No. 05-1269

In the Supreme Court of the United States

EXIDE TECHNOLOGIES, FKA EXIDE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

GREER S. GOLDMAN
JOHN T. STAHR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the de facto merger rule should be applied as a matter of federal common law or Pennsylvania law for the purpose of determining whether petitioner is liable as a corporate successor under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A44) is reported at 423 F.3d 294. The memoranda of the district court (Pet. App. A45-A72) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2005. A petition for rehearing was denied on November 4, 2005 (Pet. App. A80-A81). On January 20, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including April 3, 2006, and the petition was filed on March 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States sued petitioner Exide Technologies to recover the government's costs of responding to the improper disposal of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq*. The United States District Court for the Eastern District of Pennsylvania ruled that petitioner was liable as the corporate successor of the entity that disposed of the hazardous substances. Pet. App. A45-A79. The court of appeals affirmed. *Id*. at A1-A44. The majority concluded that petitioner was liable as a successor under the de facto merger rule, which the majority applied as a matter of federal law. *Id*. at A1-A27. Judge Rendell, concurring in part and dissenting in part, reached the same result by applying the same de facto merger rule as a matter of state law. *Id*. at A27-A44.

1. Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). That Act "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). It "both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted), overruled on other grounds, *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste con-

tamination may be forced to contribute to the costs of cleanup." *Bestfoods*, 524 U.S. at 56 n.1 (quoting *Pennsylvania* v. *Union Gas Co.*, 491 U.S. at 21).

CERCLA provides the President, acting primarily through the Environmental Protection Agency (EPA), with several alternatives for cleaning up sites contaminated with hazardous substance.[1] As one alternative, EPA can itself undertake response actions, using the Hazardous Substances Superfund. See CERCLA § 104, 42 U.S.C. 9604 (2000 & Supp. III 2003); *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004). The United States can then recover EPA's response costs from responsible parties through a cost recovery action. See CERCLA § 107(a), 42 U.S.C. 9607(a); *Cooper Indus.*, 543 U.S. at 161.[2]

Section 107 of CERCLA "sets forth the scope of the liabilities that may be imposed on private parties and the defenses that they may assert." *Key Tronic*, 511 U.S. at 814. Under Section 107(a)(1)-(4)(A), responsible parties are liable for "all costs of removal or remedial action incurred" by the United States "not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(1)-(4)(A); see *Cooper Indus.*, 543 U.S. at 161.[3]

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[1] CERCLA grants authority to the President, who has delegated various powers to EPA. See Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

[2] CERCLA designates cleanup actions as either "removal" actions or "remedial" actions, and it designates either type of cleanup as a "response" action. CERCLA § 101(23), (24) and (25), 42 U.S.C. 9601 (23), (24) and (25).

[3] The national contingency plan (NCP), promulgated as a regulation pursuant to Section 105, 42 U.S.C. 9605, prescribes requirements for selection and implementation of removal and remedial actions. 40 C.F.R. Pt. 300.

Section 107(a) identifies four categories of responsible parties. 42 U.S.C. 9607(a). They include a person who—by contract, agreement, or otherwise—arranged for disposal or treatment of hazardous substances owned or possessed by such person at any facility owned or operated by another party. See 42 U.S.C. 9607(a)(3).

2. The United States brought this action to recover EPA's costs in responding to hazardous substance contamination at the Hamburg Lead Superfund Site in the Borough of Hamburg, Berks County, Pennsylvania. From the 1940s until early 1966, the Price Battery Corporation (Price) operated a lead-acid battery manufacturing plant in Hamburg that used lead plates from old batteries. Price employees brought the used batteries to the Hamburg plant, split them open, and reused the plates as part of the process of creating new batteries. Price's employees then dumped the junk battery casings, containing lead residue, at various locations in and around Hamburg. Pet. App. A2, A46.

Beginning in August 1993, EPA conducted a removal assessment at two locations where Price had dumped broken battery casings, and EPA found elevated levels of lead far exceeding the applicable removal action levels. See Pet. App. A2, A48. At those and other later-discovered locations, EPA conducted various response actions, including removal of battery casings, excavation and transportation of lead contaminated soil and debris off-site for treatment, installation of paving and soil caps, and additional monitoring. *Ibid.* EPA has generally completed active work, but continues to monitor the locations.

3. Price no longer exists. On February 11, 1966, General Battery Corporation (General) purchased Price and took over operation of the Hamburg Plant. See Pet.

