No. 01-387

In the Supreme Court of the United States

CROMPTON CO./CIE, FKA UNIROYAL CHEMICAL LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, authorizes the federal government to respond to public dangers resulting from the disposal of hazardous substances. Section 107(a)(3) of CERCLA provides that "any person who by contract, agreement, or otherwise arranged for disposal * * * of hazardous substances owned or possessed by such person," shall be liable to the United States for the government's response costs at the facility. 42 U.S.C. 9607(a)(3). The question presented is:

Whether a corporation that arranged with an herbicide manufacturer to process the corporation's 1,2,4,5-tetrachlorobenzene (TCB) into the herbicide 2,4,5-T was properly found to have "arranged for disposal" within the meaning of Section 107(a)(3), where the corporation supplied the TCB to the manufacturer and retained ownership throughout the manufacturing process and where generation of hazardous wastes requiring disposal was an inherent and expected part of the manufacturing process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 247 F.3d 706. The memorandum opinion and order of the district court (Pet. App. 30a-75a) is reported at 966 F. Supp. 1491.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2001. A petition for rehearing was denied on June 6, 2001 (Pet. App. 76a). The petition for a writ of certiorari was filed on September 4, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the United States to protect the public from the release of hazardous substances and to recover the government's cleanup expenses from the responsible parties. The United States brought this CERCLA action against petitioner Uniroyal Chemical Limited, and other parties, including Hercules, Inc. (Hercules) and Vertac Chemical Corporation (Vertac), to recover the government's costs of responding to a release of hazardous substances at an herbicide manufacturing plant in Jacksonville, Arkansas. In a series of rulings, the United States District Court for the Eastern District of Arkansas concluded, *inter alia*, that petitioner and Hercules are jointly and severally liable to the United States for cleanup costs. Pet. App. 75a. The court of appeals affirmed the judgment insofar as it held that petitioner is a jointly and severally liable party within the meaning of CERCLA, Section 107(a)(3), 42 U.S.C. 9607(a)(3), (extending liability to those who "arranged for disposal of * * * hazardous substances"), but reversed the judgment of joint and several liability against Hercules. *Id.* at 29a. The court of appeals vacated the judgments regarding recoverability of the government's costs and contribution between the liable parties, so that they could be "revisited by the district court following further proceedings consistent with this opinion." *Ibid.*

1. CERCLA establishes a uniform framework for addressing the problem of inactive hazardous-waste sites throughout the United States. "CERCLA both provides a mechanism for cleaning up hazardous-waste sites, 42 U.S.C. 9604, 9606 * * *, and imposes the costs

of the cleanup on those responsible for the contamination, §9607." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989), overruled on other grounds by *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996).

The President's authority under CERCLA, most of which has been delegated to the Environmental Protection Agency (EPA), includes the power to compel cleanup actions by responsible parties or to undertake a federal response and recover expenses from responsible parties. 42 U.S.C. 9604, 9606; 42 U.S.C. 9607 (1994 & Supp. V 1999). "CERCLA places the ultimate responsibility for clean up on 'those responsible for problems caused by the disposal of chemical poisons,'" by authorizing the United States, as well as other parties that incur eligible response costs, to recoup expenses through cost-recovery actions against parties that contributed to the release or threatened release of hazardous substances. *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) (quoting *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)); accord *Kaiser Aluminum & Chem. Corp.* v. *Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992). "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *United States* v. *Bestfoods*, 524 U.S. 51, 56 n.1 (1998) (quoting *Union Gas*, 491 U.S. at 21 (plurality opinion of Brennan, J.).

Section 107(a)(3) of CERCLA imposes liability on various classes of responsible parties, including persons who have owned or operated facilities at times when disposal of hazardous substances occurred, transporters of hazardous substances, and, as relevant here, "any person who by contract, agreement, or otherwise

arranged for disposal or treatment * * * of hazardous substances owned or possessed by such person, by any other party or entity, at any facility." 42 U.S.C. 9607(a)(3).

