No. _____

In the
Supreme Court of the United States

LAJIM, LLC, *et al.*,
Petitioners,
v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are private attorneys general who brought a Congressionally authorized Citizen Suit against Respondent under the Resource Conservation and Recovery Act ("RCRA") at 42 U.S.C. § 6972(a)(1)(B). The remedy in a RCRA Citizen Suit is an injunction – in this case, an order mandating a cleanup. On Summary Judgment, the District Court found Respondent's contamination posed an imminent and substantial endangerment to health and the environment within the meaning of RCRA but denied an injunction requiring Respondent to abate the danger, finding that Petitioners had not proved irreparable harm. The Court of Appeals disagreed and found irreparable harm and an endangerment, but nevertheless affirmed the District Court's decision to deny relief, finding an injunction was not *necessary*. According to the Court of Appeals, the State of Illinois and Respondent were parties to a state court Consent Order, which both courts concluded provided adequate relief. At issue is the proper role of federalism associated with a federal statute requiring a district court to mandate abatement of contamination found to be a public danger, and a district court's abstention from ordering relief based on a responsible party having reached a separate agreement with a state environmental agency pursuant to a state statute that Congress did not recognize as preclusive.

The questions presented are:

1. Does a district court have equitable discretion to deny an injunction when an injunction is the only form of statutory relief, after plaintiffs proved the merits of

the case, and where the equitable factors for injunctive relief require a mandatory injunction?

2. Where Congress has determined that enforcement of state environmental law is not preclusive in 42 U.S.C. § 6972(a)(1)(B) cases, can a district court rely on a Consent Order in an irrelevant state court action brought by a state government under an irrelevant state law as a basis for denying an injunction?

3. Can a federal court abstain from entering an injunction because a state environmental agency was seeking relief under a state statute that Congress did not find to be an adequate basis for precluding federal jurisdiction?

4. When Congress provided district courts with the authority for RCRA endangerments to order "such other action as may be *necessary,*" after a finding of an imminent and substantial endangerment and irreparable harm, was Congress directing district courts to order the action that was necessary, or were district courts given the discretion to find that no action was necessary?

LIST OF PARTIES

The Petitioners are LAJIM, LLC, Prairie Ridge Golf Course, LLC, First National Bank of Amboy, as Executor of the Estate of Lowell Beggs, and Martha Kai Conway (Plaintiffs-Appellants below). The Respondent is General Electric Company (Defendant-Appellee below).

CORPORATE DISCLOSURE STATEMENT

LAJIM, LLC and Prairie Ridge Golf Course, LLC are Illinois limited liability companies. Neither company has a parent corporation, nor does any publicly held corporation own 10% or more of their stock.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners are private attorneys general seeking to enforce federal law in a Congressionally authorized Citizen Suit, who respectfully petition the Supreme Court of the United States for a Writ of Certiorari for the review of a decision by the United States Court of Appeals for the Seventh Circuit affirming a decision by the United States District Court for the Northern District of Illinois.

Certiorari is warranted because (1) the decision of the Court of Appeals does not follow United States Supreme Court precedent finding a district court lacks discretion to deny an injunction when an injunction is the only means to ensure compliance with a federal law, (2) numerous courts of appeals have issued decisions that conflict with the decision in this case, each having held that in statutory injunction and RCRA cases, balancing of equitable factors is not required, or the equities tip in favor of issuing an injunction, (3) the Court of Appeals did not respect proper notions of federalism and allowed a district court to rely on a state court lawsuit enforcing state law as a basis for withholding relief, and (4) the Court of Appeals misconstrued the word *necessary* in a way that gives district courts discretion to abstain from ordering relief in instances Congress did not provide.

Petitioners' case compliments *Atlantic Richfield Co. v. Christian*, 408 P.3d 515 (Mont. 2017), *cert. granted*, 587 U.S. ___ (June 10, 2019) (No. 17-1498). In *Atlantic Richfield*, citizens sought state relief in state court in

the face of a federal environmental agency implementing federal law. In the instant case, Petitioners seek federal relief in federal court in the face of Respondent's agreement with a state environmental agency under an irrelevant state law. Both cases address the role the judiciary to fashion and grant relief to citizens for contamination caused by responsible parties, when those same responsible parties have reached separate agreements with government environmental agencies.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, App. 1-32, is reported at 917 F.3d. 933 (7th Cir. 2019). The order denying the petition for rehearing or rehearing *en banc*, App. 157-58, is unreported.

The Memorandum Opinion and Order of the District Court granting Petitioner's motion for Summary Judgment, App. 104-56, is unreported and available at 2015 WL 9259918, 13-CV-50348 (N.D.Ill. Dec. 18, 2015). The Memorandum Opinion and Order of the District Court denying Petitioners injunctive relief, App. 50-72, is unreported and available at 2017 WL 3922139, 13-CV-50348 (N.D.Ill. Sept. 7, 2017). The August 14, 2018 Order of the District Court denying Petitioner's motion for an indicative ruling and reconsideration, App. 33-45, is unreported. Intervening opinions of the District Court addressing the availability of injunctive relief, App. 73-92, 93-103, are unreported and available at 2016 WL 626801, 13-CV-50348 (N.D.Ill. Feb. 17, 2016) and 2016 WL 5792677, 13-CV-50348 (N.D.Ill. Oct. 4, 2016). The November 7,

2017 Order of the District Court denying Petitioner's motion for reconsideration, App. 48-49, is unreported. The February 15, 2018 Judgment entered by the District Court, App. 46-47, is unreported.

