No. 08-683

In the Supreme Court of the United States

F. DOUGLAS CANNON, ET AL., PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' suit was barred by 42 U.S.C. 9613(h), a provision that is contained in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, and that generally precludes federal courts from adjudicating challenges to removal or remediation actions under CERCLA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 538 F.3d 1328. The opinion of the district court (Pet. App. 19-28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2008. The petition for a writ of certiorari was filed on November 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the President to initiate removal or remedial actions, consistent with the Na-

tional Contingency Plan, 40 C.F.R. Pt. 300, whenever there is a release of hazardous substances. 42 U.S.C. 9604(a)(1). In situations where the release of a hazardous substance is from a facility under the jurisdiction, custody, or control of the Department of Defense (DoD), the President has delegated his CERCLA authority to the Secretary of Defense (Secretary). See 42 U.S.C. 9615 (authorizing the President "to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter"); Exec. Order No. 12,580, § 1(d), 3 C.F.R. 194 (1987); 40 C.F.R. 300.5 (definition of "lead agency").

In addition to his CERCLA authority, the Secretary has authority pursuant to the Act of Oct. 17, 1986 (DERP), Pub. L. No. 99-499, 100 Stat. 1725 (10 U.S.C. 2700 *et seq.*), to carry out all response actions with regard to releases of hazardous substances from any facility or site currently under the jurisdiction of DoD, as well as any "facility or site which was under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances." 10 U.S.C. 2701(c)(1)(B). The latter type of properties are known as Formerly Used Defense Sites (FUDS). DERP requires the Secretary to develop an inventory of all defense sites that "are known or suspected to contain unexploded ordinance, discarded military munitions, or munitions constituents." 10 U.S.C. 2710(a)(1). The Secretary must assign to each such defense site a "relative priority for response activities * * * based on the overall conditions at the defense site." 10 U.S.C. 2710(b)(1).

All DERP response actions must be carried out in accordance with the provisions of CERCLA. 10 U.S.C. 2701(a)(2) and (c)(1). Thus, FUDS cleanup actions are conducted under the relevant provisions of both CERCLA and DERP, utilizing DERP appropriations. See 10 U.S.C. 2703(a)(5) (establishing the "Environmental Restoration Account, Formerly Used Defense Sites"); 10 U.S.C. 2703(c)(1) (stating that the purpose of the DERP accounts is for the environmental restoration functions of the Secretary under DERP).

b. The statutory provision most directly at issue in this case is 42 U.S.C. 9613(h), which is contained in CERCLA and addresses the timing of judicial review of removal and remedial actions. Section 9613(h) provides, subject to certain exceptions that are not implicated in this case, that "[n]o federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship * * *) * * * to review any challenges to removal or remediation action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title." *Ibid.*

2. In 1945, the United States Army leased 1416 acres in Tooele County, Utah (the property), from Jesse Fox Cannon, petitioners' grandfather, for a six-month period. The property was adjacent to the Army's Dugway Proving Grounds. During the lease period, the Army used the property to test various methods "of battling Japanese forces entrenched in caves in the Pacific Islands." *Cannon* v. *United States*, 338 F.3d 1183, 1184 (10th Cir. 2003). As part of that testing, the Army used incendiary devices and chemical weapons, and it dropped conventional bombs on the property as well. Pet. App. 3-4.

After the Army ceased operations on the property, petitioners' grandfather filed three administrative claims with the government regarding the condition in which the property had been left. The first two claims (filed in September and October 1945, respectively), were granted. In 1950, Jesse Fox Cannon filed a third administrative claim, which was denied. Pet. App. 4.

In 1998, two of Jesse Fox Cannon's grandchildren (petitioners Margaret Louise Cannon and Allan Robert Cannon), who together then owned 75% of the property, filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680. In 2003, the court of appeals reversed a judgment in favor of the plaintiffs and ordered the district court to dismiss the suit because the statute of limitations barred their claims. Pet. App. 5 (citing *Cannon*, 338 F.3d at 1184, 1189-1194).

