No. _____

In the Supreme Court of the United States

Joslyn Manufacturing Company, LLC, et al.,

Applicant,

v.

Valbruna Slater Steel Corporation, et al.,

Respondent.

APPLICATION TO STAY FURTHER PROCEEDINGS IN THE DISTRICT COURT PENDING CERTIORARI

PRELIMINARY STATEMENT

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit:

Joslyn Manufacturing Company, LLC and Joslyn Corporation (hereinafter, "petitioners" or "Joslyn") respectfully request an order staying further proceedings in the district court in this case pending the filing and disposition of a petition for a writ of *certiorari*. The petition will seek review of a judgment in which the United States Court of Appeals for the Seventh Circuit wrongfully denied petitioners' statute of limitations defense under 42 U.S.C. § 9613(g)(2)(B) and its claim preclusion defense under Indiana law and the full faith and credit statute, 28 U.S.C. § 1738. Petitioners also request an interim stay pending final action on this application.

Environmental litigation is expensive to do once, but the Seventh Circuit has subjected petitioners to a second and conflicting "final" judgment on the same cause of action. It accomplished this result through an unprecedented, expansive reading of the statutory definition of "removal" action under CERCLA, a construction of the statute of limitations that all other circuits to consider it have rejected. The circuit court also allowed two claims to be brought for the exact same injury, one in state court followed by a second in federal court, a practice that Indiana preclusion law treats as claim-splitting and expressly forbids. It is reasonably probable that this Court will grant *certiorari* and reverse. This stay should be granted to preserve the *status quo* in the interim.

Petitioners asked the Seventh Circuit to stay its mandate pending the filing and disposition of a *certiorari* petition, pursuant to Fed. R. App. P. 41(d)(2)(A), but the court denied the motion without comment. (A copy of the Seventh Circuit's order is attached as Exhibit A.) The case has now returned to the district court for continued proceedings. A petition for *certiorari* is due December 5, 2019. Without a stay during the pendency of the petition, petitioners will be subject to irreparable harm because a monetary judgment is at issue. Respondents will not be prejudiced by a stay of the mandate because their judgment is secured by an appeal bond sufficient to pay the judgment and all accrued post-judgment interest.

FACTUAL AND PROCEDURAL HISTORY

Joslyn owned and operated a steel mill in Fort Wayne, Indiana (the "Site"), for about fifty years prior to 1981. When respondents' predecessor and privy, Slater Steel,

purchased the Site that year, it was a RCRA Treatment, Storage and Disposal (TSD) facility. Slater wished to close three solid waste management units so it would no longer be regulated as a TSD, and these included a former surface impoundment that held hazardous waste. From 1981 to 1987, Slater did a series of excavations to dig up contaminated soil and sludge and dispose of it offsite in an effort to permanently close the impoundment.

When it could not dig any deeper because of adjacent railroad tracks, Slater built a reinforced concrete cap over the impoundment to "landfill" the remaining contamination in place. This construction was done in November 1991. A groundwater monitoring system was built around the impoundment in 1992. The Indiana Department of Environmental Management (IDEM) certified the impoundment as closed in 1999 after monitoring results showed the cap effectively contained the contamination. The cap remains in service today.

Beginning in the late 1980s, Slater asked Joslyn to help pay for Site clean-up, but Joslyn declined because Slater had assumed responsibility for RCRA compliance going forward by purchasing the Site.[1] Joslyn's employees became Slater's at the closing, and no one has ever claimed that Joslyn misrepresented Site conditions.

Slater threatened to sue Joslyn for environmental response costs under CERCLA, but in 2000 it chose to file suit in Indiana state court and pursue the cause of action

[1] It was not until 1984, three years after the sale, that the Resource Conservation and Recovery Act was amended to require current owner-operators to take corrective action to address existing contamination at their sites. *See* Hazardous and Solid Waste Amendments of 1984, P.L. 98-616, 98 Stat. 3221 (enacted Nov. 9, 1984).

under the Indiana Environmental Legal Action statute (Ind. Code § 13-30-9-1 *et seq.*) ("ELA") and contract theories.