JURISDICTION

The decision of the Court of Appeals, App. 1-32, was entered on March 4, 2019. A petition for rehearing or rehearing *en banc* was denied, App. 157-58, on March 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §§ 6972(a) and (a)(1)(B) of the Resource Conservation and Recovery Act ("RCRA") authorize citizens to enforce federal law as follows:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action … against any person … who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment….
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> * * *
>
> The district court shall have jurisdiction … to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take

> such other action as may be necessary, or both….

42 U.S.C. § 6972(b)(2)(C) describes statutory preclusions to a RCRA Citizen Suit, with a preclusion for (a)(1)(B) cases when a state is enforcing federal environmental law, but not state environmental law:

> No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment--
> (i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;
> (ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C. § 9604]; or
> (iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C. § 9601 *et seq*.].

STATEMENT OF THE CASE

To begin, the State of Illinois is doing nothing with regard to the contamination found by the District Court to be presenting an imminent and substantial endangerment. Nothing. The State chose to file a case in state court and to invoke a state law with limited authority – not a law that provided the State with the authority to order abatement. Under the Consent Order in the State's case, Respondent never agreed to abate the danger. Respondent only volunteered to seek to restrict public access to the contamination. Significant and dangerous contamination remains today in the soil and groundwater located in Whiteside County, Illinois – unrestricted, unabated and uncontrolled –because the State, and the District Court, have not required Respondent to do anything to abate the danger.

In federal court, Petitioners prevailed on Summary Judgment, and proved that Respondent's contamination was an imminent danger, and yet were denied the statutory relief. Petitioners are private attorneys general enforcing federal environmental law, the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. § 6972(a)(1)(B). Petitioners are not seeking private gain. After considering the evidence regarding contamination caused by Respondent, the District Court found an "imminent and substantial endangerment to health and the environment" within the meaning of RCRA. App. 142; *see also* App. 33-34, 81. An injunction is the only statutory relief available, but the District Court was unwilling to mandate abatement of the risk. The District Court found that

even though the statutory elements of the RCRA endangerment case were proven, Petitioners did not prove one of the four equitable factors for injunctions described in *eBay Inc. v. Merc Exchange*, 547 U.S. 388, 391 (2006) – i.e., irreparable harm. App. 45, 72. The Court of Appeals disagreed with the District Court, finding that as a matter of law, when a RCRA plaintiff proves the existence of an endangerment, irreparable harm is established. "A RCRA plaintiff either demonstrates irreparable harm or fails to prove his or her case on the merits." App. 17.

Nevertheless, the Court of Appeals found that with Petitioners having proven both an endangerment and irreparable harm, the District Court could deny an injunction because the District Court concluded an injunction in this instance was not *necessary* – effectively allowing the District Court to abstain without proof that the contamination was being abated as required under RCRA. App. 18-27. The Court of Appeals incorrectly found that Respondent's harm was "already being addressed through [a] state proceeding." App. 20. Again, the State is doing nothing. Respondent volunteered only to seek restrictions on public access to the contamination, not to perform any cleanup at all – not to abate anything.

The Court of Appeals, like the District Court, misunderstood the evidence and the duty of a district court under RCRA to require the abatement of an endangerment. Respondent's evidence showed that there is no abatement being performed at all, and that access to the contamination is not restricted either. In contrast, Petitioners' evidence identified specific

actions that could be ordered to address the harm. At the time of the filing of this Petition for Writ of Certiorari, there is clearly harm, but that harm is *not* being addressed by Respondents, and is certainly not being addressed in any state proceeding. An injunction *is necessary*, because without one, the harm will continue unaddressed, unabated, and uncontrolled, and to the continued detriment of the citizens of Whiteside County, Illinois.

The District Court and the Court of Appeals each relied on a state court Consent Order more or less related to the contamination. The State did not require Respondent to abate the risk. Indeed, under the state statute involved, the State did not even have authority to mandate abatement. After the State invoked a statute that required no abatement, Respondent agreed to no abatement, but only to attempt to restrict access to the contamination – a promise it has not kept and it cannot keep. The federalism incorporated into RCRA at 42 U.S.C. § 6972(b)(2)(C) requires a district court to exercise jurisdiction over an *endangerment* Citizen Suit except when a state is enforcing of one of two federal environmental laws (RCRA or CERCLA [Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq*.]), and not irrelevant state environmental law. Tellingly, on Summary Judgment, the District Court recognized that the state court Consent Order did not preclude the Citizen Suit. But, at the remedy stage, the District Court relied on the very same Consent Order to abstain from taking any action, effectively providing preclusion where Congress had not provided it. App. 70-72. The Court of Appeals affirmed.

Petitioners seek to have this case remanded to the District Court with direction that abatement of the endangerment be ordered by injunction.

A. The GE Plant and the Contamination

Respondent General Electric Company ("GE") operated a now shuttered appliance manufacturing plant in the City of Morrison, Illinois for over six decades. The plant was a major employer in the prairie town in northwestern Illinois. The plant's rise in the post-World War II era and recent decline is not an unfamiliar story of American manufacturing. As a point of historical curiosity, old photographs show the plant in its heyday with proud workers celebrating a visit from then actor and GE goodwill ambassador Ronald Reagan.

