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

PETITIONERS' REPLY BRIEF

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REPLY BRIEF

Petitioners already demonstrated that there is serious confusion among the Courts of Appeals as to the proper standard for determining when a cleanup action triggers CERCLA's six-year statute of limitations for recovery of remediation costs. Respondents' efforts to minimize this conflict by turns ignores the test the Seventh Circuit applied below, misreads that test, or simply assumes its correctness. Those efforts cannot detract from the need for this Court's guidance to provide some kind of uniformity to this often recurring and outcome determinative question of law.

I. THIS CASE IMPLICATES A MULTIFACETED CIRCUIT SPLIT.

Respondents acknowledge that the circuits are split over the proper test for triggering CERCLA's six-year statute of limitations for actions to recover costs of "remedial" work. Opp. 18. They nonetheless contend that this case does not implicate the circuit split, but in doing so, they mischaracterize the disagreement among the circuits as a simple two-way split over whether for an action to be "remedial," a final remedial action plan must have been adopted. *Id.* at 17-19.

To the contrary, as Petitioners demonstrated, the circuits have adopted multiple inconsistent tests for triggering the six-year statute of limitations. The Ninth and Fifth Circuits require a final remedial action plan before a permanent fix can be considered remedial. See *California ex rel. Cal. Dep't of Toxic Substances Control* v. *Neville Chem. Co.*, 358 F.3d 661, 667 (9th Cir. 2004); *Geraghty & Miller, Inc.* v. *Conoco Inc.*, 234 F.3d 917, 927 (5th Cir. 2000), *abrogated on other grounds by Vine Street LLC* v. *Borg Warner Corp.*, 776

F.3d 312 (5th Cir. 2015). The Second Circuit requires an action "consistent with a permanent remedy" regardless of whether a remedial action plan has been adopted. *Schaefer* v. *Town of Victor*, 457 F.3d 188, 206-07 (2d Cir. 2006). The Seventh Circuit has rejected any requirement of a remedial action plan, *United States* v. *Navistar Int'l Transp. Corp.*, 152 F.3d 702, 712 (7th Cir. 1998), but in the decision below added a new requirement that to be remedial, a cleanup action, no matter how permanent, must substantially resolve the bulk of the pollution at the entire site, Pet. App. 17a.

The disagreement among the circuits is thus more extensive and complex than Respondents would have it. This case plainly implicates the actual circuit conflict. And the depth of the confusion reflected in the legal standards applied in the lower courts makes this Court's review all the more warranted.

In a further effort to downplay the disarray among the courts of appeals, Respondents attempt to portray the question presented as fact-bound. Opp. 2, 13, 21-23. The circuit split, however, centers on the proper *test* for determining when an action is remedial and thus triggers the six-year statute of limitations for cost recovery actions. Notwithstanding Respondents' mischaracterization, the question of what test should apply to trigger the statute of limitations is a question of law. That courts necessarily apply the test to a particular set of facts in a given case does not render the question of which test is correct fact-bound.

Respondents contend that the outcome in this case would be the same under any test. Opp. 2, 19-20. They note that in the Ninth Circuit, the existence of a remedial action plan is necessary, but not sufficient, for an action to be remedial, and that actions taken after the

adoption of a plan can be removal actions. Opp. 19. The Ninth Circuit explained, however, that removal actions taken after a plan is adopted are "interim rather than permanent measures." *Neville*, 358 F.3d at 670. Here, the concrete cap installed at the surface impoundment was a permanent measure that remains in place today, decades later, and was incorporated into Respondents' remediation plan for the site. See *id.* at 670-71 (explaining that the installation of a clay cap over a landfill in *Navistar* would be deemed remedial under the Ninth Circuit's approach); Pet. App. 17a (recognizing that the concrete cap is permanent); *infra* 7-8.

Respondents next attempt to cast doubt on the consent agreement in which the EPA determined the means of remediation of the surface impoundment. Although the agreement itself is not in the record, it is described, and the relevant language is quoted, in a record document, and both the district court and the Seventh Circuit noted it in their decisions. See *infra* 8-9. Respondents also contend that both courts described the agreement as limited to the excavation areas, but both courts noted that it covered monitoring of "the site." Pet. App. 2a, 35a-36a. The Ninth Circuit explained that a cap installed after "the EPA determined that, among other things, the landfill needed to be covered with a permanent clay cap to isolate the hazardous materials" would satisfy its test for remedial action. *Neville*, 358 F.3d at 670-71 (quoting *Navistar*, 152 F.3d at 704). Here, the concrete cap was installed after a similar EPA determination as to the means of remediation.