In 2004, plaintiff-respondent Valbruna[2] bought the Site from Slater. The Asset Purchase Agreement granted Valbruna the option of joining Slater's pending suit against Joslyn but it declined to exercise it. A final judgment on the merits was entered in Joslyn's favor and against Slater in 2005.

That same year, Valbruna conducted electrical resistance heating treatment to eradicate TCE contamination at another part of the Site. In 2008, Valbruna entered the Site in Indiana's Voluntary Remediation Program to address the remaining contamination. Valbruna's Remediation Work Plan described the closure of the former impoundment as a "key component" of the Site's overall remedial strategy.

In 2010, almost 20 years after Slater capped and closed the impoundment, and 5 years after judgment was entered for Joslyn in the state court environmental case brought by Slater, Valbruna filed the present complaint against Joslyn in the Northern District of Indiana. (DE 1.) Like Slater, Valbruna alleged that Joslyn caused the contamination during its operation of the Site prior to 1981. Like Slater, Valbruna sought all of its past and future response costs under the ELA. Unlike Slater, Valbruna also sought this relief under CERCLA, 42 U.S.C. § 9607(a) and § 9613(g)(2). (DE 1.)[3]

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[2] Plaintiffs Valbruna Slater Steel Corporation and Fort Wayne Steel Corporation are collectively referred to here as "Valbruna."

[3] In the complaint, Valbruna sought declaratory relief under 28 U.S.C. § 2201 and Fed. R. Civ. Pro. 57. (DE 1 at 7, ¶ 38.) The district court found declaratory relief appropriate under CERCLA itself, 42 U.S.C. § 9613(g)(2). (DE 124 at 14.)

Valbruna's ELA and CERCLA claims are based on the same factual allegations and share the same prayer for relief.

Joslyn's motions for summary judgment on the limitations and claim preclusion issues were denied by the district court. Its request for certification of questions concerning Indiana's competent jurisdiction requirement for claim preclusion was denied, as was Joslyn's request for interlocutory appeal under 28 U.S.C. § 1292(b). The case proceeded to trial on Joslyn's counterclaim for contribution under 42 U.S.C. § 9613(f).[4] After trial, judgment was entered in Valbruna's favor for $1,410,767.20 in past costs, along with a declaratory judgment that Joslyn is liable for 75% of Valbruna's future response costs compensable under CERCLA. Both sides appealed, and the Seventh Circuit affirmed. (A copy of the Seventh Circuit's August 8, 2019 decision is attached as Exhibit B.) Joslyn's petition for rehearing *en banc* was denied on September 6, 2019.

STANDARDS FOR GRANTING A STAY

Supreme Court Rule 23.1 provides that "[a] stay may be granted by a Justice as permitted by law." A stay pending *certiorari* should be granted if: (1) there is a "reasonable probability" that this Court will grant *certiorari*; (2) there is a "fair prospect" that this Court will conclude that the decision below was erroneous; (3) irreparable harm will result from the denial of a stay; and (4) the balance of the equities justifies a stay." See *California v. American Stores Co.,* 492 U.S. 1301 (1989) (O'Connor, J., in chambers). This application satisfies all four criteria.

[4] The district court excluded Joslyn's claim preclusion and limitations defenses from the trial.

APPLICATION OF THE STAY STANDARDS TO THIS CASE

I. There is a "reasonable probability" that *certiorari* will be granted and a "fair prospect" that the decision below on the CERCLA statute of limitations will be found erroneous.

A. The Seventh Circuit's decision conflicts with the statutory definitions of"removal" and "remedial" action and the circuit court precedent applying them.

1. The hallmark of "removal" action is to address an imminent threat to public health.

CERCLA defines "removal" as an immediate, temporary response to an imminent threat to public health. This is apparent from the examples of removal action set forth in the statutory text:

> The term [removal] includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. § 5121 et seq.].