As was common in the metal products manufacturing industry of the twentieth century, chlorinated industrial solvents (the most common solvent known as trichloroethylene or "TCE") were used at the plant for removing grease and dirt from metal parts. It was not uncommon for industrial solvents to be stored in vessels that leaked, or used in degreasing machines that leaked, or used to clean floors and machine surfaces. The solvents from spills, accidents, discharges, and releases would find their way into the soil and groundwater. GE's Morrison plant was no exception, and over the decades, such solvent releases contaminated the soil and groundwater under and around the plant, both within the City of Morrison and in adjacent unincorporated Whiteside County. The geologic conditions around the plant enabled the contamination to spread out and

migrate uncontrolled and unchecked. In this case, the contamination was so significant that the City of Morrison, as a matter of safety, was required to shut two drinking water supply wells in its municipal well field several thousand feet southeast of the plant, and to treat water from a third well. App. 130. Eventually, the danger caused by GE's uncontrolled contamination caused the City to close the third well and to drill a new drinking water well far from the plant. Private water wells are also in the path of the contamination. A worker at Petitioners' golf course south of the plant testified that, unaware of the contamination, during the 2007 to 2012 timeframe, he regularly drank the water from a golf course supply well. Dep. Tr. at 80-84, Dist. Ct. Dkt. 41-3 ("Q: Can you estimate how many gallons a day of water you drank from the well? A: … I drink about a gallon a day." 81:13-16). The legacy of contamination from the plant persists this very day.

GE and the local, state and federal governments all learned of the contamination at and around the plant in 1986. App. 4. Yet 33 years later, there has been no cleanup. Rather, GE volunteered only to find ways to restrict access to the contamination through institutional controls – including seeking an ordinance prohibiting groundwater use, imposed by local government. App. 27-28. In other words, instead of abating the contamination and making drinking water usable once again, GE is attempting to obtain legal instruments and government approvals to allow GE to leave its contamination in place in perpetuity. GE is thus seeking a groundwater use restriction ordinance in a portion of unincorporated Whiteside County – certainly no abatement. In 2017 GE requested that

Whiteside County enact such an ordinance, and Whiteside County declined. *See* Whiteside County correspondence, Dist. Ct. Dkt. 204-1. Nothing has changed. Thus, not only is there no cleanup, there is no institutional control (a restriction limiting access and use) either, just unabated contamination left uncontrolled and migrating. It is absurd to suggest that GE's offer to voluntarily seek restrictions on access to the contamination is protective of human health and the environment. Even if GE were able to convince local authorities to deny access to the contaminated groundwater through an ordinance, there would be no abatement of the danger, rather just a recognized danger in place in perpetuity.

The *status quo* has not changed in the six years of this litigation. While the dangerous nature of the contamination is obvious and recognized, there is no action by GE, nor is there any actual cleanup action ordered by any court or any government agency. The lack of action is unmistakable. To make the point as clear as possible, if GE were to remove one single molecule of TCE from the groundwater, that would be more abatement than GE has performed to date, and more abatement than any local, state or federal government has required over the last 33 years. Congress recognized this possibility, and hence the RCRA Citizen Suit.

B. The Private Attorneys General / Citizen Suit Plaintiffs

Lowell Beggs was not seeking private relief. Indeed RCRA does not provide for private relief. Mr. Beggs was a golf course developer and entrepreneur who in

2007 purchased what was then a closed golf course that straddled the City of Morrison and unincorporated Whiteside County just south of the GE plant. Lowell created two closely held limited liability companies, of which he was the principal: LAJIM, LLC, which owns the golf course, and Prairie Ridge Golf Course, LLC, which operated the golf course. Lowell and his partner Martha Kai Conway also purchased a home next to the golf course. App. 7. During this litigation, Lowell died, and the golf course closed.

In 2011 and 2012, GE conducted an environmental investigation related to its Consent Order with the State of Illinois. GE installed monitoring wells on the golf course, and discovered that there were two water supply wells on the golf course. GE found extreme groundwater contamination at those locations, with TCE at a concentration as high as 5,000 parts per billion, or 1,000 times greater than the drinking water standard established by the United States Environmental Protection Agency ("EPA"). App. 110. The contamination migrated throughout the City of Morrison and Whiteside County and created a concern that solvent vapors were migrating into structures by a process known as vapor intrusion. App. 139-41.

GE and the local, state and federal governments have been aware of the contamination since the 1980s, and yet no cleanup has ever been ordered or performed. Recognizing decades of inaction by GE and government, Lowell and the other Petitioners filed the instant Citizen Suit under 42 U.S.C. § 6972(a)(1)(B) of RCRA. "The goal of RCRA is the '*prompt abatement* of imminent and substantial endangerments'…" *Adkins*

v. VIM Recycling, 644 F.3d 483, 507 (7th Cir. 2011) *citing Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989) *quoting* H.R.Rep. No. 98-191, 1 reprinted in 1984 U.S.C.C.A.N. 5576, 5612 (emphasis added). Abatement is the critical RCRA remedy.

Petitioners are not environmental activists, nor do they have a political agenda or hostility to American businesses. Rather, they are private citizens and small businesses who, through no fault of their own, found themselves and their neighbors affected by environmental contamination they did not cause. Congress had anticipated that even with a society that was becoming more cognizant of environmental concerns, federal and state agencies tasked with enforcing environmental laws may not be able or willing to address every environmental concern. Congress also knew that situations like those faced by Petitioners in this case were possible, and Congress did not want those affected by contamination to be relegated to the sidelines. "Congress … chose not to place absolute faith in state and federal agencies. It provided for citizen suits to enable affected citizens to push for vigorous law enforcement even when government agencies are more inclined to compromise or go slowly." *Adkins*, 644 F.3d. at 501. Congress recognized that "because the world is not ideal, because government agencies face many demands on their resources, because administrations and policy priorities change, and because regulatory agencies are subject to the phenomenon known as 'agency capture,'" state agencies will not always be able to adequately monitor and protect health and the environment. *Id.* at 499.

