NO. 22-1207

In the
Supreme Court of the United States

COLUMBIA FALLS ALUMINUM COMPANY, LLC,
Petitioner,
v.

ATLANTIC RICHFIELD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9613(f)(1), permits district courts to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." All agree that the district court's selection of equitable factors is reviewed for abuse of discretion.

The question presented is:

Whether the district court's ultimate evaluation of those equitable factors is reviewed for clear error or abuse of discretion.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Atlantic Richfield Company ("Atlantic Richfield") is a wholly owned subsidiary of BP America Inc., which is a subsidiary of BP America Limited. BP America Limited is a subsidiary of BP Holdings North America Limited. BP Holdings North America Limited is a subsidiary of BP p.l.c., which is a publicly held company. Neither Atlantic Richfield nor any of its direct or indirect parent companies other than BP p.l.c. is publicly held.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 113(f)(1), district courts may allocate cleanup costs among parties liable for pollution at contaminated sites. This analysis requires district courts to select equitable factors and then apply those factors to determine what percentage of cleanup costs each party pays. All circuits review a district court's selection of factors for abuse of discretion and its factual findings for clear error. The petition asks the Court to decide whether one aspect of this analysis—the ultimate evaluation of the selected factors—should be reviewed for abuse of discretion or clear error. That narrow choice between two highly deferential standards of review does not affect real-world outcomes and is ill-presented in this case.

To start, there is no genuine circuit split on this issue, only an immaterial difference in terminology. As mentioned, all circuits agree that the district court's *selection* of equitable factors is reviewed for abuse of discretion. And all agree that the district court's *evaluation* of those equitable factors should be reviewed deferentially. Some circuits, including the Ninth Circuit, term their deferential standard "clear error," while others call it "abuse of discretion." But there is no practical difference in how courts apply the standard. Circuits using both formulations give heavy deference to district courts while still requiring reasoned explanations. Unsurprisingly, circuits affirm most of the time under either articulation of the test.

Columbia Falls Aluminum Company, LLC (CFAC)'s specific critiques of the district court's analysis only underscore the inconsequence of the question presented. CFAC identifies three purported errors in the district court's reasoning that it claims the Ninth Circuit would have reversed had it applied abuse-of-discretion instead of clear-error review. But two of CFAC's claimed errors target the district court's *selection* of factors—an issue all agree is reviewed for abuse of discretion. In any circuit, the district court's selection of factors would have been reviewed for abuse of discretion and CFAC would have lost.

CFAC's third objection is that the district court incorrectly determined that one of eight factors in its analysis was neutral instead of favoring CFAC. But there is no indication the Ninth Circuit would have reversed that analysis under any standard of review, much less a deferential abuse-of-discretion standard. Regardless, a district court's weighing of one factor in an eight-factor test—where the district court has undisputed discretion to pick whatever factors it wants—is hardly a question of national importance warranting this Court's intervention.

Finally, the Ninth Circuit's clear-error standard is correct. CERCLA allocation decisions are extremely fact-bound, requiring courts to evaluate highly technical economic and scientific evidence. The ordinary clear-error standard applicable to fact-intensive mixed questions of law and fact is wholly appropriate here. The Court should deny the petition.

STATEMENT OF THE CASE

A. Statutory Background

CERCLA promotes "the timely cleanup of hazardous waste sites and [ensures] that the costs of such cleanup efforts are borne by those responsible for the contamination." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1345 (2020). The Act grants EPA "broad power to command . . . private parties to clean [the sites] up." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). EPA may undertake response actions on its own or compel responsible parties to undertake response actions under the agency's supervision. 42 U.S.C. §§ 9604(a), 9606(a), 9607(a)(4)(A); *Bestfoods*, 524 U.S. at 55.

