

No. 14-1019

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**In the Supreme Court of the United States**

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STATE OF ARIZONA,

*Petitioner,*

v.

ASHTON COMPANY INCORPORATED CONTRACTORS AND  
ENGINEERS, ET AL.,

*Respondents.*

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*ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**BRIEF OF THE STATES OF COLORADO, HAWAII,  
INDIANA, MAINE, MICHIGAN, NEVADA, OHIO,  
SOUTH CAROLINA, AND SOUTH DAKOTA AS  
*AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## **QUESTION PRESENTED**

1. Was the Ninth Circuit wrong to impose a new, heightened standard of review requiring district courts to “independently scrutinize” state-negotiated CERCLA consent decrees without any operable deference to state environmental protection agencies’ expertise?

2. Did the Ninth Circuit misapply the abuse of discretion standard of review when it refused to affirm the CERCLA consent decrees that the district court had entered, even though there was ample evidence in the record to support entering the decrees?

TABLE OF CONTENTS

|   | Page |
|---|------|
| QUESTION PRESENTED .....  | i    |
| TABLE OF AUTHORITIES .....  | iii  |
| INTEREST OF AMICI CURIAE.....   | 1    |
| SUMMARY OF ARGUMENT .....   | 3    |
| REASONS TO GRANT THE WRIT .....   | 4    |
| A. CERCLA’s plain language places State<br>and federal settlement authority on equal<br>footing.....  | 4    |
| B. The majority’s ruling below ignores the<br>States’ special role under CERCLA, as<br>well as their considerable technical and<br>legal expertise, and if not overturned, the<br>ruling will hamper States’ ability to<br>fulfill CERCLA’s goals. .... | 6    |
| CONCLUSION.....   | 8    |

## TABLE OF AUTHORITIES

Page

**Cases**

|   |         |
|---|---------|
| Anderson Bros., Inc. v. St. Paul Fire & Marine<br>Ins. Co., 729 F.3d 923 (9th Cir. 2013)..... | 4       |
| Arizona v. City of Tucson, 761 F.3d 1005 (9th<br>Cir. 2014) .....                             | 1, 3, 5 |
| Arizona v. Components, Inc., 66 F.3d 213 (9th<br>Cir. 1995) .....                             | 3, 7    |
| Burlington N. & Santa Fe Ry. v. United States,<br>556 U.S. 599 (2009) .....                   | 3       |
| Niagara Mohawk Power Corp. v. Chevron USA,<br>596 F.3d 112 (2d Cir. 2010).....                | 4, 5, 6 |
| United States v. Cannons Eng'g, 899 F.2d 79 (1st<br>Cir. 1990) .....                          | 3, 7    |

**Statutes**

|                                |            |
|--------------------------------|------------|
| 42 U.S.C. § 9605(h) .....      | 1          |
| 42 U.S.C. § 9607(a) .....      | 1, 4, 5, 6 |
| 42 U.S.C. § 9607(f) .....      | 1          |
| 42 U.S.C. § 9607(f)(2)(C)..... | 5          |
| 42 U.S.C. § 9611(b) .....      | 1          |
| 42 U.S.C. § 9613(f)-(i) .....  | 1          |
| 42 U.S.C. § 9613(f)(2).....    | 2, 4, 5    |
| 42 U.S.C. § 9617.....          | 1          |

TABLE OF AUTHORITIES

|                              | Page |
|------------------------------|------|
| 42 U.S.C. § 9620(a)(4) ..... | 1    |
| 42 U.S.C. § 9621(e).....     | 6    |
| 42 U.S.C. § 9621(f) .....    | 1    |

**Other Authorities**

|   |   |
|---|---|
| Email from G. Kendall Taylor, Director, Division of Site Assessment, Remediation & Revitalization, Bureau of Land & Waste Management, South Carolina Department of Health and Environmental Control (March 18, 2015, 2:46 pm EST) (on file with author) ..... | 2 |
| Colorado Department of Public Health and Environment, Superfund Sites, available at <a href="https://www.colorado.gov/pacific/cdphe/superfund-sites">https://www.colorado.gov/pacific/cdphe/superfund-sites</a> (visited March 10, 2015) .....                | 2 |
| Ronald G. Aronovsky, A Preemption Paradox: Preserving the Role of State Law in Private Cleanup Cost Disputes, 16 N.Y.U. Envtl. L.J. 225, 232 (2008) (citing S. Rep. No. 107-2, at 15 (2001) .....   | 1 |

**INTEREST OF AMICI CURIAE<sup>1</sup>**

*Amici curiae*, the States of Colorado, Hawaii, Indiana, Maine, Michigan, Nevada, Ohio, South Carolina, and South Dakota submit this brief in support of Petitioner State of Arizona. The Ninth Circuit’s decision below, *Arizona v. City of Tucson*, 761 F.3d 1005 (9th Cir. 2014), threatens to hinder the States’ ability to efficiently resolve liability for environmental contamination under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”).