One or all of these things may have happened here. We do not know. The State environmental agency was not a party to this case, and the District Court did not have any evidence that the State approved any abatement activity, only GE's voluntary agreement to seek voluntary land use controls.

Petitioners are exactly who Congress had in mind when it authorized the Citizen Suit at issue here.

C. GE's Activities with the State of Illinois and the Consent Order

Although the contamination in the City of Morrison was first discovered in 1986, no government took any enforcement action of any kind until 2004. Then, the State of Illinois sued GE under state law seeking a fine for GE's water pollution, but with no authority to order abatement. The federal government has never taken any action. In 1987, the Illinois Environmental Protection Agency ("IEPA") conducted an initial investigation and found contamination in groundwater at and around the plant. In 1988, GE conducted an investigation and more contamination was found. In 1988, two of the three drinking water wells in the City's well field southeast of the plant were closed and technology was installed on the third drinking water well to treat the water. App. 4. The third drinking water well was closed in 2013 and a new drinking water well was drilled in a different part of the City. For over two decades after the investigation, GE took no action to abate the contamination and the State took no action to order abatement of the contamination. In the 1990s and early 2000s, GE conducted a computer assisted groundwater flow model in order to assess the

viability of natural degradation of the contamination. App. 4-5, 108. Clearly, even GE knew that something had to be done to abate the contamination.

The State of Illinois' 2004 lawsuit alleged that GE caused water pollution in violation of certain water pollution provisions of the Illinois Environmental Protection Act, 415 ILCS 5/12(a) and (d). In 2010, the State of Illinois and GE entered into a Consent Order settling that case. GE paid a fine to the State, did some investigation work, and took steps to attempt to restrict access to the contamination, but took no steps to abate the contamination. The lawsuit did not demand the abatement or cleanup of the contamination, only that GE stop polluting the water and pay a penalty. In fact, when the State of Illinois filed its lawsuit against GE (Feb. 5, 2004), the State of Illinois did not even have the authority to obtain a mandatory injunction under the Illinois Environmental Protection Act. *See People ex rel. Lisa Madigan v. J.T. Einoder, Inc.*, 28 N.E.3d 758, 764 (Ill. 2015).

By agreement, in 2011 and 2012, GE conducted an additional investigation that led to the discovery of the extremely high levels of contamination in the wells on the golf course. App. 131. Since 2011, GE has submitted various reports to the IEPA. In those reports, GE never proposed to perform any cleanup. The Consent Order does not require GE to perform a cleanup – an abatement. GE only volunteered to try to restrict access to the contamination. Yet, to this day, GE remains unable to perform even that simple activity.

Even with the proposed restrictions, the contamination will remain in place in perpetuity. 500,000,000 million gallons of previously clean drinking water available to the citizens of Whiteside County, Illinois will remain poisoned forever. *See* 6/1/2017 Tr. at 161:15-24, testimony on the volume of contaminated water elicited by Respondent's attorney. Land use restrictions are not a cleanup – not abatement. The contaminated areas of Whiteside County and the City of Morrison continue to languish with no cleanup being performed or even proposed, but with institutional controls in the form of land use controls only proposed and yet unperfected. Neither Petitioners, nor their neighbors, have any say in any of the Consent Order discussions and decisions as they are not parties to the state court action. They are on the sidelines. Petitioners and their neighbors "are not required to rely exclusively on the state agency in [a] lawsuit[] in which they may only watch from the sidelines." *Adkins*, 644 F.3d. at 507.

The State of Illinois has never approved or required anything remedial. The Consent Order does not require remediation or abatement. The *status quo* leaves GE's contamination and the endangerment in place in Whiteside County, Illinois in perpetuity.

D. Petitioners' RCRA Litigation

In May of 2013, Petitioners sent a pre-litigation Notice of Intent to Sue to GE and served the required copies on the state and federal governments, including the IEPA and the Attorney General of the State of Illinois. *See* 42 U.S.C. § 6972(b)(2)(A). The pre-litigation notice process gives the federal and state

governments the opportunity to enforce federal environmental law before citizens are authorized to do so. *Hallstrom v. Tillamook County*, 493 U.S. 20, 36 (1989). After the required 90 days had passed, and the state and federal governments declined to enforce federal law, Petitioners stepped into the shoes of the United States Attorney General as private attorneys general, and filed the Citizens Suit at issue seeking to enforce federal law in federal court.

Following extensive fact and expert discovery, both parties filed motions for Summary Judgment on Petitioners' RCRA claim. In December of 2015, the District Court granted Summary Judgment to Petitioners, and denied GE's motion. Therein, the District Court found GE's contamination to be an "imminent and substantial endangerment to health and the environment." App. 142; *see also* App. 81, 88. And, the District Court found that the state action represented by the Consent Order was not the type of action for which Congress provided preclusion. App. 127.

The District Court then turned to the issue of injunctive relief, but decided to delay holding an evidentiary hearing on the subject of injunctive relief in order to give the District Court an opportunity to observe and take notice of the activities involving the Consent Order. App. 90. In the interim, the parties briefed the District Court on the subject of injunctive relief. Petitioners filed a proposed injunctive order detailing the specific relief sought. Dist. Ct. Dkt. 121-2. The proposed order was accompanied by an expert affidavit that fully explained why each element of the

relief was necessary. Dist. Ct. Dkt. 121-1 The relief included specific cleanup and contamination migration control actions, and additional investigation tasks. *See* App. 178-79.

