No. 05-

IN THE

Supreme Court of the United States

W.R. GRACE & CO., KOOTENAI DEVELOPMENT CORPORATION, AND W.R. GRACE & CO.-CONN.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred, and created a conflict with the Eighth and Tenth Circuits, by holding that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §§ 9601 *et seq.*, requires a responsible party to pay the entire cost of an environmental response action of potentially unlimited scope and duration, undertaken without any consideration of cost or cost-effectiveness, without being allowed to challenge whether all or part of that action was necessary to contain or abate an immediate environmental hazard.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state as follows:

Petitioner W.R. Grace & Co. is a publicly held Delaware corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Kootenai Development Corporation is a subsidiary of W.R. Grace & Co., and no other publicly held corporation owns 10% or more of its stock.

Petitioner W.R. Grace & Co.-Conn. is a subsidiary of W.R. Grace & Co., and no other publicly held corporation owns 10% or more of its stock.

Petitioners W.R. Grace & Co., Kootenai Development Corporation, and W.R. Grace & Co.-Conn. filed for Chapter 11 bankruptcy in federal court in Delaware in April 2001, and that proceeding remains pending.

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INTRODUCTION

This case presents the question whether the United States may conduct an environmental response action of unlimited scope and duration under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §§ 9601 *et seq.*, *without any consideration of cost or cost-effectiveness*, and then present a responsible party with the bill. The Ninth Circuit answered that question in the affirmative, holding that once the Environmental Protection Agency (EPA) determines that any conditions at a particular site create a public health hazard, the EPA is free to spend money at will at that site, even on actions unnecessary to contain or abate the hazard, and then recover that money from a responsible party. That holding turns CERCLA upside down, and conflicts with holdings from the Eighth and Tenth Circuits.

CERCLA creates a fundamental distinction between two types of environmental response actions: "removal" and "remedial" actions. "Removal" actions are short-term, temporary measures necessary to contain or abate an immediate environmental hazard. Precisely because such actions are limited in scope and duration, parties undertaking them need not conduct extensive analysis of cost or cost-effectiveness in order later to recover costs from a responsible party. Indeed, subject to certain narrow exceptions, CERCLA expressly caps "removal" actions undertaken by the United States at $2 million or 12 months. "Remedial" actions, on the other hand, are long-term measures undertaken as a permanent environmental remedy. They are not limited in either scope or duration, *but* a party undertaking such an action must conduct substantial analysis of cost and cost-effectiveness if it wishes later to recover costs from a responsible party. The statute thus establishes a system of checks-and-balances: removal actions are limited in scope and duration, and hence require only limited procedural safeguards, whereas remedial actions are

unlimited in scope and duration, and hence require substantial procedural safeguards.

The ruling below obliterates this careful scheme. This case involves one of the largest response actions in American history: so far, the EPA has spent more than $120 million over six years to address asbestos contamination in and around Libby, Montana, and no end is yet in sight. There is no question that CERCLA authorizes the EPA to undertake such an action, and to present responsible parties like petitioners with the bill. But there is also no question that this massive response action is a long-term, permanent effort to restore Libby to its original condition. And therein lies the rub: the EPA has never made any effort to justify the cost or cost-effectiveness of any of its actions in Libby. To the contrary, the EPA has simply thrown money at the problem. The Government obviously may spend its own money as it wishes, but cannot under CERCLA force private parties like petitioners to pay the bill unless it has complied with the relevant procedural safeguards. The EPA has attempted to circumvent those safeguards in this case by asserting that everything done in Libby has been part of a single "removal" action. And the statutory caps on removal actions do not apply, according to the EPA, because everything done in Libby has been part of an *emergency* "removal" action exempt from those caps. The Ninth Circuit held that this was all fine, and affirmed the grant of summary judgment in the EPA's favor with respect to the *entire* Libby response action through the end of 2001.

The upshot of that ruling is that, in the Ninth Circuit, the line between removal and remedial actions under CERCLA is effectively gone. If *this* response action can be characterized as a removal action as a matter of law, then *any* response action can be characterized as a removal action as a matter of law, and there is no more need (or incentive) for the EPA to consider cost or cost-effectiveness when conducting such an action—after all, it

is essentially spending someone else's money. Not surprisingly, the ruling below cannot be reconciled with rulings by other courts of appeals denying cost recovery under CERCLA where a party undertook a remedial action without observing the requisite procedural safeguards, including consideration of cost and cost-effectiveness, required for such actions. *See Public Serv. Co. v. Gates Rubber Co.*, 175 F.3d 1177, 1181-82 (10th Cir. 1999); *Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1024 (8th Cir. 1998).

This Court should grant certiorari to resolve the conflict. Although CERCLA has been on the books for a generation, and has had sweeping effects on American business and society, this Court has never analyzed the statute's fundamental removal/remedial distinction. The time is now ripe for this Court to do so, and to restore CERCLA's formidable cost-recovery authority to its proper statutory bounds.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 429 F.3d 1224, and reprinted in the Appendix (App.) at 1-50a. The district court's decision granting the United States summary judgment is reported at 280 F. Supp. 2d 1135, and reprinted at App. 51-70a. The district court's decision awarding the United States all of the costs requested is reported at 280 F. Supp. 2d 1149, and reprinted at App. 71-138a.

JURISDICTION

The Ninth Circuit rendered its decision on December 1, 2005. App. 1a. On February 15, 2006, Justice Kennedy granted petitioner's application to extend the time within which to file a petition for a writ of certiorari to April 28, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

42 U.S.C. § 9601(23) provides:

> The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] 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(24) provides:

> 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.