CERCLA is an exercise in cooperative federalism—under many of its provisions, States share equal footing with the United States Environmental Protection Agency (“EPA”). *See, e.g.*, 42 U.S.C. §§ 9605(h); 9607(a),(f); 9611(b); 9613(f)-(i); 9617; 9620(a)(4); 9621(f). The States’ powers under these provisions are vital: of an estimated 450,000 environmentally contaminated sites across the country, only a fraction—fewer than 2,000—are subject to federal oversight. Ronald G. Aronovsky, *A Preemption Paradox: Preserving the Role of State Law in Private Cleanup Cost Disputes*, 16 N.Y.U. ENVTL. L.J. 225, 232 (2008) (citing S. Rep. No. 107-2, at 15 (2001)). The States are responsible for the rest.

For example, the State of Colorado oversees a total of 850 contaminated sites. Of these, 19 are listed on EPA’s National Priorities List (“NPL”), and only 8 of

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<sup>1</sup> Mr. James F. Murphy, counsel of record for the Respondents as of March 11, 2015, and Mr. Jeffrey Cantrall, counsel of record for Petitioner, received timely notice of the State of Colorado’s intent to file a brief under Rule 37.

those are overseen by EPA.<sup>2</sup> Also, the State of South Carolina has 447 contaminated sites. Of these, 43 are NPL or NPL-equivalent federal sites, and only 6 of those are EPA-lead sites.<sup>3</sup>

To tackle the monumental task of overseeing this huge number of contaminated sites, the States—like EPA—rely on settlements with private parties to help fund cleanup efforts and restoration projects. Private parties’ willingness to do so, however, is almost uniformly contingent upon their ability to obtain CERCLA contribution protection under 42 U.S.C. § 9613(f)(2), which provides immunity from additional claims for CERCLA cleanup costs. Private parties commonly ask states to embody CERCLA contribution protection in a consent decree to be formalized by a federal district court.<sup>4</sup>

The Ninth Circuit’s decision, if affirmed, would weaken this critical tool for State environmental agencies, who capably negotiate CERCLA settlements in arms-length transactions, applying considerable technical expertise throughout the negotiation process.

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<sup>2</sup> Colorado Department of Public Health and Environment, Superfund Sites, available at <https://www.colorado.gov/pacific/cdphe/superfund-sites> (visited March 10, 2015).

<sup>3</sup> Email from G. Kendall Taylor, Director, Division of Site Assessment, Remediation & Revitalization, Bureau of Land & Waste Management, South Carolina Department of Health and Environmental Control (March 18, 2015, 2:46 pm EST) (on file with author).

<sup>4</sup> Under 42 U.S.C. § 9613(f)(2), contribution protection arises from either an administrative or judicially approved settlement with a State or the United States.

Treating States like secondary players, the Ninth Circuit sanctioned a lesser level of deference for States seeking entry of a consent decree. Indeed, the Ninth Circuit implied that States are due *no deference at all* and that district courts must “independently determine” whether a settlement agreement is fair and reasonable and is otherwise consistent with CERCLA’s objectives. *City of Tucson*, 761 F.3d at 1015. No other court has adopted this “no-deference” standard, which amounts to a *de novo* review of State-negotiated settlement agreements. If this *de novo* standard is to govern State settlement authority under CERCLA, it will impair the States’ ability to achieve CERCLA’s goals—namely, ensuring “prompt and efficient” remediation of hazardous waste sites. *Arizona v. Components, Inc.*, 66 F.3d 213, 216 (9th Cir. 1995).

State enforcement agencies are obligated to address the vast majority of the nation’s contaminated sites. Hindering their authority to settle CERCLA liability is both unwise and legally unsupportable.

### SUMMARY OF ARGUMENT

Congress intended CERCLA to promote the timely cleanup of hazardous waste sites and to ensure that those responsible for contamination bear the cleanup costs. *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 602 (2009). In other words, CERCLA favors efficient environmental cleanup, not “litigation for litigation’s sake.” *United States v. Cannons Eng’g*, 899 F.2d 79, 90 (1st Cir. 1990).

It falls to the States to oversee a majority of contaminated sites nationwide. Unsurprisingly, then,

the plain language of CERCLA extends equal authority to both the United States and the States to settle parties' contamination liability. Despite this, the Ninth Circuit majority's ruling proposes a separate, heightened standard of review for State settlements. This state–federal distinction, however, is unsupported by the text of CERCLA and is inimical to the special role that States play in achieving CERCLA's goals.

## REASONS TO GRANT THE WRIT

### A. CERCLA's plain language places State and federal settlement authority on equal footing.

One of CERCLA's central purposes is to encourage “early settlement between [potentially responsible parties] and environmental regulators.” *Anderson Bros., Inc. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923, 929–30 (9th Cir. 2013) (citation and alterations omitted). This central purpose does not change when the settling party is a State rather than the federal government.

