No. 18-1564

IN THE

Supreme Court of the United States

LAJIM, LLC, *et al.*,

Petitioners,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit correctly held that the Resource Conservation and Recovery Act, which permits a district court to enter a mandatory injunction "as may be necessary," 42 U.S.C. § 6972(a)(2), does not remove the discretion district courts ordinarily possess to decide whether to grant injunctive relief.

RULE 29.6 STATEMENT

Respondent General Electric Company ("GE") is a publicly-traded company, and no publicly-held company owns 10% or more of its shares.

RELATED CASES

LAJIM, LLC, *et al.* v. *General Electric Company*, No. 13-CV-50348 (N.D. Ill.), Memorandum Opinion and Order Granting Motion for Summary Judgment in Part, entered on December 18, 2015, available at Dkt. 88.

LAJIM, LLC, *et al.* v. *General Electric Company*, No. 13-CV-50348 (N.D. Ill.), Memorandum Opinion and Order Denying Injunctive Relief, entered on September 7, 2017, available at Dkt. 181.

LAJIM, LLC, *et al.* v. *General Electric Company*, No. 13-CV-50348 (N.D. Ill.), Order Denying Petitioner's Motion for Reconsideration, entered on November 7, 2017, available at Dkt. 200.

LAJIM, LLC, *et al.* v. *General Electric Company*, No. 13-CV-50348 (N.D. Ill.), Final Judgment, entered on February 15, 2018, available at Dkt. 215.

LAJIM, LLC, *et al.* v. *General Electric Company*, No. 13-CV-50348 (N.D. Ill.), Order Denying Petitioners' Motion for Indicative Ruling and Reconsideration, entered on August 14, 2018, available at Dkt. 222.

LAJIM, LLC, *et al.* v. *General Electric Company*, Nos. 18-1522 & 18-2880 (7th Cir.), Opinion Affirming District Court, entered on March 4, 2019, available at BL-34.

LAJIM, LLC, *et al.* v. *General Electric Company*, Nos. 18-1522 & 18-2880 (7th Cir.), Final Judgment, entered on March 4, 2019, available at BL-35.

LAJIM, LLC, et al. v. *General Electric Company*, Nos. 18-1522 & 18-2880 (7th Cir.), Order Denying Petitions for Rehearing and for Rehearing En Banc, entered on March 29, 2019, available at BL-38.

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INTRODUCTION

This Court, backed by hundreds of years of common law history, has consistently recognized that equity courts have discretion to decide whether to issue injunctive relief. This is especially true where the requested injunctive relief is mandatory, *i.e.*, it does not restrain but rather requires the enjoined party to do some affirmative act. The lone exception to this long-standing rule is if Congress has displaced the court's discretion through a "clear and valid legislative command." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

In this Resource Conservation and Recovery Act ("RCRA") case, the district court and Seventh Circuit held that RCRA contains no such legislative command, as indicated by the fact that RCRA expressly requires the district court to decide if an injunction is "necessary" before its issuance. 42 U.S.C. § 6972(a)(2). In doing so, the decision below joined the First, Third, and Fifth Circuits in holding that RCRA does not *require* a court to enter an injunction upon a finding of RCRA liability. There is no decision to the contrary, meaning there is no circuit split for this Court to resolve. Petitioners' attempts to manufacture a conflict by citing to non-RCRA cases is unavailing because those cases do not analyze RCRA, or even similar statutory language, and they do not stand for the proposition offered by Petitioners.

The remainder of Petitioners' arguments amount to factual disputes that do not merit this Court's attention. Petitioners, for example, contend that a Consent Order resolving a separate action brought by Illinois in state court "is doing nothing." Pet. 5. But the decision below found that the Consent Order required investigation and

remediation, and Illinois informed the district court that it was performing rigorous oversight of the site, including by managing potential risks of exposure. App. 5, 10.

Likewise, Petitioners contend that they presented evidence in support of an injunction requiring GE to conduct a cleanup. Pet. 5-6. But as the district court and Seventh Circuit found, Petitioners did no such thing. In fact, "when asked by the district court judge what specific cleanup he recommended, [Petitioners'] expert declined to make a recommendation." App. 10.