App. A2-A3. Under the purchase agreement, General purchased virtually all of Price's assets, *id.* at A3 & n.1, and General assumed all of Price's existing obligations, *ibid.*, including "its existing contracts of every kind and description, oral or written," *id.* at A62. The purchase agreement and related documents stated that General intended to operate the business of Price as a separate division, identified as "new Price," and Price agreed to change its name, effective as of closing, to Price Investment Co. See *ibid.*

In exchange, William F. Price, Sr., the chairman of the board and sole shareholder of Price, received approximately $2.95 million in cash, and 100,000 shares of General's common stock valued as of the closing at approximately $1 million. Pet. App. A3. Price, Sr.'s stock interest represented approximately 4.537% of General's outstanding shares. *Ibid.* That amount was comparable to the holdings of General's cofounders. *Ibid.* The purchase agreement required that Price, Sr., serve with the co-founders on General's board of directors, and Price, Sr., also served on General's executive committee. *Ibid.*; *id.* at A60.

In 2000, General merged with petitioner, and petitioner has remained in business as the surviving corporation. Pet. App. A2, A48.

4. The United States filed this action against General on June 15, 2000, asserting that Price was liable under Section 107(a)(3) of CERCLA for response costs as a party that arranged for disposal of hazardous substances and that General was a successor to the liabilities of Price. See C.A. App. 47 ¶ 4. Upon General's merger with petitioner, the United States filed an amended complaint, naming petitioner as successor to General's liabilities. See *id.* at 47 ¶ 5. Petitioner did not

contest that it is the successor to General's CERCLA liabilities, or that Price arranged for the disposal of hazardous substances, but it did contest that General was a successor to Price's liabilities.

The district court granted summary judgment to the United States on the issue of liability, holding that General was a successor to Price. Pet. App. A45, A71-A72. The court held, in accordance with Third Circuit precedent, that general federal common law rather than state law governs successor liability. *Id.* at A51-A58; see *Smith Land & Improvement Corp.* v. *Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989).[4] The court rejected the contention that *Smith Land* is no longer valid in light of this Court's subsequent decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), *Atherton* v. *FDIC*, 519 U.S. 213 (1997), and *United States* v. *Bestfoods*, 524 U.S. 51 (1998). Pet. App. A55-A57.

The court also held that it need not resolve whether federal common law should reflect the traditional de facto merger test or the broader "substantial continuity" test, see *United States* v. *Carolina Transformer Co.*, 978 F.2d 832, 837-838 (4th Cir. 1992), because General was responsible for Price's liability under either standard. Pet. App. A57-A58. With respect to the de facto merger

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[4] The parties agreed that, if state law applied, Pennsylvania law would govern the Price-General transaction. The hazardous substance contamination and Price's conduct occurred in Pennsylvania, and Price was organized under the laws of Pennsylvania. See C.A. App. 71¶ 4(a) (purchase agreement). Thus, Pennsylvania "had the most significant relationship to the events and parties and the greatest interest in the successor liability of businesses located, and committing environmental torts, in Pennsylvania." *Smithkline Beecham Corp.* v. *Rohm & Haas Co.*, 89 F.3d 154, 162 n.5 (3d Cir. 1996).

rule, the court concluded that it should consider the "traditional" four factors to determine whether the purchase transaction was a de facto merger. *Id.* at A58-A59 (citing *Smithkline Beecham Corp.* v. *Rohm & Haas Co.*, 89 F.3d 154, 162 n.6 (3d Cir. 1996) (identifying the four factors for a de facto merger under Pennsylvania law); *Philadelphia Elec. Co.* v. *Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir.), cert. denied, 474 U.S. 980 (1985) (citing the same factors as looked to by "most courts")).

The district court concluded that, under the four-factor test, it must determine whether: (1) there is a continuation of the enterprise; (2) there is a continuity of shareholders such that the shareholders of the seller become a "constituent part" of the purchasing corporation; (3) the seller ceased its ordinary business operations, liquidated and dissolved as soon as legally and practically possible; and (4) the purchasing corporation assumed the obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations. Pet. App. A58-A59. The court made detailed findings as to each element, concluding that the Price-General transaction was a de facto merger. *Id.* at A58-A67.

After finding petitioner liable, the district court entered a final judgment in accordance with a joint stipulation concerning costs, under which petitioner agreed that it would be liable for past response costs of $6,475,529.20, and also liable for future costs. Pet. App. A78-A79.

