No. _____

In The Supreme Court of the United States

RESIDENTS OF GORDON PLAZA, INC.,

Petitioner,

v.

LATOYA CANTRELL, in her official Capacity as Mayor of the City of New Orleans; and City of New Orleans,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

LISA W. JORDAN
Counsel of Record
TULANE ENVIRONMENTAL LAW CLINIC
6329 Freret Street, Suite 130
New Orleans, LA 70118
Email: lwjordan@tulane.edu
Phone: (504) 865-5789
Direct: (504) 314-2481

ADAM BABICH
TULANE LAW SCHOOL
6329 Freret Street, Suite 259
New Orleans, LA 70118
Email: ababich@tulane.edu

LAUREN GODSHALL
TULANE ENVIRONMENTAL LAW CLINIC
6329 Freret Street, Suite 130
New Orleans, LA 70118
Email: lgodshall@tulane.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Fifth Circuit ruled that homeowners on a toxic landfill are precluded from suing under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, to protect their health and property, due to a liable party's minimal operation and maintenance activities, such as mowing vegetation, performed pursuant to a 2008 consent decree under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-75.

RCRA precludes citizen abatement actions when "a responsible party is diligently conducting a removal action" pursuant to a consent decree. 42 U.S.C. § 6972(b)(2)(B)(iv). The Fifth Circuit interpreted "removal action" to include New Orleans' minimal long-term operation and maintenance activities, effectively foreclosing homeowners' ability to seek abatement of ongoing risks—decades after EPA declared all response complete. *See National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List*, 69 Fed. Reg. 47068, 47071 (Aug. 4, 2004). Response actions include removal actions, which are "short-term cleanup" measures, and remedial actions, which are "measures to achieve a 'permanent remedy.'" *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986) (citing 42 U.S.C. §§ 9601(23), (24)). Once those activities are complete, CERCLA provides for "operation and maintenance." 42 U.S.C. § 9604(c)(6).

The question presented is:

Whether a liable party's operation and maintenance activities pursuant to an EPA consent decree constitute

QUESTION PRESENTED—Continued

"conducting a removal action" so as to bar a citizen suit to abate an imminent and substantial endangerment under 42 U.S.C. § 6972 after EPA has declared all response actions under the Comprehensive Environmental Response, Compensation and Liability Act to be complete.

PARTIES TO THE PROCEEDING BELOW

Petitioner Residents of Gordon Plaza, Inc., was the plaintiff-appellant in the Fifth Circuit. Respondents LaToya Cantrell and the City of New Orleans were the defendants-appellees in the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner Residents of Gordon Plaza, Inc., states that it has no parent company, and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

Residents of Gordon Plaza, Inc. v. Cantrell, No. 20-cv-1461, U.S. District Court for the Eastern District of Louisiana. Judgment entered November 6, 2020.

Residents of Gordon Plaza, Inc. v. Cantrell, No. 21-30294, U.S. Court of Appeals for the Fifth Circuit. Judgment entered February 1, 2022.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	iii
CORPORATE DISCLOSURE STATEMENT	iii
RELATED PROCEEDINGS	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
PETITION OF A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	5
A. Statutory and Regulatory Framework	7
B. Factual Background	8
C. Proceedings Below	14
REASONS FOR GRANTING THE WRIT	15
I. This writ raises an important question of federal law that is worthy of a decision by this Court	15
II. Long-term operation and maintenance activities are not "removal actions"	19
CONCLUSION	28

TABLE OF CONTENTS—Continued

Page

APPENDIX

Opinion, United States Court of Appeals for the Fifth Circuit (filed Feb. 1, 2022) ..... App. 1

Order and Reasons, United States District Court, Eastern District of Louisiana (filed Nov. 5, 2020) ..... App. 27

Judgment, United States District Court, Eastern District of Louisiana (filed Nov. 6, 2020)..... App. 39

Order and Reasons, United States District Court, Eastern District of Louisiana (filed Apr. 30, 2021) ..... App. 40

Order Denying Rehearing, United States Court of Appeals for the Fifth Circuit (filed Mar. 2, 2022) ..... App. 92

TABLE OF AUTHORITIES

Page

CASES

Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335 (2020) 15, 16, 18, 19, 27

Browning v. Flexsteel Industries, Inc., 959 F.Supp.2d 1134 (N.D. Ind. 2013) 8

Carrier Corp. v. Piper, 460 F.Supp.2d 853 (W.D. Tenn. Oct. 24, 2006) 7

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 21

Exxon Corp. v. Hunt, 475 U.S. 355 (1986) 7, 21

FTC v. Mandel Brothers, Inc., 359 U.S. 385 (1959) 21

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 21, 28

General Elec. Co. v. EPA, 360 F.3d 188 (D.C. Cir. 2004) 22

Giovanni v. United States Department of Navy, 906 F.3d 94 (3d Cir. 2018) 22

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 21

Johnson v. Orleans Parish School Bd., 2006-1223 (La. App. 4 Cir. 1/30/08); 975 So.2d 698 8

Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996) 7

Price v. United States Navy, 39 F.3d 1011 (1994) 7

Residents of Gordon Plaza, Inc. v. Cantrell, No. 18-4226, 2019 WL 2330450 (E.D. La. 2019) 14