Courts have consistently ruled that, once the United States has established the elements of CERCLA liability, the responsible party is strictly liable for the government's response costs and is jointly and severally liable for the entire harm if the harm from the release of hazardous substances is not divisible. *E.g.*, *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *Aceto Agric. Chems.*, 872 F.2d at 1377; *United States* v. *Monsanto Co.*, 858 F.2d 160, 167, 172 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). Responsible parties who are found jointly and severally liable may obtain an equitable allocation of costs by seeking contribution from other responsible parties. CERCLA § 113(f), 42 U.S.C. 9613(f). See *R.W. Meyer*, 889 F.2d at 1507; *Monsanto*, 858 F.2d at 173. "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1).

2. This case addresses massive environmental damage caused by dioxin-bearing hazardous wastes disposed in Jacksonville, Arkansas, as a result of the operation of a pesticide and herbicide manufacturing plant. The United States has incurred more than $100 million in response costs and interest in its cleanup effort. Pet. App. 9a. The government originally brought an action for injunctive relief under the Resource Conservation and Recovery Act of 1976 (RCRA), 42

U.S.C. 6973, against Vertac, the then-current owner and operator of the site, and Hercules, which owned the site and equipment from 1961 to 1976 and operated the facility from 1961 to 1971. Later, the government brought claims for relief under Section 107(a) of CERCLA, 42 U.S.C. 9607(a), to recover its response costs from responsible parties. Pet. App. 10a. Other potentially responsible parties were subsequently brought into the suit, including petitioner. *Id.* at 37a. A number of parties settled and entered into consent decrees. *Ibid.* On October 12, 1993, the district court granted summary judgment against Hercules, finding that Hercules was jointly and severally liable to the United States under CERCLA Section 107(a) for costs incurred in the cleanup effort. *Ibid.*

Petitioner's liability as an "arranger" under Section 107(a)(3) is based on facts established at a trial held in November 1993. In 1978 and 1979, petitioner paid Vertac to produce more than a million pounds of the herbicide 2,4,5-T from a raw material, 1,2,4,5-tetrachlorobenzene (TCB), that petitioner owned and supplied for processing. Pet. App. 45a. Petitioner brought the TCB into the United States under temporary import bonds, under which petitioner paid no import duties pursuant to its declarations to the United States Customs Service that it owned the TCB; that it was bringing the TCB into the country solely for processing and not for sale; and that it would own the TCB during the entire time it was in the country. *Id.* at 46a. Petitioner required Vertac to store its materials separately in a warehouse that petitioner rented from Vertac, as a means of protecting petitioner's materials from Vertac's creditors. *Id.* at 47a. Petitioner also instructed Vertac to provide insurance for petitioner's TCB and 2,4,5-T while it remained at the site. *Ibid.*

In arranging for the processing of its TCB, petitioner understood that the process for manufacturing 2,4,5-T generates hazardous wastes, including dioxin, that require disposal. Pet. App. 47a. Indeed, petitioner's agent had inspected the Vertac site at the time that Vertac was storing thousands of dioxin-laden industrial drums above ground. 48 C.A. App. 12,914. Petitioner additionally knew that the processing of the TCB that it provided necessarily resulted in hazardous waste disposal and spillage, as evidenced by the fact that petitioner provided sufficient TCB to cover the amount of the material it anticipated would be lost through waste and spillage. Pet. App. 46a.

The processing of petitioner's TCB into 2,4,5-T resulted in the disposal of hazardous substances at the Vertac site. In addition to the inevitable leaks and spills resulting from the production process, dioxin was removed from the 2,4,5-T with toluene, which was then distilled into dioxin-laden still-bottoms. Pet. App. 48a. Those still-bottoms were stored in 55-gallon drums, which leaked, resulting in the contamination of soil on the Vertac Site. *Ibid.*

On May 21, 1997, the district court ruled that petitioner was jointly and severally liable as an "arranger" under CERCLA Section 107(a)(3). Pet. App. 31a, 75a. The district court specifically relied on factual findings that petitioner owned the TCB it supplied to Vertac for processing into 2,4,5-T, that the processing of petitioner's TCB into 2,4,5-T inherently generates and requires disposal of hazardous wastes, and that the processing did, in fact, result in improper disposal and release of hazardous wastes into the environment. *Id.* at 53a.