5. The court of appeals affirmed. Pet. App. A1-A44. Applying *Smith Land*, the court held that CERCLA successor liability is determined as "a matter of uniform federal law, as derived from 'the general doctrine of successor liability in operation in most states.'" *Id.* at A6

(quoting *Smith Land*, 851 F.2d at 92, and citing *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993)). The court of appeals agreed with the district court that *Smith Land* has not been undermined by *O'Melveny*, *Atherton*, or *Bestfoods*, or by the subsequent decisions of other courts of appeals in *United States* v. *Davis*, 261 F.3d 1, 54 (1st Cir. 2001) (rejecting the "substantial continuity" test applied as federal common law), and *Atchison, Topeka & Santa Fe Railway* v. *Brown & Bryant, Inc.*, 132 F.3d 1295 (9th Cir. 1997), amended, 159 F.3d 358 (9th Cir. 1998) (also rejecting the "substantial continuity" test). Pet. App. A8-A11, A16.

The court of appeals concluded that the de facto merger rule, as followed in most States, requires application of the four-factor test set forth by the district court. Pet. App. A19-A20 (citing 15 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 7124.20, at 302 (perm. ed., rev. vol. 1999) (Fletcher) (stating majority rule and collecting cases)). The court also found that the majority rule "generally tracks the inquiry under Pennsylvania law." *Id.* at A20 (citing *Smithkline Beecham*, 89 F.3d at 162 n.6 (the "requirements for a *de facto* merger in Pennsylvania are" the four cited factors)).

The court of appeals examined the Price-General transaction in light of the four-factor test and affirmed the district court's conclusion that the transaction constituted a de facto merger. Pet. App. A20. The court concluded that the transaction resulted in continuity of the enterprise because General purchased all of Price's equipment and inventory, assumed tenancy of its plant, continued production of essentially the same products, sold to the same customers, and retained key personnel.

Id. at A20-A21. The court also concluded that the transaction resulted in continuity of shareholders because the shareholder of the seller corporation became "a constituent part of the purchasing corporation." *Id.* at A22 (quoting 15 Fletcher § 7124.20, at 302; *Smithkline Beecham*, 89 F.3d at 162 n.6). The court further concluded that Price "ceased operations, liquidated, and dissolved as soon as legally and practically possible," *id.* at A24, and that the Price-General agreement provided expressly that General "would assume Price Battery's contractual obligations and all other obligations appearing on Price Battery's balance sheet," *id.* at A26.

The court of appeals rejected, however, the district court's alternative ground for its ruling based on the "substantial continuity" doctrine. Pet. App. A27. The court of appeals concluded that the substantial continuity test creates "a more expansive rule of liability than is accepted in most states" and that, in light of *Bestfoods*, that test "is untenable as a basis for successor liability under CERCLA." *Ibid.* (citing *New York* v. *National Serv. Indus., Inc.*, 352 F.3d 682, 687 (2d Cir. 2003)).

Judge Rendell concurred in part and dissented in part. Pet. App. A28-A44. She agreed with the majority's determination "that the fact pattern presented was a *de facto* merger such that successor liability for purposes of CERCLA exists," and she concurred in the court's "ultimate ruling." *Id.* at A28. Judge Rendell disagreed, however, with the majority's view that "the issue of successor liability in this context is controlled by federal common law." *Ibid.* She would have reached the same result under Pennsylvania law. *Id.* at A44.

ARGUMENT

The court of appeals correctly ruled that petitioner is liable under CERCLA as a corporate successor pursuant to the de facto merger rule. In reaching that conclusion, the court expressed its view that Congress has directed the courts to apply a uniform federal rule of successor liability, but both the legal standard and the result would be the same if the de facto merger rule were applied as a matter of state law. The court of appeals' reasoning is consistent in result with that of other courts of appeals that have applied state rules of decision to determine successor liability. Its decision presents no conflict on the specific question at issue—whether petitioner is liable as a successor. Accordingly, there is no warrant for this Court's review.

1. Petitioner incorrectly contends (Pet. 5-9) that the court of appeals' decision in this case conflicts with decisions of this Court respecting the application of federal common law. This Court has cautioned against the unwarranted creation of federal common law, but it has not ruled that courts may never find a federal rule of decision appropriate. The Court has not addressed the question whether successor liability under CERCLA is governed by federal or state law, and the court of appeals' resolution of that issue, whether correct or not, presents no conflict with any decision of this Court.

