No. 19-917

In the Supreme Court of the United States

JOSLYN MANUFACTURING CO., LLC AND JOSLYN CORP.,

Petitioners,

v.

VALBRUNA SLATER STEEL CORP. AND FORT WAYNE STEEL CORP.,

Respondents.

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

BRIEF IN OPPOSITION

DAVID L. HATCHETT
Counsel of Record
MICHAEL J. REEDER
HATCHETT & HAUCK LLP
150 W. Market Street
Suite 200
Indianapolis, IN 46204
(317) 464-2620
david.hatchett
@h2lawyers.com

Counsel for Respondents

QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, prescribes two limitations periods for cost-recovery claims, depending on the type of cleanup action involved. The limitations period is three years after the completion of "removal" actions, *id.* § 9613(g)(2)(A), which include "actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment" and "such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment," *id.* § 9601(23). The limitations period is six years after the start of "remedial" actions, *id.* § 9613(g)(2)(B), which are "actions consistent with permanent remedy taken instead of or in addition to removal actions . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment," *id.* § 9601(24). The question presented is:

Whether the Seventh Circuit correctly concluded that the partial excavation and capping of a specific area within a much larger polluted steel mill—a "limited fix" "performed in response to an impending environmental threat" that "did not resolve the bulk of the site's ongoing pollution problems," App. 16a-17a—was not a permanent remedy that stopped the migration of hazardous substances and, therefore, was a removal action instead of a remedial action.

RULE 29.6 STATEMENT

Respondent Valbruna Slater Steel Corporation is a wholly-owned subsidiary of Valbruna Stainless, Inc., and no publicly held company owns 10% or more of its stock. Respondent Fort Wayne Steel Corporation is a wholly-owned subsidiary of Acciaierie Valbruna SpA, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

For more than fifty years, Petitioners Joslyn Manufacturing Company, LLC and Joslyn Corporation (collectively, "Joslyn") made and processed stainless steel at a facility in Fort Wayne, Indiana. Throughout that time, Joslyn's operations contaminated the soil with trichloroethylene, metals, polychlorinated biphenyls, uranium, petroleum compounds and other contaminants. In April 2004, Respondents Valbruna Slater Steel Corporation and Fort Wayne Steel Corporation (collectively, "Valbruna") acquired separate portions of the site. The following year, Valbruna initiated work to permanently clean up the widespread and still migrating contamination Joslyn left behind.

After Joslyn refused Valbruna's requests for Joslyn to pay toward the cleanup, Valbruna filed this CERCLA action in February 2010 to recover Valbruna's cleanup costs. After years of litigation and a bifurcated trial, the district court entered final judgment requiring Joslyn to pay certain of Valbruna's past and future costs to clean up Joslyn's contamination. The Seventh Circuit affirmed.

Joslyn now asks this Court to upset that judgment, claiming that Valbruna's cost-recovery suit is time-barred. According to Joslyn, efforts in the 1980s and 1990s to monitor and partially clean up a small portion of the site by an intervening owner, Slater Steels Corporation ("Slater"), constituted the site's once-and-for-all "remedial" action and thus started the clock on a six-year limitations period for any and all CERCLA claims—now or in the future—seeking to recover cleanup costs for this site.

Both of the lower courts correctly rejected that argument, holding that Slater's partial cleanup efforts are more properly classified as partial, limited "removal" actions rather than final, comprehensive "remedial" actions as defined in CERCLA. As the Seventh Circuit explained, "the removal-or-remediation question" is decided "on a case-by-case basis" in light of all the "characteristic[s] of the cleanup." App. 16a. And here, given the "evident limitations" of Slater's efforts—which amounted to a "limited fix" at one small area of the site "performed in response to an impending environmental threat" that "did not resolve the bulk of the site's ongoing pollution problems"—the court below refused to "say it was a remedial action." App. 16a-17a.

That fact-bound conclusion is correct and does not warrant this Court's review. Although Joslyn claims to have identified a circuit split, that split—which involves whether a "final remedial action plan" must be agency-approved in order to trigger the six-year limitations period—has no bearing on this case, because the facts dictate that the outcome would be the same in all three circuits. All of the cases cited by Joslyn simply underscore that the removal-or-remediation question is, as the court below explained, a case-by-case question that turns on the specific facts of each case. Joslyn's mere disagreement with the Seventh Circuit's answer to that question in this case does not merit further review. The petition should be denied.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

CERCLA is "designed to promote the 'timely cleanup of hazardous waste sites' and to ensure that

the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (citation omitted). CERCLA allows the Government and private parties to perform cleanup operations and then recover the costs from responsible parties. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161-62 (2004). The cause of action for cost recovery is located in § 107(a), 42 U.S.C. § 9607(a).