"Responsible parties are jointly and severally liable for the full cost of [a] cleanup, but may seek contribution from other responsible parties" under Section 113(f)(1) of CERCLA. *Christian*, 140 S. Ct. at 1346. To resolve contribution claims between multiple, liable parties, district courts allocate the costs associated with the required cleanup among the parties "using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613. "Courts examining this language and its history have concluded that Congress intended to grant the district courts significant flexibility in determining equitable allocations of response costs, without requiring the courts to prioritize, much less consider, any specific factor." *Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 446 (3d Cir. 2005) (collecting cases).

B. Factual Background

This case concerns a dispute between CFAC and respondent Atlantic Richfield over the costs to clean

up a former aluminum smelting facility near Columbia Falls, Montana ("Site"). Pet. App. 7a.

Atlantic Richfield and its predecessor, the Anaconda Mining Company, operated the Site from 1951 to 1985. Pet. App. 11a. In 1985, CFAC's corporate predecessor bought the Site for $1. Pet. App. 24a. Under the parties' Acquisition Agreement, Atlantic Richfield agreed to indemnify CFAC for costs relating to conditions predating the agreement so long as CFAC brought its claims before August 31, 1990. Pet. App. 28a. CFAC, in turn, agreed to indemnify Atlantic Richfield for costs relating to conditions postdating the closing date. Pet. App. 25a. CFAC did not bring its claims against Atlantic Richfield before the 1990 cut-off. CFAC operated the Site from 1985 to 2009 and continues to own the property today. Pet. App. 12a-13a. Both parties used similar technologies at the Site and produced comparable amounts of aluminum. Pet. App. 15a-22a. Atlantic Richfield spent $1.1 billion on the facility, including more than $200 million (in then-dollars) on facility construction and environmental improvement projects, and gained $565 million in profit. Pet. App. 147a. CFAC spent $95 million on the facility and netted $279 million in profit from aluminum production operations. Pet. App. 147a-149a.

In 2016, EPA listed the Site on the CERCLA National Priorities List, Pet. App. 85a—a list of hazardous sites EPA has prioritized for cleanup. *See* 40 C.F.R. § 300.5. In 2020, CFAC completed the Site Remedial Investigation and Feasibility Study. Pet. App. 83a, 85a-86a. That study concluded "groundwater is the primary migration pathway" for

the two primary contaminants of concern, cyanide and fluoride. Pet. App. 86a. The groundwater concentrations of cyanide and fluoride were highest in the area that includes the West Landfill and Wet Scrubber Sludge Pond, the two primary sources of continuing groundwater pollution. Pet. App. 79a-80a, 86a. CFAC's EPA-approved study determined that the West Landfill and the Wet Scrubber Sludge Pond would be addressed together for purposes of remediation by a single "slurry wall," Pet. App. 139a, and the cost of that remedy was "expected to be the "primary cost driver[]" of the entire cleanup. Pet. App. 89a.

C. Proceedings Below

1. CFAC brought this action against Atlantic Richfield, seeking contribution for cleanup costs pursuant to CERCLA and Montana's state-law analogue. Atlantic Richfield counterclaimed, invoking the 1985 Acquisition Agreement as a complete defense to CFAC's claims. Alternatively, Atlantic Richfield asserted a counterclaim for contribution, arguing that the Acquisition Agreement reflected the parties' intent to assign to CFAC post-acquisition responsibility for cleanup costs.

The district court held a seven-day bench trial, where it heard testimony from 16 witnesses and received 869 exhibits. Pet. App. 8a. The court issued 147 pages of detailed findings of fact and conclusions of law. Pet. App. 7a-153a.

The district court found the Acquisition Agreement did not entirely preclude CFAC's claims. Pet. App. 30a, 42a-43a. The district court also found, however, that "the circumstances surrounding the

[Acquisition Agreement] support allocating the greater cleanup responsibility to CFAC." Pet. App. 43a.

Because the Acquisition Agreement was not dispositive, the district court proceeded to equitably allocate response costs under CERCLA Section 113(f)(1), which, as noted, lets district courts allocate costs "using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Here, the court (at both parties' urging) started with the six so-called "Gore Factors"—a common set of CERCLA considerations named after a proposal by then-Representative Al Gore. *See* Pet. App. 130a. The court also considered the Acquisition Agreement and the parties' respective economic benefits.