This Court has recognized that, while federal courts routinely identify federal rules of decision in the course of interpreting federal statutes, they generally do not have license to engage in "the judicial 'creation' of a special federal rule of decision." *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997); see *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994); cf. *Empire Healthchoice Assur-*

ance, Inc. v. *McVeigh*, No. 05-200 (June 15, 2006), slip op. 10-11. If Congress has not expressly displaced an otherwise applicable state rule of decision, the courts may create an overriding federal rule only if there is "a significant conflict between some federal policy or interest and the use of state law." *Atherton*, 519 U.S. at 218 (quoting *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)); see *O'Melveny*, 512 U.S. at 87. This Court concluded that there was no need for a judicially created federal rule of decision in the situations posed in *Atherton* and *O'Melveny*, which each involved liability standards pertaining to federally insured savings institutions.

This case involves the liability of responsible parties under CERCLA for the government's costs of environmental cleanup. While CERCLA sets out a general standard for liability, see CERCLA § 107(a), 42 U.S.C. 9607(a), it does not specifically address when a corporate successor of a concededly liable party may be subject to CERCLA liability. The question has therefore arisen whether the courts should adopt a federal rule of successor liability, as a matter of federal common law, or whether the courts should apply the relevant state law rule of successor liability. This Court's decision in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), which addressed the liability of a parent corporation for the actions of its subsidiary, suggested, without deciding, that federal courts adjudicating such issues under CERCLA should usually look to the general corpus of state law rules respecting corporate liability.[5]

[5] The Court ruled in *Bestfoods* that a corporate parent that "actively participated in, and exercised control over, the operations of the facility itself," may be held "directly liable in its own right," under Section 107(a) of CERCLA, as an operator of a subsidiary's facility. 524 U.S.

Petitioner contends that the court of appeals' decision in this case to adopt a federal common law rule of successor liability conflicts with *Bestfoods*, *Atherton*, and *O'Melveny*. The court of appeals' decision to apply a federal common law rule, rather than the applicable Pennsylvania rule of successor liability, is arguably in tension with those decisions, which each caution against the adoption of federal common law rules that would displace established state law standards. The court of appeals' decision, however, plainly does not conflict with any of those decisions, because none of them addresses the application of federal common law in the specific context of successor liability under CERCLA. This Court has never had occasion to address the application of federal common law in that context, and while the court of appeals' decision might appear, at an abstract level, to depart from this Court's general teachings, it does not present a conflict warranting this Court's review.

2. Petitioner incorrectly asserts (Pet. 9-11) that the court of appeals' decision conflicts with decisions of the

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at 55. The Court added, with respect to corporate veil piercing, that CERCLA is "like many another congressional enactment in giving no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute,' and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" *Id.* at 63 (citation omitted and brackets in original), quoting *United States* v. *Texas*, 507 U.S. 529, 534 (1993). The Court, however, expressly declined to address whether "in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing," because that question "is not presented in this case." *Id.* at 63 n.9.

First, Second, and Ninth Circuits addressing successor liability. See *New York* v. *National Servs. Indus., Inc.*, 352 F.3d 682, 686-687 (2d Cir. 2003); *United States* v. *Davis*, 261 F.3d 1, 53-54 (1st Cir. 2001); *Atchison, Topeka & Santa Fe Ry.* v. *Brown & Brant, Inc.*, 132 F.3d 1295 (9th Cir. 1997), amended, 159 F.3d 358, 362-364 (9th Cir. 1998). Those decisions all rejected the "substantial continuity" theory of CERCLA-based successor liability. The court of appeals' decision in this case, which also expressly rejected the "substantial continuity" theory of CERCLA-based successor liability, see Pet. App. A27 & n.12, does not create a conflict with those decisions.

a. Before this Court's decision in *Bestfoods*, several courts of appeals had adopted the substantial continuity theory as a CERCLA-specific federal common law rule. See *B.F. Goodrich* v. *Betkoski*, 99 F.3d 505, 518-520 (2d Cir. 1996), cert. denied, 524 U.S. 926 (1998); *United States* v. *Carolina Transformer Co.*, 978 F.2d 832, 837-838 (4th Cir. 1992). As the court of appeals in this case explained, the substantial continuity doctrine provides a broader basis for liability than traditional successor liability tests because, most significantly, it eliminates the requirement under the de facto merger rule of a continuity of shareholders. Pet. App. A27.

Following this Court's decision in *Bestfoods*, the First, Second, and Ninth Circuits declined to employ the substantial continuity doctrine because it departs from traditional common law principles. See *National Servs. Indus.*, 352 F.3d at 686 (the substantial continuity test "is not a sufficiently well established part of the common law of corporate liability to satisfy *Bestfoods*' dictate that common law must govern"); *Davis*, 261 F.3d at 53-54 (accord); *Atchison*, 159 F.3d at 364 (determining not

"to extend the 'mere continuation' exception to include the broader notion of a 'substantial continuation'").