42 U.S.C. § 9601(23).

The circuits have consistently interpreted "removal" in this manner, often noting that removal actions are usually done offsite where the contamination presents an imminent threat to public health and safety, *e.g.*, treating contaminated water in a neighbor's drinking water well, or removing contaminants from a river that the public uses for fishing and swimming. The Seventh Circuit noted the general description of "removal" in its decision: "[R]emoval generally 'refers to a short-term action taken to halt risks posed by hazardous wastes immediately.'" *Slip Op.* at 15, citing *Frey v. E.P.A.*, 403 F.3d 828, 835 (7th Cir. 2005). Other circuit court decisions are in accord. *N.Y. v. Next*

Millenium Realty, LLC, 732 F.3d 117, 124-25 (2d Cir. 2013) ("Removal actions are clean-up or removal measures taken to respond to immediate threats to public health and safety."); *NYSE&G v. FirstEnergy Corp.*, 766 F.3d 212, 230-31 (2d Cir. 2014) ("Removal actions are generally clean-up measures taken in response to immediate threats to public health and safety … generally designed to address contamination at its endpoint and not to permanently remediate the problem."); *Franklin County Conv. Fac. Auth. V. Amer. Prem. Under., Inc.,* 240 F.3d 534, 540 n. 3 (6th Cir. 2001) (Removal actions "usually occur in the context of an emergency, and are considered temporary solutions"); *Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1024 (8th Cir. 1998) (removal actions are those "taken to counter imminent and substantial threats to public health and welfare"); *U.S. v. W.R. Grace & Co.,* 429 F.3d 1224, 1244 (9th Cir. 2005) ("Courts have … stressed the immediacy of a threat in deciding whether a cleanup is a removal action." (collecting cases)).

As is apparent from these decisions, most removal actions are short-term or temporary in nature. On rare occasions, a response that takes years and costs millions to complete may also be a removal action, but only when the signal characteristic of removal action is present, *i.e.*, the action was instituted to address an imminent threat to public health and safety. *See, e.g., Next Millenium, supra*.

2. The hallmark of "remedial" action is to achieve a long-term fix.

Actions aimed at effecting a long-term or permanent remedy in the absence of an imminent threat is remedial action. CERCLA defines a "remedial action" 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) (emphasis added).

The circuits have also recognized that, unlike removal action, remedial action is aimed at achieving a long-term or permanent fix to the contamination at its source and is not done on an urgent basis to address an imminent threat. *Slip Op*. at 15, citing *Bernstein v. Bankert,* 733 F.3d 190, 201 n. 5 (7th Cir. 2013) ("Remedial actions 'are longer term, more permanent responses.'"); *NYSE&G, supra,* 766 F.3d at 231 ("Remedial actions are typically actions designed to permanently remediate hazardous waste … generally long-term or permanent containment or disposal programs."); *Next Millenium, supra,* 732 F.3d at 125 ("Remedial actions are generally actions designed to permanently remediate hazardous waste."); *Schaefer v. Town of Victor,* 457 F.3d 188, 195 (2d Cir. 2006) (remedial actions are "generally long-term or permanent containment or disposal programs"); *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.,* 358 F.3d 661, 667 (9th Cir. 2004) ("remedial actions generally are permanent responses") (quoting *Geraghty and Miller, Inc. v. Conoco, Inc.,* 234 F.3d 917, 926 (5th Cir. 2000); *U.S. v. W.R. Grace, supra*, 429 F.3d at 1228 ("Remedial actions…are often described as permanent remedies to threats for which an urgent response is not warranted."), citing *Pub. Serv. Co. of Colo. V. Gates Rubber Co.,* 175 F.3d 1177, 1182 (10th Cir. 1999) ("In broad contrast, a remedial action seeks to effect a permanent remedy to the release of hazardous substances when there is no immediate threat to the public health."); *Franklin*

County, supra, 240 F.3d at 540 n. 3 ("Remedial actions are consistent with the permanent remedy taken to prevent or minimize the release of hazardous substances so they do not migrate to cause substantial danger to present or future public health, welfare or the environment").

3. CERCLA's limitations regime requires courts to maintain the line between "removal" and "remedial" action.

Congress enacted different statutes of limitation for removal and remedial actions. For removal actions, suit must be filed within three years "after completion of the removal action." 42 U.S.C. § 9613(g)(2)(A). This encourages parties to address the imminent threat to public safety first, and sue for costs second.