The district court considered Gore Factors 1-4 together; those factors concern the amount and nature of the hazardous waste at issue. The court held those factors were neutral, because "the parties operated the same facility for similar amounts of time . . . produced the same product, in similar quantities [and] the same waste streams and waste by-products." Pet. App. 139a. Alongside those factors, the court noted that Atlantic Richfield's disposal of wastes in the West Landfill was the primary contributor to Site contamination but found CFAC was independently responsible for other waste disposal areas. Pet. App. at 139a-40a. The district court also noted that the bulk of the cleanup cost was "directly connected to the joint remediation of the West Landfill and the [Wet Scrubber Sludge Pond]," to which both parties contributed. Pet. App. 139a.

The district court determined the fifth Gore Factor, degree of care, favored allocating more responsibility to CFAC. Pet. App. 140a-42a. By contrast, the sixth Gore Factor, cooperation with the government, favored allocating more responsibility to Atlantic Richfield. Pet. App. 143a-44a.

The court then considered the parties' Acquisition Agreement, which, under Ninth Circuit law, was a relevant factor "even if the[] agreement does not shift the liability as a matter of contract law." Pet. App. 144a-46a. On that score, the court found that, while "not specific enough to waive CFAC's statutory rights," the contractual language nonetheless was "understood" by "the parties … to include … the very environmental liabilities that are the subject of this case." Pet. App. 145a. In sum, "the parties' intent, as reflected in the circumstances of the sale and their subsequent conduct, was that [Atlantic Richfield] would have no further liability to CFAC five years after the sale." Pet. App. 145a.

The court also considered the parties' economic investments and benefits as "relevant," but ultimately deemed that factor "neutral" as well. Pet. App. 146a, 150a.

Based on the above findings, the district court allocated 65% of cleanup costs to CFAC and 35% to Atlantic Richfield. Pet. App. 150a.

2. CFAC appealed, and the Ninth Circuit affirmed in a unanimous, unpublished order. The court began by restating circuit precedent holding that the district court's selection of equitable factors is reviewed for "abuse of discretion," while the "equitable

allocation of those factors" is reviewed for clear error. Pet. App. 2a.

Applying that standard, the Ninth Circuit held that the district court acted "within its discretion" in considering the Acquisition Agreement as an equitable factor in the CERCLA analysis. Pet. App. 3a. Circuit precedent permitted the court to "consider[] [the agreement] when equitably allocating costs." Pet. App. 3a-4a.

The Ninth Circuit then held that the district court "did not err" in finding that the Gore factors on the amount and nature of hazardous waste weighed neutrally. Pet. App. 4a-5a. CFAC argued that these factors favored it because Atlantic Richfield allegedly polluted more than CFAC and CERCLA required the district court to "allocate costs based on each party's respective contamination." Pet. App. 5a. But under CERCLA's highly discretionary regime, nothing required the district court "to look to contamination alone." Pet. App. 5a. Instead, the district court was free to consider as a factor the cost of one particularly expensive "remedial measure alongside the Gore Factors." Pet. App. 5a.

Finally, the Ninth Circuit held that the district court did not err in concluding the economic benefit factor was neutral, recounting the various facts the district court considered, including Atlantic Richfield's large expenditures on construction and facility upgrades, CFAC's purchase price of $1, and the substantial profits earned by both parties. Pet. App. 6a.

CFAC petitioned for rehearing en banc, which the Ninth Circuit denied without dissent. Pet. App. 158a-59a.

REASONS FOR DENYING REVIEW

I. There is No Meaningful Circuit Split Over the Standard of Review in CERCLA Contribution Cases.

CFAC claims there is a "tremendously important" circuit split on whether clear-error or abuse-of-discretion review applies to a district court's evaluation of its selected equitable factors when allocating CERCLA contribution costs. Pet. 23. But, while the circuits have articulated their standards for reviewing this narrow portion of the allocation analysis differently, that terminological variance makes no real-world difference.

