No. 21-1500

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

BRIEF FOR RESPONDENTS IN OPPOSITION

MICHAEL J. LAUGHLIN
Assistant City Attorney
Counsel of Record
CHURITA H. HANSELL
Chief Deputy City Attorney
DONESIA D. TURNER
City Attorney
1300 Perdido Street, Room 5E03
New Orleans, LA 70112
(504) 658-9800
mjlaughlin@nola.gov

Counsel for Respondents

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

QUESTION PRESENTED

In a situation where there is no split in the Circuits, should this Court grant review of a carefully considered, detailed decision of the Fifth Circuit Court of Appeals that correctly relied upon the definition of "removal" under 42 U.S.C. § 9601(23), rather than the preamble to a rule proposed by the Environmental Protection Agency, in its determination that Respondents' actions under the Consent Decree with the EPA were "removal" actions which barred Petitioner's attempted citizen suit against Respondents under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*.

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INTRODUCTION

Respondents, Mayor Cantrell and the City of New Orleans, respectfully submit that none of Petitioner's arguments merit further review. The parties recognize and agree that ongoing "removal" actions pursuant to a Consent Decree obtained by the Environmental Protection Agency (EPA) bar a citizen suit under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*. The Court below was required to determine whether the actions of the City of New Orleans under the Consent Decree with the EPA are "removal" actions. The Court of Appeals, in determining that the City's actions were "removal" actions in bar of Petitioner's citizen suit, correctly relied upon the statutory definition of "removal" under 42 U.S.C. § 9601(23), rather than limiting language contained in the preamble of a rule proposed by the EPA and preferred by Petitioner.

Petitioner does not suggest that the decision of the Court of Appeals conflicts with any decision of this Court or any other Circuit, or that the Court of Appeals did not properly determine that the EPA has not provided an authoritative interpretation of "removal" to which it should accord deference under *Chevron* or a persuasive interpretation under *Skidmore*. Instead, Petitioner seeks review of the decision of the Court below by suggesting that its writ application raises an important question of federal law that should be decided by this Court. Respondents respectfully show in their argument that there is no important question of federal law to be decided in this case. The Court of

Appeals properly relied upon the unambiguous definition of "removal" action provided by Congress in 42 U.S.C. § 9601(23), rather than arguable agency interpretations of the term "removal" suggested by Petitioner.

STATEMENT OF THE CASE

This case is the second attempt by Residents of Gordon Plaza, Inc. ("Gordon Plaza"), to bring an enforcement action against the City of New Orleans and its Mayor under the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA") at 42 U.S.C. § 6972(a)(1)(B) relative to the former Agriculture Street Landfill ("ASL") site.[1] The City maintains that Gordon Plaza's citizen suit is barred by a Consent Decree between the City and the EPA and ongoing performances by the City of its obligations under the Consent Decree with respect to the former ASL site.

As related in Petitioner's application and the Opinion of the Court of Appeals, the EPA placed the former ASL site on the National Priorities List in 1994. Later that same year, the EPA listed the former ASL site as a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9600 *et seq.*, and

[1] Gordon Plaza's previous suit against Respondents under the RCRA was also dismissed for failure to state a claim. *See Residents of Gordon Plaza, Inc. v. Latoya Cantrell, et al.*, No. 18-cv-04226 (E.D. La. May 26, 2019) (ECF No. 75).

commenced response actions. The response by the EPA at the Site has included the performance of removal actions.

In 2002, the United States of America, on behalf of the EPA, filed a Complaint in the United States District Court for the Eastern District of Louisiana, Civil Action No. 02-3618, against the City of New Orleans and others under CERCLA, seeking penalties for failure to comply with an access order and for reimbursement of response costs. While this federal action was pending, Hurricane Katrina struck in 2005 and devastated the City's financial condition. Because of this occurrence, the EPA and the City negotiated a Consent Decree, which was entered by the District Court on August 5, 2008. *United States of America v. City of New Orleans, et al.*, No. 02-cv-03618 (E.D. La. Aug. 5, 2008) (ECF No. 264).

