NO.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment to the Constitution permits the unexpected and unforeseeable imposition of over $100 million in retroactive liability that is utterly disproportionate to a party's conduct, without any consideration of the factors articulated by this Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

2. Whether the Environmental Protection Agency's use of its cancer potency factor for dioxin is contrary to the Administrative Procedure Act, 5 U.S.C. § 553, because EPA admittedly has applied this factor inflexibly and without exception for over twenty-five years, effectively creating a legislative rule, but without ever subjecting it to notice-and-comment rulemaking.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, Crompton Co./CIE (formerly known as Uniroyal Chemical Ltd.) appeared as an appellant in the Court of Appeals. The Arkansas Department of Pollution Control and Ecology appeared as a plaintiff in the District Court. The following parties appeared as defendants or third-party defendants in the District Court: Vertac Chemical Corporation, Velsicol Chemical Corporation, Inter-Ag Corporation, the Department of Defense, Standard Chlorine of Delaware, Inc., BASF Aktiengesellshaft, BASF Corporation, and The Dow Chemical Company.

RULE 29.6 STATEMENT

Petitioner Hercules Incorporated states that it has no parent companies and that no publicly-held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hercules Incorporated ("Hercules") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion (Pet. App. 1a-24a) is published at 453 F.3d 1031 (8th Cir. 2006). The opinion of the district court (Pet. App. 25a-65a) is published at 364 F.Supp.2d 941 (E.D. Ark. 2005).

JURISDICTION

The Court of Appeals denied a timely petition for rehearing and rehearing en banc on September 19, 2006. (Pet. App. 66a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Relevant statutory excerpts from 42 U.S.C. §§ 9607(a), § 9613(j)(2), and 5 U.S.C. § 553(b) are reprinted in the Appendix (Pet. App. 67a-69a).

STATEMENT OF THE CASE

In this case, the Eighth Circuit imposed over $100 million in unexpected and unforeseeable retroactive liability on Hercules under CERCLA, the Superfund statute. The Court of Appeals required Hercules to pay cleanup costs for wastes generated at a chemical plant by a third-party purchaser, even though the generation and disposal of those wastes indisputably occurred *years after* Hercules had ceased production and sold the plant, and *years after* Hercules

exercised control at the site. In fact, the waste accumulation and disposal occurred when the site was under continuous supervision by a federal court and state and federal environmental agencies. Pet. App. 4a-6a. The Eighth Circuit nonetheless held Hercules liable on the ground that a highly tenuous but-for causal chain could be constructed between Hercules and the waste at issue. The Court of Appeals opined that, because it had upheld the retroactive application of CERCLA in a different case with different facts, it could impose over $100 million in retroactive liability in this case without even considering the principles of *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

The Eighth Circuit further held that the Environmental Protection Agency ("EPA") was not required to submit its cancer potency factor for dioxin to public comment and rulemaking under the Administrative Procedure Act ("APA"), even though the agency has treated its potency factor as a legislative rule for over two decades at every dioxin site in the country, *without exception* — resulting in nationwide costs of over $100 billion. EPA's failure to comply with the basic requirements of notice-and-comment rulemaking has allowed the agency to evade the overwhelming scientific evidence against its potency factor and to avoid accountability for its regulatory and political choices. This is a textbook case of an administrative agency run amok. Yet the Court of Appeals opined that EPA's potency factor was not a legislative rule because the agency claimed in litigation briefs (but not in the administrative records) that it was only "advisory." Pet. App. 21a. The Eighth Circuit's ruling conflicts with administrative law decisions by other courts of appeals, particularly the D.C. Circuit, which has a well-developed body of precedent on the issue of when rulemaking is required.

This case is of national significance. The CERCLA statute's retroactive application of strict, joint and several liability to non-negligent activity is unique in American law and has imposed massive economic costs. *See* Stephen

Breyer, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 18 (1993). The holdings of the Eighth Circuit raise important questions of federal law and conflict with decisions of this Court and of Courts of Appeals outside the Eighth Circuit. The questions presented are independent of each other, and this Court's plenary review is amply warranted on both.

1. Background.

This case is a CERCLA cost recovery action, filed by the United States pursuant to 42 U.S.C. § 9607(a), involving a chemical manufacturing plant known as the Vertac Chemical Corp. ("Vertac") site in Jacksonville, Arkansas. Hercules acquired the plant in December 1961 from Reasor-Hill Corporation and substantially improved it over the course of the next decade before ceasing production in 1970. Pet. App. 3a-4a. Hercules' primary products were herbicides known as 2,4-Dichlorophenoxyacetic acid ("2,4-D") and 2,4,5-Trichlorophenoxyacetic acid ("2,4,5-T"). These herbicides are synthetic growth hormones that kill weeds or brush by accelerating growth to the point of natural death. Under normal conditions, each herbicide biodegrades relatively quickly into harmless substances. They were used as replacements for lead arsenate, a much more lethal herbicide. JA24101-24102.

Hercules sold over 90% of its 2,4,5-T production to the Department of Defense under rated orders (which could not be refused) as a component of the defoliant "Agent Orange." JA24854. (Agent Orange was used by the US military in Vietnam to defoliate the forest canopy which provided cover for enemy troops.) In 1965, Hercules learned that the manufacture of 2,4,5-T created a trace by-product known as 2,3,7,8-Tetrachlorodibenzo-p-dioxin ("TCDD" or "dioxin"). By contrast, the manufacturing process for 2,4-D did not produce dioxin. While Hercules operated the plant from 1961 until 1970, there was no scientific evidence, anywhere in the world, linking dioxin to cancer. Scientists from The Dow

Chemical Company published the first such research paper in 1978. JA24552.

The courts below found that Hercules operated the site in an exemplary manner. The Eighth Circuit concluded that "Hercules generally improved the safety and cleanliness of the site and complied with environmental regulations between 1961 and 1971." *United States v. Hercules, Inc.*, 247 F.3d 706, 712 (CA8 2001). The District Court similarly cited Hercules' "cooperation with government officials"; explained that "[t]here is no doubt that Hercules' safety and environmental programs are to be commended"; and opined that "Hercules' safety and maintenance programs are laudatory." *United States v. Vertac Chemical Corp.*, 79 F.Supp.2d 1034, 1040 (E.D. Ark. 1999). For example, Hercules installed an underground sewage system to collect chemical wastes, upgraded major items of equipment to prevent leaks and spills, installed curbs and gutters around equipment areas, and took a number of other steps to "tighten up" the production process. JA10473, 24066, 24081-24086, 24090-91. Hercules also took great care in its selection of an onsite burial location for its chemical wastes and carefully monitored nearby creeks to ensure that it was not polluting them. Testing showed that the runoff water was safe enough to drink. JA24101.