The District Court focused on one equitable factor – whether Petitioners could prove irreparable harm in light of the fact that GE was engaged in ongoing environmental investigation pursuant to the Consent Order. App. 90, 102, 142. Petitioners argued that as private attorneys general not seeking any personal benefit (indeed none is available under RCRA), that the equitable factors did not apply. The District Court even went so far as to invite the State of Illinois to file an *amicus* brief to offer advice on whether the District Court should enforce federal law and enjoin GE in light of the Consent Order. App. 91. The State of Illinois obliged and told the District Court that it was satisfied with GE's investigation and proposed restrictions under the state statute involved, and that no injunction was necessary. App. 9-10. The District Court denied Petitioners an opportunity to respond to the State's amicus brief, but tellingly, had the State filed a RCRA or CERCLA action, and not the action under the irrelevant state law, there would have been no need for the instant RCRA Citizen Suit.

After a limited evidentiary hearing, the District Court eventually declined to enter an injunctive order requiring abatement. According to the District Court, the State of Illinois was giving Petitioners the relief that they wanted because GE had submitted a Remedial Action Plan to the IEPA. The District Court's focus on Petitioners' relief was queer – and

clearly ignored that Petitioners were not seeking individual relief, but were acting as private attorneys general. At the hearing, GE presented its proposed Remedial Action Plan to the District Court, which despite the name of the report, was not remedial and required no action. It was just a plan for GE to pursue the land use restrictions that GE had already volunteered to pursue, and a proposal by GE to allow the contamination to degrade and disperse on its own through natural attenuation. App. 27. Petitioners disagreed with the Plan and thought it should be rejected. After the hearing, the IEPA actually did reject the Plan because natural attenuation was shown not to be viable at this site. Note that the only plan by GE that was closest to an abatement was to rely on natural processes to degrade the contamination. That was rejected by the IEPA because it will not work.

Accordingly, but illogically, the District Court relied on the IEPA's rejection of GE's Remedial Action Plan, which occurred weeks after the evidentiary hearing was closed, as a rationale for denying relief, explaining that "the IEPA's rejection of General Electric's Remedial Action Plan under the consent order remedied – at least in part – Plaintiffs' harm." App. 58. According to the District Court, no injunction was necessary, as "Plaintiffs' hopes of a more expansive remediation should be buoyed by the IEPA's rejection of General Electric's Remedial Action Plan." App. 72. Of course, the State's rejection of the Remedial Action Plan proposed by GE did not remedy the harm. Only an enforceable order directing GE to abate the endangerment the District Court found would remedy

the continuing, unabated harm in the City of Morrison and Whiteside County.

After the District Court's decision denying a statutory injunction, the remedy provided by Congress in these situations, GE submitted a Revised Remedial Action Plan to the State proposing only land use restrictions. In other words, GE abandoned any attempt at showing abatement, and pursuant to the irrelevant state statute suggested only leaving the contamination in place in perpetuity, albeit, with proposed land use restrictions. App. 7. Petitioners in turn asked the District Court to reconsider its decision, noting that the Revised Remedial Action Plan, like the original Remedial Action Plan, would not remedy the irreparable and imminent and substantial harm found earlier by the District Court. The District Court denied Petitioners' motion. App. 48-49. Petitioners sought review by the Court of Appeals, and months later, while their appeal was pending, the State approved GE's revised plan, noting that "The Revised Remedial Action Plan appears to satisfactorily address remaining contamination through use of Institutional Controls." IEPA's Mar. 2, 2018 Ltr., Dist. Ct. Dkt. 217-1. In other words, the State was satisfied that GE's actions addressed the concerns articulated by the State in enforcing its irrelevant (to this action) state statute. Petitioners then sought an indicative ruling under Fed.R.Civ.P. 62.1, and reconsideration from the District Court, both of which were denied. Even with the State clearly not remedying the harm, and only approving GE's plan to pursue restrictions on land use (which could not be implemented), with no cleanup, the

District Court wrote, "Plaintiffs have yet to establish irreparable harm." App. 45.

One of the most significant findings by the Court of Appeals was its disagreement with the District Court on the issue of irreparable harm. The Court of appeals found both an endangerment and irreparable harm, and explained, "To the extent that language might be interpreted as requiring RCRA plaintiffs to demonstrate harm above and beyond that shown at the merits stage, the district court erred.... A RCRA plaintiff either demonstrates irreparable harm or fails to prove his case on the merits." App. 16-17. It is without question that Petitioners proved that (1) GE generated a solid waste, (2) GE contributed to the handling of the waste, and (3) GE's waste may present an imminent and substantial endangerment. App. 8-9. *See Albany Bank & Trust Co. v. Exxon Mobil Corp*., 310 F.3d 969, 972 (7th Cir. 2002) for elements of a RCRA endangerment case. However, the Court of Appeals concluded that "RCRA does not require a court-ordered cleanup where the court has not found such action *necessary* to prevent harm to the public or the environment." App. 26-27.

The Court of Appeals' holding that the statutory reference to "*necessary*" is a basis to affirm the District Court is a slender reed without any support and should be examined by this Court. Of course it is necessary to order an abatement of an imminent and substantial danger found to create irreparable harm.

After the District Court based its denial of the injunction on the concept of irreparable harm, the Court of Appeals found that Petitioners had proved

irreparable harm but raised the new barrier of *necessity*. The Court of Appeals' conclusion conflicts with its determination that Petitioners proved endangerment and irreparable harm. If there is danger, and if there is harm in the absence of an injunction, then it is necessary to do something to abate the danger and harm. In enacting RCRA, Congress sought the abatement of imminent and substantial endangerments, not the mere identification of endangerments for which nothing would be done. The statute's reference to necessary has an active connotation – take action necessary to abate the danger, not a passive connotation to ignore the danger if the state knows about it. How can it not be necessary to abate contamination that presents an imminent and substantial danger and irreparable harm?