The applicable statute of limitations for a cost-recovery claim under CERCLA depends on whether the cleanup is classified as a "removal" action or a "remedial action." A claim seeking costs of a "removal action" must be brought "within 3 years after completion of the removal action" absent certain circumstances not relevant here. 42 U.S.C. § 9613(g)(2)(A). A claim seeking costs of a "remedial action," on the other hand, must be brought "within 6 years after initiation of physical on-site construction of the remedial action." 42 U.S.C. § 9613(g)(2)(B).

Whether any particular cleanup work is classified as a "removal" action or a "remedial action" turns on a case-by-case, site-specific, totality-of-circumstances analysis, depending mainly on whether the work is a permanent solution to and stops the migration of the environmental contamination. *See* App. 16a ("[C]ourts decide the removal-or-remediation question on a case-by-case basis.").

CERCLA defines the term "removal" in pertinent part as:

> [T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the

> event of the threat of release of hazardous substances from the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. . . .

42 U.S.C. §9601(23).

CERCLA then defines the term "remedial action" in pertinent part as:

> [T]hose actions *consistent with permanent remedy* taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances *so that they do not migrate* to cause substantial danger to present or future public health or welfare or the environment . . . .

42 U.S.C. §9601(24) (emphases added).

Regulations promulgated by the U.S. Environmental Protection Agency ("EPA") provide examples of activities which fit within each definition. As relevant here, the regulations specify that "removal" action includes, among other things, "[e]xcavation, consolidation, or removal of highly contaminated soils . . . where such actions will reduce the spread" of the contamination and "[c]apping of contaminated soils or sludges—where needed to

reduce migration of hazardous substances . . . ." 40 C.F.R. § 300.415(e)(4), (6).

A removal action and a remedial action may be taken at the same site; however, a removal action occurs before a remedial action is taken. *See Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 291 (6th Cir. 1991). And although the inquiry is "highly fact-specific," courts have recognized that "removal actions generally are immediate or interim responses, and remedial actions generally are permanent responses." *Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 926 (5th Cir. 2000); *see also, e.g.*, *United States v. Raytheon Co.*, 334 F. Supp. 3d 519, 526-27 (D. Mass. 2018) ("[T]he primary thrust of removal actions is to remove hazardous substances that pose a threat to public health and safety while remedial actions focus primarily on the more *permanent remedy* of *preventing the migration* of released contaminants where there is no immediate threat to public health." (internal quotation marks and citation omitted) (emphasis added)).

B. Factual Background

From 1928 to 1981, Petitioner Joslyn owned and operated an expansive stainless steel manufacturing facility in Fort Wayne, Indiana ("Site"). App. 2a, 35a. Joslyn's operations used in-ground pits to treat the manufactured steel, filled parts of the Site with steelmaking wastes, placed contaminant-laden sludges onto the ground, and poured waste acids and solvents into open pits called "surface impoundments." *See* ECF 103, at 2-10.[1] Joslyn

[1] All "ECF No." citations refer to the district court docket: *Valbruna Slater Steel Corp. v. Joslyn Mfg. Co.*, No. 1:10-cv-00044-SD (N.D. Ind.).

polluted the Site's soil and groundwater with trichloroethylene ("TCE"), metals, polychlorinated biphenyls, uranium, petroleum compounds and other contaminants. App. 2a, 35a. In 1981, Joslyn sold the Site to Slater Steels Corporation ("Slater"). *Id.*

After acquiring the Site, Slater removed some metal-contaminated soil from one of Joslyn's former surface impoundments (occupying roughly a tenth of an acre in the far northeast corner of the roughly 60-acre Site) and a small waste pile of furnace dust (located in the far northwest corner of the Site). *Id.* Slater did not remove all metal-contaminated soil from the former surface impoundment and did not remove any of the impacted groundwater. *Id.*; ECF No. 46-6, at 2, ¶ 3; ECF No. 46-9, at 8-9. Slater left contamination in place at and migrating off-Site from the former surface impoundment. *Id.* For the dust pile, Slater removed the waste sitting on top of the ground but did not remove any soils. *Id.*

The removal work conducted by Slater at the former surface impoundment and waste pile did not completely or permanently address the contamination at or migrating from these locations, did not attempt to address contamination at the vast majority of the Site, and did not attempt to address any contaminant other than metals. *See* ECF No. 45, at 3-4. Slater's work "was not exceptionally complex or expensive" and was "narrowly tailored" to combat "a specific [environmental] threat." App. 50a.

