NO. 06-865

IN THE

Supreme Court of the United States

HERCULES INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

W. GORDON HAMLIN, JR.
V. ROBERT DENHAM, JR.
POWELL GOLDSTEIN LLP
One Atlantic Center
Fourteenth Floor
1201 W. Peachtree Street, N.W.
Atlanta, GA 30309-3488
(404) 572-6600

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioner

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

MISCELLANEOUS:

REPLY TO BRIEF IN OPPOSITION

The Eighth Circuit's decision warrants plenary review for two reasons. First, it imposed over $100 million in unexpected and unforeseeable retroactive liability on Hercules without even consulting the principles articulated by this Court, and adopted by all nine Justices, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Second, the Eighth Circuit held that the Administrative Procedure Act ("APA") did not require EPA to submit its dioxin potency factor to public comment and rulemaking, in clear conflict with decisions of the D.C. Circuit. The Government's cursory Brief in Opposition ("BIO") contends that "[n]one of these contentions warrants further review." BIO 11. But the questions presented are of national significance, as underscored by the amici curiae briefs in support of certiorari:

- A group of more than 30 esteemed scientists, representing the world's leaders in the field of cancer risk assessment (including members of EPA's own Science Advisory Board), have shown that EPA's failure to subject its dioxin potency factor to public notice and comment rulemaking has allowed it to ignore an overwhelming consensus against its scientific assumptions. *See* Brief of John Doull, et al., in No. 06-865.

- The American Chemistry Council has also filed an amicus brief in No. 06-865, demonstrating the need for rulemaking, followed by judicial review, of EPA's dioxin potency factor, which effectively dictates the remedial actions required at chemical disposal sites around the country and which has resulted in expenditures of over $100 billion.

- The Pacific Legal Foundation has filed a brief in Nos. 06-853 and 06-1014 urging this Court to grant review on the retroactivity question raised by the Eighth Circuit's defiance of *Eastern Enterprises.* These arguments also underscore the need for certiorari in No. 06-865.

1. This case presents the question whether the lower courts will adhere to the constitutional retroactivity doctrine of *Eastern Enterprises*, or instead whether that decision is essentially a dead letter. The Eighth Circuit refused to consider any version of the *Eastern Enterprises* test. It summarily upheld the retroactive imposition of CERCLA liability in this case solely on the ground that it had previously affirmed the denial of a last-minute motion to add a constitutional challenge to the retroactive use of CERCLA as an affirmative defense in a completely different case, *United States v. Dico*, 266 F.3d 864 (CA8 2001). Pet. App. 24a.

a. The Government defends the Eighth Circuit on the ground that the plurality's "mode of analysis was expressly rejected by five Justices." BIO 14. That is untrue. Justice Kennedy made clear that he was "in full accord with many of the plurality's conclusions." 524 U.S. at 539 (opinion of Kennedy, J.). He stated that "[t]he plurality opinion demonstrates in convincing fashion that the remedy created by the Coal Act bears no legitimate relation to the interest which the Government asserts in support of the statute." *Id.* at 549. He simply framed the analysis in terms of due process rather than takings. That is why this Court has continued to cite *Eastern Enterprises* for its precedential force. *E.g.*, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002); *Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring) (citing his separate opinion in *Eastern Enterprises*); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) (Kennedy, J., concurring) (same).

The Government's reasoning would produce absurd results. Under its view, because the Eighth Circuit in *Dico* summarily rejected a facial challenge to CERCLA retroactivity, there can be no constitutional limit to the liability of potentially responsible parties like Hercules, regardless of the circumstances under which EPA imposes

such liability. Yet all nine Justices in *Eastern Enterprises* recognized that a reviewing court must engage in a fact-intensive inquiry to consider the particular circumstances of individual statutory applications in determining whether the retroactive imposition of liability violates the Fifth Amendment. *See* 524 U.S. at 523, 528-29 (plurality); *id.* at 549-50 (opinion of Kennedy, J.); *id.* at 559, 566-68 (Breyer, J., dissenting). Because such a determination "is essentially ad hoc and fact intensive," 524 U.S. at 523 (plurality opinion), a prior judgment upholding CERCLA retroactivity on a facial basis cannot bar an as-applied challenge of the kind mounted by Hercules here. *Cf. Wisconsin Right to Life, Inc. v. FEC*, 126 S.Ct. 1016, 1018 (2006) (per curiam) (judgment that campaign finance statute was facially constitutional does not bar as-applied claim).

b. Much of the Government's analysis supports Hercules. For example, the Government acknowledges that the liability in *Eastern Enterprises* "was constitutionally problematic because the plaintiff had left the coal industry before any collective bargaining agreement gave miners an expectation of lifetime health-care benefits." BIO 14. So, too, Hercules left the site long before Vertac disposed of the materials in question, long before the enactment of CERCLA, and before even the 1978 Dow Chemical study (the first to link dioxin to any form of cancer, and only to liver cancer in female lab rats, at that). The Eighth Circuit never considered these factors and never applied any version of the *Eastern Enterprises* test.