Hercules never had an accidental death while it ran the plant. In fact, it operated for nearly seven years without a single day of lost time due to an on-the-job-injury and won numerous safety awards. JA24100, 24105. Hercules was the *only major manufacturer of 2,4,5-T in the world* never to have had an outbreak of chloracne, the signature illness of dioxin exposure, in its workforce. JA10481. Other companies had as many as 200 cases of chloracne. JA24091-95.

In the years after Hercules' operations at the plant ended, residents of the surrounding areas and former workers sometimes alleged in legal proceedings that they had been injured by exposure to dioxin. *Hercules prevailed at every*

trial.[1] In addition, a NIOSH mortality study found that Hercules' employees had *lower* cancer rates than the general public. JA10214-16, 10235-36, 24129. Extensive testing of residents of Jacksonville and Mabelvale (a nearby community) revealed essentially background concentrations of dioxin – in fact, slightly lower than levels found in most populations in the United States. JA24589-90.

2. Generation and Disposal of Wastes By Vertac Under Governmental Supervision After Hercules Had Left the Site.

Notwithstanding Hercules' best efforts, the Jacksonville plant was not profitable. In fact, in its ten years of operations, Hercules lost $3 million on total sales of about $38 million. JA20666-20668. Because Agent Orange (a non-consumer product manufactured for and sold only to the United States military) consumed nearly the entire productive capacity of the plant for over three years, Hercules lost its domestic customers for herbicides and shifted its sales force and distribution network to other products. JA24075, 24495. When the United States terminated its contracts with Hercules in December 1968, JA10471, 24075, Hercules decided to shut the plant down and seek a buyer or lessee, rather than rebuild its sales and distribution network.

In 1970, Hercules ceased production and, as the Court of Appeals found, "cleaned out all of its equipment and production vessels, [legally] buried its waste, and shipped

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[1] For example, in a case known as *Keister*, former plant workers and family members contended, *inter alia*, that Hercules had conducted ultrahazardous activities at the plant. Hercules presented extensive medical evidence showing that the representative plaintiffs had normally functioning immune systems and suffered from no injury caused by any chemicals. JA10241-44, 24581-83. The jury returned defense verdicts on all claims. In 1988, another jury returned verdicts for Hercules, finding that it had created no risk of harm for persons residing near the plant site or the two municipal landfills. The Eighth Circuit affirmed that judgment. *O'Dell v. Hercules, Inc.*, 904 F.2d 1194 (CA8 1990).

empty drums off-site." Pet. App. 4a. In 1971, Hercules leased the plant to another company, which later became Vertac, and Hercules required it to comply with all applicable laws and regulations. Vertac purchased the plant outright in 1976. *Id.* Under the agreement of sale, Hercules retained no liability for the business or the site, and Hercules believed that its financial responsibilities at the site were over.

In 1978, researchers from Dow Chemical published the first paper linking dioxin to any form of cancer (in this case, liver cancer in female, but not male, laboratory rats). JA24552. Vertac voluntarily ceased manufacturing 2,4,5-T on March 15, 1979. Pet. App. 4a. On March 4, 1980, EPA and the Arkansas Department of Pollution Control and Ecology ("ADPC&E") filed companion actions against Vertac (as a current operator of the site) and Hercules (as a former operator of the site) under the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 *et seq.* ("RCRA"), seeking injunctive relief, primarily related to the storage and management of waste. One week later, EPA published regulations prohibiting Vertac from disposing of its drummed waste. 45 Fed. Reg. 15592 (Mar. 11, 1980). After a 4-day hearing, the District Court enjoined Vertac from releasing or disposing of its waste. EPA soon issued a final rule, and Vertac was thereafter prohibited from disposing of its waste drums. 45 Fed. Reg. 32676 (May 19, 1980).

Vertac (not Hercules) generated approximately 26,000 drums of 2,4-D waste between 1979 and 1986 under the supervision of the District Court, ADPC&E, and EPA. This waste did not even exist when Hercules sold the plant in 1976. Pet. App. 4a, 14a-15a. Vertac (not Hercules) also accumulated approximately 3,000 drums of 2,4,5-T waste (known as "stillbottoms"), the vast majority of which were generated after Vertac purchased the plant from Hercules. The courts below found that Vertac stored the stillbottoms in hopes of recycling the material. Pet. App. 16a, 31a; 247 F.3d

at 712; *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870, 875 (E.D. Ark. 1980).[2]

In 1987, after seven years of constant supervision by the Court, EPA and ADPC&E, Vertac abandoned the site, leaving behind some 26,000 drums of 2,4-D waste, 3,000 stillbottom drums of 2,4,5-T waste, buildings, equipment, pallets, and trash. EPA took over the site, closed down all operations, and decided to incinerate the drums. Pet. App. 4a-6a.

EPA's decision to incinerate the 26,000 2,4-D drums abandoned by Vertac, however, was not driven by dioxin; rather, EPA's decision was driven by other risks posed by the drums, as well as the regulatory classification of the waste generated by Vertac. For example, EPA stated that, "[a]lthough cross-contamination with dioxin was a consideration in incineration, the driving forces were the ban on land disposal of F-listed wastes, the constant failure of the drums due to their corrosive contents, and the fire and explosion hazard presented by the drummed materials." JA22911.[3] EPA's Project Manager admitted that the agency "could not have disposed of that waste . . . without some type of treatment []regardless of the level of dioxin." EPA's own counsel stated that "it would not be relevant" whether the

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[2] The stillbottom drums were remediated in 1979-1980 under RCRA rather than CERCLA. Hercules and Vertac have already paid the RCRA remediation costs. The drums were stored in a specially built shed, and EPA stated in 1980 that they "pose no present threat to health or the environment." HADD0007. In the Court of Appeals, EPA admitted that the shed "stopped the drum failure." EPA Brief at 58. Far from finding that the stillbottom drums leaked, the District Court found in 1980 that the stillbottoms tended to harden into something like a rubber ball. HADD0006.

[3] "F-listed" wastes are defined as certain wastes listed by EPA at 40 C.F.R. § 261 App. VII, and in this case "the wastes generated were F-listed wastes, regardless of the presence of dioxin." 33 F. Supp.2d at 780.

drums contained dioxin because ADPC&E and EPA would have incinerated them anyway. JA27853.[4]

3. EPA's Claims Against Hercules.

Since 1987, EPA has never collected a penny from Vertac or anyone else directly responsible for the waste in question. [5] Instead, it has pursued a cost recovery action against Hercules as a "deep-pocket" target.