On these facts, the district court was well within its discretion to decide that Petitioners failed to establish the need for an injunction that required GE to do more than what was already required by Illinois and the Consent Order. In any event, this Court does not grant certiorari to review unanimously affirmed factual findings.

It is undisputed that the district court "provided [Petitioners] with numerous opportunities to present evidence that the state proceedings were not adequately protecting the public and the environment." App. 25. That Petitioners utterly failed to do so does not warrant jettisoning hundreds of years of jurisprudence and the plain text of RCRA to permit Petitioners to obtain relief without evidence. With no conflict to review, the Court should deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

A. The Resource Conservation and Recovery Act

RCRA allows a citizen to commence a civil action against a 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." 42 U.S.C. § 6972(a)(1)(B). Among other remedies, it provides the district court with 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 action ***as may be necessary***, or both . . . ." *Id.*, § 6972(a)(2) (emphasis added).

While "RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of hazardous waste," it "is not principally designed to effectuate the *cleanup* of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." *Meghrig v. Kfc W.*, 516 U.S. 479, 483 (1996) (citations omitted) (emphasis added). That is the purpose of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq. See id.* (citing *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) (the "two . . . main purposes of CERCLA" are "prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party."")). (As discussed below, CERCLA is not at issue here because Petitioners dismissed their CERCLA claim.) Instead, the "primary purpose" of RCRA "is to reduce generation of hazardous waste and to ensure the proper treatment, storage, and disposal of waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Id.* (quoting 42 U.S.C. § 6902(b)).

B. The Illinois Environmental Protection Agency Consent Order

1. GE operated a manufacturing plant in Morrison, Illinois from 1949 to 2010, where it primarily manufactured automotive and appliance parts. App. 3. GE used chlorinated organic solvents such as trichloroethylene ("TCE"), perchloroethene ("PCE"), and trichlorethane ("TCA") to clean those parts until 1994, when it switched to a soap-like solution, at which time no further waste was generated. App. 3-4.

2. In 1986, chlorinated solvents were detected in three of Morrison's municipal wells to the southeast of the GE plant. App. 4. The Illinois Environmental Protection Agency ("IEPA") installed monitoring wells to analyze the ground water and completed a remedial investigation in 1987 that concluded that the GE plant was the source of the solvents. App. 4. Since then, IEPA and GE have been involved in remediation of the site.

In 1988, GE installed additional monitoring wells and an air stripper on one of the wells to treat water by reducing the levels of solvents below the maximum contamination level ("MCL"). App. 4. The other two wells were sealed. App. 4. GE also completed a second remedial investigation that identified elevated concentrations of solvents beneath the plant's former degreasing operations. App. 4. Under IEPA supervision, GE continued to monitor and sample groundwater, and submitted reports of results to IEPA. App. 4.

In 1994, GE began a third remedial investigation of the groundwater at and downgradient from the plant

under IEPA supervision. App. 4. According to GE's 2001 investigation report, solvents in the groundwater had significantly decreased and would continue to naturally attenuate (reduce) to below the MCL. App. 4-5. The investigation also showed that Rock Creek was a natural groundwater divide that would prevent the contamination from migrating any further. App. 5.

In addition, GE completed a regulatory closure of the former RCRA container storage area at the GE plant, where wastes were stored until 1986. This included sampling to delineate solvents in soil and installation and operation of a soil vapor extraction (SVE) system to treat impacted soils. Dkt. 59-2, PageID #: 4817. The SVE system operated from March 1994 until July 1997, when GE shut it down due to successful remediation. *Id.*

3. Given the air stripper and a City of Morrison ordinance prohibiting the use of groundwater as drinking water, in 2001, GE proposed allowing the remaining contamination to continue to naturally attenuate. App. 5. IEPA disagreed and instead "concluded that active remediation of the site would be appropriate." App. 5.

The Illinois Attorney General commenced suit against GE in Illinois state court under various provisions of the Illinois Environmental Protection Act seeking "to recover costs it had incurred as well as an injunction requiring that GE investigate the nature and extent of the contamination and then perform remediation." App. 5. In 2010, GE and Illinois entered into a Consent Order, whereby GE agreed to conduct further investigation and to submit a series of reports to IEPA that would culminate in a Remedial Action Plan ("RAP") to meet remedial objectives. App.