The Government admits that even the dissenters in *Eastern Enterprises* opined that retroactive liability would violate due process if it was "fundamentally unfair." BIO 14 (internal quotation marks omitted). Yet the Eighth Circuit never inquired as to whether the imposition of retroactive liability on Hercules was fundamentally unfair.

c. The Government contends that "there is a much closer nexus between the conduct of a potentially responsible party

and the costs being imposed on it" than there was in the Coal Act context. BIO 14. Again, the Eighth Circuit never applied the *Eastern Enterprises* factors. It simply adopted the District Court's linkage of Hercules to the costs at issue, without any evaluation of whether that connection was too tenuous to support the astronomical liability in this case. By contrast, all nine Justices in *Eastern Enterprises* agreed that, even if there is a causal link between a party's conduct and the imposition of liability, the link does not pass constitutional muster if it is too "tenuous" under the constitutional test. 524 U.S. at 531 (plurality opinion); *see also id.* at 549-50 (opinion of Kennedy, J.); *id.* at 558-59, 566-68 (Breyer, J., dissenting).

Moreover, the Government's purported "closer nexus" is a fiction. It is undisputed that the disposal of the materials in question occurred *years after* Hercules had ceased production and sold the plant, and *years after* Hercules exercised control at the site. The harm was caused by a completely different company (Vertac), at a time when that company was supervised by a federal court and state and federal environmental agencies. Pet. App. 4a-6a. Nor does the Government deny that the liability is utterly disproportionate to Hercules' economic experience. Hercules lost over $3 million on its decade of operations (JA20666-68) and has already spent $40 million on cleanup separate and apart from the amounts sought by EPA.[1] Even under the facts as found by the courts below, the constitutional violation is plainer here than in *Eastern Enterprises*.

The fact that "CERCLA provides mechanisms for dividing and allocating costs with other potentially responsible parties," BIO 15, does not render the *Eastern*

[1] The Government misleadingly refers to waste drums buried (lawfully) by Hercules during its operation of the site. BIO 4. It is undisputed that Hercules remedied (under RCRA) those wastes and has committed to operate a groundwater treatment facility until at least 2015. This case involves EPA costs regarding Vertac drums, not Hercules drums.

Enterprises factors inapplicable. Unconstitutionally harsh results are possible despite the statutory provisions for contribution and allocation. In this case, for example, EPA has never collected a penny from its judgments against Vertac. Contra BIO 6 n.2. The District Court allocated 97.4 percent of the liability to Hercules and 2.6 percent to Chemtura. Pet. App. 8a, 65a. Nor does the divisibility defense (BIO 15 n.3) eliminate the need for constitutional protections. The Eighth Circuit itself warned that "proving divisibility is a 'very difficult proposition,'" Pet. App. 10a, and saddled Hercules with over $100 million in retroactive liability on the basis of a tenuous theory of cross-contamination – all without applying the constitutional safeguards of *Eastern Enterprises*.

d. This case also provides the opportunity to resolve "the broader doctrinal uncertainty about the holding of *Eastern Enterprises*." BIO 15. As the Government notes (BIO 11-12, 15), the Second and Sixth Circuits have rejected constitutional challenges to the retroactive application of CERCLA by denying any precedential effect to *Eastern Enterprises*, on the misguided theory that there was no common ground between the plurality and Justice Kennedy's separate opinion. *See United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (CA2 2003), *cert. denied*, 540 U.S. 1103 (2004) ("no 'common denominator'"); *Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc.*, 240 F.3d 534, 552 (CA6 2001) ("*Eastern Enterprises* has no precedential effect").

By contrast, other courts, including the First and Fifth Circuits, have relied on *Eastern Enterprises* as precedent outside the Coal Act context. *See Asociación De Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, __ F.3d __, 2007 WL 613719, *10 (CA1 Mar. 1, 2007) (following *Eastern Enterprises* and explaining: "[f]ive members of the Court went on to conclude that the Coal Act's application to Eastern was

unconstitutional, but Justice Kennedy relied on due process, rather than takings, principles"); *U.S. Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 416-20 (CA5 2000) (state workers compensation act); *MHC Financial Ltd. Partnership v. City of San Rafael*, 2006 WL 3507937, *12 (N.D. Cal. Dec. 5, 2006) (relying on *Eastern Enterprises*, in part, for refusal to dismiss takings claim).