The district court had previously found Hercules liable for the release of hazardous substances at the

Vertac site and at landfills, neighborhoods, and off-site areas where cleanups had been undertaken, and had rejected Hercules' argument that joint and several liability was inappropriate because the harm at the site was "divisible." Pet. App. 11a. Following its finding that petitioner was liable, the district court addressed the issue of allocation of costs between Hercules and petitioner. It determined that Hercules' share of the response costs should be 97.4% and petitioner's share should be 2.6%. *Id.* at 12a.

Petitioner and Hercules appealed a number of the district court's determinations. The court of appeals rejected petitioner's contention that the evidence failed to support the conclusion that it had arranged for disposal of hazardous substances. Pet. App. 24a. The court looked to "the totality of the circumstances" to determine that petitioner's arrangement with Vertac to have its TCB processed into 2,4,5-T, with knowledge that a certain amount of spillage and disposal of hazardous waste was inherent in the process, was, in fact, an arrangement for disposal. *Id.* at 26a- 27a.

With respect to Hercules' claims, the court of appeals held that the district court used an improper standard for considering Hercules' argument that it should not be held jointly and severally liable because the harms at the site were "divisible." Pet. App. 22a. The court remanded the question of Hercules' joint and several liability so that the district court "c[ould] address the evidence supporting divisibility in light of the proper legal standards." *Ibid.* In light of the remand on the issue of divisibility of harm, the court of appeals did not address petitioner's and Hercules' takings and due process claims; nor did it reach arguments regarding whether particular costs claimed by the United States could be recovered, or whether the apportionment of

costs between petitioner and Hercules was proper. *Id.* at 27a-28a.

ARGUMENT

The decision of the court of appeals is unsuitable for review at this time because it is interlocutory. The court of appeals concluded only that petitioner is liable as one who "arranged for disposal" of hazardous substances, without reaching other issues relating to the proper amount of the government's recovery, or addressing petitioner's constitutional claims, which the court of appeals found "not ripe" at this stage of the case. Pet. App. 26a-28a. Petitioner's challenge to the court of appeals' decision that petitioner is liable for a presently undetermined portion of the response costs is not appropriate for resolution at this point in the ongoing proceedings. In any event, the court of appeals did not err in affirming the district court's finding that, under all the facts presented, petitioner "arranged for disposal" of hazardous substances as an inherent part of its arrangement with Vertac to have its TCB processed into 2,4,5-T. Pet. App. 53a. Petitioner's contention that the lower courts are in conflict on the elements of "arranger" liability under CERCLA is mistaken and does not provide a basis for this Court to take the extraordinary step of granting interlocutory review. *Id.* at 53a.

1. The Court ordinarily does not grant a writ of certiorari to review interlocutory decisions of the courts of appeals. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). It takes that step only in the "exceptional case" in which the Court's involvement "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr.*

Co. v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893); accord *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree," and the absence of a final judgment may "of itself alone furnish[] sufficient ground for the denial of the application"). This case does not present the exceptional circumstances that might warrant the Court's intervention. The court of appeals merely applied settled CERCLA precedents to affirm the finding that the evidence as a whole indicated that petitioner "arranged for disposal" of hazardous substances as part of its herbicide formulation arrangement with Vertac. Pet. App. 27a. Furthermore, the court of appeals vacated important aspects of the district court's judgment and remanded for further proceedings that may affect the scope of petitioner's liability. *Ibid.* The remand proceedings will address petitioner's constitutional arguments, which the court of appeals concluded "are not ripe for our consideration," as well the apportionment of liability between Hercules and petitioner, which may bear on the practical need for this Court's review. See *id.* at 27a-28a.

As this Court has noted, "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." See *American Constr.*, 148 U.S. at 384. The court of appeals' interlocutory decision presents such a situation. Granting review now would disrupt the progress of this complex case and could lead to multiple, piecemeal requests for review—precisely the result that this Court's practice of denying interlocutory review is designed to avoid. In light of the current unsuitability of this case for review, petitioner should be required to preserve its objections, appeal from any adverse final

judgment on remand, and, if necessary, seek review from this Court at a later date. See *Hamilton-Brown Shoe*, 240 U.S. at 257-259; *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of a writ of certiorari); R. Stern et al., *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993).