STATEMENT OF THE CASE

A. Background

This case arises out of long-ceased vermiculite mining activities near Libby, a town of some 3,000 residents in northwestern Montana. Vermiculite is not a hazardous

substance; it is a form of mica that, when heated, expands like popcorn, and has a variety of commercial uses (especially insulation). App. 140-41a.[1] Commercial vermiculite mining at Zonolite Mountain, located about ten miles outside of Libby, began in the 1920s; in 1939, the Zonolite Company was formed to mine and process vermiculite at the site. App. 51a. Petitioner W.R. Grace & Co. purchased the Zonolite Company in 1963. *See id.*

Like most naturally-occurring minerals, raw vermiculite contains impurities—foreign substances not wanted in the final, commercial product. Among the impurities associated with vermiculite from Zonolite Mountain is tremolite, a naturally occurring mineral that is present in both asbestos and nonasbestos forms. App. 140a. Asbestos (in contrast to vermiculite) *is* a hazardous substance within the meaning of CERCLA. App. 72a (citing 42 U.S.C. § 9601(14) and 40 C.F.R. § 302.4). Because asbestos is an impurity in vermiculite, an important part of the production process in Libby focused on separating asbestos and other impurities from vermiculite.

Grace ceased commercial mining operations in Libby in 1990. *Id.* Over the following years, Grace dismantled many of its mining facilities, and began selling off its properties in and around the town. During those years, federal, state, and local authorities were well aware of residual vermiculite in and around the town, but saw no

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[1] Because the district court granted summary judgment in the Government's favor, a reviewing court must accept Grace's evidence as true, and draw all reasonable inferences in Grace's favor. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Accordingly, most of the facts set forth in this petition are drawn from Grace's Statement of Genuine Issues of Material Fact filed in opposition to the Government's summary judgment motion. *See* App. 139-84a.

reason for any action. In 1991, Grace sampled the air along the unpaved road leading from the abandoned mine to the Kootenai River for asbestos and submitted the results to local officials. None of the samples contained more than *one-tenth* the then-existing workplace-safety asbestos standard of 0.2 fibers per cubic centimeter. C.A. App. ER41-43. In 1992, the EPA investigated potential asbestos contamination along the road, and concluded that no action was necessary or appropriate. *Id.* at ER44-45; App. 9a. That same year, the Montana Department of Health and Environmental Sciences sampled soil at the former vermiculite export plant on the outskirts of town and concluded that "[n]either sample showed significant asbestos contamination. Therefore the potential site will be considered no further action at this time." C.A. App. ER1512-14.

Everything changed, however, in late 1999. On November 18—nine years after Grace closed the mine—the *Seattle Post-Intelligencer* began running a series of articles on the health risks from asbestos exposure in Libby. App. 141a. The series asserted that 192 people had died from asbestos-related causes in Libby ("A Town Left to Die"), and charged government agencies with negligence ("While People are Dying, Government Agencies Pass Buck"). The series caused a political firestorm in Montana, and a public-relations crisis for the EPA.

On November 22, 1999—within days of the *Post-Intelligencer* series—the EPA dispatched an investigative team to Libby. App. 141a. In February 2000, the Committee on Environment and Public Works of the United States Senate (which oversees the EPA and its budget, and of which United States Senator Max Baucus of Montana was then the Ranking Member), held a Field Hearing in Libby on "Federal, State, and Local Response to Public Health & Environmental Conditions From Asbestos Contamination in Libby, Montana." Senator

Baucus presided over that hearing, and EPA officials testified that Libby would be handled as a top priority.

The results of EPA's testing in Libby showed that there was no problem with airborne asbestos at any location in the town or its vicinity. App. 142a. Based on these findings, EPA reassured the community that asbestos did not present a health risk to persons living, working, or visiting the town, and made no efforts to evacuate anyone. App. 141-42a. In March 2000, the EPA's On-Scene Coordinator in Libby, Paul Peronard, stated that "[n]one of the results from the soil, insulation and dust samples point to obvious candidates for cleanup." C.A. App. ER1579; *see also* C.A. App. ER183 ("Test results from area homes, soil, dust and air have thus far shown little for the community to be concerned about," and "[i]f somebody were asking me right now, I would say the ambient air is no problem") (Peronard); C.A. App. ER171 ("Sampling to date does not indicate an ambient air asbestos concentration problem.").

Despite these findings, in May 2000, the EPA issued an "Action Memorandum" memorializing its decision to carry out not only a *removal* action (as opposed to a *remedial* action), but an *emergency* removal action (exempt from CERCLA's 12-month, $2 million caps on removal actions) at the site of the former screening plant on the banks of the Kootenai River some four miles outside of town. App. 11a.[2] At that point, the site was owned and occupied by a local couple, the Parkers, who

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[2] The Action Memorandum also memorialized EPA's decision to undertake an emergency removal action at the former export plant site. On the same day the agency issued the Memorandum, however, the agency also issued a Unilateral Administrative Order directing *Grace* to carry out that cleanup. Grace did so at its own expense, and costs associated with that project are not at issue here. App. 11a n.8.

had purchased the property from Grace in the mid-1990s for $126,600. C.A. App. ER1515-17. The Action Memorandum allocated $4.025 million for remediation work at the site, which (without any analysis of cost or cost-effectiveness) was spent on razing all the buildings, excavating the soil to a depth of up to 13 feet, replacing the soil, and improving the property (*e.g.*, installing step pools for trout and rocks along the river to prevent erosion) *Id.* at ER896-97, ER1021-22, ER1187-88; ER1145-72 (photographs); App. 159-63a.