In 1996, Slater entered into the Indiana Department of Environmental Management's ("IDEM") Voluntary Remediation Program to address the Site's contamination, including contamination still found at the former surface impoundment. ECF No. 46-9, at 15-16; ECF No. 46-7, at 4-5. Slater

investigated and monitored that contamination but never had any approved cleanup plan and never took additional action to clean it up. ECF No. 46-9, at 15-16; ECF No. 46-7, at 4-5.

In 2000, IDEM issued a Notice of Violation to Slater because of widespread historical contamination still impacting the Site and downgradient (off-Site) properties. App. 36a-37a; ECF No. 46-7, at 4-5. The notice listed 45 different problem areas at the Site, the contaminants associated with each location, and the action required at each location. The partially-addressed former surface impoundment and waste pile were among the listed locations in need of investigation and cleanup.[2] App. 36a-37a; ECF No. 46-7, at 77-82.

In 2002, Slater and IDEM entered into an Agreed Order in an effort to resolve the violations. App. 37a. Later that same year, Slater submitted a proposed Remediation Work Plan to IDEM, but IDEM found the plan to be lacking and required additional information and changes. *Id.* Slater went bankrupt shortly thereafter, never obtained IDEM approval for its planned cleanup, and never began the Site work contemplated in the unapproved plan. *Id.*

In April 2004, Respondent Valbruna acquired the Site out of the Slater bankruptcy. *Id.* In May 2005, Valbruna submitted a work plan to IDEM which specified using Electrical Resistance Heating ("ERH") technology to address a huge mass of TCE in a

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[2] The notice also included an unexecuted/proposed Corrective Action Agreed Order drafted by IDEM which briefly referenced a 1988 Consent Agreement and Final Order between Slater and the EPA, ECF 46-7, at 8-9. The actual terms of this 1988 document are unknown as it was never part of the record below.

different area of the Site where Joslyn had operated a TCE-containing degreaser.[3] App. 38a. IDEM approved the ERH work plan on May 20, 2005–the first approved cleanup plan anywhere on the Site–and the ERH work began on May 23, 2005. *Id*.

In November 2007, IDEM issued a Risk Assessment Review to Valbruna outlining the Site's remaining areas of environmental concern after the ERH work was completed. App. 4a; ECF No. 46-16, at 40-46; ECF No. 46-15, at 2-3, ¶ 14; ECF No. 169, at 37, ln. 2-7. IDEM stated that metals contamination in and around the former surface impoundment area was so high that its migration was causing "widespread concentrations" above what could be allowable even at an industrial property—and this migration was impacting a nearby public park. ECF No. 46-16, at 45. Valbruna entered the Site into IDEM's VRP in 2008. ECF 46-15, at 3, ¶ 15; ECF No. 169, at 122.

As the discussion above makes clear, Valbruna did not cause any of the contamination at the Site. App. 4a. Nevertheless, Valbruna as the current Site owner is the only party committed to permanently addressing the widespread contamination Joslyn left behind, so that those contaminants no longer migrate. App. 32a, 37a-38a. Valbruna and IDEM are working together to determine how to fully address the historical contamination which continues to pose an unacceptable threat to human health and the environment. App. 4a, 32a; ECF No. 46-15, at 2-3,

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[3] TCE was present in soil at concentrations over 1,000 times higher than IDEM's most lenient cleanup level and was contaminating on- and off-Site groundwater. ECF No. 46-17, at 30.

¶¶ 13; ECF No. 169, at 127-28, 136, 150; ECF No. 170, at 77-78, 104-05, 106, 126-27.

C. Procedural History

1. District Court

In February 2010, Valbruna filed the instant lawsuit against Joslyn, seeking to recover Valbruna's costs pursuant to CERCLA § 107(a). Valbruna made clear that the ERH work qualified as a "remedial action," and that the suit was timely because it was filed less than six years after Valbruna initiated that work in May 2005. App. 4a, 32a. Joslyn later asserted a counterclaim against Valbruna for contribution under CERCLA § 113(f). App. 31a.

In January 2012, Joslyn moved for summary judgment on Valbruna's CERCLA claim. Among other things, Joslyn argued that Slater's prior work at the surface impoundment and waste pile constituted a "remedial" action that triggered the six-year limitations period no later than 1991–thirteen years before Valbruna had even purchased the Site. App. 4a-5a. Joslyn therefore asserted that Valbruna's suit was time-barred, and that it should accordingly be able to escape liability for the costs of cleaning up its contamination.