To be clear, Hercules does not challenge (and has not challenged) EPA's costs regarding waste generated or disposed of by Hercules. It is undisputed that Hercules cooperated fully with state and federal authorities, spent over $40 million in cleanup costs, remedied (under RCRA) the wastes lawfully buried onsite while it operated the plant, and later committed to operate a groundwater treatment facility until at least 2015. JA24196-99, 24597-615. None of EPA's costs at issue relate to Hercules' buried waste.

Rather, this case involves EPA's attempt to recover over $100 million in cleanup costs for waste generated and disposed of *by Vertac – after* Hercules had ceased its operations at the site. EPA sought recovery from Hercules for costs associated with the incineration of drums accumulated and disposed of by Vertac (not Hercules), operating under the supervision of the District Court, EPA,

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[4] Similarly, EPA concluded that the principal perceived threat to human health from the buildings related to asbestos, not dioxin. JA27254, 27259, 27371-72, 28265-66, 28268-69, 28350-51.

[5] EPA initially sought an injunction against Vertac's owners and companies to which they had conveyed assets. The District Court found that Vertac's owners had fraudulently conveyed assets to evade environmental liabilities. On appeal, the Eighth Circuit reversed because EPA had failed to serve process on the new parties. *United States v. Vertac Chemical Corp.*, 855 F.2d 856 (CA8 1988), *vacating*, 671 F. Supp. 595 (E.D.Ark. 1987). On remand, EPA settled with Vertac's assignees. *United States v. Vertac Chemical Corp.*, 756 F. Supp. 1215 (E.D. Ark. 1991), *aff'd*, 961 F.2d 796 (CA8 1992). However, EPA has never received any funds from that settlement.

and ADPC&E. EPA also sought costs from Hercules for the cleanup of Vertac's buildings, equipment, pallets and trash – including some items that did not even exist when Hercules sold the plant in 1976.

EPA's theory of liability was nothing more than a highly tenuous chain of but-for causation. EPA hypothesized that dioxin created during Hercules' former operation of the plant might have seeped into the soil and that, many years after Hercules sold the site, such soil might have been placed into some of the drums by Vertac employees and EPA contractors during drum cleanup and over-packing operations. As a result, the employees and contractors might have contaminated Vertac's 2,4-D drums that did not otherwise contain dioxin. Yet EPA ignored the fact that such cross-contamination, if it occurred at all, would have happened years after Hercules' involvement with the site had ceased, at a time when Hercules was powerless to control any site activities, and during a time when the site was under the supervision of the Court, EPA, and ADPC&E. Indeed, dumping soil into drums would have been directly contrary to the rules under which the cleanup proceeded. Instead, workers were directed to place contaminated soil into separate, special containers.[6]

[6] EPA's theory was also a blatant post hoc rationalization. No EPA representative had ever suggested at the time of the cleanup that the drummed waste should be incinerated because of any dioxin-containing dirt that might be inside. No EPA witness ever offered such testimony, either. In fact, there was undisputed evidence that over 17,000 drums of 2,4-D waste (out of a total of 26,000) contained no dirt at all at the time Vertac abandoned the plant. JA24828-31. A 1989 test of a random 30-drum sample of 2,4-D waste indicated no detectable concentrations of dioxin, JA24259, 24870, and the uncontradicted evidence at trial demonstrated the invalidity of every analytical test purporting to find dioxin in the 2,4-D waste drums. JA24248, 24257, 24372, 27809-18, 27859-65, 28137, 28430.

Similarly, EPA speculated that dioxin created during Hercules' former operation of the plant might have remained in various production vessels after they were cleaned and sold to Vertac and might have contaminated Vertac's production many years later. But the record contained no evidence linking *Hercules'* dioxin to any such cross-contamination. Indeed, such a linkage would have been impossible to show, because after the sale Vertac used the production vessels over a 17–year period to manufacture millions of gallons of both 2,4,5-T and 2,4-D. During that time, Vertac mixed the contents of vessels used to make dioxin-containing 2,4,5-T with vessels used to make non-dioxin containing 2,4-D and thereby permanently altered the condition of the vessels as sold by Hercules many years earlier. Moreover, EPA's speculation was even more flimsy because, after Vertac abandoned the site in early 1987, the only testing of its production vessels was performed by a company convicted of dioxin testing fraud in another state, and EPA itself concluded that the test results were unreliable. JA28230-62. Furthermore, EPA's own evidence proved the thoroughness with which Hercules cleaned the equipment in 1970[7] and showed that any Hercules residual would have long been flushed out by Vertac's own production.[8] The District Court

[7] An EPA witness testified that about 40 men worked on this "really big job" for six months after Hercules stopped its operations in 1970. JA12737-38, 12854. They removed the residues in the vessels with heated water and even fire hoses. They were careful to remove the sediments in the bottom of the vessels. JA27540-41. They disassembled and cleaned the process lines and disconnected the pumps. JA27522-24, 27540-42. The EPA witness added that Hercules was "very professional" and extremely safety conscious. JA12694-95,12707-09.

[8] EPA's Project Manager for incineration agreed that 10 consecutive batches of 2,4-D production would leave no more than a few parts per quadrillion of dioxin, even under the assumption of cross-contamination. Tab 115 to MSJ, at 137-148. Another EPA project manager concurred. JA15687-88. Such miniscule levels would have been orders of magnitude below any threshold of regulatory concern. At least five other expert

had itself rejected the "lingering dioxin" theory in 1980. HADD0018. In short, there was no evidence to support either of EPA's theories of liability against Hercules.

In addition, EPA based certain cleanup decisions on a scientifically dubious "cancer potency factor" for dioxin that the agency never subjected to rulemaking under the APA. The potency factor is a number used by EPA "to calculate the risk and to set dioxin cleanup standards." Pet. App. 20a.[9] EPA created its potency factor for dioxin in 1980, ratified it in a guidance document known as the 1985 Health Assessment, and has never altered it since. EPA explained that its decisions at the Vertac Site used the "[s]tandard cancer potency factors." JA22915. The agency stated: "In fact, 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. When Hercules proposed a different potency factor, EPA dismissed the proposal on the ground that it was "not in accordance with EPA policy." JA16528, 16902-03, 17041.

EPA has used the same potency factor across the nation in a uniform and consistent manner. JA16897-98. A survey of administrative Records of Decision ("RODs") at 35 dioxin sites, JA16899-902, 17159-540, showed that EPA used its "standard" potency factor at every site. JA22916-17. EPA could not identify *any* dioxin site since the enactment of CERCLA in 1980 where it had declined to use its standard potency factor. Nor could EPA offer a single piece of paper from the administrative records indicating an express intent to reserve discretion on the issue. To the contrary, EPA repeatedly admitted that it has applied the same potency

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witnesses agreed conceptually that "flushing" would occur relatively quickly.