In July 2001, EPA issued a second Action Memorandum memorializing its decision to expand the Libby response action from the screening plant site to two nearby uninhabited forest areas (the Flyway and the Bluffs), three local schools to which Grace had donated vermiculite and/or other mining materials for outdoor athletic facilities, two residential properties (Siefke and Brownlee) with small piles of vermiculite or contaminated mining equipment on site, and the unpaved road between the mine and the river. App. 12a. The second Action Memorandum raised the ceiling for spending on the Libby response action to over $20 million, and extended the estimated duration of the project to 34 months. App. 12-13a. Pursuant to the second Action Memorandum, EPA (without any analysis of cost or cost-effectiveness) dug up the soil in the forest at the Flyway and the Bluffs, replaced all the soil, ripped up the athletic facilities at the schools (even though the mining materials donated by Grace had long since been removed or paved over), and engaged in other remedial activities (including buying a new public announcement system and portable popcorn machine for the high school). App. 163-69a; *see also* C.A. App. ER642-51, ER897-912, ER1021-22, ER1653-57.

In May 2002, EPA issued a third Action Memorandum memorializing its decision to expand the Libby removal action yet again, this time to residential properties and businesses throughout the Libby valley. App. 13a. The third Action Memorandum raised the ceiling for spending

on the Libby project to $55.6 million, and extended the estimated duration of the project by two to three years. *Id.* Pursuant to the third Action Memorandum, EPA (without any analysis of cost or cost-effectiveness) to this day is digging up residents' yards throughout Libby, replacing the soil, and restoring the facilities. C.A. App. ER912-13.

Notwithstanding all of this activity, EPA made no attempt to place Libby on the National Priorities List (NPL), a list required by CERCLA, 42 U.S.C. § 9605(a)(8), which ranks the highest national priorities for environmental response actions (and in this period included over 1,000 sites). Inclusion on the NPL is a prerequisite for EPA to perform a remedial action (unlike a removal action). *See* 42 U.S.C. § 9605(a)(8); 40 C.F.R. § 300.425(b)(1). Ultimately, rather than itself trying to justify placing Libby on the NPL, the agency instead lobbied the Governor of Montana to exercise her unreviewable one-time statutory power to designate a site within the State for placement on the NPL. C.A. App. ER 1643-45. The Governor agreed to do so, *id.* at ER1646-48, and Libby was listed on the NPL in October 2002, *see National Priorities List for Uncontrolled Hazardous Waste Sites*, 67 Fed. Reg. 65315 (Oct. 24, 2002)—well *after* the agency had issued the three Action Memoranda and incurred all of the costs at issue here.

B. This Lawsuit

On March 30, 2001, the United States filed this action against Grace and its subsidiaries Kootenai Development Corporation and W.R. Grace & Co.-Conn (collectively Grace) under Section 107 of CERCLA, 42 U.S.C. § 9607, seeking recovery of response costs incurred in Libby through December 31, 2001. The complaint also sought a declaration of Grace's liability under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), that would be binding in future actions to recover further response costs or

damages incurred by the United States in connection with the Libby response action.

Grace sought to defend itself on the grounds, among others, that the EPA had exceeded its statutory and regulatory authority (1) by characterizing the entire Libby response action as a removal action, thereby evading the procedural safeguards required for remedial actions, and (2) in any event, by characterizing the entire Libby response action as an "emergency," and thereby exceeding the 12-month, $2 million caps on removal actions. In December 2002—before discovery was finished, and before Grace had even taken certain critical depositions—the district court (Molloy, C.J.) granted the United States summary judgment with respect to both these challenges. App. 51a-70a. (Because discovery had not yet concluded, the district court allowed Grace to file its Statement of Genuine Issues of Material Fact (App. 139-84a) *after* the court entered its summary judgment order; the court later stated on the record that none of the facts identified in the Statement altered its decision.)

With respect to the agency's characterization of the entire Libby response action as a removal action, the court asserted that "the record indicates that the EPA *considered* the mandatory factors set forth in 40 C.F.R. § 300.415(b)(2)" for a removal action, and that the agency could "proceed with a removal action after *considering* these factors." App. 60a (emphasis added). The court emphasized that "*[c]onsideration* of the mandatory factors is what is required to conduct a removal action; *because the EPA did so*, its decision to conduct a removal action rather than a remedial action ... cannot be second-guessed by this Court." *Id.* (emphasis added). The court did not address Grace's contention that the agency's actual response actions in Libby went far beyond the permissible scope of a removal action. And with respect to the agency's decision to exceed the statutory caps on removal actions, the court asserted that the caps are "not inviolate," and upheld EPA's decision on the ground that

the agency had "*consider[ed]*" the factors necessary to exceed the caps. App. 61-62a (emphasis added).

After the court granted the United States summary judgment on liability, the only issue left for trial was whether the United States was entitled to all the costs claimed—$54,527,081.11. The court held a three-day bench trial on that issue in early 2003, and, several months later, issued a decision granting the United States *every penny* requested. App. 71a-138a.