The district court rejected that theory, on two independent and alternative grounds. First, it held that Slater's prior work was a "removal" action and that Valbruna's suit against Joslyn was timely filed within the applicable six-year limitations period governing "remedial" actions. App. 50a-51a ("Under the relevant case law cited by both parties, all of [the] factors weigh in favor of considering Slater's cleanup efforts at the surface impoundment and waste pile a removal action. That interpretation is also consistent

with the federal regulations, which specifically designate the actions taken by Slater, in this context, a removal action.").

Second, as an "alternative basis" for its statute of limitations holding, the district court found that "Slater's actions at the surface impoundment and waste pile were a separate and distinct cleanup effort from the ERH remediation, and as such had no effect on when the statute of limitations began to run for the remedial action currently taking place." App. 52a-53a.

Undeterred, in March 2015, Joslyn filed a successive motion for summary judgment re-raising the same statute of limitations issue without first seeking leave to do so and despite the court warning Joslyn earlier that leave would be required. App. 5a. The court denied Joslyn's successive motion on procedural grounds for having "flagrantly ignored" that prior directive. *Id.*; ECF No. 124 at 4.

In December 2015, the district court found Joslyn liable to Valbruna under CERCLA § 107(a). App. 5a. The court held a bifurcated trial in February and June 2017 addressing (1) the amount of damages owed by Joslyn under CERCLA § 107(a); and (2) the extent to which Joslyn could equitably allocate any of those damages to Valbruna pursuant to Joslyn's CERCLA § 113(f) counterclaim. *Id.* The district court entered final judgment in July 2018, awarding Valbruna $1,410,767.20 of the claimed $2,029,871.09 in past costs and declaring Joslyn responsible for 75% of Valbruna's future costs associated with addressing the Contamination. *Id.* at 5a-6a, 23a-24a.

2. Circuit Court

The Seventh Circuit affirmed the district court's determination in all respects. Most importantly for present purposes, the court held that Slater's work at the surface impoundment and waste pile was a "removal" action, and that Valbruna's claim against Joslyn thus sought recovery for a "remedial" action and was therefore timely filed within the six-year limitations period. App. 14a-17a.

In doing so, the court laid out general principles for distinguishing between "removal" and "remedial" actions depending on the particular facts of each case. Relying on precedent from several other circuits, the court explained that "a removal action is usually one that . . . is designed as an interim or partial fix . . . in response to an immediate threat" and thus "does not address the entire problem." App. 15a. By contrast, the court explained, a "remedial action is generally . . . designed as a permanent or complete fix" to "address the entire problem." *Id.* "Given the potential for overlap between the two characterizations," the court observed, "the removal-or-remediation question" is decided "on a case-by-case basis," with "[n]o one characteristic of the cleanup" being "dispositive." App. 15a-16a.

Applying that case-specific framework here, the court concluded that neither Slater's partial excavation of sludge and soil in the 1980s, nor its filling and placement of a concrete cap in 1991 "constituted remedial action." App. 16a. As the court explained:

> In the 1980s, Slater excavated sludge and soil from just two areas of the site (a former surface impoundment and waste pile). That

> was far from a comprehensive or permanent action. It was a temporary solution, covering only part of the plant's pollution causes. Slater also performed the work in response to the threat the waste posed to nearby water sources, which was of concern to regulators. As for the 1991 work, Slater filled the excavated area at the surface impoundment area with clean soil. It then constructed a concrete cap for that area, and Slater implemented a ground-water detection monitoring program. Again, this was a limited fix: it focused only on the impoundment lot. And the capping, too, was performed in response to an impending environmental threat, as regulators highlighted for Slater.

App. 16a.

In reaching that conclusion, the court addressed and rejected Joslyn's argument that the concrete cap was "permanent," noting that Joslyn was "prioritiz[ing] form (the cap's makeup) over function (the cap's purpose and effect)." App. 17a. "The concrete cap," the court explained, "covered just one area, and not even Joslyn seriously contends that it was meant to substantially resolve the bulk of the site's ongoing pollution problems." *Id.* The cap was thus "so far from comprehensive" that the court could not "say it was a remedial action."[4] *Id.*

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[4] The Seventh Circuit was also careful to note in its decision below that it did *not* address the district court's alternative and independent basis for denying Joslyn's statute of limitations argument. *See* App. 17a-18a. ("Because we affirm on [the

The Seventh Circuit denied Joslyn's petition for rehearing en banc without asking for a response from Valbruna. App. 60a.

REASONS FOR DENYING THE PETITION

Joslyn asks this Court to review the Seventh Circuit's conclusion that Slater's cleanup efforts constituted "removal" action rather than "remedial" action. That fact-bound conclusion is correct, and it does not implicate a conflict with any decision of any other Court of Appeals. Indeed, Joslyn's efforts to inject the decision below into a circuit split rests on factually unsupported arguments that were neither raised nor resolved below. The petition should be denied.