TABLE OF AUTHORITIES—Continued

Page

State of N.Y. v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) 21

United States v. Bestfoods, 524 U.S. 51 (1998) 21

CONSTITUTIONAL PROVISIONS

Louisiana Constitution, Art. XII, § 10(C) 9

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 6972(a)-(b) 3

42 U.S.C. § 6972(a)(1)(B) 5, 7, 14, 15

42 U.S.C. § 6972(b)(2)(B)(iv) 6, 8, 14, 15, 16

42 U.S.C. § 9601(23) 4, 7, 23

42 U.S.C. § 9601(24) ..... *passim*

42 U.S.C. § 9601(25) 4, 6

42 U.S.C. § 9604(a) 21

42 U.S.C. § 9604(a)(2) 23

42 U.S.C. § 9604(b) 4, 23

42 U.S.C. § 9604(c)(3) 21

42 U.S.C. § 9604(c)(6) 5, 7, 25

42 U.S.C. § 9604(e)(3) 9

42 U.S.C. § 9604(e)(5)(B)(i) 9

42 U.S.C. § 9621(b)(1) 24

TABLE OF AUTHORITIES—Continued

Page

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 ..... *passim*

Disaster Relief and Emergency Assistance Act 4, 23

Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B) ..... *passim*

REGULATIONS AND RULES

40 C.F.R. § 300.415(b)(3) 19

40 C.F.R. § 300.415(b)(5) 19

40 C.F.R. § 300.415(d) 19

40 C.F.R. § 300.425(e) 17, 18

40 C.F.R. § 300.435(f)(1) 20, 26

40 C.F.R. § 300.435(f)(2) 21

40 C.F.R. § 300.435(f)(4) 26

40 C.F.R. § 300.5 ..... 16, 17, 20, 25

59 Fed. Reg. 65206 (Dec. 16, 1994) 9

65 Fed. Reg. 37483 (June 15, 2000) 10

EPA, *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed. Reg. 8666 (Mar. 8, 1990) 16, 25, 26, 27

EPA, *National Priorities List*, 74 Fed. Reg. 35126 (July 20, 2009) 18

EPA, *National Priorities List Update*, 62 Fed. Reg. 67736 (Dec. 30, 1997) 18

TABLE OF AUTHORITIES—Continued

Page

EPA, *National Priorities List Update*, 73 Fed. Reg. 33724 (June 13, 2008) 18

EPA, *Notice of Deletion of the Del Norte County Pesticide Storage Area Superfund Site from the National Priorities List*, 67 Fed. Reg. 58731 (Sep. 18, 2002) 18

EPA, *Notice of Deletion of the Tulalip Landfill Superfund Site from the National Priorities List*, 67 Fed. Reg. 58730 (Sep. 18, 2002) 18

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List, 69 Fed. Reg. 47068 (Aug. 4, 2004). 6, 8, 9, 10, 11

U.S. Department of Justice, *Notice of Lodging*, 73 Fed. Reg. 34040 (June 16, 2008) 12

Fed. R. Civ. P. 12(b)(1) 15

Fed. R. Civ. P. 12(b)(6) 15

Sup. Ct. R. 10 15

OTHER AUTHORITIES

Consent Decree, *United States v. City of New Orleans*, No. 02-cv-03618 (E.D. La. May 29, 2008) 12, 14

DOJ, *Memorandum in Support of United States' Unopposed Motion for Entry of Consent Decree*, United States v. City of New Orleans, No. 02-3618 (E.D. La. July 29, 2008).....12

TABLE OF AUTHORITIES—Continued

Page

EPA, *Close Out Procedures for National Priorities List Sites* (OSWER 9320.2-22 May 27, 2011) 16, 26

EPA, Final Closeout Report for the Agriculture Street Landfill Superfund Site (2002) 27

EPA, *Fourth Five-Year Review Report for the Agriculture Street Landfill Superfund Site* (2018) 5, 12, 20

EPA, *Notice of Intent to Delete the Del Norte County Pesticide Storage Area Superfund Site from the National Priorities List*, 67 Fed. Reg. 51528 (Aug. 8, 2002) 17

EPA, *Press Release for the Partial Deletion of the Cone Mills Superfund Site* (Sept. 20, 2021) 18

EPA, Presumptive Remedy for CERCLA Municipal Landfill Sites (EPA 540-F-93-035, Sept. 1993) 12

EPA, *Second Five-Year Review Report for the Agriculture Street Landfill Superfund Site* (2008) 9, 10, 20

Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (Superfund) Act of 1980*, 8 Colum. J. Env't L. 1 (1982) 22

U.S. Department of Health and Human Services, *Health Consultation* (Aug. 29, 2006) 6

PETITION OF A WRIT OF CERTIORARI

Petitioner Residents of Gordon Plaza, Inc., respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the Fifth Circuit (App. 1-26) is reported at 25 F.4th 288. The Fifth Circuit's denial of rehearing en banc (App. 92-93) is unpublished. The decision of the district court (App. 27-38) is reported at 2020 WL 6503618.