Grace appealed, but a panel of the Ninth Circuit (McKeown, J., joined by Betty Fletcher and Bea, JJ.) affirmed. App. 1-50a. The panel "diverge[d] from the district court's reasoning in some respects," but "reach[ed] the same ultimate conclusion: The EPA's cleanup in Libby was a removal action that was exempt from the temporal and monetary cap." App. 4a. The Ninth Circuit recognized that "Congress created a bifurcated scheme of removal and remedial actions and, accordingly, there must be outer limits to removal actions." App. 42a. Nonetheless, the court held that the EPA was entitled to characterize the *entire* Libby response action as a "removal action" in light of "the documented evidence that, absent immediate action, the airborne toxic particles would continue to pose a substantial threat to public health." *Id.* The court made no effort to link the entire Libby response action to any such threat. Rather, the court declared, "[w]e refrain from slicing and dicing the EPA's single, cohesive removal action into a myriad of fractured parts." App. 23a. On the twin assumptions that (1) the EPA was entitled to undertake an emergency removal action to respond to an immediate public health hazard, and (2) the EPA was entitled to characterize the entire Libby response action as a "single, cohesive removal action," the court not only held that the entire Libby response action was a removal, but that the entire Libby response action was an *emergency* removal exempt from the statute's monetary and durational caps. Judge Bea concurred "to emphasize that this court should stand

ready to review separately the EPA's actions at different locations at a removal site under the 'arbitrary and capricious' standard stated in 42 U.S.C. § 9613(j)(2)." App. 50a.

This petition follows.

REASON FOR GRANTING THE WRIT

The Ninth Circuit Erred, And Created A Circuit Conflict, By Holding That The Entire Libby Response Action Qualifies As An Emergency Removal Action That Exempts The EPA From Considering Cost Or Cost-Effectiveness.

The Ninth Circuit erred, and created a circuit conflict, by holding that CERCLA requires a responsible party to pay the entire cost of an environmental response action of potentially unlimited scope and duration, undertaken without any consideration of cost or cost-effectiveness, without being allowed to challenge whether all or part of that action was necessary to contain or abate an immediate environmental hazard. That approach turns CERCLA on its head by essentially obliterating the core statutory distinction between "removal" and "remedial" actions.

Although, as the Ninth Circuit correctly observed, the statutory definitions of "removal" and "remedial" actions are hardly models of clarity, *see* App. 14a, 24a, there is broad consensus on the basic nature of the distinction. "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 to '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.'" *General Elec. Co. v. EPA*, 360 F.3d 188, 189 (D.C. Cir. 2004) (*per curiam*) (quoting 42 U.S.C. § 9601(24)); *see also Exxon Corp. v. Hunt*, 475 U.S. 355,

360 (1986) (distinguishing a "'removal action,'" *i.e.*, "a short-term cleanup" from a "'remedial action,'" *i.e.*, "measures to achieve a 'permanent remedy' to a particular hazardous waste problem"); *Colorado v. Sunoco, Inc.*, 337 F.3d 1233, 1240 (10th Cir. 2003) (same); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 894 (5th Cir. 1993) (same); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) (same); *cf.* 132 Cong. Rec. S14895-02, 14896 (daily ed. Oct. 3, 1986) ("Removals should remain interim and relatively short-term and inexpensive actions or urgent responses.") (statement of Sen. Stafford, Chairman of the Senate Committee on Environment and Public Works).

However difficult it may be to distinguish between removal and remedial actions at the margins, the distinction is "critical" to CERCLA's statutory scheme and the EPA's corresponding regulatory scheme, the National Contingency Plan (NCP). App. 8a; *see also* Jerry L. Anderson, *Removal or Remedial? The Myth of CERCLA's Two-Response System*, 18 Colum. J. Envtl. L. 103, 103-04 (1993). As the Ninth Circuit explained below, "'the requirements for remedial actions are much more detailed and onerous'" than the requirements for removal actions. App. 8a (quoting *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1136 (10th Cir. 2002)); *see also* Anderson, *supra*, at 104 (CERCLA and the NCP provide "dramatically different requirements for removal as opposed to remedial action").

In particular, "the EPA is required to consider costs when selecting remedial alternatives whereas 'CERCLA contains no corresponding mandate for removal actions.'" App. 8a (quoting *United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir. 1992)). This distinction makes sense: a party need not consider cost or cost-effectiveness before containing or abating an immediate environmental hazard, but must consider cost and cost-effectiveness before permanently remediating a contaminated site. "The division of responses into the two categories of

removal and remedial actions is designed to provide an opportunity for immediate action—a removal—without detailed review, where there is no time to safely conduct such review due to the exigencies of the situation." *Channel Master Satellite Sys., Inc. v. JFD Elecs. Corp.*, 748 F. Supp. 373, 385-86 (E.D.N.C. 1990); *see also* Anderson, *supra*, at 107-08. A party is free to remediate a site without following the procedural safeguards for remedial actions, but cannot thereafter recover those costs from another party. *See, e.g., Gates Rubber*, 175 F.3d at 1181-82; *Kalman W. Abrams,* 155 F.3d at 1024; *Sherwin-Williams Co. v. City of Hamtramck*, 840 F. Supp. 470, 475-76 (E.D. Mich. 1993); *Channel Master*, 748 F. Supp. at 384-87; *Amland Properties Corp. v. Aluminum Co.*, 711 F. Supp. 784, 795-801 (D.N.J. 1989); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1574-83 (E.D. Pa. 1988). The statute thus protects the public health without forcing liable parties to pay for unnecessary or wasteful response costs. *See, e.g.*, Anderson, *supra* at 107-08; *see also id.* at 103 ("Congress made the distinction between remedies and removals *crucial* to the recovery of cleanup costs.") (emphasis added); App. 8a (removal/remedial distinction "vital to those held liable").