A. The Seventh Circuit Correctly Categorized The Slater Work As A "Removal" Action

The Seventh Circuit correctly determined that the cleanup work performed by Slater in the 1980s and 1990s constituted "removal" action under CERCLA, such that the cleanup did not constitute the "initiation of physical on-site construction of [a] *remedial* action" for purposes of the six-year statute of limitations, 42 U.S.C. § 9613(g)(2)(B) (emphasis added). As a result, Valbruna's May 2005 cleanup constitutes the only "remedial" action at issue, and Valbruna's claim was timely filed in 2010. Joslyn's contrary arguments are unavailing.

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removal-or-remedial] ground, we need not delve into the district court's alternative reason for finding [Valbruna's] CERCLA claim timely: that even if the earlier cleanups were remedial, they were separate 'operable units' from Valbruna's current cleanup.").

1. CERCLA broadly defines "removal" action to mean "the cleanup or removal of released hazardous substances from the environment," including actions "taken in the event of the threat of release of hazardous substances into the environment," actions taken "to monitor, assess, and evaluate the release or threat of release of hazardous substances," and any "other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release." 42 U.S.C. § 9601(23).

The EPA's implementing regulations give certain examples of such "removal" actions, including the "[e]xcavation, consolidation, or removal of highly contaminated soils . . . where such actions will reduce the spread" of the contamination and "[c]apping of contaminated soils or sludges – where needed to reduce migration of hazardous substances . . . ." 40 C.F.R. § 300.415(e)(4), (6).

By contrast, CERCLA defines a "remedial action" as an action "consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." 42 U.S.C. § 9601(24).

Given the "potential overlap" between the definitions, the courts have coalesced around a test that "decide[s] the removal-or-remediation question on a case-by-case basis" in light of "the circumstances and purpose" of the work. App. 15a-16a. Simply put, remedial work generally involves "a comprehensive,"

"permanent" response to fully address contamination at the site, while removal work involves a "partial" response in the face of an "imminent environmental threat." App. 15a-17a (collecting cases); *see also Geraghty*, 234 F.3d at 926 (noting that although inquiry is "highly fact specific," "removal actions generally are immediate or interim responses, and remedial actions generally are permanent responses").

As both courts below concluded, Slater's cleanup work in the 1980s and 1990s falls squarely on the removal side of the line. Slater's actions consisted of "soil and sludge excavations, site capping, and groundwater monitoring and assessment." App. 46a. Each of those actions is explicitly referenced in statutory and regulatory definitions of removal. *See* 42 U.S.C. § 9601(23) ("actions . . . to monitor, assess, and evaluate the release or threat of release of hazardous substances"); 40 C.F.R. § 300.415(e)(4) ("[c]apping of contaminated soils or sludges"); *id.* § 300.415(e)(6) ("[e]xcavation, consolidation, or removal of highly contaminated soils"). Moreover, each action was taken "in response to an impending environmental threat." App. 16a. And each action constituted only a "limited fix" to two discrete areas of the Site, and thus "did not resolve the bulk of the site's ongoing pollution problems." App. 16a-17a.

Further bolstering the "removal" finding, the contamination continued to migrate from the former surface impoundment after Slater's work. The "so that they do not migrate" requirement for a "remedial action" under 42 U.S.C. § 9601(24) was not met here. *See Raytheon*, 334 F. Supp. 3d at 526-27 ("[T]he primary thrust of removal actions is to remove hazardous substances that pose a threat to public

health and safety while remedial actions focus primarily on the more *permanent remedy* of *preventing the migration* of released contaminants where there is no immediate threat to public health." (internal quotation marks and citation omitted) (emphases added)).

2. Joslyn contends that any action that happens to be "consistent with [a] permanent remedy" is necessarily "remedial." Pet. 12. That simplistic argument fails to account for the rest of the statutory and regulatory text. As the district court explained, it would effectively eviscerate the distinction between removal and remedial actions, because "every removal action is consistent with every remedial action in that all are attempts to alleviate environmental concerns." App. 50a. Indeed, Joslyn's interpretation leads to absurd results: Any cleanup effort that does not impede a permanent remedy, no matter how small or ineffective in removing the contamination, would constitute a remedial action.

Joslyn's approach is also at odds with the statutory definition of "remedial action," which directly states that such an action can be "*in addition to* removal actions." 42 U.S.C. § 9601(24) (emphasis added). The statute thus plainly contemplates that a removal action can be compatible with a remedial action without itself *becoming* a remedial action. *See generally United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1239 (9th Cir.) (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000)) ("In interpreting 'removal' and 'remedial,' we . . . follow the Supreme Court's guidance in taking a comprehensive, holistic view of CERCLA because it is a 'fundamental canon of statutory construction that the words of a statute must be read in their context

and with a view to their place in the overall statutory scheme.'").