5-6. That same year, the City of Morrison passed an ordinance prohibiting the use of groundwater and the installation of wells in the affected area. App. 6.

4. Pursuant to the Consent Order, GE installed monitoring wells and then completed a Focused Site Investigation Report ("FSI") in 2013. That report showed that while solvents had migrated to Rock Creek, wells on the other side of Rock Creek either did not contain solvents or did at a level below the MCL, meaning that the contamination was contained. App. 6. IEPA approved the FSI in 2015 and "determined that GE 'adequately defined the nature and extent of the contamination.'" App. 6. In August 2016, IEPA conditionally reviewed GE's revised Remedial Objectives Report ("ROR"), outlining the objectives for remediation. App. 6, 75-76.

In March 2017, GE submitted a proposed Remedial Action Plan ("RAP") to IEPA. App. 6. IEPA denied that proposal in June 2017. App. 7. At the time of the relevant hearing in the litigation below, GE's revised RAP was under consideration by IEPA. App. 7, 10. That RAP was approved in March 2018, after the district court's order denying injunctive relief. App. 7, 10-11.

C. The District Court Proceedings

1. Petitioner Lowell Beggs purchased a golf course near the GE plant in 2007, and the golf course was subsequently operated by Petitioner LAJIM, LLC. App. 7. Beggs and his companion, Petitioner Martha Kai Conway, then moved into a home next to the golf course. *Id.* Beggs was fully aware of the contamination before he purchased the land. App. 7-8.

2. In 2013, Petitioners commenced this litigation in the Northern District of Illinois, asserting claims under RCRA, CERCLA, and state common law. App. 8. The parties then engaged in "extensive discovery," leading up to cross-motions for summary judgment. App. 8. GE conceded that two elements of the RCRA claim—generation of hazardous waste and contribution to the same by GE—were satisfied, and the district court concluded that the contamination "may present an imminent and substantial danger to health or the environment" thereby satisfying the third element of a RCRA claim. App. 8-9. The district court dismissed the state law claims as untimely. App. 9.

Although the district court found the RCRA claim satisfied, Petitioners asked the district court to defer consideration of whether they were entitled to a mandatory injunction requiring cleanup under RCRA. App. 9. "Over the next two years, the district court considered [Petitioners'] request for a mandatory injunction in a number of hearings and a series of opinions." App. 9.

In October 2016, the district court held that the pending state court Consent Order did not prevent it from entering a mandatory injunction, finding that the question "was not whether it *could* grant relief but whether it *should*." App. 9 (emphasis in original). Because Petitioners had not yet offered any facts to demonstrate that the Consent Order was not already remedying any potential risk posed by the contamination, the district court ordered an evidentiary hearing. App. 9; *see also* App. 92 ("At this point, the Court needs facts to determine whether the extraordinary remedy of mandatory injunctive relief is appropriate under the specific facts of this case and if so, what that relief would entail.").

Put another way, as the Seventh Circuit explained, "the district court informed the parties *repeatedly* that it was looking for evidence of harm not already being addressed through the state proceeding and for what exactly plaintiffs wanted the court to order GE to do to address that harm." App. 20 (emphasis in original). To that end, the district court also invited "IEPA and Illinois Attorney General to provide their views on the progress under the Consent Order and whether the court should order injunctive relief under the RCRA." App. 9.

3. The State of Illinois informed the district court that it did not believe injunctive relief was necessary because it would overlap with the work already underway, which included "site investigation, monitoring and payment of costs as well as an order barring further endangerment . . . [and] some type of remedial effort." App. 9-10. Illinois also insisted that these actions were "'being done with diligence and rigorous oversight by the Illinois EPA,' and that injunctive relief 'may result in a clean-up that is inconsistent with the clean ups of other contaminated sites in Illinois.'" App. 10.

4. Following the submission from Illinois, the district court held a two-day evidentiary hearing, at which both parties presented expert testimony. App. 10. Petitioners did not present evidence in favor of any additional remedial measures, but instead contended "that any remedial measures would be premature at this stage because the extent of the contamination has not been properly determined." App. 59. Petitioners and their expert, however, never "tested the groundwater or soil" on their own. App. 61. Instead, Petitioners' expert critiqued GE's investigation and "testified that additional

investigation was necessary before he could opine on the proper remediation." App. 20. Indeed, "when asked by the district court judge what specific cleanup he recommended, [Petitioners'] expert declined to make a recommendation." App. 10.