1. As CFAC acknowledges, the circuits are in lockstep on the bulk of the analysis of a district court's equitable allocation of costs under Section 113(f)(1). All ten circuits to have addressed the standard of review for CERCLA contribution actions review a district court's selection of equitable factors for an abuse of discretion. Pet. 16, 18-19, 22.

Likewise, all ten of these circuits review a district court's findings of fact for clear error.[1] CFAC

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[1] *Asarco LLC v. Atl. Richfield Co., LLC*, 975 F.3d 859, 868 (9th Cir. 2020); *Trinity Indus. v. Greenlease Holding Co.*, 903 F.3d 333, 356 (3d Cir. 2018); *Lockheed Martin Corp. v. United States*, 833 F.3d 225, 234 (D.C. Cir. 2016); *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 186 (4th Cir. 2013); *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 301 (5th Cir. 2010); *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 22 (1st Cir.

recognizes as much when it concedes that "subsidiary findings of fact … receive no less deference under abuse-of-discretion review," and that "abuse of discretion and clear-error standards treat historical facts identically." Pet. 32-33.

In accord, the Ninth Circuit here reviewed the district court's selection of factors for abuse of discretion and its factual findings for clear error. Pet. App. 2a. CFAC takes no issue with these two aspects of the Ninth Circuit's review.

Importantly, though, these two aspects of a district court's allocation analysis—its chosen equitable factors and its factual findings—largely determine a court's ultimate allocation of costs. For example, if a district court decides to consider only the degree of involvement by the parties in the generation of the hazardous waste, and finds that only one party generated hazardous waste, that finding will compel the conclusion that the party who generated the waste should bear 100% of the cleanup costs. CFAC does not challenge the level of deference afforded to these foundational decisions that drive a district court's ultimate allocation of cleanup costs.

2. CFAC instead focuses on an ensuing aspect of the contribution analysis—what standard of review courts of appeals should apply to the district court's bottom-line *evaluation* of its selected factors and factual findings. CFAC says abuse of discretion, not

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2004); *United States v. Consolidation Coal Co.*, 345 F.3d 409, 412-13 (6th Cir. 2003); *Goodrich Corp. v. Town of Middlesbury*, 311 F.3d 154, 169 (2d Cir. 2002); *Tosco Corp. v. Koch Indus.*, 216 F.3d 886, 892 (10th Cir. 2000); *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 304 (7th Cir. 1999).

clear error, should govern, and conjures a vast disparity between the two. Pet. 16-23. Although the courts of appeals articulate in different language the standard of review on that question, the two alternatives are both highly deferential and functionally the same. Indeed, eight of the nine cases CFAC cites as establishing the split outside of the Ninth Circuit do not contain any substantive discussion of the standard of review, let alone any suggestion that a different standard could lead to a different outcome. The only case that substantively addresses the standard of review—*Goodrich*, 311 F.3d at 170—gives the issue all of one footnote. *Id.* at 170 n.16.

That lack of concern reflects the minimal difference between abuse-of-discretion and clear-error review. As this Court has recognized outside the CERCLA context, "[w]hen an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990); *accord Monasky v. Taglieri*, 140 S. Ct. 719, 735 (2020) (Alito, J., concurring) ("I would say that the standard of review on appeal is abuse of discretion, not clear error. As a practical matter, the difference may be no more than minimal. The important point is that great deference should be afforded to the District Court's determination.").

Unsurprisingly, lower courts have likewise recognized that the abuse-of-discretion and clear-error standards are not meaningfully different. *E.g.*, *United States v. Richards*, 674 F.3d 215, 223 (3d Cir. 2012) ("The differences that would result under the [clear-error and abuse-of-discretion] standards of review are few, if any."); *United States v. Jones*, 107 F.3d 1147, 1154 (6th Cir. 1997) (clear-error and abuse-of-discretion standards "appear to represent a difference without a distinction."); *Hazeur v. Keller Indus.*, No. 92-3488, 1993 U.S. App. LEXIS 38258, at *22 (5th Cir. Jan. 11, 1993) (difference between clear-error and abuse-of-discretion standards "appears negligible").