In this case, however, the Ninth Circuit held that the EPA was entitled to characterize the *entire* Libby response action as a "removal" action, and to recover from Grace every penny of the more than $54 million spent through the end of 2001, because the agency was entitled to conclude that there was a public health hazard in Libby that justified such an action. *See* App. 4a, 14a-15a, 41a-42a. With all due respect, that is a *non sequitur*.

Grace does not deny that CERCLA authorizes the EPA to conduct removal actions to contain or abate immediate environmental hazards, without any consideration of cost or cost-effectiveness, and thereafter recover the cost of such actions from responsible parties. But that is not what the EPA did here. Rather, from the

outset, the EPA set out to permanently remediate the entire site. Indeed, EPA's On-Scene Coordinator, Paul Peronard, described the response action in Libby as a "permanent," "long-term" solution. C.A. App. ER1183, ER1191; *see also* App. 160a. The problem here is that the EPA undertook these remedial actions without observing the procedural safeguards for such actions, and made no effort to distinguish these improper remedial actions from otherwise permissible removal actions. Through this lawsuit, the EPA is seeking to recover the cost of *all* its actions in Libby through the end of 2001, without regard to whether those actions involved the containment or abatement of an immediate environmental hazard or the permanent remediation of the site.

All Grace is saying here, thus, is that it is entitled to its day in court to try to prove that particular elements of the $54 million requested by the Government (in Grace's view, the vast majority of that amount) were not necessary to contain or abate an immediate environmental hazard, and thus not recoverable as "removal" costs under CERCLA. (As the Ninth Circuit noted, "[t]he EPA does not dispute that the [Libby] cleanup did not meet the National Contingency Plan's procedural requirements for a remedial action." App. 14a n.13.) So far, Grace has been denied that opportunity: the district court granted (and the Ninth Circuit affirmed) *summary judgment* against Grace with respect to liability for the entire Libby response action through the end of 2001. That result is particularly shocking because the EPA has never claimed, and neither the district court nor the Ninth Circuit ever determined, that all (or even a majority, or a substantial portion) of the costs at issue were necessary to contain or abate an immediate environmental hazard (as opposed to permanently remediate the site).

It is no answer to say, as did the Ninth Circuit, that "the situation [in Libby] warranted an immediate, aggressive response to abate the public health threat."

See App. 4a. Whether or not a removal action was *warranted* has nothing to do with whether or not a removal action was *conducted*. The Ninth Circuit brushed aside Grace's core argument that the Libby response action went far beyond the permissible scope of a removal by declaring that it would not "slic[e] and dic[e] the EPA's single, cohesive removal action into a myriad of fractured parts." App. 23a; *see also* App. 11a n.9 ("[W]e analyze the EPA's activities in Libby as a single response action rather than a patchwork of discrete smaller actions."). That, of course, is the very question presented in this case: whether the EPA's Libby response action through the end of 2001 *was* a "single, cohesive removal action." To the extent that the action was devoted in whole or in part to the permanent remediation of the site, as opposed to the containment or abatement of an immediate environmental hazard, it was *not* a "single, cohesive removal action" exempt from the procedural safeguards for remedial actions, such as consideration of cost and cost-effectiveness. In a nutshell, the Government is not entitled to collect costs for the entire Libby response action as a removal action if the entire Libby response action was not a removal action.

The Ninth Circuit's "all or nothing" approach—under which an entire response action at a site may be characterized as a removal action if *any portion* of that action may be characterized as a removal action—is flatly inconsistent with decisions from other circuits. Thus, in *Kalman W. Abrams*, the Eighth Circuit affirmed in part and reversed in part a grant of summary judgment in favor of the *defendant* in a CERCLA cost-recovery action. *See* 155 F.3d at 1023-26. At issue there was a site where hazardous lead contaminants had been spread over a property. *See id.* at 1021. The Minnesota Pollution Control Agency conducted a response action at the site; over the course of several years, it permanently remediated the property (digging up the contaminated soil and replacing it with new soil), but failed to observe

the procedural safeguards required for remedial action. *See id.* at 1021-22. When the State of Minnesota later filed a CERCLA cost recovery action against several responsible parties, the district court granted summary judgment in the defendants' favor on the ground that the State could not recover remedial costs where it had not complied with remedial safeguards. *See id.* at 1023.

The Eighth Circuit affirmed the district court's decision that the State could not recover the cost of the entire response action. *See id.* at 1024. The Eighth Circuit readily acknowledged "the obvious fact that lead contaminants were 'removed' from the site." *Id.* But that did not mean, the court explained, that the procedural safeguards for remedial actions were categorically inapplicable. To the contrary, the court concluded, "we agree with the district court that the *permanent nature* of the McGuire site cleanup and the *leisurely manner* in which MPCA dealt with the problem make it appropriate to hold the agency to the NCP standards for remedial action." *Id.* (emphasis added); *see also id.* at 1026 ("[T]he kind of arbitrary and wasteful agency action that occurred in this case cannot be rewarded.").