GE's expert, in contrast, "provided reasonable, rational and credible bases explaining why certain actions were taken and others were not" with regard to the investigation of the contamination, as well as its remediation plans. App. 10, 27.

5. The district court denied injunctive relief in September 2017. App. 50. In doing so, the court examined whether the work under the Consent Order was "repairing [Petitioners'] injury" and whether Plaintiffs had established that additional investigation was necessary. App. 57. The district court concluded that Petitioners were not entitled to injunctive relief because they did not show that GE's "investigation into the site was inadequate," as indicated in part by the fact that "IEPA is satisfied with General Electric's investigation to date and has moved on to evaluating what remedial measures are necessary for this site." App. 59, 70-71. The district court concluded that Petitioners had failed to demonstrate that their "injuries are [not] being remedied in the parallel state-court proceeding." App. 70.

The district court denied Petitioners' motion for reconsideration on November 7, 2017, and Petitioners later voluntarily dismissed their CERCLA claims, and appealed the district court's denial of RCRA injunctive relief decision to the Seventh Circuit. App. 10, 46-47.

Then, in March 2018, Petitioners filed a combined Rule 62.1 motion for an indicative ruling and a second motion for reconsideration based on IEPA's subsequent approval of GE's Remedial Action Plan. App. 11. The district court denied that motion because the approval of the RAP did not constitute newly discovered evidence since it did not exist at the time of the court's decision. App. 41. Further, the district court also denied the motion because the evidence would not alter its decision given that Petitioners were using it to argue that the district court should have ordered further cleanup, but they still had not offered any evidence of what type of cleanup was necessary. App. 42-43.

D. The Seventh Circuit Proceedings

The Seventh Circuit unanimously affirmed the district court's decision on March 4, 2019. App. 1. The Seventh Circuit held that the district court was right to find that an injunction does not necessarily follow just because plaintiff establishes RCRA liability. App. 15. Further, it held that the district court was also correct to require Petitioners to establish that injunctive relief was "necessary" under RCRA. App. 26. In affirming the decision, the Seventh Circuit noted that, on appeal, Petitioners did not even "directly challenge the district court's factual findings" regarding the sufficiency of the investigation conducted by GE in conjunction with Illinois. App. 20. With the district court's factual findings unchallenged, the Seventh Circuit further noted that "[i]n spite of the district court's multiple inquiries to [Petitioners'] expert as to what remedy he proposed [in addition to the Consent Order], he did not make a recommendation, leaving the court without guidance." App. 26. As a result, the Seventh Circuit

found the "district court did not abuse its discretion in concluding [Petitioners] had not carried their burden to establish mandatory injunctive relief was necessary under the RCRA." App. 27.

The Seventh Circuit subsequently denied Petitioners' petitions for rehearing and rehearing en banc. App. 157.

THE PETITION SHOULD BE DENIED

I. The Decision Below is Consistent With the Text of RCRA and This Court's Prior Precedents

Petitioners first argue that the Seventh Circuit's holding that RCRA does not *require* the issuance of a mandatory injunction following a finding of RCRA liability conflicts with this Court's decision in *United States v. Oakland Cannabis Buyers' Co-Op.*, 532 U.S. 483, 497-98 (2001). Pet. 23-24. Petitioners specifically argue that *Oakland Cannabis*—which they have never before cited—stands for the proposition that "[w]hen 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.'" Pet. 24 (quoting 532 U.S. at 497). This argument is inapposite for several reasons.

First, *Oakland Cannabis* did not hold that a district court must issue an injunction. It held the opposite: "The Cooperative is also correct the District Court in this case had discretion . . . . Because the District Court's use of equitable power is not textually required by any 'clear and valid legislative command,' the court did not have to issue the injunction." 532 U.S. at 496.