3. a. In November 2005, petitioners filed suit against the United States, DoD, the Department of the Army, and the Secretary (collectively, the United States) under the citizen-suit provisions of the Solid Waste Disposal Act (SWDA), 41 U.S.C. 6901 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. 706. Pet. App. 5-7. Petitioners sought a declaratory judgment that the United States had contaminated the property, violated various federal and state regulations, and unlawfully withheld and unreasonably delayed cleanup of the property. Petitioners also requested injunctive relief "including, but not limited to, an order for remediation of the solid and hazardous wastes disposed of on the Property by [the United States], as necessary to address the imminent and substantial endangerment to human health and the environment * * * and to restore the property to a safe and useful condition." *Id.* at 22.

b. Relying on Section 9613(h), the district court dismissed petitioners' suit for lack of subject-matter jurisdiction. Pet. App. 19-28. The court stated that it was "undisputed that the [Army Corps of Engineers (Corps)] had undertaken efforts to begin the site inspection process at" petitioners' property, "including having obligated funds for a contract for the work, providing a draft site inspection workplan to [petitioners] and the Utah Department of Environmental Quality ('UDEQ'), and soliciting rights-of-entry for properties involved in the investigation." *Id.* at 24.[1] The court concluded that "[t]hese actions fall within the statutory definition of 'removal,'" and "are also authorized pursuant to" 42 U.S.C. 9604(a). Pet. App. 24. The district court held that, for purposes of Section 9613(h)'s jurisdictional bar, "the activities undertaken and to be undertaken by the Corps" therefore "constitute a 'removal or remedial action selected under'" 42 U.S.C. 9604. See Pet. App. 24. The district court further determined that petitioners' suit was a "challenge" to that removal or remediation action "because the relief [petitioners] seek would have an impact on the FUDS process there." *Id.* at. 26.[2]

4. The court of appeals affirmed. Pet. App. 1-18. The court explained that Section 9613(h) "protects the execution of a CERCLA plan *during its pendency* from

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[1] The Secretary of Defense has delegated responsibility for the DERP/FUDS program to the United States Army, and the Secretary of the Army has delegated responsibility to the Corps. Pet. App. 25 n.4.

[2] The district court also observed that "[n]o party ha[d] suggested that any of the five exceptions to the withdrawal of jurisdiction" contained in Section 9613(h) was applicable here, and it concluded that none of those exceptions applied. Pet. App. 24-25; see *id.* at 9-10 (court of appeals stating that "[t]he parties concede that none of § 9613(h)'s exceptions apply").

lawsuits that might interfere with the expeditious clean-up effort," but "does not preclude actions to challenge a remedial plan *after* that plan has been completed." *Id.* at 8-9 (quoting *New Mexico* v. *General Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006)).

The court of appeals first concluded "that the Government had selected a removal action [with respect to petitioners' property] pursuant to its authority under [42 U.S.C. 9604]." Pet. App. 16; see *id.* at 10-17. The court explained that "the Government's authority to begin removal actions depends on 42 U.S.C. § 9604," and that Section 9604(a) "authorizes the President to take removal or other remedial action which the President 'deems necessary to protect the public health or welfare or the environment.'" *Id.* at 11 (quoting 42 U.S.C. 9604(a)). As the court further observed (*id.* at 11-12), Section 9604(b) in turn provides that "[w]henever the President is authorized to act pursuant to subsection (a)," he may undertake appropriate preparatory steps, including "investigations, monitoring, surveys, testing and other information gathering as he may deem necessary or appropriate to identify the existence and extent of" threats to public health or the environment, as well as "studies or investigations as he may deem necessary to plan and direct response actions." 42 U.S.C. 9604(b)(1); see 42 U.S.C. 9601(23) (defining the term "removal" as including "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances").

Based on that statutory language, the court of appeals determined "that a removal action is ongoing and * * * § 9613's jurisdiction strip applies, even if the Government has only begun to 'monitor, assess, and evaluate the release or threat of release of hazardous sub-

stances.'" Pet. App. 13 (quoting *Razore* v. *Tulalip Tribes*, 66 F.3d 236, 239 (9th 1995)). The court also concluded that, under that standard, "the Government's removal actions [in this case] are * * * sufficient to trigger § 9613(h)." *Id.* at 14. The court observed that "the Government has completed a preliminary assessment of [petitioners'] property," which included "compil[ing] historical records, interviews, and site surveys to determine the exact nature of the military testing conducted on [petitioners'] property" and preparing a draft report that "indicated that [petitioners'] property was in fact highly contaminated." *Ibid.*; see 40 C.F.R. 300.415(b)(4) and (4)(i) (providing that such a report must be prepared "[w]henever a planning period of at least six months exists before on-site activities must be initiated" and that it consists of "an analysis of removal alternatives for a site"). The court further noted that "the record * * * indicates that the Government was planning its site inspection while this suit was pending before the district court." Pet. App. 14.[3]