[9] The cancer potency factor for dioxin is expressed as a specific number: 156,000 $(mg/kg\text{-}day)^{-1}$. JA16896.

factor uniformly and without exception at all sites where dioxin contamination was sufficient to affect remedial choices. JA16899, 17152. Because EPA has relied on an invalid rule to make its response choices, it is not entitled to recover its costs under 42 U.S.C. § 9613(j)(2).

4. The Decisions Below.

On October 23, 1998, the District Court granted summary judgment to EPA on the issue of liability and held Hercules jointly and severally liable under CERCLA for all of EPA's costs for the Vertac site and two municipal landfills. 33 F.Supp.2d 769. The court rejected Hercules' claim that the retroactive imposition of liability violated the Fifth Amendment. *Id.* at 785. The court also opined that the potency factor did not need to undergo notice-and-comment rulemaking because it was a statement of "policy." *Id.* at 779.

In 2001, the Eighth Circuit reversed the District Court's summary judgment, opining that "the district court's analysis of Hercules's divisibility arguments reflects a fundamental misunderstanding of the doctrine of divisibility. These legal errors clouded the court's view of the evidence supporting divisibility." 247 F.3d at 719. The Court of Appeals remanded for a trial on divisibility of harm without reaching the constitutional or potency factor issues.

On remand, the District Court held only a "limited evidentiary hearing," rather than a full trial, and refused to permit any discovery, even though no expert witness discovery had ever occurred. The court then took three and a half years to issue findings of fact, which essentially reiterated its previous conclusions. On March 30, 2005, the Court effectively reinstated its prior orders and imposed more than $100 million in retroactive liability against Hercules. Pet. App. 65a-66a.

This time, the Eighth Circuit affirmed. It adopted EPA's tenuous cross-contamination theory, opining that:

> Hercules caused dioxin to enter the environment, thereby disposing of the waste. That Vertac and the EPA overpacked leaking drums in an effort to contain further contamination of the site does not absolve Hercules of CERCLA liability. Accordingly, Hercules remains responsible for the ongoing contamination caused by the dioxin . . . .

Pet. App. 15a. The Court of Appeals rejected Hercules' retroactivity challenge on the ground that it was bound by circuit precedent holding that "CERCLA's retroactive application remained constitutional after *Eastern Enterprises*." *Id.* at 24a. In addition, the Eighth Circuit upheld EPA's potency factor for dioxin, even though it has never been subject to notice-and-comment rulemaking. *Id.* at 20a-21a.

REASONS FOR GRANTING THE WRIT

This case presents important issues of federal law. The first issue involves a $100 million question of constitutional retroactivity. The second involves a $100 billion question of agency accountability and the use of science in the regulatory process. On both questions, the judgment of the Eighth Circuit is in conflict with decisions of this Court and of Courts of Appeals outside the Eighth Circuit. This Court's plenary review is amply warranted.

I. REVIEW IS WARRANTED TO ADDRESS THE QUESTION OF THE CONSTITUTIONAL LIMITS ON RETROACTIVE LIABILITY.

This case involves the retroactive imposition of astronomical liability on a model corporate citizen that did nothing wrong, caused no harm, and yet has been unjustly saddled with over $100 million in cleanup costs based on circumstances outside its control – namely, the actions of a subsequent purchaser operating under the supervision of federal and state environmental agencies and under the jurisdiction of a federal court. It would be difficult to find a

more obvious example of fundamentally unfair retroactive liability. Although Hercules believes that many of the facts found by the District Court and Court of Appeals are clearly erroneous, that disagreement is not material to this petition. This Court's review is amply warranted even under the facts as found by the courts below.

A. The Eighth Circuit's Judgment Is Inconsistent With *Eastern Enterprises* Because It Failed To Apply The Factors Articulated By This Court.

Certiorari is necessary in this case because the Eighth Circuit's decision conflicts with *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which makes clear that, even where a party is causally responsible for a particular harm, a conclusion which in this case is exceptionally tenuous at best, a reviewing court *must* nonetheless apply a three-factor test to ensure that retroactive liability is reasonably foreseeable and proportionate to the party's conduct. The Court of Appeals in this case failed to undertake the constitutionally mandated inquiry – in square conflict with this Court's decision in *Eastern Enterprises*. Hercules has not asserted, and does not now assert, a facial challenge to the retroactive application of CERCLA. Rather, Hercules challenges the constitutionality of retroactive liability under CERCLA as applied to the facts of this case, in which the Eighth Circuit failed to undertake the requisite *Eastern Enterprises* analysis.

In *Eastern Enterprises*, this Court held that, under the Fifth Amendment, the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722, could not be applied retroactively to require a company which had once owned a coal mining business to pay health care benefits to over 1,000 former employees of that business. Although there was no single opinion for the Court, Justice O'Connor, writing for a plurality that included Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, distilled from prior case law three factors of "particular significance" to the Fifth Amendment inquiry: "the economic impact of the regulation, its interference with

reasonable investment backed expectations, and the character of the governmental action." 524 U.S. at 523-24.

The remaining Justices applied similar reasoning, although they would have framed the inquiry in terms of Fifth Amendment due process rather than the Fifth Amendment's Takings Clause. Their point was that such laws are constitutional only if the parties on whom liability is imposed are *responsible*, in some real sense, for the costs they are being asked to bear. *See* 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 556-58 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting). The dissenters explained that, "like the plurality," they "would inquire if the law" as applied retroactively was "fundamentally unfair or unjust." *Id.* at 558. "[T]he Due Process Clause can offer protection against legislation that is unfairly retroactive . . . for . . . a law that is fundamentally unfair because of its retroactivity is basically arbitrary." *Id.* at 557 (Breyer, J., dissenting).

The Eighth Circuit's judgment conflicts with this Court's decision in *Eastern Enterprises*. The Eighth Circuit made no attempt to apply – or even to consider – any of the factors articulated by any of the Justices in *Eastern Enterprises.* It never inquired as to "the economic impact of the regulation," 524 U.S. at 523, even though the financial impact on Hercules was distinctly more severe than the $50-100 million liability at issue in *Eastern Enterprises.* After all, Eastern Enterprises had earned substantial profits from coal mining from 1947-1964 and from its subsidiary thereafter, which more than offset the retroactive liability imposed by the government. *See* 524 U.S. at 516. Here, by contrast, it is undisputed that 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.