JURISDICTION

The Fifth Circuit entered judgment on February 1, 2022 (App. 1) and denied rehearing on March 2, 2022. App. 92. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Resource Conservation and Recovery Act provides in relevant part:

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1) . . . .

(B) against any person . . . and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;

. . . .

(b) Actions prohibited

. . . .

(2) . . . .

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

. . . .

> (iv) has obtained a court order (including a consent decree) . . . pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

42 U.S.C. § 6972(a)-(b).

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), provides in pertinent part:

> The terms "remove" or "removal" means the 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 into 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. The term 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. § 9601(23).

> The terms "remedy" or "remedial action" means those 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. . . .

Id. § 9601(24).

> The terms "respond" or "response" means remove, removal, remedy, and remedial action; all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

Id. § 9601(25).

Operation and Maintenance.—

> For the purposes of paragraph (3) of this subsection [concerning conditions for federal remedial action], in the case of ground or surface water contamination, completed remedial action includes the completion of treatment or other measures, whether taken onsite or offsite, necessary to restore ground and surface water quality to a level that assures

> protection of human health and the environment. With respect to such measures, the operation of such measures for a period of up to 10 years after the construction or installation and commencement of operation shall be considered remedial action. Activities required to maintain the effectiveness of such measures following such period or the completion of remedial action, whichever is earlier, shall be considered operation or maintenance.

Id. § 9604(c)(6).

STATEMENT OF THE CASE

The Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), empowers people to protect their health and welfare from "past or present . . . disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." Here, the Petitioner corporation comprises property owners who face the risks of living directly on a toxic landfill in New Orleans ("the City"), known as the Agriculture Street Landfill. EPA has acknowledged that nine residential properties on the landfill "may contain contaminant levels that are unacceptable for non-industrial use." *See* App. 3. And EPA has insisted on an ordinance that forbids residents from digging down more than eighteen inches on their private property without notice to the City. EPA, *Fourth Five-Year Review Report for the Agriculture Street Landfill Superfund Site*, p. 8 (tbl. 3)

(2018).[1] After Hurricane Katrina, the federal Agency for Toxic Substances and Disease Registry reported that polycyclic aromatic hydrocarbons ("PAHs") concentrations at the site pose "an indeterminate public health hazard." U.S. Department of Health and Human Services, *Health Consultation* p. 6 (Aug. 29, 2006).[2]

The Fifth Circuit ruled that the Petitioner corporation (comprising property owners) is precluded from suing to protect their health and homes because a liable party—the City—performs minimal operation and maintenance activities, such as mowing vegetation, pursuant to a 2008 consent decree with EPA under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-75. EPA completed response actions at the landfill long ago and declared in 2002 that no further action was necessary. *See* 69 Fed. Reg. 47068, 47071 (Aug. 4, 2004). (Response actions include removal actions, 42 U.S.C. § 9601(25)). RCRA precludes citizen abatement actions when, *inter alia*, "a responsible party is diligently conducting a removal action" pursuant to a consent decree. 42 U.S.C. § 6972(b)(2)(B)(iv). Here, the Fifth Circuit's ruling that "removal action" includes the City's minimal, long-term operation and maintenance activities forecloses property owners' ability to seek abatement of ongoing risks to their health and welfare.

---

[1] Available at https://semspub.epa.gov/work/06/9796660.pdf.

[2] Available at https://ldh.la.gov/assets/oph/Center-EH/envepi/PHA/Documents/AgricultureStLandfill-NewOrleansHC082906_1.pdf.

A. Statutory and Regulatory Framework

Congress enacted RCRA and CERCLA in response to this nation's hazardous waste problem. Among other things, RCRA empowers citizens to protect themselves, their families, and property from waste disposal that may pose "imminent and substantial" risks. 42 U.S.C. § 6972(a)(1)(B). RCRA authorizes citizen suits to abate "a threat which is present now, although the impact of the threat may not be felt until later." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996) (quoting *Price v. United States Navy*, 39 F.3d 1011, 1019 (1994)). RCRA's citizen abatement provision provides only for equitable relief, *i.e.*, there is no civil penalties component to 42 U.S.C. § 6972(a)(1)(B). Accordingly, the scope of relief under this provision is subject to the equitable discretion of trial courts.

In CERCLA, Congress authorized EPA to respond to releases of hazardous substances and defined "response" to include two types of activities: "'removal,' or short-term cleanup, [42 U.S.C.] § 9601(23), and 'remedial action,' or measures to achieve a 'permanent remedy' to a particular hazardous waste problem, § 9601(24)." *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986). Once those activities are complete, CERCLA provides for "operation and maintenance." 42 U.S.C. § 9604(c)(6).

To ensure that RCRA citizen abatement actions "do not duplicate or interfere with remediation efforts already underway," *Carrier Corp. v. Piper*, 460 F.Supp.2d 853, 856-57 (W.D. Tenn. Oct. 24, 2006),

Congress included in RCRA a provision that bars RCRA citizen abatement suits if, pursuant to a CERCLA consent decree with EPA, a responsible party is already diligently engaged in a removal or remedial action. 42 U.S.C. § 6972(b)(2)(B)(iv). "But if a removal action were complete—or stalled—and no additional removal or remedial actions have been selected or are under active consideration, litigation may serve to accelerate, rather than delay, clean up efforts . . . [and] [s]uch suits are not necessarily barred." *Browning v. Flexsteel Industries, Inc.*, 959 F.Supp.2d 1134, 1155 (N.D. Ind. 2013). RCRA does not contain a statutory provision that precludes citizen abatement actions when a responsible party is conducting operation and maintenance of a completed response action.