Respondents also contend that the outcome here would be the same in the Second and Fifth Circuits, but their argument misreads the Second Circuit's

analysis and conflates the Seventh Circuit's "comprehensiveness" requirement with a requirement that the action be "permanent." Respondents misread the Second Circuit's *Schaefer* decision as not even addressing the standard for whether an action is remedial. Although the parties agreed that the overall cleanup was remedial, the court's analysis of which specific actions constituted the initiation of the remedial action turned on the test for when an action qualifies as remediation. See *Schaefer*, 457 F.3d at 203-04 (use of a dragline was an "'action[] consistent with permanent remedy'"; "use of cover is a 'remedial action' for purposes of the statute"). Respondents do not dispute that the cleanup efforts here would be remedial under *Schaefer*. Instead, they rely on a subsequent Second Circuit decision, *N.Y. State Elec. & Gas Corp.* v. *FirstEnergy Corp.*, 766 F.3d 212 (2d Cir. 2014), which they say "makes clear that a 'remedial' action is a 'final, once-and-for-all cleanup.'" Opp. 21 (quoting *FirstEnergy Corp.*, 766 F.3d at 236). But they fail to explain how a permanent concrete cap would not satisfy that test. In any event, to the extent that *FirstEnergy* adopts a different test from *Schaefer*, it merely adds to the overall confusion among the lower courts for which this Court's guidance is needed.

Similarly, as to the Fifth Circuit, Respondents note that the court applied the rule that "'removal actions generally are immediate or interim responses,' whereas 'remedial actions generally are permanent responses.'" Opp. 22 (quoting *Geraghty*, 234 F.3d at 926). They do not explain why the permanent concrete cap would fail that test, nor do they acknowledge that the Seventh Circuit required not only a permanent action, but also one that addressed substantially the bulk of the pollution at the site.

As to the Sixth Circuit's decision in *GenCorp, Inc.* v. *Olin Corp.*, 390 F.3d 433 (6th Cir. 2004), Respondents assert only that the analysis was "fact-bound," Opp. 22, but again, here the issue is the *legal* question of what test to apply. In any event, the Sixth Circuit determined that the actions in *GenCorp* were not remedial because they were not permanent—the EPA required the defendants to *dismantle* their initial cleanup efforts, 390 F.3d at 444-45. In stark contrast, the concrete cap here remains in place. In equating the Sixth Circuit's analysis with the decision below, Respondents simply ignore the Seventh Circuit's "comprehensiveness" requirement.

The courts of appeals have adopted multiple disparate tests for triggering the six-year limitations period for recovery of remediation costs. This Court should grant the petition to provide much-needed clarity to allow parties to know whether and when a cause of action has accrued and when a claim has expired.[1]

II. THE DECISION BELOW IS INCORRECT.

Respondents have no response to Petitioners' showing that the Seventh Circuit's "comprehensiveness" requirement has no basis in the statutory text. The stat-

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[1] Respondents imply that it would be unfair for the statute of limitations to have run years before it purchased the site. Opp. 9. But that is precisely what statutes of limitations do. If the action is remedial, an action to recover costs must be brought within six years of initiation of the remediation. Any purchaser of a site more than six years after remediation begins would not be able to bring a cost recovery action. Indeed, this demonstrates the need for clarity in the test for when the six-year statute of limitations is triggered. A test based on an amorphous concept of "comprehensiveness" fails to alert parties that their cause of action has accrued.

ute starts the limitations period from the date of "initiation" of onsite physical construction of remediation, *i.e.*, actions "consistent with permanent remedy." 42 U.S.C. § 9613(g)(2)(B); *id.* § 9601(24). It says nothing about "substantially resolv[ing] the bulk of" the site's pollution or any threshold level of "comprehensiveness."