Similarly, the Eighth Circuit never inquired as to the second factor cited by the *Eastern Enterprises* plurality – "interference with reasonable investment backed

expectations." 524 U.S. at 523-24. Even on the facts found by the courts below, this factor should have led the Eighth Circuit to invalidate the astronomical liability imposed on Hercules. The District Court acknowledged that "Uniroyal and Hercules are left 'holding the bag' for Vertac, who at least arguably caused the greatest amount of harm." *United States v. Vertac Chemical Corp.*, 79 F.Supp.2d 1034, 1036 (ED Ark. 1999). Hercules' operations at the site ceased a decade before CERCLA took effect on December 11, 1980. *See* 42 U.S.C. § 9652(a). Hercules had completely severed its connection with the plant before researchers published the first paper linking dioxin to any form of cancer in 1978. Even if dioxin in some of the dirt at the Vertac site had been the trigger for the decision to incinerate the drums, and even if some of the dioxin had originated during Hercules' prior operations, Hercules plainly had no ability to prevent Vertac or EPA's contractors from violating cleanup protocols by placing the dirt into Vertac drums, at a time when the District Court, EPA and ADPC&E were supervising Vertac. Further, EPA sought to recover costs for all of Vertac's trash, pallets, buildings, tanks, vessels, and pipes, whether or not they existed when Hercules sold the plant in 1976, and whether or not dioxin was a factor in EPA's decision to remediate them. The enormous retroactive liability imposed here thus profoundly interferes with Hercules' reasonable investment-backed expectations.

Until now, the accepted rule has been that the sale of a useful product, building, or piece of equipment does not create CERCLA liability, even if it contains a hazardous substance. *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 54 F.3d 379, 384 (CA7 1995). Thus, in *G.J. Leasing*, Judge Posner, writing for the court, held that the seller of a plant was not liable for the release of asbestos fibers caused by a third-party contractor's "ham-handed" job of dismantling the facility, years after the sale. *Id.* at 385. Judge Posner explained that, "[i]t seems to us very odd, even in Superfund

Cloudcuckooland, to attribute the negligent, unforeseeable conduct of the buyer's agents to the seller." *Id.* *See also ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 359 (CA2 1997) (holding prior owners not liable despite passive spread of contamination); *United States v. CDMG Realty Co.*, 96 F.3d 706, 722 (CA3 1996) (same).

The Eighth Circuit's ruling thus creates a circuit split, as well as a significant shadow of uncertainty over long-completed transactions that were undertaken against an entirely different background understanding. No one reasonably expected that CERCLA liability could arise in the context of the sale of useful equipment to a purchaser who then employed that equipment to manufacture products and create waste. Heretofore, no court has ever held that the sale of an operating plant constituted a "disposal" of material inside the useful equipment. The decision below threatens to upset the settled expectations of former owners who will be shocked to discover that CERCLA liability may arise even when the subsequent actions of their purchasers are supervised by the government.

Imposing liability on Hercules would be every bit as unjust as imposing it on the Department of Defense ("DOD"), which initially developed the site in the 1930s as a munitions plant and owned it during World War II. Yet DOD has been held not liable for any costs because it did not control the disposal of waste during the Hercules years. *United States v. Vertac Chemical Corp.*, 46 F.3d 803, 809 (CA8), *cert. denied*, 515 U.S. 1158 (1995). Similarly, this Court has held that the government may not be held responsible for Hercules' costs incurred in defending and settling tort claims related to Agent Orange, even though DOD prescribed the formula and detailed specifications for manufacture pursuant to the Defense Production Act of 1950, 64 Stat. 798, as amended, 50 U.S.C.App. § 2061 *et seq.* *See Hercules v. United States*, 516 U.S. 417, 419 (1996). Precisely the same reasoning shows

the arbitrariness and disproportionality of imposing over $100 million in costs on Hercules.

The Eighth Circuit also ignored the third *Eastern Enterprises* factor – "the character of the governmental action." 524 U.S. at 524. In *Eastern Enterprises*, the statute's remedial payment scheme was neither wholly unfamiliar to, nor unforeseeable by, Eastern, which had operated its former coal mining business against the background understanding of a 1946 labor agreement, a 1947 retirement fund, and a 1950 benefit plan. *See* 524 U.S. at 505-08. Here, by contrast, the character of the governmental action is extraordinary. "[P]arties could not be expected to have foreseen CERCLA before it was enacted." *Purolator Prods. Corp. v. Allied-Signal, Inc*., 772 F. Supp. 124, 132 (W.D.N.Y. 1991). There is no way that Hercules could have foreseen that it could one day be held liable for over $100 million in costs to clean up waste it did not create. Even the dissenting Justices in *Eastern Enterprise* would find the imposition of CERCLA liability unconstitutional in this case because Hercules is simply not *responsible* in any real sense for the costs which Hercules is being asked to bear. *See* 524 U.S. at 556-58, 566-68 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting).

This case is a good vehicle to reaffirm the constitutional principles governing retroactivity because the constitutional violation here is plainer and more obvious than in *Eastern Enterprises*. The Eighth Circuit's failure to apply — or even to consider — the three relevant factors is flatly inconsistent with this Court's governing precedent.

B. The Eighth Circuit's Judgment Is Inconsistent With *Eastern Enterprises* Because It Ignored the Difference Between Facial and As-Applied Challenges.

Instead of applying the *Eastern Enterprises* factors, the Court of Appeals relied on prior Eighth Circuit caselaw

upholding the retroactive application of CERCLA in a different context. The Court of Appeals stated that "[w]e previously resolved this exact issue in *United States v. Dico*, in which we held that CERCLA's retroactive application remained constitutional after *Eastern Enterprises*." Pet. App. 24a. The Court of Appeals thus interpreted Eighth Circuit law as holding that all retroactive impositions of CERCLA liability are *ipso facto* constitutional, regardless of the factual context. The Court treated the retroactivity issue as one solely of CERCLA's *facial* constitutionality – ignoring the principle that facial validity does not preclude an as-applied challenge in a given case. *E.g.*, *Wisconsin Right to Life, Inc. v. FEC*, 126 S.Ct. 1016, 1018 (2006) (per curiam).[10]

The Eighth Circuit's judgment is squarely inconsistent with *Eastern Enterprises*, where all nine Justices concluded that a reviewing court must engage in a fact-intensive inquiry to consider the particular facts and 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).