Circuits' reasoning in CERCLA contribution cases underscore the lack of any real difference in the standards. Courts applying the abuse-of-discretion standard and courts applying the clear-error standard both afford significant deference to a district court's ultimate allocation of response costs, reviewing to determine whether the district court's conclusion is rational, well-reasoned, and supported by the findings of fact, and affirming those that are within the range of permissible outcomes. Just like clear-error review, CFAC concedes that its preferred abuse-of-discretion review "affords significant deference to the district court's allocation." Pet. 21.

Comparing the analysis in *Valbruna Slater Steel Corp. v. Joslyn Mfg. Co.*, 934 F.3d 553, 566-67 (7th Cir. 2019), which applies the abuse-of-discretion standard, with that in *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1187-88 (9th Cir. 2000), which applies the clear-error standard, demonstrates just how little these standards differ.

In *Valbruna*, a steel manufacturer bought a metal-production site with known pollution for $6.4 million, plus $500,000 in escrow for cleanup costs. 934 F.3d at 558. After incurring over $2 million in cleanup costs, Valbruna sued the seller. *Id.* at 558-59. The district court reduced Valbruna's recoverable response costs by $500,000, the amount of costs Valbruna "accounted for" by way of the escrow payment, then allocated 75% of response costs to the seller and 25% to Valbruna. *Id.* at 559. Valbruna appealed, arguing (*inter alia*) that the district court abused its discretion by allocating Valbruna 25% of the response costs despite being a no-fault owner. *Id.* at 567-68.

Applying an abuse-of-discretion standard, the Seventh Circuit upheld the district court decision on "how to ultimately divvy cleanup costs." *Id.* at 566. Although "the 25% imposition on a no-fault owner" was "striking," it was not an abuse of discretion because the decision was "based on the evidence and reasoned." *Id.* at 567.

The Ninth Circuit in *Boeing* applied the clear-error standard to reach remarkably similar results with similar analysis. 207 F.3d at 1187-88. There, the district court had allocated 70% of response costs to Cascade and 30% to Boeing, based primarily on the volume of each party's contribution to the contamination. *Id.* at 1187. Cascade argued on appeal that the district court erred by allocating Cascade 70% of the response costs. *Id.* But the Ninth Circuit found no clear error. *Id.* at 1187-88. The Ninth Circuit acknowledged, "the testimony presented might have led the trial court to a different conclusion," but nonetheless affirmed the allocation as not clearly

erroneous because "the 70:30 allocation was among the reasonable conclusions supported by the evidence." *Id.* at 1188. The differently articulated standard of review made no practical difference.

3. CFAC's efforts to distinguish clear-error and abuse-of-discretion review are unavailing. CFAC argues that courts applying the abuse-of-discretion standard undertake more exacting review by requiring a district court to provide a "reasoned explanation" for its decision that is "internally consistent" with its allocation determination. Pet. 31-32. But courts applying a clear-error standard require those same hallmarks. *See AmeriPride Servs. v. Tex. E. Overseas, Inc.*, 782 F.3d 474, 489 (9th Cir. 2015) (reversing due to district court's failure to explain "its methodology" and "the equitable factors it considered"); *Mission Linen Supply v. City of Visalia*, 817 F. App'x 336, 339 (9th Cir. 2020) ("[T]he district court committed a clear error of judgment by relying upon two sets of internally inconsistent findings.").

Similarly, CFAC argues that courts applying the clear-error standard unduly emphasize the "quantity of factual findings." Pet. 18. But courts applying the abuse-of-discretion standard also consider a district court's factual thoroughness. *See Bancamerica Commer. Corp. v. Mosher Steel*, 100 F.3d 792, 802-03 (10th Cir. 1996) (holding district court did not abuse its discretion by considering only two factors in allocating liability where the district court conducted "extensive fact-finding during a trial lasting more than seventeen days" and issued a "fifty-six-page" opinion).