The court of appeals in this case expressly agreed that the substantial continuity doctrine, which "creates a more expansive rule of liability than is accepted in most states," does not provide an appropriate basis for a federal common law rule of CERCLA-based successor liability. Pet. App. A27 & n.12. Citing *Bestfoods*, the court concluded that "CERCLA does not, *sub silentio*, abrogate fundamental common law principles of indirect corporate liability" and that the substantial continuity doctrine is "untenable as a basis for successor liability under CERCLA." *Ibid.* The court of appeals thus reached the same result as the First, Second, and Ninth Circuits in rejecting the substantial continuity theory as a basis for CERCLA-based successor liability, and its decision accordingly creates no conflict with the decisions of those circuits.[6]

b. Petitioner nevertheless asserts that the court of appeals' decision gives rise to a conflict because that court ultimately concluded that petitioner should be subject to CERCLA liability as a successor, under the traditional de facto merger test followed by most States, as a matter of federal common law. Pet. 10-11. Petitioner urges that this Court's review is warranted because, if the court of appeals had adhered to the reasoning of the First, Second, and Ninth Circuits, it would have applied the de facto merger test as a matter of state law. *Ibid.*

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[6] Although the United States relied on the substantial continuity doctrine as an alternative basis for liability in the district court, Pet. App. A52-A53, the United States did not defend the district court's invocation of that doctrine in the court of appeals, see *id.* at A27 n.11, and it has not sought review of the court of appeals' rejection of that theory of liability.

The fact remains, however, that the courts of appeals would all apply the *same* test on the facts of this case. This Court does not grant review to resolve inconsequential inconsistencies among the courts of appeals with respect to their reasoning. See, *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'" (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956))).

3. Petitioner additionally urges (Pet. 11-14) that the court of appeals' decision to apply the de facto merger test as a matter of federal law, rather than state law, presents an important question in its own right that warrants this Court's review. To the contrary, however, that issue is of no practical importance because its resolution in this case would not change the result. As the district court and all members of the court of appeals panel recognized, the district court would have applied the same four-factor test under Pennsylvania law. See Pet. App. A19-A20 (majority decision); *id.* at A44 (Rendell, J., concurring in part and dissenting in part); *id.* at A51-A52 (district court).

As the court of appeals explained, it derived its de facto merger test from the four-factor standard followed by most States. See Pet. App. A19-A20. That test "generally tracks the inquiry under Pennsylvania law." *Id.* at A20; see *Smithkline Beecham Corp.* v. *Rohm & Haas Co.*, 89 F.3d 154, 162 n.6 (3d Cir. 1996) (the "requirements for a *de facto* merger in Pennsylvania" are the same four cited elements); see *Commonwealth* v. *Lavelle*, 555 A.2d 218, 227-228 (Pa. Super. Ct. 1989) (setting forth the four factors). Judge Rendell similarly concluded that there is no conflict between Pennsylvania law and the majority state law rule, observing that "we

need not abandon Pennsylvania law." Pet. App. A44. The district court agreed. See *id.* at A51-A52. The Third Circuit has since reaffirmed that same four-factor test in applying the de facto merger rule under Pennsylvania law. *Berg Chilling Sys., Inc.* v. *Hull Corp.*, 435 F.3d 455, 468-469 (2006) (citing *Philadelphia Elec. Co.* v. *Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir. 1985) (applying Pennsylvania law), cert. denied, 474 U.S. 980 (1985)).

The court of appeals carefully examined the district court's detailed findings under each element of the test and affirmed the district court's conclusion that "the de facto merger criteria are satisfied." Pet. App. A26. Judge Rendell, in concurring as to petitioner's liability, also reached that conclusion, finding that "the fact pattern presented was a *de facto* merger" establishing successor liability. *Id.* at A28. Thus, the majority and Judge Rendell clearly applied the same test, and reached the same result, in concluding that petitioner was liable as a successor.

This Court does not grant certiorari to resolve an asserted conflict among courts of appeals where the resolution of that conflict would not affect the ultimate outcome of the case before it. See Robert L. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002) (citing this Court's denial of a writ of certiorari in *Sommerville* v. *United States*, 376 U.S. 909 (1964), as an example of a case in which "the resolution of the conflict could not change the result reached below, since the petitioner would be liable under either federal or state law"). Every judge that has reviewed this case has correctly concluded that the outcome would be the same whether the de facto merger standard is applied as a uniform federal rule or as Pennsylvania law. There accordingly is no warrant for this Court's review.