A source of confusion about the law seems to derive from a misunderstanding of the evidence, including expert testimony during the evidentiary hearing. Throughout the entire post-Summary Judgment process up through the completion of the evidentiary hearing, Petitioners put forth evidence that there should be active remedies for the contamination, including recovery wells to control groundwater flow and prevent contamination from leaving the plant, the removal of sources of contamination, and more investigation work to effectuate those remedies and identify the best long term solutions to the decades old contamination problem. Petitioners' expert never failed to recommend a remedy, but merely deferred offering an opinion on the best long-term remedy until there was additional data collected from more testing.

GE did not want more data for obvious reasons. Petitioners' expert did not say that there should be no long-term remedy or that the remedial action he proposed in his affidavit should not be implemented. *See* App. 178-79. In contrast to Petitioners' evidence which called for action, GE put forth evidence showing that it had no cleanup plan at all, only an intent to implement restrictions (if they could be obtained) and rely on natural degradation and dispersion (which the IEPA eventually rejected). GE's evidence was thus that it would not be abating the endangerment at all, just leaving the contamination in place, while Petitioners' evidence was that active remedial steps and further investigation should be ordered to abate the endangerment.

Despite their differences on the issue of irreparable harm, the District Court and the Court of Appeals both made the same mistake in the weight they gave to the state court Consent Order. Both courts relied on, and put their hopes in, a case brought by the State of Illinois in state court pursuant to an irrelevant portion of the Illinois Environmental Protection Act. As a matter of both law and fact, the state court action is irrelevant to Petitioners' case. As explained below, the District Court cannot have jurisdiction over a federal RCRA case and find an endangerment, only to deny relief in reliance on an irrelevant state court action not preclusive pursuant to 42 U.S.C. § 6972(b)(2)(C). Consistent with Congress' analysis of proper preclusion, the state law action does not remedy any harm. There is no abatement of the endangerment in the state action, only proposed – and as yet, unavailable – land use controls.

REASONS FOR GRANTING PETITION

I. CONSISTENT WITH *UNITED STATES V. OAKLAND CANNABIS BUYERS' CO-OP*, BECAUSE AN INJUNCTION IS THE ONLY REMEDY AVAILABLE UNDER RCRA, ORDERING INJUNCTIVE RELIEF IS THE ONLY MEANS OF ENFORCING THE LAW.

If a district court has the discretion to deny an injunction in a RCRA Citizen Suit to plaintiffs who have prevailed on the merits and proved the four equitable factors for injunctive relief, then a district court denying an injunction in such a circumstance is not actually conducting equitable balancing at all. Rather, it is simply ignoring the Congressional mandate of RCRA. District courts do not have discretion to deny injunctions in RCRA cases to plaintiffs who prevail. To do so is reaching a conclusion outside of the statute's authority. District courts call 'balls and strikes,' and they should not change the rules of the game set forth by Congress.

In RCRA Citizen Suits, Congress expected district courts to further the statutory goal of the "prompt abatement of imminent and substantial endangerments." *Adkins*, 644 F.3d at 498. The only form of relief available to RCRA plaintiffs is an injunction. 42 U.S.C. § 6972(a).

As this Court has explained about statutory injunctions, the "choice [for district courts] (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; *the[]*

choice is not whether enforcement is preferable to no enforcement at all." *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 497-98 (2001) (emphasis added). The Court of Appeals relied on Supreme Court decisions addressing different circumstances. In *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) and *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008), there was not proof of both the merits and the four equitable factors before an injunction was denied.

When a statute provides that the only remedy is an injunction, and an injunction is thus the only means to ensure compliance, the district court's equitable discretion must be used to fashion, but not deny, the injunction. When an injunction is the only statutory remedy, a "[d]istrict [c]ourt lack[s] discretion because an injunction [is] the 'only means of ensuring compliance." *Oakland Cannabis*, 532 U.S. at 497. In Petitioners' RCRA endangerment case, an injunction is the only way to remove the imminent and substantial endangerment and thus ensure compliance. Without an injunction, Petitioners and the District Court are unable to compel, and be assured of, the abatement of the RCRA endangerment. Neither Petitioners nor the District Court have the power to require GE to perform any work at all under the State Consent Order. Regardless, all that GE is proposing is a groundwater ordinance that it cannot obtain.

II. SEVERAL CIRCUIT COURTS OF APPEAL HAVE REACHED DECISIONS THAT CONFLICT WITH THIS CASE, HAVING FOUND TRADITIONAL EQUITY CONSIDERATIONS INAPPLICABLE IN RCRA CASES, OR THAT THE EQUITIES FAVOR INJUNCTIVE RELIEF.

Several courts of appeals have found that equitable balancing is not a requirement in this instance, or that the nature of a RCRA Citizen Suit action tips the balance in favor of private attorneys general. Thus, after success on the merits, an injunction should be issued. "Actions for statutory injunctions need not meet the requirements for an injunction imposed by traditional equity jurisprudence." *Commodity Futures Trading v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979). This is true even more so in law enforcement cases where, like here, public health is at stake. "The law of injunctions differs with respect to governmental plaintiffs (or private attorneys general) as opposed to private individuals. Where the plaintiff is a sovereign and where the activity may endanger the public health, 'injunctive relief is proper, without resort to balancing.'" *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337-38 (4th Cir. 1983) *citing Illinois v. City of Milwaukee*, 599 F.2d 151, 166 (7th Cir. 1979) *rev'd on other grounds*, 451 U.S. 304 (1981). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco*

Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987), quoted by the Seventh Circuit Court of Appeals in *EPA v. Environmental Waste Control*, 917 F.2d 327, 332 (7th Cir. 1990). Congress showed that it favored injunctions in RCRA cases by lowering the equitable standard for district courts. RCRA's "provisions have enhanced the courts' traditional equitable powers by authorizing the issuance of injunctions when there is but a risk of harm, a more lenient standard than the traditional requirement of threatened irreparable harm." *W.R. Grace & Co. v. EPA*, 261 F.3d 330, 339 (3d Cir. 2001) *quoting United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982).