The court of appeals rejected petitioners' claim "that the Government has not selected a removal action until it has complied with the full panoply of the applicable regulations," that is, until the government has "conduct[ed] a site inspection, issue[d] an engineering evaluation and cost assessment report, take[n] public comments, and finally ma[d]e a decision about the removal action based on the administrative record." Pet. App. 15 (citing 40 C.F.R. 300.415). The court stated that "[n]othing in the statutory language suggests that Congress intended th[e] jurisdiction-stripping provision to apply

[3] The court of appeals denied the United States' request to take judicial notice of the final site inspection plan, explaining that the document was "not necessary for the resolution of this appeal." Pet. App. 14 n.6.

only once the Government has completed a substantial portion of its removal proceeding." *Id.* at 15-16. The court of appeals also held that petitioners' suit constitutes a "challenge," within the meaning of Section 9613(h), to the ongoing removal process. *Id.* at 17. The court explained that a grant of injunctive relief ordering the remediation of petitioners' property "would undoubtedly interfere with the Government's ongoing removal efforts." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the jurisdiction-stripping provision contained at 42 U.S.C. 9613(h) bars petitioners' suit. Petitioners' claims are based on the SWDA and the APA and therefore arise "under Federal law." *Ibid.* Petitioners do not contend that any of the exceptions listed in Section 9613(h)(1)-(5) is applicable here. See Pet. App. 9-10, 24-25. The only question, therefore, is whether this citizen suit, though not brought under CERCLA itself, nonetheless constitutes a "challenge[] to removal or remedial action selected under section 9604 of" Title 42. 42 U.S.C. 9613(h). As the court of appeals correctly determined, petitioners' suit is such a challenge and is therefore barred by Section 9613(h).[4]

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[4] Other courts of appeals have likewise held that Section 9613(h) bars challenges to ongoing removal or remedial action conducted under Section 9604 even when those challenges are brought under statutes other than CERCLA. See, *e.g.*, *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 331 (9th Cir.) ("The district court correctly determined that CERCLA Section 113(h) withholds federal jurisdiction to review citizen suits and actions brought under other, non-CERCLA

a. Contrary to petitioners' contention (Pet. 16-17), the Corps' activities constitute a "removal * * * action" within the meaning of 42 U.S.C. 9604. Section 9604(a)(1) authorizes the President to take removal or remediation actions that he deems "necessary to protect the public health or welfare or the environment." 42 U.S.C. 9604(a)(1). Section 9604(b), in turn, provides that "[w]henever the President is authorized to act pursuant to subsection (a)," the response may include "such *investigations*, monitoring, surveys, testing, *and other information gathering* as [the President] may deem necessary or appropriate to identify the existence and extent of the release or threat thereof," the nature of the hazardous substances involved, and the extent of the danger to the public health or the environment. 42 U.S.C. 9604(b)(1) (emphases added). The fact that those preliminary steps are themselves part of a "removal * * * action" is confirmed by 42 U.S.C. 9601(23), which defines the terms "remove" and "removal" to include "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances," as well as any "action taken under section 9604(b)." Accord *APWU* v. *Potter*, 343 F.3d 619, 624 (2d Cir. 2003) ("'Removal actions' are defined broadly to include not only the cleanup and removal [of hazardous substances], but also the undertaking of studies, investigations, testing and other information gathering activities.").

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statutes that challenge ongoing CERCLA cleanup actions."), cert. denied, 516 U.S. 807 (1995); *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1024 (3d Cir. 1991) (stating that, when it applies, Section 9613(h) "deprives [a federal court of jurisdiction] to hear claims under * * * any * * * statute[] that would interfere with EPA's clean-up actitivities on a Superfund site").