Joslyn also asserts that the Seventh Circuit's decision below "requires . . . that the clean-up work constitute the *entirety* of the permanent remedy" to qualify as remedial action "and does not allow for phased initiation of clean-up efforts." Pet. 12-13. But the Seventh Circuit said no such thing, because this case does not involve "phased initiation of clean-up efforts." Instead, it involves two distinct companies (Slater and Valbruna) performing two distinct cleanup operations. Only the second company—Valbruna—is enacting a plan to fully and permanently clean up the Site. That is the only remedial action implicated in this case.

B. This Case Does Not Implicate Any Circuit Split

1. Joslyn contends that the Seventh Circuit's decision "exacerbated" a "circuit split" as to when CERCLA's six-year statute of limitations for a "remedial action" is triggered, and it focuses on decisions by the Second, Seventh, and Ninth Circuits. *See* Pet. 9-12 (citing *Schaefer v. Town of Victor*, 457 F.3d 188 (2d Cir. 2006); *United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702 (7th Cir. 1998); *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661 (9th Cir. 2004)). According to Joslyn, these circuits are divided over whether cleanup efforts can be classified as remedial (rather than removal) if a site's "final remedial action plan" has not been "adopted" by the relevant environmental agency. Joslyn says the Ninth Circuit has set out a "bright-line" rule requiring agency approval of a final remedial action plan, while

the Seventh and Second Circuits do not impose such a requirement. Pet. 9-10.[5]

It is true that the Second Circuit has declined to "adopt the Ninth Circuit's . . . bright-line rule for determining the initiation of remedial action" based on the "approval of a final remedial action plan," *Schaefer*, 457 F.3d at 207, and that the Seventh Circuit has also declined to adopt a similar bright-line rule, *Navistar*, 152 F.3d at 712. That disagreement, however, is not implicated by this case, because Slater's cleanup is properly classified as removal action—and Valbruna's action is therefore timely—under either approach. The relevant environmental agency (IDEM) approved the only remedial action plan involved on May 23, 2005. App. 38a. Thus, as the district court explained, under the Ninth Circuit's bright-line test, "the triggering event" for any cleanup at the Site to be classified as "remedial" "could not occur until on or after May of 2005," App. 52a n.5, meaning that Valbruna's 2010 lawsuit falls within the six-year limitations period.

And under the Seventh and Second Circuits' more flexible approach—which does *not* require a final remedial action plan—Slater's cleanup efforts were still properly classified as removal for the reasons explained by the Seventh Circuit in this case. As that court found, Slater's efforts were "limited fix[es]" responding to "impending environmental threat[s]" that were not designed to resolve even "the bulk of the

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[5] When asking this Court for additional time to file its petition for certiorari, Joslyn argued there was a "multi-phase cleanup" circuit split. *See* Appl. for Ext. of Time 4-5, No. 19A600 (Nov. 25, 2019). Notably Joslyn's petition has now abandoned that assertion.

site's ongoing pollution problems." App. 16a-17a. The Seventh Circuit did not rest its conclusion on the existence (or absence) of a final remedial action plan. Thus, even if the circuits are divided over whether a final remedial action plan must be adopted before the remedial action statute of limitations period is triggered, the answer to that question has absolutely no bearing on this case.

Nevertheless, Joslyn asserts that this action would "have been untimely under the Ninth Circuit's test" in light of "a 1988 consent decree between Slater and the EPA." Pet. 11. This contention is legally and factually meritless.

For starters, even if the 1988 consent order constituted a "final remedial action plan" for purposes of the Ninth Circuit's test, the Ninth Circuit has not held that the adoption of such a plan is *sufficient* to convert removal action into remedial action, only that an approved plan is *necessary*. Indeed, *Neville* itself explained that "even though an action can be remedial if it is taken after the final remedial action plan is approved, that does not mean that *all* actions taken after the final remedial action plan is approved are remedial." 358 F.3d at 670. To the contrary, cleanup efforts occurring "*after* a remedial action plan" is adopted must still be evaluated according to "the character of the various actions in light of the definitions of 'remedial' and 'removal.'" *Id.* at 670-71. That is precisely what the Seventh Circuit did here.