CFAC also attempts to demonstrate that reversals are less common in circuits applying the clear-error standard than in those applying the abuse-of-discretion standard. Pet. 18, 22. Primarily, any statistics on CERCLA equitable allocation reversals are dubious given the rarity of such appeals. In the 35-plus years since Congress created the right of CERCLA contribution in 1986, respondent located only 47 published and unpublished circuit decisions that reviewed a district court's equitable allocation. That small sample size warrants skepticism of CFAC's numerical comparison.

Regardless, reversals are equally scarce under both highly deferential standards—though CFAC exaggerates the point in contending that "the Ninth Circuit has apparently never reversed a district court's equitable allocation based on inadequate consideration of a selected factor." Pet. 18 & n.5. In fact, in *TDY Holdings v. United States*, 885 F.3d 1142, 1149 (9th Cir. 2018), the Ninth Circuit—applying the clear-error standard CFAC contends has never been used to reverse an equitable allocation—reversed the district court's allocation in part for failing to give adequate weight to its finding that "TDY complied with prevailing environmental standards at that time, and responded to new regulations in the 1970s by modifying its operational practices to reduce environmental contamination." And, the Ninth Circuit also reversed the district court's allocation in *Boeing Co. v. N.W. Steel Rolling Mills, Inc.*, No. 97-35973, 2004 U.S. App. LEXIS 5116, at *9-11 (9th Cir. Mar. 17, 2004), in full, and in *Boeing*, 207 F.3d at 1189-1190, in part, because in both cases the district

court made a computational error while applying a selected factor—again, clear-error reversals.

The overall numbers tell the same story. CFAC claims the Ninth Circuit has a "near universal affirmance rate" and that the Fourth and Fifth Circuits have never reversed an allocation decision. Pet. 22. But the Ninth Circuit has issued only ten reported opinions reviewing a district court's equitable allocation of response costs since 1986. In six cases it affirmed the district court's allocation, and in four cases it reversed—three because a district court clearly erred in applying its selected factors, as discussed above, and one because a district court failed to adequately explain what equitable factors it considered, *AmeriPride*, 782 F.3d at 489. For their parts, the Fourth and Fifth Circuits have reviewed a district court's allocation of response costs only twice each.[2] All told, circuits applying clear error to the ultimate allocation decision have reversed about 43% of the time.[3]

By contrast, of the 33 decisions reviewing a district court's CERCLA contribution allocation from circuits that apply an abuse-of-discretion standard

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[2] *See PCS Nitrogen Inc.*, 714 F.3d at 185-86 (affirming the lower court); *Minyard Enters., Inc. v. Se. Chem. & Solvent Co.*, 184 F.3d 373, 387 (4th Cir. 1999) (reversing for placing the burden of proof on the wrong party) and *Lyondell*, 608 F.3d at 300-01 (reversing due to improper admission of certain expert reports); *Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607, 613 (5th Cir. 2006) (affirming the lower court).

[3] *See TDY*, 885 F.3d at 1147-49; *AmeriPride*, 782 F.3d at 489; *Lyondell*, 608 F.3d at 300-01; *N.W. Steel Rolling Mills*, No. 97-35973, 2004 U.S. App. LEXIS 511, at *9-11; *Boeing*, 207 F.3d at 1189-90; *Minyard*, 184 F.3d at 387.

across the board, only seven have reversed an allocation as erroneous in any respect.[4] That 21% reversal rate is *lower* than the rate for circuits applying clear-error review. Indeed, four of the circuits that apply CFAC's preferred test—the First, Sixth, Tenth, and D.C. Circuits—appear to have *never* reversed an allocation for any reason. The fact that CFAC's preferred test turns out *worse* for appellants in practice confirms that clear-error review is not the meaningless "rubber stamp" CFAC claims. Pet. 3.