B. Factual Background

The Residents of Gordon Plaza, Inc., comprises homeowners living atop the Agriculture Street Landfill. The landfill "was a municipal waste landfill operated by the City of New Orleans" from approximately 1909 until "the late 1950's" and again in 1965. 69 Fed. Reg. 47068, 47070 (Aug. 4, 2004). The City redeveloped a portion of the property for residential use "[f]rom the 1970's through the late 1980's, including "[p]rivate single-family homes." 69 Fed. Reg. at 47070. Homebuyers "were not told that their homes were located on what had once been a part of the City's landfill." *Johnson v.*

Orleans Parish School Bd., 2006-1223, p. 2 (La. App. 4 Cir. 1/30/08); 975 So.2d 698, 703.[3]

After years of complaints, the EPA listed the Agriculture Street Landfill as a Superfund site on the National Priorities List in 1994. 59 Fed. Reg. 65206, 65216 (Dec. 16, 1994). Between 1994 and 1997, EPA conducted four removal actions. 69 Fed. Reg. 47068, 47070-71 (April 4, 2004). "At the conclusion of these removal actions, EPA and LDEQ [the Louisiana Department of Environmental Quality] agreed that response actions for the site were complete and that no further action was required." EPA, *Second Five-Year Review Report for the Agriculture Street Landfill Superfund Site*, p. 11 of 30 (2008);[4] *see also* 69 Fed. Reg. 47068, 47069 (April 4, 2004). Nine of the residential property owners did not agree to remedial activities on their properties (although EPA did not need their permission, *see* 42 U.S.C. §§ 9604(e)(3), (e)(5)(B)(i)). For those nine untouched homes, conveyance notifications were filed at the Orleans Parish Conveyance Office to notify the public that soil on these properties may contain contaminant levels that are unacceptable for non-industrial use of the property. EPA, *Second Five-Year*

---

[3] The landfill was the subject of a state law-based toxic tort lawsuit. Under the Louisiana Constitution, however, collection of a judgment against the City of New Orleans is impractical. Article XII, § 10(C) of the Louisiana Constitution states, "No judgment against the state, a state agency, or a political subdivision shall be eligible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered."

[4] Available at https://semspub.epa.gov/work/06/9041844.pdf.

Review Report for the Agriculture Street Landfill Superfund Site, p. VIII (Executive Summary) (2008); *see also id.* at Attachment 7 ("Conveyance Notices").[5] People still live at most of these nine "unacceptable" homes.

In 2000, EPA conducted a final site inspection and provided each cooperating property owner with a "Close Out Completion Package" that contained "a Close Out Letter," "a Certificate of Completion [of the Removal Action]," and "Instructions on how to maintain the permeable cap, including instructions for any necessary excavation below the geotextile mat/marker." 69 Fed. Reg. at 47071. EPA then "determined that no further action was necessary." *Id.*

In 2002, EPA announced that it had "completed all response actions for the Agriculture Street Landfill site." App. 2. In 2000, EPA deleted parts of the site from its National Priorities List. 65 Fed. Reg. 37483 (June 15, 2000). When proposing to delete the balance of the site from the national priorities list,[6] EPA explained that its response actions were complete and that "operation and maintenance," including "maintenance of the cap and vegetative cover" should continue:

---

[5] Available at https://semspub.epa.gov/work/06/9041844.pdf.

[6] EPA did not publish a final rule to follow up on this proposal.

> All cleanup actions and other response measures identified in the Action Memorandum dated September 2, 1997, were successfully implemented on each OU [Operational Unit], with the exception of nine residential properties located in the Gordon Plaza Subdivision (OU2) where access was not granted. *The response measures were completed* in accordance with the Action Memorandum, the SOW, design documents, and Work Plans formulated to implement the Action Memorandum. The constructed action is operational and performing according to engineering design specifications. Operation and maintenance activities, including maintenance of the cap and vegetative cover, should be continued by each individual property owner . . . Copies of maintenance procedures were provided to property owners and utility companies.
>
> Those property owners who elected not to participate in the response action were instructed to maintain the surface vegetation to minimize the potential exposure to contaminants in the subsurface soils and prevent soil erosion.

69 Fed. Reg. at 47072 (emphasis added).[7]

---

[7] EPA's decision to task individual property owners with "maintenance of the cap" is contrary to EPA's policy that it is not appropriate or necessary to estimate the risk associated with future residential use of the landfill source, as such use would be incompatible with the need to maintain the integrity of the containment system. (Long-term waste management areas, such as municipal landfills, may be appropriate, however, for recreational

EPA had attempted "to encourage the city of New Orleans, which is the primary potentially responsible party (PRP) for this site, to perform or finance site investigations, or provide in-kind services for the response actions [but the City] asserted that it was unable to fund any of the requested actions." *Id*. at 47071. Finally in 2008, EPA and the City entered into a Consent Decree. *See* U.S. Department of Justice, *Notice of Lodging*, 73 Fed. Reg. 34040 (June 16, 2008).