As the court of appeals correctly recognized, the "statutory definition of a removal action dictates that a removal action is ongoing," and that Section 9613(h)'s jurisdictional bar applies, "even if the Government has only begun to monitor, assess, and evaluate the release or threat of release of hazardous substances." Pet. App. 13 (internal quotation marks and citation omitted). Other courts have agreed that the existence of ongoing investigative activities is sufficient to trigger Section 9613(h). See, *e.g.*, *Hanford Downwinders Coal., Inc.* v. *Dowdle*, 71 F.3d 1469, 1477 (1995) (health assessment and surveillance activities constitute removal action), aff'd, 76 F.3d 385 (9th Cir. 1996); *Razore* v. *Tulalip Tribes*, 66 F.3d 236, 239 (9th Cir. 1995) (preliminary investigations under CERCLA's remedial investigation process); *APWU*, 343 F.3d at 624 (testing and investigation of possible anthrax contamination).

Under that standard, the Corps' activities with respect to petitioners' property constitute a removal action. The Corps has completed a preliminary assessment of the property, which involved an investigation to determine precisely what activities were conducted there during the final year of World War II. Pet. App. 14. At the time of the district court's decision, moreover, the Corps had set aside appropriated funds for the purpose of conducting a site survey, had provided a draft site inspection workplan to petitioners and the appropriate state authorities, and had begun soliciting rights-of-entry from owners of impacted properties. *Id.* at 24.

b. Petitioners contend (Pet. 19-20) that the Corps has not yet "selected" a removal action, and that Section 9613(h) therefore is inapplicable here, because the agency has not yet completed the full extent of the regu-

latory procedures, including a public comment period and the making of a final decision about how to complete the removal action. That argument, however, "unduly restricts the plain language of § 9613(h)." Pet. App. 15. As explained above, "a removal action is [an] ongoing" undertaking that begins as soon as the government "beg[ins] to 'monitor, assess, and evaluate the release or threat of release of hazardous substances.'" *Id.* at 13 (quoting *Razore*, 66 F.3d at 239). "Nothing in the statutory language suggests that Congress intended [Section 9613(h)] to apply only once the Government has completed a substantial portion of" an ongoing removal proceeding. *Id.* at 15-16; accord *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1023 (3d Cir. 1991) (holding that Section 9613(h)'s jurisdictional bar applied where the EPA had communicated an intent to begin preliminary studies that might or might not lead to other CERCLA response activities); *Razore*, 66 F.3d at 239 (holding that Section 9613(h) barred the plaintiff's claims where investigations were ongoing under a Remedial Investigation and Feasibility Study, which is an interim step in a removal action).

c. The court of appeals also correctly rejected petitioners' contention (Pet. 14-16) that this suit does not constitute a "challenge" to a removal action. As the court of appeals explained, a suit constitutes such a "challenge" if it would "interfere with the Government's ongoing removal efforts," Pet. App. 17, or "relate[] to the goals of the cleanup," *New Mexico* v. *General Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006); accord *Broward Gardens Tenants Ass'n* v. *EPA*, 311 F.3d 1066, 1072-1073 (11th Cir. 2002); *Costner* v. *URS Consultants, Inc.*, 153 F.3d 667, 675 (8th Cir. 1998); *Razore*, 66 F.3d at 239.

Petitioners asked the district court to enter an injunction "order[ing] [the] remediation of" their property "as necessary to address the imminent and substantial endangerment to human health and the environment that currently exists and to restore the property to a safe and useful condition." Pet. App. 22. That form of relief would clearly "relate to the goals of the cleanup" and risk "substitut[ing] a federal court's judgment for the authorized judgment of" the Corps about what steps are necessary and appropriate with respect to petitioners' property. *General Elec. Co.*, 467 at 1249; see *Hanford Downwinders Coal.*, 71 F.3d at 1482 (holding that requests for injunctive relief qualify as challenges to CERCLA response activity). The Corps' current investigations and studies are a necessary step in any removal or remedial action, see 40 C.F.R. Pt. 300, and those activities will enable the agency to make informed decisions regarding any additional action required to clean up the property. Because "challenges to the procedure employed in selecting a remedy * * * impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute[,] the statute necessarily bars these challenges." *Schalk* v. *Reilly*, 900 F.2d 1091, 1097 (7th Cir.), cert. denied, 498 U.S. 981 (1990).