But that conclusion, in turn, did not mean that the State was categorically barred from recovering *any* of its response costs. *See id.* at 1025 ("[W]e disagree with the district court's decision to preclude the State from any cost recovery under CERCLA."). Rather, the State was entitled to recover that portion of the costs that were incurred in compliance with the CERCLA scheme. *See id.* Thus, the Eighth Circuit remanded the case to give the defendants an opportunity to show that particular response costs were "unreasonable or unnecessary." *Id.* at 1026. "The State may not recover response costs incurred in implementing appropriate remedial actions to the extent appellees prove on remand that they would have and could have accomplished the cleanup more cost effectively." *Id.; see also Amland*, 711 F. Supp. at 795-96 (granting summary judgment to CERCLA cost-recovery

defendant with respect to the "vast majority of the costs" incurred in a response action, which were "for the remedial actions undertaken in an attempt to remove [hazardous chemicals] from the [site].").

Similarly, in *Gates Rubber*, the Tenth Circuit affirmed a grant of summary judgment in favor of the *defendant* in a CERCLA cost-recovery action. *See* 175 F.3d at 1183-86. At issue there was a site contaminated with lead and polychlorinated biphenyls (PCBs). *See id.* at 1179. One of the responsible parties, the Public Service Company of Colorado (PSCO), undertook a comprehensive response action (which included excavating and transporting contaminated soil from the site) over more than four years, but failed to comply with the procedural requirements for remedial actions. *See id.* at 1179-80, 1184. PSCO later sought to recover a proportionate share of the response cost from other responsible parties, but the district court granted summary judgment in favor of the defendants on the ground that "as a matter of law PSCO's cleanup was a remedial action" that did not comply with the procedural requirements for such actions. *Id.* at 1180.

The Tenth Circuit agreed with the district court, and affirmed the judgment denying *any* cost recovery. As the court explained, "PSCO intended to effect a permanent remedy" through the multi-year response action. *Id.* at 1184. Although, in the course of this comprehensive response action, PSCO undertook discrete actions that, standing alone, might qualify as removal actions, that did not alter the fact that they were part of a broader remedial action subject to CERCLA's heightened procedural safeguards. *See id.* ("Although PSCO 'removed' and 'excavated' soils and buried storage drums, neither of those acts alone nor their particular labeling transforms the cleanup into a removal action."). Thus, the Tenth Circuit concluded that "[t]he district court did not err in concluding PSCO undertook a remedial action which triggered the more detailed requirements of the

NCP." *Id.* (citing *Kalman W. Abrams*, 155 F.3d at 1024); *see also Versatile Metals*, 693 F. Supp. at 1578 (granting judgment in favor of CERCLA cost-recovery defendants based on evidence presented at a trial "that although some immediate actions were taken at the time the contamination was discovered, [the CERCLA cost-recovery plaintiffs'] response action was remedial.").

The Ninth Circuit's decision below, affirming the grant of summary judgment in favor of the *plaintiff* in a CERCLA cost-recovery action, cannot possibly be squared with these precedents. As noted above, the Ninth Circuit characterized the *entire* Libby response action though the end of 2001 as a removal action, even though Grace vigorously disputed whether the bulk of the action was necessary to contain or abate an immediate environmental hazard, *see* App. 139-84a, and the EPA itself neither could nor did attempt to justify all of its actions in Libby under that standard. In contrast, the Eighth Circuit in *Kalman W. Abrams* remanded for a determination of which response costs were indeed necessary, and the Tenth Circuit in *Gates Rubber* simply denied any cost recovery altogether. Both *Kalman W. Abrams* and *Gates Rubber* rejected the argument that an entire response action at a particular site must (or even may) be characterized as a removal just because, among other things, hazardous substances were contained, abated, or removed. *See* 175 F.3d at 1184; 155 F.3d at 1024. Thus, the cost-recovery defendants in both *Kalman W. Abrams* and *Gates Rubber*—in sharp contrast to Grace—had their day in court to argue that at least portions of a disputed CERCLA response action were remedial in nature but lacked the remedial safeguards.

The Ninth Circuit's "all or nothing" approach not only conflicts with *Kalman W. Abrams* and *Gates Rubber*, but renders the fundamental removal/remedial distinction a dead letter. After all, the predicate for *any* response action (whether removal or remedial) under CERCLA is the release of "hazardous substances" into the

environment. 42 U.S.C. § 9601(23) (statutory definition of "removal" actions); *id.* § 9601(24) (statutory definition of "remedial" actions). By definition, then, *any* CERCLA response action will involve an attempt to address an environmental hazard. Accordingly, if the existence of a such a hazard were the touchstone for distinguishing between removal and remedial actions, the distinction would be meaningless. Indeed, almost every remedial action could be said to encompass a removal action, because the permanent remediation of a site typically involves the removal of hazardous substances. Under the Ninth Circuit's decision below, a party responding to environmental contamination can immediately launch a remedial action without any consideration of cost or cost-effectiveness, and later collect all of the costs of that action, by simply pointing to the part of the action that contained or abated the release of a hazardous substance—which is precisely what the EPA has done here. Needless to say, the statutory and regulatory requirements for remedial actions would be wholly meaningless if *any* response action can be characterized as a removal action.