EPA attached the consent decree as Appendix D to its *Fourth Five-Year Review Report for the Agriculture Street Landfill Superfund Site* (2018).[8] *See also* Consent Decree, *United States v. City of New Orleans*, No. 02-cv-03618 (E.D. La. May 29, 2008) (ECF No. 257-1). The federal government explained, "In light of its depleted financial resources after Hurricanes Katrina and Rita, the City will make no payment of money . . . but it will undertake various injunctive requirements for the purpose of protecting the geotextile/soil cap . . . and notifying property owners of the presence of contamination in place beneath the geotextile/soil cap." DOJ, *Memorandum in Support of United States' Unopposed Motion for Entry of Consent Decree*, United States v. City of New Orleans, No. 02-3618 (E.D. La. July 29, 2008) (ECF No. 262-2) at 6. The United States emphasized, "The cleanup is completed," *id*. at 11, and

---

or other limited uses on a site-specific basis). EPA, Presumptive Remedy for CERCLA Municipal Landfill Sites (EPA 540-F-93-035, Sept. 1993), available at https://semspub.epa.gov/work/05/207542.pdf.

[8] Available at https://semspub.epa.gov/work/06/9796660.pdf.

summarized the City's obligations under the decree as follows:

> a. Maintain the existing fencing on undeveloped areas of the Site [this obligation has expired];
>
> b. Provide for regular mowing of the right of ways and undeveloped property around and within the Site;
>
> c. Provide to all utilities operating within the Site area the Technical Abstract for Utilities Operating within the Site (which includes instructions for the proper handling and disposal of soil excavated from the Site);
>
> d. Join and maintain its membership in the LAOne Call program for utilities and residents and designate a point of contact to provide the Technical Abstract for Utilities Operating within the Site;
>
> e. Instruct all City agencies to follow the Technical Abstract as standard operating procedure within the Site;
>
> f. Provide an Annual Notice to Property Owners Within the Site concerning the waste in place and excavation restrictions;
>
> g. Enact an ordinance to require a permit for excavation within the Site (already completed);
>
> h. Record in the land records for affected properties notices of the 2-foot soil barrier and

> appropriate restrictions on use and excavation of the property;
>
> [i]. Provide access to EPA and its contractors; and
>
> j. Record easements on behalf of EPA for access and enforcement of use and excavation restrictions.

Id. at 7; *see also* Consent Decree, *United States v. City of New Orleans*, No. 02-cv-03618 (E.D. La. May 29, 2008) (ECF No. 257-1), at §§ V-VI, pp. 8-16.

C. Proceedings Below

The Residents of Gordon Plaza, Inc., initiated this action under the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), on May 15, 2020, in the United States District Court for the Eastern District of Louisiana, against LaToya Cantrell, in her official capacity as Mayor of the City of New Orleans and against the City itself.[9] The Residents alleged that the City's disposal of municipal waste at the Agriculture Street Landfill may

---

[9] The residents had filed an earlier action against the Mayor and the City, which the district court dismissed without prejudice pursuant to the standing-to-sue doctrine. *Residents of Gordon Plaza, Inc. v. Cantrell*, No. 18-4226, 2019 WL 2330450 (E.D. La. 2019). That court determined, however, that 42 U.S.C. § 6972(b)(2)(B)(iv), the relevant statutory bar here, did not prohibit the Residents' suit from proceeding because the City's operation and maintenance activities, required by the consent decree, "are not removal actions" but instead "involve basic maintenance of completed removal actions." *Id*. at *3.

present an imminent and substantial endangerment to health or the environment.

On July 31, 2020, the City filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), claiming the Residents' suit is precluded by 42 U.S.C. § 6972(b)(2)(B)(iv). On November 5, 2020, the district court granted the City's motion to dismiss under Rule 12(b)(6), ruling that the City was diligently engaged in a removal action pursuant to a consent decree with EPA.

The Fifth Circuit affirmed dismissal in a unanimous opinion.

REASONS FOR GRANTING THE WRIT

I. This writ raises an important question of federal law that is worthy of a decision by this Court.

In its ruling below, the Fifth Circuit "decided an important question of federal law that has not been, but should be, settled by this Court." *See* Sup. Ct. R. 10. The decision frustrates Congress' intent to provide property owners and other affected people with 42 U.S.C. § 6972(a)(1)(B), a powerful tool—subject to the equitable discretion of trial courts—to abate risks caused by disposal of hazardous waste. The decision implicates an issue similar to that in *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020); that is, the extent to which EPA's decisions under CERCLA dispose

of landowners' rights to protect their health and property. In the *Christian* case, the Court (under different statutory provisions) answered the question of whether a liable party can be "liable for the landowners' own remediation beyond that required under [CERCLA]." 140 S. Ct. at 1355. The Court held that "the answer is yes—so long as the landowners first obtain EPA approval for the remedial work they seek to carry out," 140 S. Ct. at 1355, while the residents' property remains "on the Superfund list," *id*. at 1354. Here, the Fifth Circuit ruled that long-term operation and maintenance activity constitutes a "removal action" and therefore indefinitely blocks citizen abatement actions under RCRA, 42 U.S.C. § 6972(b)(2)(B)(iv).