The Seventh Circuit's atextual requirement does not start the limitations period from the date of *initiation* of actions *consistent with* a permanent remedy, but rather from the date of clean-up work constituting the *entirety* (or some indefinite level close to the entirety) of the permanent remedy. This standard potentially eviscerates the statute of limitations, as any single aspect of a cleanup operation is unlikely to qualify as addressing the bulk of the pollution. It also ignores the reality that CERCLA clean up actions are frequently multi-phase actions over multiple years. Respondents' only response is that here "two distinct companies" performed "two distinct cleanup operations." Opp. 17. But it is often the case in the CERCLA context that cleanup operations span multiple owners of a site. And here Respondents themselves characterized the earlier cleanup efforts as a key component of the overall remedial plan. See ECF No. 101-11.[2]

Respondents contend that the decision below correctly classified the surface impoundment work as removal rather than remedial action. But to do so, they simply assume the correctness of the Seventh Circuit's

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[2] "ECF No." citations refer to the district court docket: *Valbruna Slater Steel Corp.* v. *Joslyn Mfg. Co.*, No. 1:10-cv00044-JD (N.D. Ind.).

"comprehensiveness" test. Opp. 14-15. That is precisely the question that this Court should grant the petition to resolve.

Respondents note that the regulatory definition of "removal" includes "[c]apping of contaminated soils or sludges." Opp. 14, 15 (alteration in original). But they omit that the definition includes capping only "where needed to *reduce* migration" of pollutants into the environment, consistent with the temporary nature of removal actions. 40 C.F.R. § 300.415(e)(4) (emphasis added). The statutory definition of "remedial action," by contrast, is "actions consistent with *permanent* remedy." 42 U.S.C. § 9601(24) (emphasis added). And although Respondents quote part of the statutory definition of "remedial action," Opp. 14, they omit the part of that definition listing "confinement" of pollutants as an example of remedial action, 42 U.S.C. § 9601(24). A permanent concrete cap intended to confine pollutants at the surface impoundment is remedial under the plain language of the definition.[3]

Respondents do not dispute that the concrete cap was a permanent fix and remains in place today. Citing only their own opposition to Petitioners' motion for summary judgment, Respondents contend that the impoundment work failed to fully contain the contamination. Opp. 15, 24-25. But as the district court explained, after Slater installed the reinforced-concrete cap, IDEM accepted Slater's application stating that the "site remediation was complete," and issued a certificate acknowledging "a successful remediation of the

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[3] In describing the surface impoundment cleanup in the factual background section, Respondents neglect to even mention the permanent concrete cap or the groundwater monitoring system installed in 1991-1992. Opp. 6.

former Joslyn surface impoundment location." Pet. App. 36a. The Seventh Circuit similarly treated the cap as a permanent solution, refusing to classify it as remedial not because of any lack of permanency, but solely because it did not "substantially resolve the bulk of the site's ongoing pollution problems," and thus was not sufficiently "comprehensive." Pet. App. 17a; *id.* ("So while the fix may have been permanent, it was so far from comprehensive that we cannot say it was a remedial action.").

III. THIS CASE INVOLVES A RECURRING ISSUE OF NATIONAL IMPORTANCE AND IS AN EXCELLENT VEHICLE TO RESOLVE THE ACKNOWLEDGED SPLIT AMONG THE COURTS OF APPEALS.

Respondents do not dispute that the proper trigger for CERCLA's six-year statute of limitations is an issue that arises frequently and applies nationwide. This Court's guidance would provide much-needed national uniformity.

Respondents also do not dispute that the facts of this case are typical of CERCLA cost-recovery actions. Instead, Respondents make several arguments to contend that this case is a poor vehicle for this Court to resolve the circuit split. None is availing.

First, Respondents contend that Petitioners forfeited reliance on the consent agreement in which the EPA determined that if the impoundment could not be closed "by removal," it should be closed as a "landfill." Opp. 23. According to Respondents, this is because the district court docket does not contain the consent agreement itself but instead contains a proposed Corrective Action Agreed Order prepared by IDEM that "allegedly paraphrases" the consent agreement. *Id.* at

24. Respondents' position is meritless. Both the district court and the Court of Appeals noted the consent agreement in their respective decisions. Pet. App. 2a; *id.* at 35a-36a (citing ECF No. 46-7, at 8). And the IDEM Agreed Order in the record includes the consent agreement as a "Finding of Fact" and directly *quotes* the relevant language. ECF No. 46-7, at 8-9. Moreover, Petitioners rely on the consent agreement here only to demonstrate that the action would be untimely in the Ninth Circuit, which requires an agreed remedial action plan to trigger the statute of limitations for "remedial" costs.