Second, this Court has consistently held that district courts have extraordinary discretion in deciding whether to issue an injunction. *See, e.g.*, *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944) (explaining that for "several hundred years of history" courts in equity have enjoyed "sound discretion" to consider issuing injunctive relief). This principle remains true in environmental cases like this one. For example, in *Weinberger v. Romero-Barcelo*, a Clean Water Act case, the Court explained that the "essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." 456 U.S. 305, 312 (1982) (citation omitted). Thus, contrary to Petitioners' argument, injunctive relief "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." *Id.* (citation omitted).

Third, the only exception to this rule exists if "[s]uch discretion is displaced only by a 'clear and valid legislative command.'" *Oakland Cannabis*, 532 U.S. at 496 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). But this Court "do[es] not lightly assume that Congress has intended to depart from established principles" that afford the district court with discretion. *Weinberger*, 456 U.S. at 312. Petitioners have not identified any language in RCRA that limits the district court's discretion. There is none. *See* 42 U.S.C. § 6972(a)(2).

Rather than limit the district court's discretion, RCRA affords the district court with the discretion to decide whether a mandatory injunction is "necessary." 42 U.S.C. § 6972(a)(2). This language expressly leaves the district

court to decide whether a RCRA plaintiff has established that a mandatory injunction is necessary to achieve the goals of RCRA. And notably, a plaintiff's burden for obtaining a mandatory injunction is particularly high because it imposes a significant burden on the defendant. *See, e.g.*, *Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235 (1972) (a mandatory injunction is an "extraordinary remedy [to] be employed only in the most unusual case"); *see also Trinity Indus. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 139 (3d Cir. 2013) (a movant seeking mandatory injunctive relief under RCRA must carry a "particularly heavy" burden such that its "'right to relief must be indisputably clear'") (quoting *Communist Party*, 409 U.S. at 1235).

The only mandatory language in RCRA is the phrase "shall have jurisdiction," but a "grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances." *Weinberger*, 456 U.S. at 312; *cf.* 42 U.S.C. § 9604(e)(5)(B) (providing that a court "shall enjoin" a defendant under certain narrow circumstances pursuant to CERCLA); *Dickerson v. Administrator, EPA*, 834 F.2d 974, 977 (11th Cir. 1987) (explaining that pursuant to 42 U.S.C. § 9604(e)(5)(B) "Courts must enjoin any interference with the EPA's entry to property . . . .").

Fourth, Petitioners' plea that the Court cast aside these principles because the "only form of relief available to RCRA plaintiffs is an injunction" is based on an error. Pet. 23. To the contrary, a district court may also "apply any appropriate civil penalties" or order the EPA Administrator to perform certain acts or duties to remedy a RCRA violation. 42 U.S.C. § 6972(a)(2). Further, as the

Seventh Circuit recognized in this case, the Consent Order and IEPA were already providing Petitioners with relief, which left the district court to consider whether "to order relief in addition to what IEPA has already required." App. 26.

Fifth, the crux of Petitioners' argument, namely that the district court was required to order GE to conduct further *cleanup* of the site, conflicts with this Court's interpretation of RCRA. The purpose of RCRA is not to require cleanup; that is the purpose of CERCLA. *See Mehrig*, 516 U.S. at 483 (RCRA "is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards."). Instead, the "primary purpose" of RCRA "is to reduce generation of hazardous waste and to ensure the proper treatment, storage, and disposal of waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Id.* (quoting 42 U.S.C. § 6902(b)). Petitioners' contention that they effectively had no burden to establish that injunctive relief was "necessary" to "minimize" any threat to human health and the environment is thus wrong. 42 U.S.C. § 6972(a)(2).

In short, absent clear statutory language to the contrary, even if there were a violation of law, "a federal judge . . . is not mechanically obligated to grant an injunction." *Weinberger*, 456 U.S. at 312 (citations omitted). Because Petitioners have identified no clear (or even arguable) language in RCRA removing the court's discretion, the Seventh Circuit's holding that "an injunction does not follow automatically from a finding of a risk of imminent and substantial endangerment," App. 25, is wholly consistent with this Court's jurisprudence.

II. The Decision Below is Consistent With Decisions of Other Circuits

1. In holding that RCRA does not obligate a district court to grant an injunction to remedy a RCRA violation, the Seventh Circuit joined the uniform decisions of the First, Third, and Fifth Circuits. There is no circuit split that merits this Court's review.