The Eighth Circuit has created another way to render *Eastern Enterprises* a dead letter. Ironically, pre-*Eastern Enterprises* cases, while upholding the retroactive application of CERCLA in particular cases, had engaged in a robust constitutional analysis. *E.g., United States v. Monsanto Co.*, 858 F.2d 160, 173 (CA4 1988), *cert. denied*, 490 U.S. 1106 (1989). This is now unnecessary in the Eighth Circuit.

This case is an excellent vehicle for considering the precedential effect of *Eastern Enterprises*, as discussed in the Pacific Legal Foundation amicus brief. This case would allow this Court to address the status of *Eastern Enterprises* under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), as well as the Eighth Circuit's ruling that a prior judgment addressing the facial retroactivity of a statute bars a subsequent as-applied claim. The issue has percolated in the circuits for a substantial period of time, and there is no indication that the lower courts will resolve the division by themselves.

2. This case also presents the question of whether EPA's dioxin potency factor is contrary to the APA because it is a legislative rule that has never been subjected to notice and comment rulemaking or judicial review. The Government acknowledges that the dioxin potency factor has substantial legal consequences because "EPA uses cancer potency factors in establishing cleanup levels consistent with the national contingency plan," BIO 16, so that the dioxin potency factor was used to "select[] the appropriate remedial action for the landfill site" in this case. *Id.* The Government does not deny that the dioxin potency factor has been responsible for

approximately $100 billion in litigation and compliance costs. This case is the most important risk assessment matter to come before this Court since *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (rejecting OSHA benzene standard).

a. The Government insists rulemaking was not necessary because there is no evidence "that EPA intended [its dioxin potency] factor to be binding in all cases." BIO 18. Yet the Government admits that EPA has used the same dioxin potency factor for over 25 years, *without exception.* BIO 18. EPA has never been able to identify a single dioxin site where it departed from the factor. EPA refers to the dioxin potency factor as its "[s]tandard" factor. JA22915. The agency stated: "if EPA had not applied the cancer potency factor uniformly and consistently across the country, . . . the agency could be considered to be acting arbitrarily and capriciously." JA21228. EPA made no attempt in the administrative records of this case to justify its dioxin potency factor; it merely cited to its official policy.[2] When Hercules proposed a different potency factor, EPA dismissed it on the ground that it was "not in accordance with EPA policy." JA16528, 16902-03, 17041. There is no evidence in the record that EPA intended to reserve any discretion on the matter.

b. The Eighth Circuit's ruling thus conflicts with decisions by this Court and other circuits, especially the D.C. Circuit. Hercules does not argue simply that the Eighth Circuit "misapplied" the D.C. Circuit's test. BIO 17. Rather, the Eighth Circuit – while giving lip service to D.C. Circuit precedent – actually minted a new test, one that permits an

---

[2] The sum total of EPA's explanation for the landfill and off-site areas was: "The cancer potency factor used in the 1986 EA was 156,000 $(mg/Kg/day)^{-1}$. This continues to be the cancer potency factor used in EPA risk assessments for 2,3,7,8-TCDD (EPA, 1989)." JA21302. EPA made no attempt in the administrative records to justify these assumptions.

agency to circumvent the APA requirements of notice and comment rulemaking and judicial review by hiding legislative rules in "policy statements" or "guidance" documents.

The Eighth Circuit ignores this Court's instruction that "[t]he particular label placed upon [an agency order] by [an agency] is not necessarily conclusive, for it is the substance of what the [agency] has purported to do and has done which is decisive." *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 416 (1942). The Eighth Circuit elevated form over substance. It created a new standard that makes the label decisive and gives determinative effect to an agency's words, even if expressed only in litigation briefs. The Eighth Circuit opined that EPA was entitled to reject a lower potency factor proposed by Hercules because it was "contrary to EPA guidance and resulted in cleanup goals much less restrictive than those calculated by the EPA." Pet. App. 21a (quoting JA16407). But this statement was simply another way of explaining that EPA could reject any estimate that was not in accord with its official policy.