In any event, the "1988 consent decree" was not, as Joslyn suggests, a "final remedial action plan." Pet. 11. The actual terms of this misnamed "consent decree" are unknown, as the document was not produced in this litigation and was never part of the record below. Although Joslyn represents that the

1988 order "provided in relevant part" that "the impoundment would be 'closed by landfill' if it could not be 'closed by removal,'" Pet. 5, 11, Joslyn references only a draft state agency document from May 2000 that purports to paraphrase—in a single paragraph—parts of a 1988 "Consent Agreement and Final Order" between Slater and the EPA, ECF No. 46-7 at 8-9.[6] And Joslyn omits the description of this 1988 order by both courts below, which explained that it contemplated "closure *of the polluted areas under excavation*"—i.e., closure of only the portions of the Site that Slater was excavating, not "the entirety of the Site." App. 35a-36a (emphasis added) (citing ECF No. 46-7 at 8); *see* App. 2a. Thus, even these paraphrased snippets of the 1988 order indicate that it did not require Slater to "remove all contaminants" from the Site and that "more work" would be "necessary," App. 2a-3a, meaning that it could not plausibly amount to a "final remedial action plan" for purposes of the Ninth Circuit's test, *Neville*, 358 F.3d at 670 n.7.

2. Joslyn asserts that this case "would be untimely under the Second Circuit's approach in *Schaefer*." Pet. 11. That is also incorrect. In *Schaefer*, "both parties *concede*[*d*]" that all of the cleanup work was "clearly remedial," as it involved "long-term, permanent" work for a complete site closure in an effort to address all of the contamination at the site. 457 F.3d at 203-05 (emphasis added). The only question was whether some of the concededly remedial actions initiated *before* the adoption of a

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[6] Joslyn is quoting from an unexecuted IDEM "Corrective Action Agreed Order" attached to an IDEM "Notice of Violation" dated May 17, 2000. ECF No. 46-7 at 4-6, 8-9.

remedial plan triggered the six-year limitations period. *Id.* *Schaefer* thus casts no doubt on the Seventh Circuit's conclusion in this case that remedial action is designed to be both "permanent" and "comprehensive." App. 17a.

Joslyn appears to assert that the Second Circuit would decide in its favor based on *Schaefer*'s reference to the statutory text that remedial action is action "consistent with [a] permanent remedy." Pet. 10-11 (quoting *Schaefer*, 475 F.3d at 207); *see* 42 U.S.C. § 9601(24) ("remedial action" is action "consistent with permanent remedy"). But as noted above, *Schaefer* had no occasion to "decide the removal-or-remediation question," App. 16a, because the parties in that case *agreed* that the cleanup work was remedial—the only question was whether that action "commenced" before or after the adoption of a final remedial plan, 475 F.3d at 203. And, in any event, the Second Circuit's later decision in *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212 (2d Cir. 2014) makes clear that a "remedial" action is a "final, once-and-for-all cleanup." *Id.* at 236. Under that definition, Slater's partial cleanup efforts in the 1980s and early 1990s certainly were *not* remedial. This case would thus come out the same way in the Second Circuit as it did below.

3. The remaining lower-court cases cited by Joslyn (Pet. 10-12) only support the fact-specific removal-or-remedial analysis conducted by the courts below and confirm the "removal" classification of Slater's work.

In *Geraghty*, the Fifth Circuit undertook a removal-or-remedial analysis and concluded, based upon the facts specific to that site, "that [the installation of monitoring wells under a corrective

action program in response to a state agency order] are properly categorized as removal activities." *Id.* at 927 ("The undisputed facts show that no permanent remedy was in place for the [entire site] when [plaintiff] constructed and installed the wells. Even if the wells performed some function that falls within the definition of remedial activity, that does not automatically exclude them from classification as removal activities. There can be some overlap between the two."). In doing so, the court applied the straightforward rule—which the Seventh Circuit also applied here—that "removal actions generally are immediate or interim responses," whereas "remedial actions generally are permanent responses." *Id.* at 926.

The Sixth Circuit, in *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433 (6th Cir. 2004), also undertook a removal-or-remedial analysis. It agreed with the district court that the work in question—changing the slope of the land and adding topsoil and clay covers to prevent erosion—"falls within the parameters of removal actions" and concluded that, based upon the facts specific to that site, "[u]nder these circumstances, Olin's actions in the 1980s did not trigger the statute of limitations for recovery of its costs related to its 'remedial' actions over a decade later." *GenCorp*, 390 F.3d at 444-45. The Seventh Circuit likewise performed a fact-bound analysis here to decide the removal-or-remedial question.

Finally, in *Raytheon*, a district court located within the First Circuit undertook a removal-or-remedial analysis and concluded, based upon the facts specific to that site, "the pump-and-treat system served primarily as a long-term, remedial action." *Raytheon*, 334 F.Supp. 3d at 527 (the work at issue

there "is remedial in nature" because, among other things: its objective was to *contain the migration* of contaminated groundwater; and it was and continues to be effective in *capturing and containing* the solvent plume). *Raytheon* is not a circuit-level opinion and is factually inapposite because Slater's "removal" work did *not* contain the migration of contaminated groundwater and was *never* effective in doing so.