While the Court of Appeals relied on *Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 297 (1st Cir. 2006) for the proposition that a RCRA injunction does not issue automatically from success on the merits, the District Court of Maine ultimately did use its equitable powers to order the development of a remedy in that case after – like here – years of inaction and no cleanup. *Maine People's Alliance v. HoltraChem Mfg. Co., LLC*, No. 00-CV-00069, 2015 WL 5155573, *28 (D. Me. Sept. 2, 2015). The decision of the District Court of Maine to order an injunction is consistent with the First Circuit Court of Appeals' earlier RCRA analysis in that case. Citing precedent and RCRA's Congressional record, the First Circuit explained, "we perceive a congressional thumb on the scale in favor of remediation." *Mallinckrodt*, 471 F.3d at 296-297. Even in *United States v. Bethlehem Steel Corp.*, cited by the Seventh Circuit in this case, App. 16, the Seventh Circuit explained that "where the plaintiff is a sovereign and where the activity may endanger the

public health, 'injunctive relief is proper without resort to balancing.'" 38 F.3d 862, 868 (7th Cir. 1994) *quoting City of Milwaukee*, 599 F.2d at 166. The very idea that Petitioners seek private gain must be dispelled in this case. Petitioners are private attorneys general.

The Fifth Circuit Court of Appeals also found *Weinberger,* cited by the Seventh Circuit, App. 18, to be inapplicable*,* explaining, "We do not agree that … *Weinberger* require[s] a court to balance the equities and make findings regarding irreparable harm and the adequacy of legal remedies in all cases arising under the environmental statutes." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1358 (5th Cir. 1996). *See also Interfaith Comm. Org. v. Honeywell Intern., Inc.* 399 F.3d 248, 267-68 (3d Cir. 2005), invoking *Oakland Cannabis*, 53 U.S. at 497, *Weinberger*, 456 U.S. at 313, and *Porter v. Warner Holding Co*., 328 U.S. 395, 398 (1946) in support of injunctive relief in RCRA endangerment cases.

In this litigation, Petitioners are private attorneys general, enforcing a health and environmental safety statute, who proved that Respondent's contamination is causing an imminent and substantial endangerment within the meaning of RCRA, currently threatening the public in Morrison and Whiteside County, Illinois. There is irreparable harm – harm that will remain in the absence of an injunction. Congress intended that in such situations, an order requiring the abatement of the endangerment should issue. The discretion of the District Court is to determine the scope of the order, but not to choose to not issue an order at all.

III. 42 U.S.C. § 6972(b)(2)(C) IS AN EXAMPLE OF PROPER FEDERALISM AND THE STATE ACTION IS NOT PRECLUSIVE.

Denying GE's Motion for Summary Judgment, the District Court correctly found that the state action brought under the Illinois Environmental Protection Act was not a statutory bar to a RCRA Citizen Suit. App. 127. 42 U.S.C. § 6972(b)(2)(C) precludes RCRA Citizen Suits only when a state is enforcing a RCRA 6972(a)(1)(B) case of its own, or is engaged in a removal action or a remedial action under CERCLA. District courts must exercise jurisdiction in the wake of state actions unless one of the 6972(b)(2)(C) preclusions apply. District courts are not permitted to abstain from exercising jurisdiction over RCRA Citizen Suits because there is a state engaged in the matter under an irrelevant state law. *Adkins*, 644 F.3d at 506. Yet, in a remarkable error, both the Court of Appeals and District Court relied on GE's proposal to voluntarily seek restrictions on access to the contamination in a precluded state action as a basis for not awarding relief in a federal RCRA action. RCRA Citizen Suits are not structured that way, and it is not proper to conclude that RCRA relief was unavailable based on an irrelevant state statute.

The District Court denied the injunction in unjustified reliance on the Consent Order, which was entered under a state law that GE could not use to deny the District Court's initial jurisdiction. Congress was concerned about state law enforcement cases relegating plaintiffs to the sidelines, which is why state law enforcement actions are not included among the

6972(b)(2)(C) preclusions. "[P]laintiffs are not required to rely exclusively on the state agency in lawsuits in which they may only watch from the sidelines." *Adkins*, 644 F.3d at 507. In cases where no cleanup action has been ordered, like here, where it has been 33 years since the contamination was discovered and no cleanup has started or been proposed, a RCRA Citizen Suit is exactly what Congress called for. "[T]he idea behind citizen suit enforcement is to unleash an army of private attorneys general to force cleanups when the government drags its feet[.]" *AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1349 (7th Cir. 1997).

Ironically, denying an injunction to Petitioners puts Petitioners right where they were when they filed their lawsuit in federal court in the first place – on the sidelines. Petitioners' inability to participate in the state enforcement action is why Congress provided access to federal court. Neither Petitioners, nor their neighbors, are parties in the State of Illinois' action and cannot participate. A lack of a public opportunity to participate is a recognized reason why citizens are given the right by Congress to enforce the law in federal court. *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage Dist.*, 382 F.3d 743, 757 (7th Cir. 2004).