For remedial actions, suit must be filed within six years after "*initiation* of physical on-site construction of the remedial action." 42 U.S.C. § 9613(g)(2)(B) (italics added). Why this distinction? As the Seventh Circuit observed in *U.S. v. Navistar International Transp. Corp.*, 152 F.3d 702 (7th Cir. 1998), Congress enacted the statute of limitations to promote timely, accurate determinations and provide finality to potentially responsible parties. *Id.* at 710. Remedial action can go on for decades, and so Congress provided for the limitations period to commence with the *initiation* rather than the completion of the response action, and compensated for this adjustment by extending the limitations period to six years.

Given that decades of additional remedial work might be required, Congress also gave plaintiffs the right to seek declaratory relief or file subsequent actions to seek future costs, so long as the initial cost recovery action was timely. 42 U.S.C. § 9613(g)(2).

What CERCLA does not allow is the result in this case: An initial CERCLA cost recovery action filed more than six years after the initiation of physical on-site construction of remedial action.

4. The work done at the surface impoundment was clearly remedial action.

The work at this Site's former surface impoundment bears the hallmarks of remedial action, not removal action. There was no imminent threat to public health. The work was done to close the impoundment, *i.e.*, to effect a permanent remedy. Slater first tried to achieve closure by doing a series of excavations over a six-year period. After four years of relative inactivity, it built a reinforced concrete cap over the impoundment in 1991 to permanently "landfill" or contain the residual contamination in place. The Indiana Department of Environmental Management (IDEM) certified the impoundment as closed after the cap was constructed, and Valbruna has called closure of the impoundment a "key component" of the overall remedial strategy at the Site.

In *Navistar, supra,* the Seventh Circuit found that the construction of a defective clay cover to permanently contain hazardous waste constituted the initiation of physical on-site construction of remedial action that triggered the six-year limitations period under 42 U.S.C. § 9613(g)(2)(B). *A fortiori,* the reinforced concrete cap built in 1991 and still in service 30 years later did the same.

5. The Seventh Circuit's interpretation of "removal" action is unsupported by the statutory text or circuit court precedent.

The Seventh Circuit found that the reinforced concrete cap over the impoundment constituted removal rather than remedial action. The decision refers to

the "threat" that the contamination at the impoundment presented (*see Slip Op.* at 16), but every environmental response, including remedial action, responds to a threat. Congress intended removal actions to be limited to *imminent* threats to public health and safety, and there are no facts to support a finding of imminent threat to the public here. The court below identifies none in its decision, and Valbruna made no claim of an imminent threat in its brief below.

Given the absence of an imminent threat, the Seventh Circuit's finding that the cap constituted removal action necessarily rested on the fact that the cap did not address the entire site and left further remedial work to be done in other areas. *Slip Op*. at 16 (The work at the impoundment "was far from a comprehensive or permanent action. It was a temporary solution, covering only a part of the plant's pollution causes.").

But nothing in the statutory text supports the conclusion that a response aimed at achieving a long-term or permanent fix rather than addressing an imminent threat is removal action. And there is no language in the statute to support the view that a remedial action becomes a removal action because it only addresses part of a site. Nor did the Seventh Circuit cite any precedent for an expanded definition of "removal" action that extends beyond work taken to address an imminent threat.

The Seventh Circuit's decision thus eliminates the important and very deliberate distinction Congress made between "removal" and "remedial" action. This creates uncertainty where it did not previously exist and threatens the CERCLA limitations regime Congress intended. There are dozens of waste units at industrial sites like this

one. If remedial action at each unit were deemed a removal action simply because it did not address the entire site, as here, the six-year limitations period for an initial CERCLA cost recovery action would never be triggered. The tail of liability thus created would span decades, if not centuries; the statute of limitations for remedial actions would effectively be repealed.

6. This Court found error in a liberal approach to CERCLA's statute of limitations in *CTS v. Waldburger*.

The Seventh Circuit's decision stripped Joslyn of its limitations defense by an unprecedented expansion of CERCLA's definition of "removal" beyond the statutory text. Some may believe this liberal interpretation serves CERCLA's remedial purpose of making the polluter pay, but this Court specifically found error in that approach in *CTS v. Waldburger,* 134 S.Ct. 2175 (2014).