2. Contrary to petitioners contention (Pet. 21-24), the court of appeals' decision in this case does not conflict with the Seventh Circuit's decision in *Frey* v. *EPA*, 403 F.3d 828 (2005). In *Frey*, the EPA had completed the process of formally selecting a particular method for remediating the property in question, and it had completed the implementation of its chosen approach more than five years before the date of the court of appeals' decision. See *id.* at 831-832. The Seventh Circuit there-

fore framed the issue before it as "whether the record shows that only a stage [of a remedial action] has been completed, or if it shows that an entire remedial measure has been complete." *Id.* at 834. The *Frey* court determined that, on the facts before it, the remedial action had been completed for purposes of Section 9613(h)'s jurisdictional bar because the EPA had finished its excavation and there was "no evidence of any kind that EPA will be doing anything specific in the future with this site." *Id.* at 835.

This case differs from *Frey* in two material respects. First, unlike the plaintiffs in *Frey*, petitioners do not contend that the Corps has *completed* a removal or remediation action with respect to their property. Because the court of appeals in this case recognized that "Section 9613(h) * * * does not preclude actions to challenge a remedial plan *after* that plan has been completed," Pet. App. 9, its decision does not suggest that Section 9613(h) would bar a suit under the circumstances that the Seventh Circuit found to exist in *Frey*. Accord *Schalk*, 900 F.2d at 1095-1095 (relying on Section 9613(h) to affirm dismissal of a suit involving the same property at issue in *Frey* where remedial action had not yet been completed). Second, whereas the Seventh Circuit in *Frey* understood the government to be arguing that the Section 9613(h) bar applies "as long as [EPA] has any notion that it might, some day, take further unspecified action with respect to a particular site," here the Corps has taken a number of concrete steps that together provide "objective indicator[s]" of an ongoing process. *Frey*, 403 F.3d at 834-835. As the courts below explained, at the time this case was pending in the district court, funds had been allocated for the work, and the Corps had conducted a preliminary assessment of

the property and had issued a draft site inspection work plan. Pet. App. 14, 24. Those activities clearly constitute removal actions as that term is defined in CERCLA. See pp. 9-10, *supra*.

The court of appeals stated without explanation that its decision "splits with the Seventh Circuit's holding in *Frey*." Pet. App. 16 n.7. For the reasons stated above, however, the different outcomes here and in *Frey* are attributable to factual differences between the two cases. Petitioners read *Frey* to hold that Section 9613(h) does not apply during the investigative phase of a remedial action unless the government has identified some objective basis for concluding that its remedial activities will proceed at a reasonable pace. See Pet. 22. Even if that reading is accurate, the factbound question whether the government is proceeding with reasonable dispatch in this case would not warrant this Court's review.

3. Petitioners contend (Pet. 25-28) that the court of appeals' decision in this case does not further the overriding "purpose of the bar on preenforcement review." Pet. 25. They argue that the circumstances of this case "cry[] out for a federal court to assert jurisdiction," Pet. 26, even if it means crafting a judicially created "exception" to "[t]he bar on preenforcement review codified in" Section 9613(h), Pet. 28. That contention lacks merit.

"Federal courts are courts of limited jurisdiction," and they "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen* v. *Guardians Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citation omitted). In addition, "[t]he best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *West Va. Univ.*

Hosps., Inc. v. *Casey*, 499 U.S. 83, 98 (1991). A federal court may not adjudicate a case over which Congress has divested it of jurisdiction, even if the court concludes that the purposes of the relevant jurisdictional bar are not implicated in the particular circumstances before it.

In any event, this suit squarely implicates the considerations that prompted Section 9613(h)'s enactment. In enacting Section 9613(h), "Congress intended to prevent time-consuming litigation which might interfere with CERCLA's overall goal of effecting the prompt cleanup of hazardous waste sites." *United States* v. *City of Denver*, 100 F.3d 1509, 1514 (10th Cir. 1996) (citation omitted). Allowing petitioners' suit to proceed would disserve that congressional intent by threatening to disrupt, and thus slow down, cleanup of formerly used defense sites on a national basis.

In addition, DERP instructs the Secretary of Defense to "assign[] the response priority for a" given site based "primarily [on] factors relating to health and safety," 10 U.S.C. 2710(b)(2), and it directs the Secretary to consider eight specified criteria in making those determinations, 10 U.S.C. 2710(b)(2)(A)-(H). Petitioners' suit threatens to distort that evidence-based process for determining how to expend the finite resources available for cleanup operations. If petitioners' attempt to obtain a judicial decree ordering the immediate cleanup of their property were to succeed, it would encourage any property owner who was dissatisfied with the pace of the Corps' actitivities or his place in the line to file suit in the hopes of being moved to the front.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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