4. Petitioner argues (Pet. 14-17) that the district court and the court of appeals erred in concluding that the transaction between General and Price constituted a de facto merger under the prevailing common law standard reflected in Pennsylvania law. Petitioner is mistaken, but in any event, that issue, which rests on a fact-specific application of common law principles, does not present a question warranting this Court's review.

Petitioner contends (Pet. 15) that the court of appeals' application of the de facto merger test diverges from Pennsylvania law because General's stock payment to William Price, Sr., constituted 4.537% of its outstanding shares, which petitioner views as inadequate to establish continuity of shareholders under the de facto merger test reflected in Pennsylvania law. Pennsylvania, like most other States, however, provides that a continuity of shareholders exists if the purchasing corporation pays with shares of its stock such that the shareholders of the seller "become a constituent part of the purchasing corporation." *Smithkline Beecham*, 89 F.3d at 162 n.6; see *Berg Chilling Sys.*, 435 F.3d at 469; *Philadelphia Elec. Co.*, 762 F.2d at 310. The district court and the court of appeals in this case applied precisely that test. Pet. App. A24, A64-A65.[7]

Petitioner argues (Pet. 15) that the "transfer of less than a controlling interest" is insufficient to establish a

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[7] Petitioner's assertions (Pet. 14-15) that no Pennsylvania court has found a de facto merger "without" a stock transfer, and that the "absence" of a transfer is "fatal" or at least creates a "strong presumption" against a de facto merger, are irrelevant because in this case there was a stock transfer. See *Berg Chilling Sys.*, 435 F.3d at 469 (holding under Pennsylvania law that there is "a strong presumption against imposing successor liability" where there is "no stock transfer").

continuity of shareholders.[8] But the state courts, including the courts of Pennsylvania, have not required any minimum percentage stock transfer or any particular stock-to-cash ratio for a transaction. Pet. App. A23 & nn.9-10 (discussing cases).[9] Rather, the courts determine on the facts of a given transaction whether the seller shareholders have become a "constituent part" of the purchasing corporation. See *id.* at A20, A58-A59.[10] The district court here undertook that analysis and correctly concluded that Price, Sr., became a "constituent part" of General. See *id.* at A64-A65.[11]

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[8] Petitioner bases that argument on a "holistic view" of Pennsylvania corporate law and refers to several Pennsylvania statutes relating to shareholder rights to challenge transactions under a de facto merger theory. See Pet. 15-16. Petitioner concedes, however, that those statutory enactments "do not abrogate the equitable principles of successor liability." Pet. 16.

[9] The court of appeals noted, for instance, that continuity of ownership has been found where a seller received 12.5%, 2.27%, and even less than 1% of the buyer's stock. Pet. App. A23 n.10. In *Farris* v. *Glen Alden Corp.*, 143 A.2d 25 (Pa. 1958), cited by petitioner (Pet. 15), the court noted that the seller's stockholders acquired a majority of the purchaser's shares. 143 A.2d at 31. The court did not, however, establish a requirement that there be a majority stock acquisition, nor did the court discuss or establish any particular stock acquisition standard at all. The court simply described the evidence "in the present case," from which it found a de facto merger. *Ibid.*

[10] See, *e.g.*, *Philadelphia Elec. Co.*, 762 F.2d at 310 ("It is the duty of the court to examine the substance of the transaction to ascertain its purpose and true intent."); *Farris*, 143 A.2d at 28 ("to determine properly the nature of a corporate transaction, we must refer not only to all the provisions of the agreement, but also to the consequences of the transaction and to the purposes of the provisions of the corporation law said to be applicable").

[11] Petitioner cites (Pet. 13) a statement by the court of appeals that the state law standard is "somewhat unsettled" as to mixed stock and

In any event, the court of appeals correctly identified the proper four-part test for a de facto merger, whether that test is viewed as a matter of federal or Pennsylvania law. Petitioner's contention that the lower courts misapplied one element of that test to the facts of this case presents no question of national importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
GREER S. GOLDMAN
JOHN T. STAHR
Attorneys

JUNE 2006

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cash transactions. The court of appeals nevertheless concluded that the general test for continuity of shareholders is clear and rests on whether "the owners of the predecessor enterprise become a 'constituent part' of the successor by retaining some ongoing interest in their assets." Pet. App. A24.