The Court of Appeals created a further conflict with this Court's precedent by conflating causation with the constitutional command of *Eastern Enterprises*. The Eighth Circuit opined that, once Hercules "caused dioxin to enter the

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[10] The Eighth Circuit's reliance on *United States v. Dico*, 266 F.3d 864 (CA8 2001), demonstrates that it has created a rule that the retroactive application of CERCLA is constitutional regardless of the facts of the individual case and the factors prescribed in *Eastern Enterprises*. *Dico* involved a completely different situation from this case. There, the defendant had been *directly* responsible for cleanup costs because it "had for many years used [a solvent] for degreasing and other industrial applications" and released it onto its own site and into the public water supply. 266 F.3d at 868. Unlike Dico, Hercules' connection to the drums and other wastes created and abandoned by Vertac, a subsequent purchaser of the business, was, at best, tenuous.

environment," it would remain responsible for any "ongoing contamination caused by the dioxin." Pet. App. 15a. But that sort of "but-for" reasoning is inconsistent with *Eastern Enterprises*, which makes clear that the constitutional question is not coterminous with the issue of causation. After all, Eastern Enterprises itself was linked to the injury the Coal Act sought to remedy: the company had employed the miners involved, had benefited from their past labor, and was at least partially responsible for their health conditions. Yet retroactive application of the statute to Eastern Enterprises was held unconstitutional. Indeed, all nine Justices in *Eastern Enterprises* made clear that the Fifth Amendment may sometimes preclude the imposition of disproportionate retroactive liability *even if a party is somehow causally responsible for the harm in question.* Eastern "could not have contemplated liability" of the magnitude it faced. 524 U.S. at 531. Even though there was a causal link, it was too "tenuous." *Id.*; *see also id.* at 549-50 (opinion of Kennedy, J.); *id.* at 558-59, 566-68 (Breyer, J., dissenting). The same reasoning is applicable here, because any connection between Hercules and the costs in question was too remote, too tenuous, and too unforeseeable to support the astronomical retroactive liability imposed. This Court's review is urgently needed.

C. The Confusion and Division Among the Lower Courts Regarding *Eastern Enterprises* Underscore the Need for Certiorari.

A circuit conflict is not a prerequisite to certiorari here. After all, prior to *Eastern Enterprises* no lower court had invalidated the retroactive application of the Coal Act on constitutional grounds — indeed, an unbroken string of six appellate decisions had upheld the retroactive application of the Coal Act, and this Court had denied certiorari in three of those cases. *See* 524 U.S. at 519 n.4.

Nevertheless, there is confusion in the circuits regarding the status of *Eastern Enterprises*. Just as the Eighth Circuit

refused to apply the *Eastern Enterprises* factors, other circuits have ignored the mandate of *Eastern Enterprises*. In particular, the Second, Third, Fourth, Sixth, and D.C. Circuits have limited *Eastern Enterprises* to its facts on the misguided theory that there was no common ground between the plurality and Justice Kennedy's separate opinion. As the Second Circuit has explained:

> Because the substantive due process reasoning presented in Justice Kennedy's concurrence is not a logical subset of the plurality's takings analysis, no "common denominator" can be said to exist among the Court's opinions. The only binding aspect of such a splintered decision is its specific result, and so the authority of *Eastern Enterprises* is confined to its holding that the Coal Act is unconstitutional as applied to Eastern Enterprises.

United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (CA2 2003), *cert. denied*, 540 U.S. 1103 (2004).[11]

These dismissive holdings cannot be squared with decisions in other circuits applying *Eastern Enterprises*. For example, in *U.S. Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 416-20 (CA5 2000), the Fifth Circuit applied the three *Eastern Enterprises* factors to hold that a state workers' compensation statute altering a funding formula violated the

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[11] *See also Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc.*, 240 F.3d 534, 552 (CA6 2001) ("*Eastern Enterprises* has no precedential effect on this case because no single rationale was agreed upon by the Court."); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1253-58 (CADC 1998) ("In short, the government is correct in stating that the only binding aspect of *Eastern Enterprises* is its specific result – holding the Coal Act unconstitutional as applied to Eastern Enterprises."); *Anker Energy Corp. v. Consolidated Coal Co.*, 177 F.3d 161, 169-74 (CA3) (quoting D.C. Circuit), *cert. denied*, 528 U.S. 1003 (1999); *A.T. Massey Coal Co., Inc. v. Massanari*, 305 F.3d 226, 236-37 (CA4 2002), *cert. denied*, 538 U.S. 1012 (2003) (citing the D.C. and Third Circuits).

Fifth Amendment as applied to pre-enactment insurance contracts of insurers who had withdrawn from the state market or had substantially reduced their underwriting in the state. The First Circuit has also held that *Eastern Enterprises* has precedential effect with respect to Takings Clause claims. *Patella v. Ret. Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (CA1 1999).[12]

The misguided attempt by the Eighth Circuit and other circuits essentially to ignore *Eastern Enterprises* warrants this Court's plenary review. Justice Kennedy represented the fifth vote in *Eastern Enterprises* holding the retroactive application of the Coal Act unconstitutional under the Fifth Amendment. "Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land." *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 693 (CA3 1991),

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[12] *See also S & M Brands, Inc. v. Summers*, 2005 WL 3160869, *9 (M.D. Tenn. 2005) (relying on *Eastern Enterprises* to hold that the state violated due process regarding escrow of certain funds); *Golan v. Ashcroft*, 310 F. Supp.2d 1215, 1220 (D. Colo. 2004) (focusing on "Justice Kennedy's concurrence in *Eastern Enterprises* for the proposition that retroactive legislation that unfairly burdens individuals and disrupts settled expectations is arbitrary and, thus, violates due process," in order to deny motion to dismiss due process claim). Commentators have expressed the same view. *See, e.g.*, Bruce Howard, "A New Justification for Retroactive Liability in CERCLA: An Appreciation of the Synergy Between Common and Statutory Law," 42 ST. LOUIS U. L.J. 847, 847 n.a1 (1998) ("[T]he decision in *Eastern Enterprises* makes it clear that courts must be prepared to find that in any given case the particular facts of CERCLA liability, if enforced against an unfortunate party to the limits of the strict, joint, several and retroactive law, will run afoul of the takings and due process clauses of the Constitution."); Jan G. Laitos, "The New Retroactivity Causation Standard," 51 ALA. L. REV. 1123, 1129 n.35 (2000) ("The *Eastern Enterprises* result raises questions about the constitutional validity of CERCLA"); Daniel E. Troy, "Retroactive Legislation" 85 (American Enterprise Institute 1997) (arguing that retroactive application of CERCLA may be unconstitutional).

modified on other grounds, 505 U.S. 833 (1992) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)); *see Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

