No. 18-1564

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondent now makes a new argument with a novel statutory interpretation worthy of this Court's review. According to Respondent, "RCRA *expressly* requires the district court to decide *if* an injunction is 'necessary' before its issuance." Op. Br. 1 (emphasis added).

No, it does not – certainly not after the District Court has found that the contamination presents an imminent and substantial danger to human health and the environment.

That is, after the District Court found that Respondent's contamination presents an imminent and substantial endangerment, and after the Court of Appeals contradicted Respondent and the District Court and found that Petitioners had proved irreparable harm, and after the District Court held that Petitioner's claim was not precluded by a State enforcement involving an irrelevant state statute, Respondent changes its argument in this appeal. However, according to Congress, after finding that Respondent's contamination is present, and that the presence of Respondent's contamination creates an imminent and substantial danger to the public, necessity was shown. At that point, Congress mandated that polluters are required to take all necessary action to permanently abate the danger – not as Respondent would have you believe, that Respondent has yet another opportunity to argue that an irrelevant state program is adequate. After an endangerment finding, it is only the scope – not the necessity – of the injunction that the District Court

must determine. It remains a mystery why the question of the state action in this case was not raised by Respondent pursuant to Federal Rule of Civil Procedure 12(b)(6), but it is clear that Respondent waived that claim, and then lost the argument on Summary Judgment and never appealed it.

Let's also be clear. Petitioners seek no personal gain. Petitioners are private attorneys general enforcing federal law. All of the discussions that Petitioners' "injuries" are being addressed are rubbish. Moreover, Petitioners did not ask the District Court to "defer consideration of *whether they were entitled* to a mandatory injunction." Op. Br. 7 (emphasis added). Rather, after Summary Judgment, Petitioners asked the District Court to order prompt, mandatory abatement of contamination found to be creating danger, while Respondent sought leave for an interlocutory appeal. Tellingly, Respondent never did challenge the endangerment finding.

I. THE FEDERAL STATUTE AND FEDERALISM REQUIRE THAT AFTER AN ENDANGERMENT FINDING, AN INJUNCTION IS REQUIRED ORDERING *RESTRAINT, OTHER ACTION, OR BOTH.*

Under RCRA, at 42 U.S.C. § 6972(a), Congress provided that after the finding of an imminent and substantial endangerment, a district court is:

> [1] 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 …,

> [2] to order such person to take such *other action* as may be necessary, [3] *or both*…

42 U.S.C. § 6972(a) (emphasis added).

That is, a district court is to order the polluter to stop polluting, take "other action" as may be necessary to abate the contamination, or both. Respondent's statutory interpretation ignores "other action" and negates the "or both" by effectively substituting "or neither." The "as may be necessary" and the reference to "other action" is a statutory direction to take all affirmative action necessary to abate the danger, and it is not another opportunity for Respondent to argue that affirmative abatement action may *not* be necessary. "If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012). Here, affirmative abatement action was shown necessary with the District Court's finding that Respondent's contamination is present, and that the contamination presents danger that is both imminent and substantial.

The language in § 6972(a) is Congress' call for positive abatement action, not a grant of discretion to allow individual judges to abstain from ordering relief, or an admonition to "hope" that the danger will someday, somehow be abated. *See United States v. Price*, 688 F.2d 204, 213 (3d Cir. 1982); Pet. 31. This is consistent with the goal of RCRA, "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).

Respondent ignores the reference to "other action" and "or both," and substitutes "or neither" for "or both" based on Respondent's argument that no action is necessary because Respondent is performing other activities pursuant to an irrelevant Consent Order issued pursuant to an irrelevant state statute that provides no authority to mandate abatement of the imminent and substantial danger. Indeed, other action is required – abatement action.

While Respondent refers to so-called "remedial" efforts, the state statute and the Consent Order that Respondent claims to be following provide no abatement of the danger. No one should be confused. Respondent is not performing, and the State is not requiring Respondent to perform, any abatement activity that is required under RCRA § 6972(a)(1)(B). The word "remedial" may have some other loose meaning under the irrelevant state statute, but doing nothing after investigating and confirming the continuing presence of an imminent and substantial danger is not remedial abatement required by Congress.

Respondent's new argument underscores why the Court should accept review. After finding that a polluter caused contamination significant enough to be an imminent and substantial danger – did Congress mean that the polluter is required to take all action

necessary – even "other action" – to abate the imminent and substantial danger? Or, did Congress provide yet another opportunity for the polluter to argue that its non-action under the irrelevant state statute is adequate? Respondent ignores the supplemental nature of "other action," and replaces "or both" with "or neither," while ignoring Congress' mandate to preclude §6972(a)(1)(B) actions only when there is state enforcement of relevant *federal* law. *See* 42 U.S.C. §6972(b)(2)(C).