In other words, the only way that a statutory and regulatory regime based on the removal/remedial distinction makes sense is that a removal action must be limited in scope to containing or abating the exigency that gave rise to that action in the first place. If, as the decision below allows, an exigency justifying a removal action is an "open sesame" to conduct a full-blown remedial action without observing the remedial safeguards, the removal/remedial distinction is gone. A responding party has no incentive to constrain its spending (and indeed, a perverse incentive to maximize its spending) if it knows that it can conduct a multi-year, multi-million dollar cleanup on someone else's tab. *See, e.g.*, *Bell,* 3 F.3d at 907 (CERCLA does not give EPA "unrestrained spending discretion," and "such unbridled discretion removes any restraint upon the conduct of the

EPA in exercising its awesome powers; if the EPA knows there are no economic consequences to it, its decisions and conduct are likely to be less responsible"); *cf.* Stephen G. Breyer, *Breaking the Vicious Circle* 11-19 (1993) (noting danger that unconstrained regulators will overregulate against risk). That is why there must be a nexus between the exigency justifying a removal action and the scope of that action, and sober judicial assessment of that nexus—particularly because CERCLA gives the EPA broad discretion to select the response in the first instance, *see* 42 U.S.C. § 9613(j)(2), and bars pre-enforcement judicial review of that response, *see id.* § 9613(h). Because the district court here granted summary judgment in the Government's favor across the board, and the Ninth Circuit affirmed that decision, Grace has been denied any such assessment.

It is no answer to say, as did the Ninth Circuit, that the situation in Libby is "truly extraordinary." App. 4a, 15a. What that means, apparently, is that the Ninth Circuit concluded (notwithstanding the summary judgment posture of the case) that the public health hazard presented in Libby was acute. *See id.* at 4a ("[T]he population of Libby ... faces ongoing, pervasive exposure to asbestos particles being released through documented exposure pathways. We cannot escape the fact that people are sick and dying as a result of this continuing exposure."). But that means at most that the Ninth Circuit believes that it would be hard for Grace to show that all aspects of the EPA's response action in Libby through the end of 2001 were not necessary to contain or abate such an immediate environmental hazard. It provides no basis whatsoever for denying Grace its day in court to attempt to make that showing in the first place.[3]

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[3] Judge Bea's concurrence is especially perplexing on this score. Judge Bea appeared to agree with Grace that particular

In opposing the Government's motion for summary judgment, Grace identified numerous aspects of the Libby response action that were not geared to containing or abating an immediate environmental hazard. App. 139-84a. At the most basic level, the Libby response action focused from the outset on excavating and replacing the soil. Given that asbestos does not pose a public health risk unless it is *airborne*, App. 155a, it is fanciful to suggest that excavating and replacing the soil at a depth of anywhere from five to thirteen feet could represent a short-term or interim (rather than permanent) solution to an asbestos contamination problem. The EPA dug up concrete and asphalt to get to the soil underneath, and then *after* replacing the soil, remediated the site by, among other things, planting new trees, installing new rocks along the riverfront to prevent erosion, and building new step pools for trout. App. 159-65a. By no stretch of the imagination can all of these actions be characterized as steps necessary to contain or abate an immediate environmental hazard. Notably, neither the EPA, the district court, nor the Ninth Circuit ever contended otherwise. Rather, as noted above, the EPA, the district court, and the Ninth Circuit all characterized the *entire* Libby response action as a permissible removal because it

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components of the Libby response action could be challenged, but rejected a particular example discussed in Grace's Ninth Circuit brief on the ground that "the record contains additional findings that supply a rational reason" to place that example on the removal side of the removal/remedial distinction. App. 50a. Given the summary judgment posture of the case, however, the question is not whether the EPA's position was "rational," but whether the EPA's position was correct as a matter of law. Again, Grace never has had its day in court to show that all the EPA's actions in Libby through the end of 2001 were not necessary to contain or abate an immediate environmental hazard.

contained a removal (as well as a frankly remedial) component—precisely the opposite of the way the Eighth and Tenth Circuits approached the issue.

The EPA, moreover, has been taking its time on the Libby response action; right now, that action has been underway for more than six years, and no end is in sight. Although the Ninth Circuit downplayed the duration of the action by blaming the weather, *see* App. 36a-37a (citing *Sherwin-Williams* with a "*but see*"), that assertion misses the point that the EPA has had ample time to evaluate the cost and cost-effectiveness of its actions in Libby but steadfastly has refused to do so, *see* App. 163-68a. If excavating and replacing the soil to a depth of six feet in uninhabited forest areas was not necessary to contain or abate an immediate hazard, *see* App. 163-65a, then the EPA should have analyzed cost and cost-effectiveness before excavating and replacing the soil to a depth of six feet in uninhabited forest areas—which might have dissuaded the EPA from undertaking that particular action in the first place. That is the way CERCLA is supposed to work.

Indeed, given that CERCLA expressly caps removal actions by the EPA at $2 million or 12 months, *see* 42 U.S.C. § 9604(c)(1), it is nothing short of remarkable that the Ninth Circuit held that the EPA was entitled to summary judgment with respect to its characterization of the *entire* Libby response action through the end of 2001 as a removal action. Although the statutory caps are not inviolate, and may be exceeded (as allegedly relevant here) if "immediately required to prevent, limit, or mitigate an emergency," 42 U.S.C. § 9604(c)(1)(A), the caps at the very least underscore the limited and interim nature of removal actions. Certainly, the fact that the EPA is seeking through this lawsuit to recover more than *$54 million* in costs for response actions taken over more than *two years* on its face tends strongly to confirm Grace's position that something more than a removal action is afoot.