In that case, the plaintiffs alleged that the defendant's industrial operations contaminated their property. The defendant had ceased operations 24 years earlier, and North Carolina had a ten-year statute of repose. The Fourth Circuit concluded that 42 U.S.C. § 9658 pre-empted the North Carolina statute and allowed the lawsuit to proceed, invoking the proposition that remedial statutes should be interpreted in a liberal manner. *Id.* at 2185.

This Court reversed, finding it was error to liberally construe the statute of limitations to achieve CERCLA's remedial purpose rather than determining Congressional intent from the statutory text. *Id*. The same result is appropriate here. As this Court observed in *Waldburger*, statutes of limitation "promote justice by preventing

surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 2183. The statutory text of 42 U.S.C. § 9613(g)(2)(B) requires suit to be filed within six years of the initiation of physical on-site construction of remedial action. This suit came decades too late.

7. The Seventh Circuit decision applies an "operable units" approach to the statute of limitations that other circuits reject.

The district court denied Joslyn's limitations defense on the alternative ground that, even if the cap were remedial, it did not prevent Valbruna from recovering remedial costs incurred at other "operable units." The Seventh Circuit stated in a footnote that its finding that the cap constituted removal action made it unnecessary for it to "delve" into the "operable units" approach to the statute of limitations. *Slip Op.* at 18, n. 4. However, by finding that the cap was removal action simply because it did not address the entire site, the Seventh Circuit nevertheless applied the operable units approach. This presents a clear conflict with other circuits.

"Virtually every court that has considered the issue has agreed" that "there can only be one remedial action at any given site." *NYSE&G, supra,* 766 F.3d at 235-36 (collecting cases); *Colorado v. Sunoco, Inc.,* 337 F.3d 1233, 1241 (10th Cir. 2003); *Kelley v. E.I. DuPont de Nemours & Co.,* 17 F.3d 836, 843 (6th Cir. 1994). Thus, an initial CERCLA action to recover the costs of remedial action must be filed within six years of the initiation of physical on-site construction of any remedial action.

8. Under the statutory text and other circuit decisions, the cap triggered the limitations period as to the whole Site because it was "consistent with the permanent remedy."

The Seventh Circuit decision also conflicts with the statutory text and other circuit court decisions in finding that only a "comprehensive" action addressing the entire site can trigger the six-year limitations period of U.S.C. § 9613(g)(2)(B). On the contrary, CERCLA only requires an action to be *"consistent with [the] permanent remedy"* to constitute remedial action. 42 U.S.C. § 9601(24) (emphasis added); *Gencorp, Inc. v. Olin Corp.*, 390 F.3d 433, 444-45 (6th Cir. 2004), citing *Geraghty & Miller, supra,* 234 F.3d at 917 (5th Cir. 2000) and *Navistar, supra,* 152 F.3d at 711 (7th Cir. 1998); *Schaefer, supra,* 457 F.3d at 207 (2d Cir. 2006).

The cap over the impoundment meets this test. IDEM accepted the impoundment as closed after the cap was built. It is still in service. And Valbruna told Indiana environmental authorities that closure of the impoundment was a key component of the overall remedial strategy.

CONCLUSION

The Seventh Circuit's holding that the surface impoundment at the Site was removal action rather than remedial action, when there was no emergent condition or imminent threat, and solely because the action addressed contamination on only a discrete portion of the Site, applied the "operable units" approach that every other circuit has rejected. This approach has not only created a split of authority on the application of CERCLA's statute of limitations, it creates an indefinite tail of liability that does violence to the statutory language and Congressional intent.

For the foregoing reasons, petitioners respectfully request an order staying further proceedings in this case pending the filing and disposition of the petition for *certiorari*. Petitioners also request that an interim stay be granted while this application is under consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Joshua G. Vincent, counsel for applicant, Joslyn Manufacturing Company, LLC, et al., and a member of the bar of this Court, hereby certifies that on September 20, 2019, I caused a copy of the Application to Stay Further Proceedings in the District Court Pending Certiorari in the above-captioned case to be served by overnight delivery on the following:

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I further certify that all parties required to be served have been served.

/s/Joshua G. Vincent

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