more people could be in the courtroom. I wish more people could see what actually occurs and gain confidence in our rule of law, our allegiance to judicial independence, our commitment to due process and fair dealing for all, including the poor and disadvantaged.

Richard Lazarus: I agree with John that if people could really see the Court, they'd respect it more, and what they do with the arguments. I'm just not convinced if you put cameras in there it won't hurt the quality of the Court's work.