The Consent Decree requires the City to undertake work obligations with respect to the former ASL site, including City maintenance of "18 inches of clean soil and a vegetative cover in the rights of ways and 24 inches of clean soil and a vegetative cover on residential properties" (which would include Gordon Plaza Subdivision, the subject of Petitioner's suit), as well as the following obligations required by the EPA and agreed to by the City:

a. Maintain the existing fencing on undeveloped areas of the site;

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 the Technical Abstract which provides 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;

e. Instruct all City agencies to follow the Technical Abstract as a 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;

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.

Consent Decree, *United States of America v. City of New Orleans, et al.*, No. 02-cv-03618 (E.D. La. Aug. 5, 2008) (ECF No. 264, at §§ V-VI, pp. 8-16).

Of significance to the case at hand, in consideration of the City undertaking these additional work obligations with respect to the Site and the City's agreement to certain stipulated penalties for noncompliance at Section X of the Consent Decree, the United States on behalf of the EPA agreed not to sue or take administrative actions against the City under CERCLA, including Section 106 thereof relative to abatement actions. Consent Decree, at § XI(33). Notwithstanding this agreement by the EPA, Petitioner seeks to act as a citizen attorney general on behalf of the EPA to bring an abatement action.

The City has faithfully performed under the Consent Decree and remains in compliance with the Consent Decree and, therefore, is entitled to waiver of abatement actions under Section 106 of CERCLA. The EPA issued its Fourth and most recent Five-Year Review Report for the ASL Superfund Site on September 7, 2018. ROA.174. Available at https://semspub.epa.gov/work/06/9796660.pdf. In its Report, the EPA acknowledged the City's compliance with the Consent Decree and determined that the remedy being provided by the EPA and the City is protective of the health of the residents, stating:

> **Protectiveness Statement**
>
> The time critical and non-time critical removal actions performed at the site are protective of human health and environment, because contaminated soil was removed or contained and is protected from erosion, and a barrier has been constructed to prevent

> exposure to any remaining impacted soil. The soil barrier that covers the entire site is in place and expected to remain in place over time, restricting exposure to the remaining subsurface contaminants associated with the site. The City of New Orleans continues to comply with the Consent Decree, issued to provide continued maintenance of the protective barriers where installed. Because the completed response actions for the ASL [Agriculture Street Landfill] site prevent exposure to remaining site contamination, the remedy is considered protective of human health and the environment in the short- and long-term for each OU [Operable Unit] and will continue to be protective if the recommendations identified in this five-year review are addressed.

ROA.182. Available at https://semspub.epa.gov/work/06/9796660.pdf.

In the face of the Consent Decree and the City's ongoing removal actions and obligations thereunder, Petitioner seeks to bring an action against Respondents for further enforcement and abatement under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, specifically, the citizen suit provisions at 42 U.S.C. § 6972(a)(1)(B).

The citizen suit provisions of the RCRA, 42 U.S.C. § 6972(a)(1)(B), provide as follows:

(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, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, 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; or

. . .

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. . . . The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B) . . . and to apply

> any appropriate civil penalties under section 6928(a) and (g) of this title.

Subsection (b) of 42 U.S.C. § 6972 – referred to by subsection (a) thereof as an exception from citizen suits – includes the prohibition against a citizen suit such as Gordon Plaza's against the City as a past or present operator of a disposal facility who has contributed or is contributing to the past or present storage or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment ***if***:

> . . . the [EPA] 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 –
>
> . . .
>
> has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C. § 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Action Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

42 U.S.C. § 6972(b)(2)(B)(iv).

The City maintains, and the Courts below determined, that the Consent Decree and the City's ongoing

work obligations and performances thereunder are "removal" actions which, by the terms of 42 U.S.C. § 6972(b)(2)(B)(iv), bar a citizen suit by Gordon Plaza to enforce the RCRA on behalf of the EPA as a citizen attorney general.