If the Court of Appeals' decision stands, parties who caused contamination will be incentivized to find friendly supporters at state environmental agencies and make the best deals they can with the state agencies, while they attempt to keep their contamination matters under wraps and out the view of the public and those most directly affected by their

contamination. They will do this to protect themselves from the burden of potentially more rigorous enforcement in federal court. Such a result would be the exact opposite of the Congressional intent of Citizen Suits. "Citizen suits … enable affected citizens to push for vigorous law enforcement even when government agencies are more inclined to compromise or go slowly." *Adkins*, 644 F.3d at 501. Congress clearly understood what it was doing when it precluded federal jurisdiction for diligent prosecution of federal law and not state law actions. District courts cannot deny RCRA abatement remedies in reliance on the types of state court cases that Congress did not rely on to preclude federal jurisdiction.

IV. WHEN CONGRESS AUTHORIZED DISTRICT COURTS TO ORDER "SUCH OTHER ACTION AS MAY BE NECESSARY," IT WAS A DIRECTIVE THAT DISTRICT COURTS ORDER NECESSARY ACTION TO ABATE THE ENDANGERMENTS, NOT A GRANT OF DISCRETION TO FIND ACTION NOT NECESSARY.

In response to "imminent and substantial endangerments," RCRA directs district courts:

> to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both. . . .

42 U.S.C. § 6972(a). This language is a call for positive action, not an offer of discretion to abstain. In RCRA Citizen Suit cases, when these words apply, the environmental risk has been characterized as a danger and threat to health and the environment that is both imminent and substantial. Citing the Congressional record of RCRA, the Court of Appeals for the Third Circuit in *Price*, 688 F.2d at 213, analyzed this same "such action as may be necessary" language in the context of endangerment suits brought by the federal government under 42 U.S.C. § 6973:

> The expansive language of this provision was intended to confer "overriding authority to respond to situations involving a substantial endangerment to health or the environment." H.R. Committee Print No. 96-IFC 31, 96th Cong., 1st Sess. at 32 (1979) (the Eckhardt Report). As stated in the Eckhardt Report:
>
> The section's broad authority to "take such other actions as may be necessary" includes both short- and long-term injunctive relief, ranging from the construction of dikes to the adoption of certain treatment technologies, upgrading of disposal facilities, and removal and incineration.
>
> Imminence in this section applies to the nature of the threat rather than identification of the time when the endangerment initially arose. The section, therefore, may be used for events which took place at some time in the past but which continue to present a threat to the public health or the environment.

The Seventh Circuit Court of Appeals once explained in *Avondale Federal Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 696 (7th Cir. 1999):

> § 6972 empowered the district court not only to order responsible parties to clean up hazardous waste sites, but also "to order such person to take such other action as may be necessary." 42 U.S.C. § 6972. This is hardly what one would call constraining language.

The statutory preclusions support that this this language is a call to action. Congress wanted to make sure that responsible parties were both ceasing to cause contamination and cleaning up the contamination they caused. If the government is pursuing enforcement of federal law "to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment," then plaintiffs could not do so because the matter was being tended to. 42 U.S.C. § 6972(b)(2)(B) and (C). But if the federal or state governments were not enforcing federal law to "restrain or abate" an endangerment, then plaintiffs can, as private attorneys general, seek that relief. Congress really meant to provide teeth to federal environmental cleanup law. When Congress gave district courts the authority "to restrain any person…, to order such person to take such other action as may be necessary, or both," 42 U.S.C. § 6972(a), Congress was not telling district courts they had the option to order nothing. Rather, Congress was directing district courts to order the necessary action to make sure that responsible parties were both ceasing to cause

contamination and cleaning up the contamination they had caused.

The Court of Appeals in the instant litigation relied on *Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 140 (3d Cir. 2013) as support for its view that RCRA plaintiffs are required to show why actions beyond what is provided under a state court Consent Order are necessary in an endangerment case. However, the plaintiff in *Trinity* is unique. Trinity Industries is not an ordinary Citizen Suit plaintiff affected by contamination it did not cause. Trinity Industries was actually the defendant under the state court Consent Order at issue, and Trinity Industries in turn brought its RCRA action to compel other parties to clean up contamination for which it was already responsible. Trinity Industries was thus attempting to use a RCRA Citizen Suit to obtain contribution to offset its liability to the state. Certainly, that is not the purpose of a RCRA Citizen Suit.

Moreover, Trinity Industries' performance of an actual cleanup was already underway, unlike the case at bar where there has been no cleanup in 33 years, nor has any cleanup even been proposed. *Trinity* is hardly precedent on which to base a necessity analysis and deny non-responsible plaintiffs relief.

CONCLUSION

In 42 U.S.C. § 6972(a)(1)(B), Congress provided district courts with both prohibitory and mandatory injunctive powers to order relief for environmental conditions that have been determined to be an imminent and substantial threat to health and the environment. If a district court finds such an endangerment, it would be illogical to provide the district court with discretion to not act at all. Congress found it necessary that something must be done about endangerments and directed district courts to order all necessary action. Reading the language "such other relief as may be necessary" as a call to action instead of as an invitation to withhold relief is consistent with RCRA being a health and safety statute with a singular form of relief – an injunction. Additionally, denying an injunction because a district court hopes that the harm is being remedied by a Consent Order in a state court action implicating a state law that was determined by Congress to not be preclusive turns the statute on its head. Abstention is not an option, certainly not in the face of 500,000,000 gallons of previously clean drinking water.

For the foregoing reasons, Petitioners respectfully petition the Supreme Court of the United States for a Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit.

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