In *Maine People's Alliance v. Mallinckrodt, Inc.*, for example, the First District held that "[a] district court is not commanded . . . to issue an injunction after a finding of [RCRA] liability . . . ." 471 F.3d 277, 297 (1st Cir. 2006).

Similarly, in *Trinity Indus.*, the Third Circuit affirmed the denial of mandatory injunctive relief because the plaintiff had not met its burden in showing that the injunction was "necessary" under § 6972(a)(2) where (like here) a state consent order was already implementing a remediation scheme. 735 F.3d at 140.

And in *United States v. Marine Shale Processors*, the Fifth Circuit held that there is "nothing in RCRA which, 'in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity.'" 81 F.3d 1329, 1359-60 (5th Cir. 1996) (quoting *Weinberger*, 456 U.S. at 313); *see also Ctr. for Biological Diversity, Inc. v. BP America Prod. Co.*, 704 F.3d 413, 431 (5th Cir. 2013) (affirming denial of RCRA injunctive relief when remediation efforts were already ongoing, and the plaintiff had not proven they were "deficient").[1]

1. District courts have reached the same conclusion. *See Grace Christian Fellowship v. KJG Invs. Inc.*, Case No. 07-C-0348, 2009 U.S. Dist. LEXIS 76954, at *15 (E.D. Wisc. Aug. 7, 2009)

Finally, the Seventh Circuit held that RCRA suits are not "immune from all other constitutional and preclusive doctrines, such as standing, mootness, and claim or issue preclusion" where there is an ongoing state remedial action. *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 503 (7th Cir. 2011). In other words, the Seventh Circuit previously established that in circumstances such as this one, a RCRA plaintiff must establish why its case is not moot when some level of relief has been afforded elsewhere.

2. In the face of these uniform decisions, Petitioners have not identified a single case to the contrary that would warrant this Court's review. Instead, they cite to a number of non-RCRA cases. But several of these cases do not purport to interpret or apply RCRA (or even similar statutory language), which means they are not "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. Rule 10(a).

Further, most of the cases cited by Petitioners are from the Seventh Circuit—including *Commodity Futures Trading v. Hunt*, 591 F.2d 1211 (7th Cir. 1979), *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979), *EPA v. Environmental Waste Control*, 917 F.2d 327 (7th Cir. 1990), *United States v. Bethlehem Steel Corp.*, 38 F.3d

("RCRA does not evidence an intent to deny courts their traditional equitable discretion . . . ."); *Hodgins v. Carlisle Engineered Prods.*, No. 1:02-CV-01454, 2006 U.S. Dist. LEXIS 11321, at *8-*9 (N.D. Ohio Mar. 2, 2006) (Under RCRA, "the court must perform the normal balancing of equities in any decision regarding injunctive relief."); *Gache v. Town/Village of Harrison*, 813 F. Supp. 1037, 1044 (S.D.N.Y. 1993) ("A violation of RCRA does not mean that a permanent injunction necessarily follows.").

862 (7th Cir. 1994). Obviously, these cases do not create an inter-Circuit conflict meriting this Court's review. In addition, the Seventh Circuit already rejected any notion that the decision below created an intra-Circuit conflict, when it denied Petitioner's en banc petition. App. 157.

3. The lone RCRA case cited by Petitioners does not create a conflict. In *Environmental Defense Fund, Inc. v. Lamphier*, the Fourth Circuit did *not* adopt the argument that a mandatory injunction is required upon a finding of RCRA liability. 714 F.2d 331 (4th Cir. 1983). It did not even address that question; it merely held that a court could focus on the general public interest instead of balancing traditional equitable factors. *See id.* at 337-38 ("Second, in cases of public health legislation, the emphasis shifts from irreparable injury to concern for the general public interest."). This is consistent with the Seventh Circuit's decision below. App. 17 (explaining that a RCRA plaintiff need only show "a risk of harm" rather than the traditional requirement of actual "irreparable harm"). Moreover, and in direct conflict with the argument Petitioners make to this Court, the RCRA injunction in *Lamphier* did *not* require the defendant to cleanup a contamination, but "merely require[d] Lamphier to open up his property to state inspection at reasonable times." *Id.* at 338. Thus, *Lamphier* is wholly consistent with the decision below.