ARGUMENT

Petitioner's application should be denied upon Rule 10 considerations and because the decision of the Court of Appeals is correct under the law. Petitioner does not suggest that the decision of the Court below conflicts with a decision of another Court of Appeals. Nor has Petitioner demonstrated that the Court of Appeals has decided an important question of law that should be settled by this Court or in a way that conflicts with relevant decisions of this Court.

The Court below, in determining that the City's actions were "removal" actions in bar of Petitioner's attempted citizen suit under the RCRA, properly relied upon the definition of "removal" under CERCLA at 42 U.S.C. § 9601(23), cross-referenced by the RCRA at 42 U.S.C. § 6972(b)(2)(B)(iv), which 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 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. . . .

Pet.App. 16-17. The Court of Appeals was also properly informed by precedent recognizing that "Congress intended that the term 'removal action' be given a broad interpretation" and that "removal encompasses more than the 'cleanup . . . of released hazardous substances from the environment' and is 'aimed at containing and cleaning up hazardous substance releases.'" Pet.App. 17.

Petitioner counters that the ongoing work of the City under the Consent Decree should be characterized as "operation and maintenance" actions and seizes upon the preamble to a rule proposed by EPA which states that "CERCLA . . . defines response as removal and remedial actions and does not include operation and maintenance activities." *See* EPA, *Notice of Intent to delete the Del Norte County Pesticide Storage Area Superfund Site from the National Priorities List*, 67 Fed. Reg. 51,528 (Aug. 8, 2002). The Court of Appeals properly disposed of this argument by recognizing that

this limiting language did not find its way into a final Rule of the EPA. Pet.App. 12-13.

Moreover, the Court below correctly determined that neither the limiting language of EPA's proposed rule nor any of the other extrapolations from EPA actions argued by Petitioner to remove the City's actions as a bar to a citizen suit were entitled to deference or persuasive authority. Petitioner utterly ignores the Court of Appeals' dismissal of these arguments under *Chevron* and *Skidmore*.

Petitioner ignores the *Chevron* caveat that deference to an administrative agency does not apply where Congress has directly spoken to the issue ("[i]f the intent of Congress is clear, that is the end of the matter"). *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). Petitioner ignores that Congress has expressly defined "removal" to include actions "that prevent, minimize, or mitigate damage to the public health or environment." 42 U.S.C. § 9601(23) (cross-referenced by 42 U.S.C. § 6972(b)(2)(B)(iv)). There is no cause to defer to any administrative agency definition of "removal action" where Congress has defined such an action. *Chevron, supra*.

Additionally, Petitioner has not directed and cannot direct this Court to any EPA Rule or Regulation defining "removal action" which contradicts the lower Court's construction of that term, or, more precisely, *the lower Court's reliance on Congress' definition of that term*. The EPA's action at 67 Fed. Reg. 51,528

(Aug. 8, 2002), as relied upon by Petitioner, is not a Rule or Regulation of the EPA defining a "removal action" under the RCRA. Rather, the EPA's action at 67 Fed. Reg. 51,528 (Aug. 8, 2002) was merely a "Proposed Rule" as characterized in the Federal Register or, as described in the proposed action, itself, a "Notice of Intent to delete the Del Norte County Pesticide Storage Area Superfund Site from the National Priorities List." It does not include a proposal and comment period for the EPA's determination of the scope of the term "removal actions" in line with the Congressional definition, and no Rule or Regulation addressing the scope of the term "removal" action as promulgated by the EPA.

Moreover, Petitioner ignores that the Consent Judgment between the EPA and the City was entered in 2008 and that the EPA has deemed the ongoing performance of the Consent Judgment by the City as a "removal action" or actions which the EPA has agreed to be in bar of any further abatement actions against the City. Petitioner cites no support in law and does not even address how a rule "proposed" by the EPA in 2002 may supersede the express language of an agreement by the EPA six years later in the 2008 Consent Judgment.