2. Even if the court of appeals' decision were not interlocutory, it would not warrant review. Petitioner asks this Court to resolve an alleged "split among the Circuit Courts of Appeals" created by "the Courts of Appeals' use of different standards to decide 'arranger liability.'" Pet. 12. Petitioner suggests that "confusion and unfairness" could be avoided if this Court were to hold that arranger liability under Section 107(a)(3) hinges on a showing of an obligation to control the disposal or treatment of hazardous substances. *Ibid.*

Petitioner errs both in its identification of an alleged "conflict" and in its prescription for a strict rule requiring that an "arranger" have an obligation or ability to control the disposal of the hazardous substances at issue in order for liability to attach. The courts have followed an intensely factual, case-by-case approach in determining the application of arranger liability. Those courts have observed that CERCLA does not define the phrase "otherwise arranged for disposal," 42 U.S.C. 9607(a)(3), and they have rejected reliance on any "*per se* rule" in applying that term to the wide variety of factual situations in which it may come into play. See *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F.2d 1313, 1317-1318 (11th Cir. 1990).

In particular, the courts have refused to adopt a per se rule requiring a showing of control over the waste disposal process. See *Catellus Dev. Corp.* v. *United States*, 34 F.3d 748, 752 (9th Cir. 1994) ("Requiring continued ownership or control for section 107(a)(3) li-

ability would make it too easy for a party, wishing to dispose of a hazardous substance, to escape by a sale its responsibility to see that the substance is safely disposed of."); *United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996) ("[A] party can be responsible for 'arranging for' disposal, even when it has no control over the process leading to the release of substances."); *Cadillac Fairview/Cal. Inc.* v. *United States*, 41 F.3d 562, 565 (9th Cir. 1994) ([A]rranger liability "is not limited to those who own the hazardous substances, who actually dispose of or treat such substances, or who control the disposal or treatment process."); *United States* v. *TIC Inv. Corp.*, 68 F.3d 1082, 1087-1088 (8th Cir. 1995) ([A]rranger liability may be established either by proof that the defendant exercised "some level of actual participation" in activities causally related to the arrangement of hazardous waste disposal or by proof of actual "control" over the disposal arrangements.). As those decisions recognize, and as the court below correctly concluded, "[c]ontrol * * * is not a necessary factor in every case of arranger liability." Pet. App. 25a.

Liability as an "arranger" is not dependent on any one factor but hinges on a variety of factors peculiar to the particular transactions at issue. Control or authority to control disposal may take on significance in situations in which the potentially liable parties are not involved in a close business relationship that contemplates the use and disposal of hazardous substances. For example, in *General Elec. Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992), General Electric sought to hold several oil companies liable as entities that arranged for the disposal of waste motor oil that was stored by dealers at service stations that the dealers leased from the oil companies. General

Electric maintained that the oil companies, as lessors, had the authority to control the manner by which its dealers disposed of waste oil and that the oil companies could have prevented the dealers from contracting with a waste oil scavenger who improperly disposed of the oil. *Id.* at 283. The Second Circuit rejected that argument, stating that "there must be some nexus between the potentially responsible party and the disposal of the hazardous substance." *Id.* at 286. Unlike the situation here, there was no relationship at all between the purportedly liable oil companies and the waste oil scavenger that disposed of the hazardous substances. The court of appeals concluded in those circumstances that the mere potential authority to control disposal was not enough, by itself, to provide the necessary connection to show an arrangement for disposal in that case. *Id.* at 287-288.