Nor is it correct to suggest that there was no common rationale in *Eastern Enterprises*. In the opening paragraph of his separate opinion, Justice Kennedy went out of his way to underscore that he was "in full accord with many of the plurality's conclusions." 524 U.S. at 539. He agreed that "[t]he plurality's careful assessment of the history and purpose of the statute in question demonstrates the necessity to hold it arbitrary and beyond the legitimate authority of the Government to enact." *Id.* The fact that Justice Kennedy viewed the case through the lens of the Fifth Amendment's Due Process Clause rather than the prism of the Takings Clause neither vitiates the Court's Fifth Amendment holding nor transforms a 5-4 decision into a 4-1-4 ruling. If it did, the *Eastern Enterprises judgment* would not have *reversed* the decision below but would instead have *affirmed* that decision by an equally divided Court. Indeed, even the dissenters noted that the same three factors articulated by the plurality could properly be applied in the due process rather than the takings context. 524 U.S. at 567 (*citing Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225-27 (1986)). No Justice in *Eastern Enterprises* disputed that "an unfair retroactive assessment of liability upsets settled expectations, and . . . thereby undermines a basic objective of law itself," or questioned the need to inquire whether a law "is fundamentally unfair or unjust" as applied in a particular case. 524 U.S. at 558 (Breyer, J., dissenting).

Accordingly, this Court has continued to treat *Eastern Enterprises* as binding precedent.[13] Justice Kennedy has

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[13] *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 174 (2003) (Scalia, J., joined by O'Connor and Thomas, JJ., dissenting) ("We have held that the Commissioner's use of this power [to require coal companies to pay health benefits] violates the

continued to describe his separate opinion in *Eastern Enterprises* as calling for "heightened scrutiny for retroactive legislation under the Due Process Clause."[14] This case is an ideal vehicle for this Court to clarify the status of *Eastern Enterprises* and the proper application of the factors articulated in that decision.

II. REVIEW IS WARRANTED FOR THE SEPARATE REASON THAT EPA'S USE OF ITS POTENCY FACTOR IS INCONSISTENT WITH THE APA AND WITH DECISIONS OF OTHER U.S. COURTS OF APPEALS.

Certiorari should be granted for the independent reason that the Eighth Circuit's decision with respect to the potency factor for dioxin involves a question of exceptional importance and is inconsistent with the holdings of other circuits, particularly the D.C. Circuit. There is no dispute that, for the last 25 years, EPA has applied its "standard" potency factor at every site at which dioxin affected remedial choices. In fact, EPA has affirmatively stated that it would be "arbitrary and capricious" for the agency *not* to do so. There is no evidence that EPA retained any discretion to use any other number. It rejected Hercules' proposed alternative on the ground that it was "not in accordance with EPA policy." JA16528, 16902-03, 17041. Thus, while parties were free to propose alternative potency factors, EPA announced that it would not consider them. JA16164-66. Reminiscent of the imaginary "dirt-eating children" that Justice Breyer has mocked so forcefully in similar contexts, EPA coupled its

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Constitution to the extent it imposes severe retroactive liability on certain coal companies.") (citing *Eastern Enterprises*).

[14] *Kelo v. City of New London*, 125 S.Ct. 2655, 2670 (2005) (Kennedy, J., concurring); *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 548 (2005) (Kennedy, J., concurring) (citing his *Eastern Enterprises* concurrence for the proposition that "a regulation might be so arbitrary or irrational as to violate due process").

potency factor with absurd exposure assumptions in order to justify its response actions in this case.[15]

Under the APA, 5 U.S.C. § 553(b), an agency is required to submit legislative rules to notice-and-comment rulemaking. Yet the Eighth Circuit held that the potency factor was exempt from this requirement because it was contained in what was "at most only a technical and advisory report." Pet. App. 21a (quoting the District Court). The Court of Appeals added that EPA had considered Hercules' comments on the potency factor and rejected them because they "were contrary to EPA's guidance." *Id.* (citation omitted). The court found it immaterial that EPA failed to cite a single deviation from its dioxin "policy" since it was developed in 1980.

The Eighth Circuit's decision is inconsistent with administrative law rulings in other circuits (particularly in the D.C. Circuit) holding that an agency's uniform and inflexible practice creates a legislative rule and triggers the need for notice-and-comment rulemaking. The bare assertion by an agency in a litigation brief that it has reserved discretion on the matter is immaterial. The Eighth Circuit's reasoning that an agency can avoid rulemaking by purporting to consider

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[15] *See United States v. Ottati & Goss, Inc*., 900 F.2d 429, 441 (CA1 1990) (Breyer, J.) (affirming lower court's refusal to accept EPA's target for cleaning up soil contaminated with PCBs). *See also* BREAKING THE VICIOUS CIRCLE, at 12 (spending $9.3 million to protect "non-existent dirt-eating children" is the problem of "the last 10 percent"). In this case, EPA assumed that: (1) children would live every moment of their lives between the ages of 2 and 5 on the Jacksonville landfill, (2) from ages 6 through 12, children would spend 56% of their time on the landfill, (3) teenagers would never leave the landfill, and (4) adults would then spend the next 50 years of their lives moored to the landfill. JA16341, 16859. EPA made these assumptions despite the fencing around both the two landfills, the low and declining population densities in the area, the poor drainage and standing water, the location of the landfills in the hundred-year floodplain (which would likely preclude financing for homes), and the fact that no one had ever lived on either landfill. JA16307-08, 16358, 16979-80.

comments, and then invariably rejecting them as contrary to agency policy, is inconsistent with this Court's admonition that "it is the substance of what the [agency] has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942).

As the D.C. Circuit has declared, agency actions speak louder than words: If the agency "will automatically decline to entertain challenges to the statement's position, then the statement is binding." *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (CADC 1988). In *McLouth*, the D.C. Circuit rejected EPA's assertion that it did "not consider itself . . . bound" by a model used to predict levels of hazardous waste and that it "retained discretion to deviate from its use." *Id.* (internal quotation marks and citation omitted). The D.C. Circuit held that agency practice proved otherwise and that EPA had created a legislative rule requiring rulemaking: "More critically than EPA's language adopting the model, its later conduct applying it confirms its binding character." *Id.* at 1321. The D.C. Circuit noted that EPA was "close-minded and dismissive in its denial of a delisting petition," *id.*; "the model is not just a 'musing[ ] about what the [agency] might do in the future'"; "EPA was simply unready to hear new argument"; and "EPA has evidenced almost no readiness to reexamine the basic propositions that make up the" model. *Id.* (citation omitted; brackets in original). The D.C. Circuit concluded that "[t]he model thus created a norm with 'present-day binding effect,'" even though EPA pointed to four out of 100 cases where it deviated from the model. *Id.* at 1321.