The Court of Appeals has properly concluded as to the predicate requirement, *Chevron* step zero, that the EPA has not issued an interpretation of the statute defining the word "removal" in a manner that gives it the force of law, which forecloses the applicability of *Chevron* deference. Pet.App. 11-13.

Even if this Court were to do an analysis using the *Chevron* two-step framework, a different result would not be obtained. As to step one, certainly, Congress has spoken directly to the definition of "removal" by expressly and unambiguously defining the term under 42 U.S.C. § 9601(23) (cross-referenced by 42 U.S.C. § 6972(b)(2)(B)(iv)), leaving no room for further agency interpretation. Nor is *Chevron* step two satisfied. Petitioner's proposed construction of the term "removal" to exclude monitoring, management, and oversight, conflicts with the plain statutory definition of "removal." The statutory definition of "removal" expressly includes "such actions as may be necessary to monitor . . . the release or threat of release of hazardous substances, . . . 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, ... The term includes . . . security fencing or other measures to limit access. . . ." 42 U.S.C. § 9601(23) (cross-referenced by 42 U.S.C. § 6972(b)(2)(B)(iv)).

The Court of Appeals also properly declined to afford *Skidmore* deference to the EPA's interpretation of statutes it administers that do not carry the force of law. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet.App. 14-15. *Skidmore* deference does not authorize an agency to interpret a statute in a way that conflicts with an express definition by Congress or require that a rule "proposed" by the EPA in 2002 supersede the express language of an agreement by the EPA six years later in the 2008 Consent Judgment. The EPA is not

authorized to re-write the statutory definition of "removal" under *Chevron* or *Skidmore*.

The Court of Appeals correctly determined, based upon the 2008 Consent Decree and the EPA's 5-Year Report, that the actions the City has taken and continues to take under the Consent Decree are protective of human health and the environment and will continue to be protective into the future. In contrast to what Petitioner seeks to paint as minimal maintenance obligations, the Court below analyzed the protective and ongoing obligations of the City under the Consent Decree and the EPA's finding that the City is in compliance with the Consent Decree. Upon such determinations from the record, the Court of Appeals correctly concluded that these continued actions are "removal actions" as defined by 42 U.S.C. § 9601(23) (cross-referenced by 42 U.S.C. § 6972(b)(2)(B)(iv)), which barred Plaintiff's attempted citizen suit under the RCRA.

The Consent Decree was agreed to by and between the City and the EPA in good faith. The EPA and the City have been diligently proceeding with a removal action with respect to the former ASL site pursuant to the Consent Decree. The EPA has also agreed by this Consent Judgment not to sue or take administrative actions against the City under CERCLA, including Section 106 thereof relative to abatement actions, and this promise extends to and bars suits by citizen attorney generals on behalf of the EPA. Accordingly, Petitioner's attempted citizen suit is barred by the RCRA's prohibition of suit at 42 U.S.C. § 6972(b)(2)(B)(iv).

Therefore, Petitioner's Complaint was properly dismissed for failure to state a claim upon which relief may be granted.

CONCLUSION

Petitioner's attempted citizen suit against Respondents under the RCRA is barred by the clear and unambiguous terms of the exception to such suits at 42 U.S.C. § 6972(b)(2)(B)(iv) where a party is diligently conducting a removal action pursuant to a Consent Decree obtained by the EPA. Thus, further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL J. LAUGHLIN
Assistant City Attorney
Counsel of Record
CHURITA H. HANSELL
Chief Deputy City Attorney
DONESIA D. TURNER
City Attorney
1300 Perdido Street, Room 5E03
New Orleans, LA 70112
(504) 658-9800
mjlaughlin@nola.gov

Counsel for Respondents