There can be no doubt that, if this case had arisen in the D.C. Circuit, the court of appeals would have correctly recognized the dioxin potency factor as a legislative rule and therefore would have required rulemaking. The Government does not even bother to *cite* – let alone distinguish – *General Elec. Co. v. EPA*, 290 F.3d 377, 384-85 (CADC 2002), where the D.C. Circuit vacated an EPA "guidance document" with a cancer potency factor for PCBs, because "an agency pronouncement will be considered binding if it . . . is applied by the agency in a way that indicates it is binding." *Id.* at 383 The instant case, like *GE*, involves a cancer potency factor used by EPA to drive cleanup choices – choices that translate into the expenditure of very real dollars. Like *GE*, this case involves a guidance document – here, the 1985 Health Assessment. As in *GE*, there is no evidence in the record that EPA retained any discretion whatsoever to alter the potency factor. *See also CropLife Am. v. EPA*, 329 F.3d 876, 883

(CADC 2003) (rejecting EPA claim that directive was merely a "policy statement": "*General Electric* and other cases also make it clear that the agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise"); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (CADC 2000) (EPA "Guidance" document was a legislative rule: "If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, . . . then the agency's document is for all practical purposes 'binding.'").

c. In its defense of EPA, the Government notes that "there has been no prior litigation" over the dioxin potency factor. BIO 18. But that is just the point. By shielding the factor from rulemaking and judicial review, EPA has avoided both public and legal scrutiny of its misguided science. The "under-the-radar" nature of EPA's $100 billion dioxin policy is a vice, not a virtue.

The Government asserts that EPA's uniform use of its dioxin potency factor "could just as easily support the conclusion that the cancer potency factor is well-supported by scientific evidence." BIO 18. That assertion is preposterous in light of the detailed analysis in the amici briefs supporting certiorari. EPA itself has long been aware of the scientific flaws in its dioxin potency factor, yet has stubbornly clung to it, without a rulemaking or judicial review.[3] This is yet

[3] In 1991, EPA announced that it would conduct a reassessment of dioxin. JA17776-87. EPA submitted the Reassessment to its Science Advisory Board (SAB) for review, and in 1995 the SAB strongly criticized EPA's failure to justify its continued reliance on the linear extrapolation model, concluding that "[t]he cancer risk assessment models applied to the human data by EPA are conceptually flawed." JA14967-68. Prominent scientists publicly protested the absence of peer review. JA15015-16. Congress also voiced strong criticism of EPA. As part of the 1996 Appropriations Bill, Committees of both Houses explained that "it is widely held in the

another instance of circuit conflict. The D.C. Circuit has held that an agency's reliance on facts it knows to be wrong is the essence of arbitrary and capricious decisionmaking. *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1290-91 (CADC 2000) (EPA standard was "arbitrary and capricious" and inconsistent with "best available science"); *Leather Industries v. EPA*, 40 F.3d 392, 404-05 (CADC 1994) (Wald, J.).

3. This Petition is the best vehicle for this Court to decide the questions presented. The Petition in No. 06-853 does not present the APA issue concerning the dioxin potency factor. In addition, this case is the better vehicle to decide the retroactivity question. Hercules faces substantially greater retroactive liability than Chemtura because the District Court allocated 97.4 percent of the Vertac site costs to Hercules (and only 2.6 percent to Chemtura) and all of the landfill costs to Hercules as well. Pet. App. 8a. Moreover, Hercules' operations at the Vertac site ended a decade before CERCLA took effect on December 11, 1980. By contrast, Chemtura continued to do business with Vertac until only months before Vertac ceased to manufacture 2,4,5-T. Pet. App. 6a.

CONCLUSION

The petition for writ of certiorari should be granted.

---

scientific community that EPA's draft dioxin risk characterization document (chapter 9) . . . does not accurately reflect the science on exposures to dioxins and their potential health effects. . . . The Committee also understands that inaccuracies and omissions in the risk characterization chapter, which have been noted and criticized by EPA's [SAB] and the general scientific community, were the result of the agency's failure to consult with and utilize the assistance of the outside community in writing chapter 9." H.Rep. 104-201, at 53-54 (1995). *See also* S.Rep. 104-140, at 89 (1995). But EPA did not alter the dioxin potency factor. EPA produced another version of the Reassessment in 2000, again ignoring the SAB and Congress. This time, a different SAB leveled much the same criticisms. *See* www.epa.gov/sab/pdf/ec01006.pdf, at 5-6, 44-46, 49-50. The National Academy of Sciences issued its own critical report in July 2006.

Respectfully submitted,

W. GORDON HAMLIN, JR.
V. ROBERT DENHAM, JR.
POWELL GOLDSTEIN LLP
One Atlantic Center
Fourteenth Floor
1201 W. Peachtree Street, N.W.
Atlanta, GA 30309-3488
(404) 572-6600

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioner

March 2007