Similarly, in *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1233 (CADC 1994), the D.C. Circuit rejected an agency's claim that a schedule of penalties was a mere "policy statement" because the agency's practice showed that it "intend[ed] to use that framework to cabin its discretion." *Id.* at 1233. A "policy statement," the court explained, is merely "an indication of an agency's current position on a

particular regulatory issue." *Id.* The court noted that "[t]he schedule of fines has been employed in over 300 cases and only in 8 does the Commission even claim that it departed from the schedule." *Id.* It was, therefore, a rule.

By contrast, in this case EPA has *never* identified any instance where it deviated from its potency factor in choosing a dioxin remedy. This case is indistinguishable from *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 polychlorinated biphenyls ("PCBs"). The court held that the guidance document was a legislative rule, not a policy statement, and therefore should have been issued only with the benefit of notice and comment rulemaking. *Id.* at 383-85. A guidance document that the agency "administers with binding effect" qualifies as a rule, and the agency "must observe the APA's legislative rulemaking procedures." *Id.* at 383 (citation and internal quotation marks omitted). The D.C. Circuit stated that "[o]ur cases likewise make clear that an agency pronouncement will be considered binding if it . . . is applied by the agency in a way that indicates it is binding." *Id.*. As in *GE*, the relevant document in this case is a guidance document, namely the 1985 Health Assessment, and as in *GE*, there is no evidence in the record that EPA retained any discretion whatsoever to alter the potency factor. If anything, this case is even easier than *GE*: whereas EPA's potency factor for dioxin has remained unchanged for more than two decades, it appears that EPA's factor for PCBs has diminished slightly over the last twenty years. *Compare* 290 F.3d at 379 (factors ranging from 0.04 to 2.0 $(mg/kg/day)^{-1}$) *with* JA22727 (PCBs listed at 4.34 $(mg/kg/day)^{-1}$)).

The fact that the potency factor is a number does not render it any less a legislative rule. Other circuits have often found that "rules establishing fixed criteria to control the agencies' decisions" amount to legislative rules. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 910 (CA5

1983). For example, in *Community Nutrition Institute v. Young*, 818 F.2d 943, 950 (CADC 1987) (per curiam), the D.C. Circuit held that an FDA "action level" of 20 parts per billion (ppb) of the contaminant aflatoxin in food was a legislative rule. Even though the FDA did not publish the aflatoxin regulation in the C.F.R., and even though exceeding the "action level" would not, without more, establish a statutory violation, the Court of Appeals was "convinced that FDA has bound itself," and "this type of cabining of an agency's prosecutorial discretion can in fact rise to the level of a substantive, legislative rule." *Id*. at 948. In *Batterton v. Marshall*, 648 F.2d 694 (CADC 1980), the D.C. Circuit held that a statistical formula for allocating unemployment aid required rulemaking. The court explained that "[a] general statement of policy" is "like a press release." *Id.* at 706. "The statistical methodology at issue here does not merely represent DOL's future intention. It presents the course the agency has selected and followed . . . ." *Id.* (internal quotation marks omitted). The Eighth Circuit's holding is inconsistent with the D.C. Circuit's well-reasoned analysis.[16]

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[16] *See also Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (CADC 2005) (EPA's interpretations required notice and comment rulemaking because they were intended to be "bind[ing]"); *Alaska v. DOT*, 868 F.2d 441, 447 (CADC 1989) (finding that rules were legislative rather than interpretive because they were "tests to shape and channel agency enforcement"); *Jerri's Ceramic Arts v. Consumer Product Safety Comm'n*, 874 F.2d 205, 208 (CA4 1989) ("the Commission has made a legislative rule and called it an interpretation"); *National Knitwear Manufacturers Ass'n v. Consumer Products Safety Comm'n*, 666 F.2d 81, 83 (CA4 1981) (agency's "characterization of its statement as an exposition of its policy or interpretation of the standard does not preclude our finding that it is something more"); *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1113 (CADC 1974) (Parole Board's use of guidelines established specific factors for determining parole eligibility and therefore required rulemaking: "they are self imposed controls over the manner and circumstances in which the agency will exercise its plenary power"; "they thus narrow [agency's] field of vision, minimizing the influence of other factors and encouraging decisive reliance upon factors whose significance might have been differently articulated").

The question presented is a vital one. The legislative history of the APA explains that "public participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves, and to afford safeguards to private interests." S. Rep. No. 248, 79th Cong., 2d Sess. 19-20 (1946). "In light of the importance of these policy goals of maximum participation and full information," *American Hospital Association v. Bowen*, 834 F.2d 1037, 1044-45 (CADC 1987), any exemption from the rulemaking requirement "must be narrowly construed." *United States v. Picciotto*, 875 F.2d 345, 347 (CADC 1989). "A rulemaking would force important issues into full public display and in that sense make for more responsible administrative action." *National Family Planning & Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 241 (CADC 1992) (internal quotation marks omitted).

Nothing about this case would require this Court to second-guess the agency on a substantive matter within its expertise. Rather, this case involves the enforcement of a *procedural* requirement at the heart of the APA: the need for legislative rules to undergo public scrutiny as part of notice-and-comment rulemaking.

A legislative rule is one that "provide[s] the policy decision." *Chamber of Commerce of the U.S. v. OSHA*, 636 F.2d 464, 469 (CADC 1980). In this case, EPA has used the potency factor to make a hidden policy choice and to impose over $100 billion in regulatory compliance costs across the country. JA16903, 17713. By labeling its rule as mere "guidance," EPA has cynically evaded accountability for its policy choice, shielded itself from notice-and-comment rulemaking, and evaded judicial review. EPA was harshly criticized by some of the nation's leading toxicologists in a brief amici curiae filed in the Eighth Circuit. *See* Brief of John Doull, et al. (Oct. 3, 2005). These eminent scientists attacked EPA's uniform application of its potency factor and its persistent refusal to consider the persuasive and mounting

body of scientific information that supports a different approach to dioxin risk assessment and regulation. They noted that EPA's own Science Advisory Board has criticized the model creating the agency's potency factor — a criticism recently echoed by the National Academy of Sciences. *See* Health Risks from Dioxin and Related Compounds: Evaluation of the EPA Reassessment (July 11, 2006).

This Court should grant review to determine the lawfulness of a regulatory regime that permits the EPA to set a $100 billion national policy without responding to contrary scientific information or subjecting its decisions to public rulemaking, scientific scrutiny, and judicial review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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