For these reasons, the Seventh Circuit's decision did not create a circuit split, much less one that merits this Court's review. There is no reason to grant certiorari given the uniform voice of the appellate courts on this matter.

III. The Fact-Bound Decision Below is Correct and Presents a Poor Vehicle for this Court's Review

Finally, the Court should deny certiorari because the fact-bound decision below was correct and only subject to reversal in the event of an abuse of discretion or a clearly erroneous finding of fact. *See eBay Inc. v. Merc Exchange, L.L.C.*, 547 U.S. 388, 391 (2006) ("The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable for abuse of discretion.") (citation omitted); *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("We are also aware that we review the District Court's findings only for 'clear error.'"). Beyond their contention that the district court lacked discretion to deny a mandatory injunction, Petitioners' chief complaint is that the decisions below improperly deferred to the Consent Order because Illinois "is doing nothing." Pet. 6. This critique misconstrues the decisions below.

First, Petitioners' contentions that the Consent Order does nothing and does not require an abatement are false. The Consent Order specifically requires "that GE investigate the nature and extent of the contamination and then perform remediation." App. 5. Moreover, Illinois assured the district court that these actions were "being done with diligence and rigorous oversight." App. 10. Petitioners' disagreement with this finding does not warrant this Court's review because it "do[es] not grant . . . certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Second, Petitioners' repeated complaints that the district court should have issued "an order mandating a

cleanup" or "require[d] the abatement of an endangerment" are misplaced. Pet. i, 6. While Petitioners claim (without citation) that their "evidence identified specific actions that could be ordered to address the harm," Pet. 6-7, the opposite is true. As the district court found, Petitioners never presented evidence in favor of further cleanup, but instead contended "that any remedial measures would be premature at this stage because the extent of the contamination has not been properly determined." App. 59. The Seventh Circuit agreed that Petitioners failed to present evidence, noting that "when asked by the district court judge what specific cleanup he recommended, [Petitioners'] expert declined to make a recommendation." App. 10. Not only that, but the district court found that even the additional *investigation* proposed by Petitioners' expert—drilling through the bedrock to test the aquifer below—would do more harm than good by creating an avenue for the otherwise contained contamination to spread. App. 27, 44. At best, Petitioners' argument that the evidence supported a cleanup is a factual dispute that does not warrant this Court's review. In reality, given the testimony of Petitioners' expert that he could not make a recommendation, this argument is disingenuous. Petitioners invited any error through their failure to present evidence in favor of a cleanup, which makes this case a poor vehicle for review.

Third, Petitioners' contention that the decision below failed to give adequate weight to the potential harm by unduly deferring to the Consent Order is wrong. On the contrary, the decision below actually recognized that in many cases injunctive relief is warranted when RCRA liability is found: "True, once a court finds a defendant liable for creating a risk of imminent and substantial

danger, it will usually be the case that injunctive relief is warranted." App. 16 (citation omitted). Moreover, the district court did not defer to the Consent Order. Rather, it stated it would *not* defer to the Consent Order. App. 81. It then admonished Petitioners that "it was looking for evidence of harm requiring relief in addition to the [Consent Order]." App. 25. In fact, as the Seventh Circuit recognized, the district court "provided [Petitioners] with numerous opportunities to present evidence that the state proceedings were not adequately protecting the public and the environment." App. 25. Petitioners, however, simply failed to present evidence, in part, because they "did not conduct any of their own investigation," and because their expert "did not make a recommendation, leaving the court without guidance." App. 25-26.

Under these facts, the district court did not abuse its discretion in concluding that Petitioners did not meet their burden to establish that injunctive relief was "necessary." There is no reason for the Court to revisit these factual findings.

CONCLUSION

In reality, Petitioners' problem is not with the Seventh Circuit's holding, but with Congress's decision to preserve the district court's long-held discretion to decide whether to issue an injunction. Whatever the merits of Petitioners' concerns about the Consent Order, it was their burden to present the district court with evidence establishing the necessity of further injunctive relief. They did not do so, and they have identified no error of law, much less a conflict with any other authority from this Court or another court of appeals. The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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