Operation and maintenance of engineered cleanup plans often continues indefinitely, long after any removal or remedial action is complete. *See* EPA, *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed. Reg. 8666, 8700 (Mar. 8, 1990) ("Many NPL sites will require operation and maintenance following deletion from the NPL in order to maintain the protectiveness of the remedy (*e.g*. cutting grass or maintaining monitoring wells))." Thus, EPA's national contingency plan defines operation and maintenance (O&M) separately from removal and remedial action, 40 C.F.R. § 300.5, and EPA has specified that "O&M is not defined as a response action by the NCP and may continue after site deletion." EPA, *Close Out Procedures for National Priorities List Sites* 4-3

(p. 37) (OSWER 9320.2-22 May 27, 2011).[10] Under the Fifth Circuit's ruling, however, O&M (for example, as here, cutting the grass) is removal action that, if required by a consent decree, may block citizen abatement decades after EPA cleanup decisions—decisions which may or may not be consistent with current science and policy—have been made.

The Fifth Circuit's decision is also inconsistent with longstanding EPA interpretations under its Superfund program and, therefore, has the potential to disrupt operation of that program. Under EPA's national contingency plan, the agency may not delete sites from its national priorities list unless "no further response [defined to include removal] is appropriate." 40 C.F.R. § 300.425(e). Under the national contingency plan, however, O&M is defined as "measures required to maintain the effectiveness of response actions," rather than as removal or remedial action. 40 C.F.R. § 300.5. Thus, as EPA has explained on multiple occasions, the agency may delete sites undergoing O&M from the Superfund list because "CERCLA section 101(25) defines response as removal and remedial actions, and does not include operation and maintenance activities. Accordingly, a site may be deleted from the NPL where only operation and maintenance activities remain." EPA, *Notice of Intent to Delete the Del Norte County Pesticide Storage Area Superfund Site from the National Priorities List*, 67 Fed. Reg. 51528, 51528

[10] Available at https://semspub.epa.gov/work/HQ/176076.pdf.

(Aug. 8, 2002).[11] Under the Fifth Circuit's ruling that O&M activities constitute removal, many EPA deletions of sites with ongoing O&M activities would be illegal under 40 C.F.R. § 300.425(e). Yet such "deletions from the NPL can revitalize communities, raise property values, and promote economic growth by signaling to potential developers and financial institutions that cleanup is complete." EPA, *Press Release for the Partial Deletion of the Cone Mills Superfund Site* (Sept. 20, 2021).[12] Further, given the significance this Court placed on delisting in *Atlantic Richfield Co. v. Christian* as the trigger required before private property owners' cleanup actions can commence, private property owners are left with a scenario in which federal

---

[11] *See also* EPA, *National Priorities List Update*, 62 Fed. Reg. 67736, 67737 (Dec. 30, 1997) ("[N]either the CERCLA-required five-year reviews, nor operation and maintenance of the constructed remedy is considered further response action for these purposes."); *see also* EPA, *National Priorities List*, 74 Fed. Reg. 35126 (July 20, 2009) (delisting the Central Wood Preserving Company Site even though maintenance of soil and fencing were ongoing); EPA, *National Priorities List Update*, 73 Fed. Reg. 33724, 33725-26 (June 13, 2008) (delisting the Old Inger Refinery even though periodic mowing and fence repairs were ongoing); EPA, *Notice of Deletion of the Del Norte County Pesticide Storage Area Superfund Site from the National Priorities List*, 67 Fed. Reg. 58731 (Sep. 18, 2002) (delisting the Del Norte County Pesticide Storage Area even though operation and maintenance was ongoing); EPA, *Notice of Deletion of the Tulalip Landfill Superfund Site from the National Priorities List*, 67 Fed. Reg. 58730 (Sep. 18, 2002) (delisting the Tulalip Landfill even though operation and maintenance activities were continuing pursuant to a consent decree).

[12] Available at https://www.epa.gov/newsreleases/us-finishing cone-mills-superfund-site-greenville-south-carolina-partially-deleted.

courts rely on EPA's failure to delist NPL sites as a bar to private remedial action, while also preventing EPA from delisting sites subject to operation and maintenance. *See Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1354.

II. Long-term operation and maintenance activities are not "removal actions."

CERCLA creates three basic categories of agency action at Superfund sites: removal action, remedial action, and operation and maintenance. First, removal action is relatively immediate action, taken in the short-term to abate or stabilize risks pending the more elaborate administrative processes required for "remedial action," *i.e.*, action "consistent with permanent remedy." 42 U.S.C. § 9601(24). Thus, if "a removal action is appropriate," actions generally "begin as soon as possible to abate, prevent, minimize, stabilize, mitigate, or eliminate the threat to public health or welfare," 40 C.F.R. § 300.415(b)(3), without the extensive administrative process required for remedial action. EPA removal actions are presumptively "terminated after $2 million has been obligated for the action or 12 months have elapsed from the date that removal activities begin." *Id.* § 300.415(b)(5). To the extent practicable, a removal action "contribute[s] to the efficient performance of any anticipated long-term remedial action." *Id.* § 300.415(d).