In addition, Respondent is correct that factual matters do not merit the Court's attention in deciding whether or not to accept review, Op. Br. 1, but Respondent nevertheless argues facts that are in dispute. For example, Respondent argues that the Consent Order requires remediation, but Respondent knows that the so-called Remedial Action Plan it proposes contains no RCRA mandated abatement or other remedial efforts. Also, it is absurd to argue that RCRA is not a cleanup statute. Op. Br. 14. Of course RCRA § 6972(a)(1)(B) is a cleanup statute. Certainly that provision is included in an omnibus statute with many provisions, but to say that the RCRA provision is not a cleanup statute is wrong. Subchapter VII of RCRA, and particularly 42 U.S.C. §§ 6972 and 6973, authorizes civil actions for the cleanup of wastes released into the environment.

Moreover, Petitioners did not manufacture a conflict in the Circuits. Op. Br. 1. As articulated in the Petition for Writ of Certiorari, there are several decisions in the Circuits addressing the need for a mandatory injunction to be ordered after an

endangerment finding that conflict with the case at bar. Pet. 25-27.

Finally, Respondent argues that Petitioners have a high bar in this case. Indeed, Petitioners cleared that high bar and proved that GE's contamination had permanently contaminated 500,000,000 gallons of previously clean drinking water creating an imminent and substantial danger and irreparable harm. Petitioners proved that Respondent was not abating the danger. Indeed, the District Court noted that Respondent had never removed any of the contamination in 30 plus years. App. 134 ("no remediation has yet occurred"). That is, Respondent has not yet performed any remedial action at the site.

At this point, the issues for this Court's review include the proper role of federalism in environmental enforcement cases. "RCRA is an exercise of federalism." *United States v. Marine Shale Processors*, 81 F.3d 1361, 1367 (5th Cir. 1996). Congress addresses federalism at 42 U.S.C. § 6972(b)(2)(C), and consistent with the Supremacy Clause of the United States Constitution, Congress established the proper role of states in enforcing federal law. Congress did not provide the district courts with authority to abstain from ordering relief in deference to state enforcement actions – except where the state is enforcing relevant *federal* law. It is the policy of the United States that contamination found to pose an imminent and substantial danger shall be abated. H.R.Rep. No. 98-191, 1 reprinted in 1984 U.S.C.C.A.N. 5576, 5612 ("primary goal of this provision [§6972], … the prompt abatement of imminent and substantial

endangerments"). Judicial activism is improper, and it is the obligation of the federal courts to call balls and strikes and not change the policy of the United States.

II. COURTS SITTING IN EQUITY CANNOT IGNORE CONGRESS.

Respondent misunderstands the significance of *United States v. Oakland Cannabis Buyers' Co-Op.*, 532 U.S. 483 (2001). According to Respondent, this Court granted district courts unbounded discretion on whether or not to issue injunctions. (Respondent incorrectly states that *Oakland Cannabis* was only first cited by Petitioners in this Court, Op. Br. 11, but Petitioners argued the case to the Court of Appeals. *See* App. 172, 175, 181.) As this Court explained, "a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation." *Oakland Cannabis*, 532 U.S. at 497, *quoting Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 551 (1937). Here, Congress provided that after an endangerment finding, a district court is required to order restraint, abatement (that may include other action), or both – but not, neither. The District Court's discretion involves only the scope of the restraint and/or action - not whether or not there should be an injunction. "The[] choice 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." *Oakland Cannabis*, 532 U.S. at 498-99. If review is granted, the parties will brief the *Oakland Cannabis* case appropriately.

CONCLUSION

This case presents this Court with the opportunity to weigh in on the proper role of federalism applicable to environmental enforcement cases, as well as Respondent's new argument involving the interpretation of a federal environmental statute, and the equitable discretion of district courts. The issues presented are of national significance in 2019 in an era of emerging federalism. That is, federal authorities intend to perform less environmental enforcement and expect the states to do more. Limited budgets, agency capture, legitimate administrative efficiencies and politics will limit state activity. The expected slack in enforcement under federal law will fall to citizens seeking to enforce federal environmental law according to authorities provided in federal Citizen Suit legislation, and this Court's guidance is needed now, more than ever.

For the reasons set forth in Petitioners' Petition for Writ of Certiorari and this Reply Brief, Petitioners respectfully petition the Supreme Court of the United States for a Writ of *Certiorari* to review the decision of the Court of the Appeals for the Seventh Circuit.

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Respectfully submitted,

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