Next, Respondents take issue with Petitioners' citation to Respondents' 2012 "Remediation Work Plan." Respondents do not dispute that they characterized the 1991 closure of the former impoundment as a "key component" of the "overall remedial strategy." Their only response is to point out that the 2012 Remediation Work Plan also referred to Slater's work at the impoundment as "*removal* efforts." Opp. 24. While the excavations done between 1981 and 1987 might be deemed a "removal effort" because contaminated sludge was *removed* and hauled away, that does not necessarily make it a "removal action" as defined by CERCLA. And even if the excavations were deemed "removal action," Respondents themselves observe that remedial action can be in addition to removal action. *Id.* at 16. The cap was remedial action in addition to any removal actions because it was installed to effect a permanent remedy through closure of the impoundment. Indeed, Respondents' "Remediation Plan" referred to the "surface impoundment c*losure*" as "Source *Remediation*." ECF No. 101-11 (emphases added).

Respondents further reiterate their contention that the impoundment work did not fully contain the contamination. As noted above, this contention mischaracterizes the record and ignores the district court's and the Seventh Circuit's characterization of the cap as permanent. *Supra* 7-8.

Finally, Respondents contend that as a result of the *district court's* alternative holding, Petitioners could not obtain relief even if the Court granted certiorari and ruled in Petitioners' favor. Opp. 25-26. This contention is baffling. The district court ruled in the alternative that even if the concrete cap were a remedial action, it was "a separate and distinct cleanup effort" from the later remediation at the site and thus each remediation effort was subject to a separate limitations period. Pet. App. 52a-58a. Respondents acknowledge, however, that the Court of Appeals did not address this alternative holding in affirming the district court. Opp. 25; Pet. App. 17a-18a. If this Court ruled in Petitioners' favor, the case would be remanded to the Seventh Circuit for further proceedings consistent with the Court's decision. Depending on how the Court resolves the question presented, its ruling might well foreclose the district court's alternative holding here. And of course, in ruling on the proper test for triggering the six-year statute of limitations in a multi-phase cleanup effort, this Court could choose to provide guidance to the lower courts on the related issue of whether there can be more than one remedial action at a given site.

In any event, if the Court's decision did not of its own accord eliminate the district court's alternative basis for holding the action timely, the Seventh Circuit could address that holding on remand. And it is far from clear that the Seventh Circuit would affirm the district

court on this basis. As the Second Circuit has explained, "[v]irtually every court that has considered this issue has agreed" that "there can only be one remedial action at any given site." *FirstEnergy Corp.*, 766 F.3d at 235-36 (citing, *inter alia*, *Colorado* v. *Sunoco, Inc.*, 337 F.3d 1233, 1241 (10th Cir. 2003) and *Kelley* v. *E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 843 (6th Cir. 1994)); see *Kelley*, 17 F.3d at 843 (all removal activity should be considered part of one removal action because "[i]t is simply inconsistent with the[ ] 'essential purposes' [of CERCLA] to require suit on each arguably independent removal activity"). In the decision below, the Seventh Circuit recognized this weight of authority contrary to the district court's ruling. Pet. App. 17a n.4. The court "note[d]" that it "*appear*[*s*] to have recognized [the district court's alternative holding] ground before." *Id.* (emphasis added) (citing *Bernstein* v. *Bankert*, 702 F.3d 964, 984 (7th Cir. 2012), *amended and superseded on reh'g*, 733 F.3d 190 (7th Cir. 2013)). But it left open whether *Bernstein* conflicts with the circuit courts that "have rejected the idea that there can be multiple removal or remediation actions at a given site." *Id.* On remand, guided by this Court's decision, the Seventh Circuit would likely reverse the district court's alternative ruling. In any event that alternative holding is no reason not to resolve the question presented here as to what triggers the six-year statute of limitations for cost recovery actions under CERCLA, and this case is an excellent vehicle for this Court to decide that recurring and important question.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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