To the contrary, CERCLA gives EPA and the States equal authority to resolve the CERCLA liabilities of settling parties as against non-settling parties. 42 U.S.C. § 9607(a); *Niagara Mohawk Power Corp. v. Chevron USA*, 596 F.3d 112, 126 (2d Cir. 2010). And CERCLA bestows equal protection on settling parties regardless of whether they have “resolved [their CERCLA] liability to the United States or a State.” 42 U.S.C. § 9613(f)(2).

As the dissent below noted, here the Arizona Department of Environmental Quality presented its settlements to the court with an ample “basis for evaluating [the State’s liability] estimates”: the State provided a detailed explanation of the factual and technical reasons for its chosen calculation methodology. *City of Tucson*, 761 F.3d at 1025. As with most CERCLA consent decree actions, here the State was simply exercising its statutory authority and discretion—authority and discretion that is *identical* to that exercised by the federal government in similar situations. *Id.* at 1024.

Elsewhere, CERCLA makes clear that where deference is due to the federal government, the same deference is owed to a State. In the context of damage to natural resources, CERCLA explicitly requires a rebuttable presumption of correctness for both federal and State “determination[s] or assessment[s].” 42 U.S.C. § 9607(f)(2)(C). Below, the majority conceded that CERCLA affords States and the federal government the same rebuttable presumption of correctness (*i.e.*, deference) in this context. *City of Tucson*, 761 F.3d at 1013 n.5. And yet, although CERCLA also treats the States and EPA identically under the statutory provisions at issue here, 42 U.S.C. §§ 9607(a) and 9613(f)(2), the majority chose to afford States *no deference*, while simultaneously, and inconsistently, acknowledging the “significant deference” afforded EPA under those very same provisions. *City of Tucson*, 761 F.3d at 1013 n.6. This dichotomy between the States and the federal government has no basis in the language of CERCLA. If the States’ ability to act under CERCLA is truly “autonomous,” as courts routinely recognize, *Niagara*,

596 F.3d at 126, their considered settlement decisions must be given the same respect as EPA's.

**B. The majority's ruling below ignores the States' special role under CERCLA, as well as their considerable technical and legal expertise, and if not overturned, the ruling will hamper States' ability to fulfill CERCLA's goals.**

CERCLA recognizes the special role States fill in overseeing environmentally contaminated sites. In fact, CERCLA *depends* on a federal and state partnership to remediate environmental pollution, *Niagara*, 596 F.3d at 138, especially because of the number and variety of contaminated sites across the country, only a fraction of which EPA oversees, *see id.* at 126 (quoting an EPA amicus brief).

States exercise technical and legal expertise on myriad CERCLA matters outside the context of settlement agreements. For example, State expertise is applied when assessing and pursuing potentially responsible parties, *see* 42 U.S.C. § 9607(a), and when determining applicable and appropriate remediation standards, *see* 42 U.S.C. § 9621(e). Before and during settlement discussions, it is the States, more often than not, that evaluate contamination at sites nationwide, assess environmental and human health risks, and select remedial actions and objectives. In carrying out those duties, States are treated as independent entities and are not required to seek EPA's authorization before they may act. *Niagara*, 596 at 127.

Typically, States—and not EPA—are autonomously involved at contaminated sites well before they have “pulled the laboring oar in constructing the proposed settlement.” *Cannons Eng’g*, 899 F.2d at 84. Precisely because States are intimately and independently involved in the legal and technical aspects of contaminated areas, district courts routinely defer to State agency expertise when party to arm’s length agreements. “While the district court should not mechanistically rubberstamp the agency’s suggestions, neither should it approach the merits of the contemplated settlement *de novo*.” *Id.* Indeed, in a past case, the Ninth Circuit demonstrated that district courts are perfectly capable of appropriately scrutinizing State settlement agreements without subjecting those agreements to an unwarranted *de novo* review that would not apply to an EPA-negotiated settlement. *See Components*, 66 F.3d at 215.

And, as a final matter, the Ninth Circuit’s new standard will substantially increase the costs to both the States and potentially responsible parties in reducing CERCLA liability to an enforceable consent decree. Under the new standard, when a State-crafted CERCLA settlement is brought before a district court for approval, the court will be required to independently hear pertinent facts and expert testimony, and then balance and weigh that information against relevant technical and legal standards. By forcing district courts to conduct this kind of mini-trial, the incentives in favor of early settlement will be substantially reduced, if not eliminated. Time and money spent on litigation—both of which would be more efficiently allocated to actual

remediation—will increase, and site cleanup will be significantly delayed.

**CONCLUSION**

For the foregoing reasons, the undersigned respectfully request that the Petition be granted.

Respectfully submitted,

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