In sum, these decisions accord with the Seventh Circuit's observation that "the removal-or-remediation question" must be decided "on a case-by-case basis," App. 16a, and none conflicts with the application of that case-specific analysis undertaken by the courts below.

C. This Case Is A Poor Vehicle For Addressing The Question Presented

The petition should also be denied because it presents a poor vehicle for this Court to resolve any questions about CERCLA. Joslyn relies heavily on arguments that were not made below—and on a mischaracterization of essential facts—and it fails to acknowledge the existence of an entirely independent and alternative basis for rejecting its statute-of-limitations challenge.

1. Much of Joslyn's argument is forfeited and factually unsupported. For example, as noted above, Joslyn claims that "a 1988 consent decree between Slater and the EPA provided that the [surface] impoundment would be 'closed by landfill' if it could not be 'closed by removal.'" Pet. 11. Joslyn argues that this purported "consent decree" *might* mean that the "removal" work conducted by Slater at the surface impoundment was actually the "initiation of remediation." *Id.*

Joslyn forfeited this argument by failing to present it to the lower courts. *See OBB Personenverkerkehr AG v. Sachs*, 136 S. Ct. 390, 397-98 (2015). Moreover, the actual terms of this so-called "consent decree" are unknown, as it was never produced in this litigation and was never part of the record below. *See* Pet. 5 (citing only to ECF 46-7, at 8-9—an unexecuted/proposed Corrective Action Agreed Order drafted by IDEM in 2000 which allegedly paraphrases parts of a 1988 "Consent Agreement and Final Order" between Slater and the EPA)); *supra* at p. 7, fn. 2.

Joslyn then quotes a 2012 submittal Valbruna made to IDEM to argue that Slater's work was a "key component" to Valbruna's remedial approach. Pet. 7 (citing ECF No. 101-11, at 3). But Joslyn only designated that one-page excerpt from Valbruna's 2012 submittal as part of Joslyn's *procedurally-rejected* successive motion for summary judgment. *See* ECF No. 124 at 4 (district court denying Joslyn's successive motion on procedural grounds for having "flagrantly ignored" a prior directive.). In any event, Joslyn mischaracterizes that "key component" language within the 2012 submittal, which on that very same page describes Slater's work as "*removal* efforts." ECF No. 101-11, at 3 (emphasis added).

Joslyn also baldly claims—without any citation to the record—that the Slater work at the surface impoundment "would prevent rainwater from percolating through the residual contamination and spreading it farther" and "was containing the contamination." Pet. 6. The record refutes Joslyn's wholly-unsupported revisionist take on the results of Slater's work and instead demonstrates that Slater's work did not completely or permanently address the contamination at or migrating from these locations,

attempt to address contamination at other parts (*i.e.*, the vast majority) of the Site, or attempt to address any contaminant other than metals. *See* ECF No. 45, at 3-4.

2. Joslyn also ignores the district court's alternative basis for finding that Valbruna's cost recovery action against Joslyn was timely filed. Although the Seventh Circuit had no need to address this alternative basis, it means that Valbruna would prevail on remand even if Joslyn were to prevail on the question presented.

The district court held, in the alternative, that:

> Even if the actions Slater took in the 1980s and 1990s were remedial in nature, *there is an alternative basis* for denying summary judgment on statute of limitations grounds. Slater's actions at the surface impoundment and waste pile were a separate and distinct cleanup effort from the ERH remediation, and as such had no effect on when the statute of limitations began to run for the remedial action currently taking place.

App. 52a-53a (emphasis added). The Seventh Circuit was careful to note in its decision below that it did *not* address this alternative basis. *See* App. 17a-18a. ("Because we affirm on [the removal-or-remedial] ground, we need not delve into the district court's alternative reason for finding [Valbruna's] CERCLA claim timely: that even if the earlier cleanups were remedial, they were separate 'operable units' from Valbruna's current cleanup.").

This separate and unresolved basis for Valbruna prevailing at the trial court means that Joslyn could

not obtain relief even if the Court grants certiorari and resolves the question presented in its favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID L. HATCHETT
Counsel of Record
MICHAEL J. REEDER
HATCHETT & HAUCK LLP
150 W. Market Street
Suite 200
Indianapolis, IN 46204
(317) 464-2620
david.hatchett
@h2lawyers.com

Counsel for Respondents

April 6, 2020