Second, remedial action requires a much more elaborate process to develop "actions consistent with

permanent remedy." 42 U.S.C. § 9601(24). After preparation of a remedial investigation and feasibility study, *id.* § 300.430(a)(2), the agency evaluates nine selection factors, *id.* § 300.430(e)(9)(iii), takes public comment, *id.* § 300.430(f)(1)(ii), and selects a remedy according to regulatory criteria. *Id.* § 300.430(f)(1)(i) (including "Long-term effectiveness and permanence," *id.* § 300.430(e)(9)(iii)(C)). It is beyond dispute that there has been no remedial action at the Agriculture Landfill site.[13]

Third, "operation and maintenance (O&M)" are "measures required to maintain the effectiveness of response actions" (*i.e.*, removal or remedial action). 40 C.F.R. § 300.5. Operation and maintenance measures "are initiated after the remedy has achieved the remedial action objectives and remediation goals in the ROD [record of decision], and [in general] is determined to be operational and functional." *Id.* § 300.435(f)(1). In general, "[a] remedy becomes 'operational and functional' either one year after construction is complete, or when the remedy is determined concurrently by

---

[13] EPA has consistently emphasized that, "No remedial actions have been performed at the ASL [Agriculture Street Landfill] site. The time-critical and non-time critical removal actions performed at the site were found to be sufficient to protect human health and the environment, and the RODs [Record of Decisions] for all five OUs [Operable Units] specified a remedy of no further action." EPA, *Second Five-Year Review Report for the Agriculture Street Landfill Superfund Site*, p. 9 of 30 (2008), available at https://semspub.epa.gov/work/06/9041844.pdf; *see also* EPA, *Fourth Five-Year Review Report for the Agriculture Street Landfill Superfund Site*, p. 7 (2018) ("No remedial action was performed."). Available at https://semspub.epa.gov/work/06/9796660.pdf.

EPA and the state to be functioning properly and is performing as designed, whichever is earlier." *Id.* § 300.435(f)(2). The states, rather than EPA, are generally responsible for funding long-term operation and maintenance. 42 U.S.C. § 9604(c)(3).

The regulatory provisions cited above are particularly relevant to interpreting CERCLA because that statute requires governmental response to be "consistent with the national contingency plan [NCP]." 42 U.S.C. § 9604(a). Those provisions also flow naturally from the statute itself, despite the fact that CERCLA "is not a model of legislative draftsmanship." *United States v. Bestfoods*, 524 U.S. 51, 56 (1998) (quoting *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986)).[14] It has long been understood—as per this Court's ruling in *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986)—that removal actions are "short-term cleanup" measures, while remedial actions, are "measures to achieve a 'permanent remedy."[15] By finding operation and

---

[14] "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.'" *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' . . . and 'fit, if possible, all parts into an harmonious whole.'" *Id.* (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) and *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)).

[15] *See, e.g.*, *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) (CERCLA "distinguishes between two kinds of response: remedial actions—generally long-term or permanent containment or disposal programs—and removal efforts—

maintenance, *i.e.*, long-term action to maintain response actions, to be "removal actions," the Fifth Circuit turned this principle on its head.

In CERCLA, Congress provided broad, seemingly overlapping definitions of "removal" and "remedial actions" and also broke "operation and maintenance" out into a separate category. Specifically, CERCLA provides:

> The terms "remove" or "removal" means the 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 into 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

---

typically short-term cleanup arrangements) (footnotes omitted); *Giovanni v. United States Department of Navy*, 906 F.3d 94, 104 (3d Cir. 2018); ("Removal actions generally include short-term or immediate efforts, while remedial actions typically involve longer term activities."); *General Elec. Co. v. EPA*, 360 F.3d 188, 189, 360 (D.C. Cir. 2004) ("Removal actions are short-term remedies, designed to cleanup, monitor, assess, and evaluate the release or threatened release of hazardous substances. Remedial actions are longer-term, more permanent remedies. . . ."); Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (Superfund) Act of 1980*, 8 Colum. J. Env't L. 1, 11 (1982) ("S. 1480 would establish a two-level response mechanism, as does the law finally enacted. 'Removal,' *i.e.*, immediate cleanup, is the first step. The second is 'remedial action,' which includes more far-reaching, permanent restoration.").

> 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. The term 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. § 9601(23). Congress also provided in CERCLA:

> Removal Action.—Any removal action undertaken by the President under this subsection (or by any other person referred to in section 9622 of this title) should, to the extent the President deems practicable, contribute to the efficient performance of any *long term remedial action* with respect to the release or threatened release concerned.

42 U.S.C. § 9604(a)(2) (emphasis added). In contrast, section 9601(24) provides for remedial action:

> The terms "remedy" or "remedial action" means *those 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. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601(24) (emphasis added). Remedial actions must "utilize[] permanent solutions . . . to the maximum extent practicable." 42 U.S.C. § 9621(b)(1).