Contrary to petitioner's suggestion (Pet. 6-7), *General Electric* hinged on the peculiar facts of the case and not on any *per se* rule requiring a showing of control or ability to control. The court of appeals in that case specifically emphasized that "[u]nlike the defendants in * * * [*United States* v. *Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989)], the oil companies did not own the hazardous substance, nor did they control the process by which waste motor oil was generated." *General Elec.*, 962 F.2d at 287. Moreover, "[t]o the extent that the oil companies did exercise control over certain aspects of their dealers' businesses, none of it was directed toward either the generation of or the disposal of waste oil." *Ibid.* In this case and in *Aceto*, by contrast, the liable party retained ownership

of the hazardous substance and exercised control over the process that generated the waste.[1]

Petitioner is also mistaken in suggesting (Pet. 10) that *South Florida Water Management District (South Florida)* v. *Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996), establishes a rigid test for arranger liability that turns on control over disposal. That case reaffirms that courts must "reject[] any attempt to substitute a *per se* rule for the phrase 'arranged for,'" and should instead "focus on all of the facts in a particular case." *Ibid.* In *South Florida*, pesticide sprayers who had spilled hazardous chemicals on and around their airstrip, filed a third-party complaint against the landowners who had contracted for the sprayers' services. *Id.* at 405. The court found that the relationship between the landowners and the sprayers did not form a basis for a finding of arranger liability as to landowners because "the [s]prayers have simply not alleged the Landowners had sufficient knowledge of *or* control over the [s]prayers' disposal practices to be held liable." *Id.* at 409 (emphasis added). The court found (*id.* at 408) that the relationship between the landowners and the sprayers bore "little resemblance" to the relationship between the parties to the pesticide formulation contract considered in *United States* v. *Aceto Agricultural Chemicals Corp.*, *supra*:

> In *Aceto*, the mixing and packaging of pesticides 'inherently' involved the creation of hazardous wastes such that the manufacturers should have expected the formulator would have to dispose of

[1] The court of appeals found "no basis to reverse the district court's finding that Uniroyal owned the material throughout the transaction," Pet. App. 27a, and petitioner does not contest that finding here.

> these wastes as part of the service they were purchasing.

South Florida, 84 F.3d at 408.

The court of appeals in this case correctly concluded that the situation here is governed by *Aceto*. See Pet. App. 23a-25a. It bears no resemblance to either *General Electric* or *South Florida*. As in *Aceto*—and unlike the situation in *General Electric* or *South Florida*—petitioner owned the pertinent hazardous materials throughout the manufacturing process and arranged for its materials to be processed in a manner that petitioner knew would generate wastes that would require disposal. See pp. 5-6, *supra*. The district court found that the agreement between petitioner and Vertac "provided for waste and spillage of the TCB during processing into 2,4,5-T" by requiring petitioner to supply more TCB than would have been necessary in the absence of waste or spillage. Pet. App. 46a. Petitioner thus participated in the fundamental chemical processing decisions that directly led to the improper disposal of hazardous waste. Where waste disposal is an inherent part of the process, as here and as in *Aceto*, the party who has arranged for the processing may also be properly found to have arranged for the accompanying disposal of the resulting hazardous wastes.[2]

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[2] While authority to control the means of waste disposal is not a requirement for liability, petitioner did in fact exercise control over aspects of the manufacturing process and could have exercised control over the disposal of hazardous wastes in this case. Petitioner demonstrated its ability to exercise that control by insisting that its TCB be stored separately and that it be insured. Pet. App. 47a. Petitioner is incorrect in its assertion (Pet. 4), without citation to the record, that "the parties stipulated in the District Court that [petitioner] exercised no control over Vertac's

In sum, the decision below is consistent with the decisions of the other courts of appeals that have addressed the issue of arranger liability under CERCLA. There is no conflict among the courts of appeals warranting this Court's review. Indeed, even if the limited number of decisions exhibited any tension on the issue presented here, there would be no warrant for addressing that tension through review of a case that is presently in an interlocutory posture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2001

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manufacture of 2,4,5-T or over the operation of the Vertac plant." Petitioner is perhaps referring to a colloquy from a 1993 jury instruction conference, in which the United States simply agreed that "there is no evidence in this case that Uniroyal exercised any control over the *disposal* of the hazardous waste." 11/17/93 Tr. 40 (emphasis added). Petitioner's failure to exercise control over the disposal of wastes does not establish that it could not have done so, just as it chose to exercise control of other aspects of the manufacturing process, such as the storage and insurance of the raw material whose processing necessarily resulted in the disposal of hazardous wastes.