The Ninth Circuit tried to justify its contrary conclusion by insisting that "the purpose of the statute ... points towards a liberal reading of 'removal' in order to effectuate CERCLA's underlying purpose of protecting and preserving public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites." App. 28a (internal quotation and brackets omitted); *see also id.* ("[A] liberal reading provides the EPA with greater flexibility to use this tool for the protection of the public health."). That approach, of course, begs the fundamental question whether all of the EPA's actions in Libby through the end of 2001 (as to which the Ninth Circuit affirmed the grant of summary judgment in the EPA's favor) were in fact necessary to contain or abate an immediate environmental hazard. Allowing Grace its day in court to challenge specific actions would not undermine CERCLA's purpose of protecting public health and the environment; rather, it would only further CERCLA's purpose of preventing arbitrary and capricious agency action. "'Congress has not provided that private parties must pay for the consequences of arbitrary and capricious agency action.'" *Kalman W. Abrams*, 155 F.3d at 1024 (quoting *Bell*, 3 F.3d at 905). This distinct purpose is reflected in the statutory provisions mandating procedural safeguards (including consideration of cost and cost-effectiveness) for remedial actions; to declare (as did the Ninth Circuit) that CERCLA's "remedial purpose" mandates a broad interpretation of "removal actions," App. 41a, is simply to read these latter provisions out of the statute.

Nor does the legislative history support the Ninth Circuit's approach. Indeed, the decision below provides a classic example of the adage that legislative history can be used in a manner akin to "entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). The Ninth Circuit "[took] away from the legislative history ... the drafters' overarching

concern that aggressive action be taken to protect the public health." App. 29a. By focusing on that "overarching concern," the Ninth Circuit wholly ignored a more specific concern applicable here: a concern that the EPA not use its removal authority "to circumvent the more rigorous and explicit requirements regarding public participation and health standards" for remedial actions. 132 Cong. Rec. at 14896 (statement of Sen. Stafford, Chairman of the Committee on Environment and Public Works).

Similarly misguided is the Ninth Circuit's suggestion that some form of judicial deference (the Ninth Circuit was not sure which) was due the EPA's characterization of its actions in Libby as removal actions. *See* App. 19a-24a. That suggestion defies fundamental principles of administrative law. This lawsuit is a cost-recovery action brought by the EPA. Congress delegated to the *courts*, not the *agency*, the authority to determine in the first instance whether such cost recovery is warranted. *See* 42 U.S.C. § 9607. Thus, there is no basis for courts to defer to the agency's characterization of particular actions as removal (as opposed to remedial) actions, just as there is no basis for courts to defer to a prosecutor's characterization of particular actions as criminal. *See, e.g.*, *Kelley v. EPA*, 15 F.3d 1100, 1105-08 (D.C. Cir. 1994) (Silberman, J.). With respect to the characterization of the particular response actions undertaken by the EPA in Libby, there is nothing to which a court can defer other than the agency's briefs.

In any event, the Ninth Circuit's discussion of the deference issue only underscores the need for this Court's review. The Ninth Circuit frankly admitted that it could not reconcile this Court's precedents in this area, particularly on the degree of judicial deference due to informal agency adjudications. *See* App. 19a ("Our decisions understandably have been conflicted as to whether *Chevron* deference only applies upon formal rulemaking and whether lesser deference applies in other

situations.") (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001)). As the Ninth Circuit observed, with some understatement, "[f]ollowing *Mead*, the continuum of agency deference has been fraught with ambiguity." App. 19a; *see also id.* at 20a ("*Mead* ... further obscured the already murky administrative law surrounding *Chevron*.") (internal quotation omitted). Ironically, Grace agrees with the Ninth Circuit's ultimate conclusion that resolution of the deference issue should not affect the result in this case, *see* App. 21a, but for the opposite reason: while the Ninth Circuit concluded that the entire Libby action may be characterized as a removal action regardless of the standard of deference, Grace believes that the entire Libby action may *not* be characterized as a removal action regardless of the standard of deference. Given the Ninth Circuit's open confusion on the deference issue, though, at the very least that issue confirms the need for this Court's review.

In the final analysis, the Ninth Circuit has seriously distorted an important federal statute. As the Eighth and Tenth Circuits have recognized, CERCLA's remedial safeguards are not technicalities, but vital checks on the awesome power to present someone else with the bill for an environmental cleanup. *See Gates Rubber*, 175 F.3d at 1181-82; *Kalman W. Abrams*, 155 F.3d at 1024. In the Ninth Circuit, however, a party can now avoid those checks by simply identifying some removal component within a remedial action, and then shoehorning the entire response action at the site into the removal category. The upshot is that, in the Ninth Circuit at least, the EPA now has *carte blanche* under CERCLA to use its removal authority not only to contain or abate an immediate environmental hazard, but also to remediate a site without complying with the procedural requirements for remedial actions.

By underscoring that—for better or worse—the removal/remedial distinction underlying CERCLA is

"critical," App. 8a, the Ninth Circuit also underscored that this distinction should be clear. If any lesson may be drawn from the decision below, it is that the distinction is not clear. Although this Court has alluded to the distinction in passing, *see Exxon*, 475 U.S. at 360, it has never analyzed it. Given CERCLA's signal role in American environmental law, and the billions of dollars expended under that statute, Grace respectfully submits that the decision below is worthy of this Court's review.

The bottom line here is that if EPA is allowed to characterize the entire Libby response action (which to date has cost over $120 million and lasted over six years) not only as a removal action, but as an "emergency" removal exempt from the statutory caps, then CERCLA's substantive and procedural protections are a dead letter, and the agency has unfettered power to spend other people's money. That result would be a defeat not only for sound environmental policy but also for the rule of law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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