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

REPLY BRIEF FOR PETITIONER RESIDENTS OF GORDON PLAZA, INC.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Petitioner Residents of Gordon Plaza, Inc. files this Reply to respond to four misstatements in the Brief for Respondents in Opposition. Specifically the Respondents ("the City") erroneously:

1) attribute a statement to EPA with no support that—on information and belief—EPA never made,

2) misrepresent the 2008 Consent Decree between EPA and the City,

3) mischaracterize the nature of a "citizen suit" under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a), and

4) misstate the Petitioner's position as to the definition of "removal."

ARGUMENT

I. There is no evidence that EPA has ever referred to the City's O&M activities as "removal."

The City claims, without citation or other support, that "EPA has deemed the ongoing performance of the Consent Judgment by the City as a 'removal action. . . .'" Br. in Opp. 12. The City has no evidence that EPA deemed the Consent Decree obligations to be removal actions. Indeed, EPA declared long ago that "no further response measures are appropriate." 69 Fed. Reg. 47068, 47072 (Aug. 4, 2004). The term "response," includes "removal" under 42 U.S.C. § 9601(25). When

moving for District Court approval of the 2008 Consent Decree, the United States stated, "The cleanup at the Site is completed." 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 11. The 2008 Consent Decree discusses removal activities at the site in the past tense and describes ongoing requirements as follows: "Because contaminants have been left in place beneath the geotextile mat, proper operation and maintenance practices and institutional controls are required to maintain the integrity of the cap." Consent Decree, *United States v. City of New Orleans*, No. 02-cv-03618 (E.D. La., May 29, 2008) (ECF No. 257-1), at § I, ¶ D, p. 4.

II. The City misrepresents the 2008 Consent Decree.

The City states falsely that "EPA agreed not to sue or take administrative actions against the City under CERCLA, including Section 106 . . . ," Br. in Opp. 5, that "EPA has agreed to be in bar of any further abatement actions against the City," Br. in Opp. 12, and that EPA "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." Br. in Opp. 14. That is not what the Consent Decree says. Instead, the Decree provides:

> Except as specifically provided in Section VIII [*i.e.*, § XII] (Reservation of Rights by United States), the United States covenants not to

> sue or to take administrative action against Settling Defendant pursuant to Sections 104(e), 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9604(e), 9606, and 9607(a), to recover *Past* Response Costs [defined in § IV, ¶ 3(k), p. 7, as "costs that EPA or DOJ on behalf of EPA has paid at or in connection with response actions for the Site *through the date of lodging of this Consent Decree* . . . "], civil penalties related to the Settling Defendant's *prior* failure to provide access, or the Work [*i.e.*, the City's O&M obligations as per § IV, ¶ 3(r), pp. 7-8].

Consent Decree, *United States v. City of New Orleans*, No. 02-cv-03618 (E.D. La., May 29, 2008) (ECF No. 257-1), at § XI, ¶ 33, pp. 25-26 (emphasis added). The United States expressly reserved its § 106 abatement authority as well as other rights to sue about the City's:

> b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
>
> c. liability for injunctive relief or administrative order enforcement under *Section 106 of CERCLA*, 42 U.S.C. § 9606;
>
> d. criminal liability; and
>
> e. liability for damages for injury to, destruction of, or loss of natural resources. . . .

Id. at § XII, ¶ 34, p. 26 ("Reservations of Rights by United States") (emphasis added). In addition, the Decree provides that "matters addressed in this Consent Decree [relevant to the scope of 'contribution

protection' under 42 U.S.C. § 9613(f)(2)] are Past Response Costs and the Work." *Id*. at § XIV, ¶ 39, p. 28 ("Effect of Settlement/Contribution Protection").

III. The City mischaracterizes the nature of "citizen suits" under RCRA and seeks to broaden the reach of the EPA Consent Decree without support.

The City claims without support that the Petitioner "seeks . . . *on behalf of the EPA* to bring an abatement action," Br. in Opp. 5 (emphasis added), and that the EPA Consent Decree "extends to and bars suits by citizen attorney generals *on behalf of the EPA*." Br. in Opp. 14 (emphasis added).

First, it is beyond dispute that RCRA citizen suits are prosecuted on behalf of the citizen plaintiffs, not on behalf of EPA. The statute states unambiguously, "Except as provided in subsection (b) or (c) of this section, any person may commence a civil action *on his own behalf*. . . ." 42 U.S.C. § 6972(a) (emphasis added). The statutory text leaves no room for an argument that citizens can bring such lawsuits on the government's behalf.

Second, the City's assertion that a government settlement under CERCLA "extends to and bars suits" by citizens has no basis in law. This Court has twice ruled about the limited extent to which an EPA settlement under CERCLA disposes of nonparties' claims. In *United States v. Atlantic Research Corp.*, 551 U.S.

128, 140-41 (2007), the Court clarified that the "contribution bar" of 42 U.S.C. § 9613(f)(2) protects potentially liable parties only from contribution claims brought under 42 U.S.C. § 9613(f), not from cost-recovery claims under 42 U.S.C. § 9607(a). The other case is *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020), and is described in the Petition at pages 15-16.

In general, of course, Consent Decrees do not bind nonparties. *See Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529-30 (1986); *see also Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 528 (5th Cir. 2008) (a citizen's Clean Air Act lawsuit is not mooted by a subsequent EPA Consent Decree if "there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the Consent Decree"); *La. Env't Action Network v. City of Baton Rouge*, 677 F.3d 737, 745 (5th Cir. 2012) (a government Consent Decree cannot moot a subsequently filed citizen suit).

IV. The City misstates the Petitioner's position as to the definition of "removal."

The City asserts incorrectly that the Petitioner construes "the term 'removal' to exclude monitoring, management, and oversight." Br. in Opp. 13. Not true. The Petitioner has never suggested that "monitoring, management, and oversight" could not be part of a removal action. Those activities could be part of a

removal, a remedial action, or operation and maintenance, depending on context. Here, where EPA has completed all response action, including removal, the goal of the City's activities (which are more accurately characterized as mowing the grass, fence repair, and providing information) is to help maintain the effectiveness of that completed response, *i.e.*, O&M.

CERCLA and the national contingency plan distinguish response actions—which include both removal and remedial actions under 42 U.S.C. § 9601(25)—from long-term activities to maintain the effectiveness of such actions. *See* 42 U.S.C. § 9604(c)(6) ("Activities required to maintain the effectiveness of such measures following [10 years] or the completion of remedial action, whichever is earlier, shall be considered operation or maintenance."); 40 C.F.R. § 300.5 (defining "operation and maintenance" as "measures required to maintain the effectiveness of response actions").

CONCLUSION

For the foregoing reasons and those stated in the Petition for a writ of certiorari, the Petitioner respectfully requests that this Court issue a 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
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