With respect to operation and maintenance, CERCLA § 9604(c)(6) provides:

> For the purposes of paragraph (3) of this subsection [concerning conditions for federal remedial action], in the case of ground or surface water contamination, completed remedial action includes the completion of treatment or other measures, whether taken onsite or offsite, necessary to restore ground and surface water quality to a level that assures protection of human health and the environment. With respect to such measures, the operation of such measures for a period of up to 10 years after the construction or installation and commencement of operation shall be considered remedial action. *Activities required to maintain the effectiveness of such measures following such period or the completion of remedial action, whichever is earlier, shall be considered operation or maintenance*.

42 U.S.C. § 9604(c)(6) (emphasis added).

Accordingly, in its national contingency plan, EPA defined "operation and maintenance" as "measures required to maintain the effectiveness of response actions." 40 C.F.R. § 300.5. When promulgating its 1990 re-write of the plan, EPA explained, "[w]here EPA selects a final remedy for an operable unit (e.g., a final, as compared to a temporary, *landfill cap*), then any maintenance activity for that site will be considered O&M." 55 Fed. Reg. 8666, 8739 (Mar. 8, 1990) (emphasis added). Further, "Operation and maintenance (O&M) measures are initiated after the remedy has

achieved the remedial action objectives and remediation goals in the ROD, and is determined to be operational and functional, except for ground- or surface-water restoration actions covered under § 300.435(f)(4)." 40 C.F.R. § 300.435(f)(1).

> [T]hese O&M activities might well include maintenance of the cap on a landfill above the aquifer, or continued operation of the landfill's leachate collection system. Because these source control maintenance activities would merely "maintain the effectiveness of the restoration"—and not be necessary to achieve the remedial action objectives and remediation goals in the ROD—they are clearly the types of measures that are not "necessary" to restore the aquifer even though if they were not performed, some degradation of the aquifer might occur. These measures are O&M activities, and will be funded by the state.

55 Fed. Reg. at 8737-38. EPA has consistently distinguished operation and maintenance measures as a set of activities that are not considered removal or remedial actions in the context of hazardous substance cleanups. EPA, *Close Out Procedures for National Priorities List Sites* 4-3 (p. 37) (OSWER 9320.2-22 May 27, 2011) ("O&M is not defined as a response action by the NCP and may continue after site deletion.").[16]

In EPA's final closeout report for the Agriculture Street Landfill Superfund Site, EPA explained that the response actions ordered for the site had been

[16] Available at https://semspub.epa.gov/work/HQ/176076.pdf.

completed, but that "maintenance of the cap and vegetative cover" constituted "operation and maintenance activities" that would continue at the site. EPA, Final Closeout Report for the Agriculture Street Landfill Superfund Site, 11 (2002).[17] EPA's consent decree with the City provides operation and maintenance measures to be performed by the City. For example, in the Consent Decree, EPA described the City's work obligations as to "maintain and repair the security fence around the OU1 undeveloped property,"[18] and to "mow the vegetation at least twice per year." (Consent Decree ¶ 5(a)-(b)).

Long-term maintenance activities conducted at a partially or fully remediated Superfund site, such as the occasional mowing of vegetation and fence repair surrounding a partially-capped landfill, are "clearly the type of measures that are not 'necessary' to restore the [site] even though if they were not performed, some degradation of the [site] might occur." *See* 55 Fed. Reg. 8666, 8738 (Mar. 8, 1990). Neither Congress nor EPA included operation and maintenance measures within the definition of removal actions, and the Fifth Circuit's ruling contradicts Congress' intentions. Just as this Court determined that "the Act's definition of remedial action does not reach so far as to cover planting a garden, installing a lawn sprinkler, or digging a sandbox," *Atlantic Richfield Co. v. Christian*, 140 S. Ct.

---

[17] Available at https://semspub.epa.gov/work/06/911175.pdf; also available at https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.537.7314&rep=rep1&type=pdf.

[18] This obligation has since expired.

1335, 1354 (2020), common sense dictates that the Act's definition of removal action does not include "mow[ing] vegetation at least twice per year" and similarly minimal, long-term operation and maintenance activities. The Fifth Circuit's interpretation cuts against the principle that remedial statutes create a "coherent regulatory scheme," *Food and Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000), and withdraws from landowners the right to protect their property by abating potential imminent and substantial endangerments under RCRA. This Court should grant certiorari to resolve this issue.

CONCLUSION

The Petitioner respectfully pleads that this Court grant its writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

LISA W. JORDAN
Counsel of Record
TULANE ENVIRONMENTAL LAW CLINIC
6329 Freret Street, Suite 130
New Orleans, LA 70118
Email: lwjordan@tulane.edu
Phone: (504) 865-5789
Direct: (504) 314-2481

ADAM BABICH
TULANE LAW SCHOOL
6329 Freret Street, Suite 259
New Orleans, LA 70118
Email: ababich@tulane.edu

LAUREN GODSHALL
TULANE ENVIRONMENTAL LAW CLINIC
6329 Freret Street, Suite 130
New Orleans, LA 70118
Email: lgodshall@tulane.edu

Counsel for Petitioner