II. The Question Presented Is Unimportant and Not Well Presented.

Whether styled as abuse-of-discretion or clear-error review, there is no practical distinction in how the circuit courts review CERCLA contribution allocations. Even if there were some small difference between the standards, it would not warrant this Court's review, and this would not be the case to decide the question in any event.

1. While CERCLA contribution cases are undoubtedly important generally, Pet. 23-24, which deferential standard of appellate review applies to one aspect of contribution allocations is not.

CERCLA contribution cases are infrequently tried, even less frequently appealed, and affect very

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[4] *Von Duprin LLC v. Major Holdings, LLC*, 12 F.4th 751, 767-68 (7th Cir. 2021); *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 700-03 (7th Cir. 2014); *New York v. Solvent Chem. Co.*, No. 10-2026-cv(L), 2011 U.S. App. LEXIS 25067, at *47-49 (2d Cir. 2011); *K.C. 1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1018 (8th Cir. 2007); *Beazer East*, 412 F.3d at 445-49; *Akzo*, 197 F.3d at 307; *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326 (7th Cir. 1994).

few parties. As noted, *supra* at 15, respondent found fewer than 50 contribution cases that were appealed in the past 35 years. Appellate courts are rarely in the position to apply *any* standard of review to CERCLA equitable allocation decisions.

Instead, as CFAC implicitly acknowledges, CERCLA cases typically settle. Pet. 25-26. CFAC claims the question presented "alter[s] settlement incentives." Pet. 25-26. But CFAC never explains what effect any difference in this one facet of the standard of review could possibly have on settlements. Parties inclined to settle do not reverse course and go to trial just because one aspect of the ultimate decision would be reviewed for clear error instead of abuse of discretion. And it is even less plausible that the standard affects settlement incentives when the standard affects both contribution plaintiffs and defendants alike; no side would inherently prefer one standard over the other until the district court renders its decision.

By contrast, this Court's previous CERCLA contribution cases like *Guam v. United States,* 141 S. Ct. 1608, 1611 (2021), and *Christian,* 140 S. Ct. at 1345, address issues that arise before a court ever gets to allocation—namely, triggering events for accrual of a contribution claim and limits on litigants' ability to bring such a claim. Those substantive issues shape settlement incentives. Any difference between deferential standards of review on appeal does not.

The question presented is especially unimportant given that it relates to only one of several steps in the review of a contribution decision. All agree that abuse-of-discretion review governs the district court's

selection of factors—the decision that usually drives the analysis. Pet. 18. And all agree that clear-error review governs any embedded factual questions within the contribution analysis. Pet. 32. CFAC's petition thus asks this Court to resolve which of two materially similar, deferential standards of review governs the bottom-line evaluation of factors. That narrow issue does not merit this Court's attention.

2. CFAC urges that the question presented is intrinsically important because it concerns a standard of review, and this Court has weighed in on standards of review in the past. Pet. 24. But all the cases CFAC cites on this point involved a circuit split between *de novo* review and a deferential standard of review. Pet. 24-25 (citing *Thompson v. Keohane*, 516 U.S. 99, 116 (1995) (state-court "in custody" determinations are not entitled to the presumption of correctness but instead warrant independent review by federal habeas court); *Monasky*, 140 S. Ct. at 730 (reviewing habitual residence determination independently rather than deferentially); *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 963 (2018) (bankruptcy court's determination of non-statutory insider status should be reviewed for clear error rather than *de novo* review); *McLane Co. v. EEOC*, 581 U.S. 72, 75 (2017) (reviewing district court's decision to enforce or quash an EEOC subpoena for abuse of discretion rather than *de novo*); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 321-22 (2015) (reviewing district court's resolution of an underlying factual dispute regarding the construction of a patent claim for clear error rather than *de novo*)). CFAC points to no case where this Court has ever granted certiorari to decide between two very similar and

highly deferential standards of review, like abuse of discretion and clear error. Rarely arising CERCLA cases are not the place to start.

3. Even if the question presented warranted this Court's review, this would not be the case for it.

To begin with, the decision below offers no analysis for this Court to evaluate. In its orders below, the Ninth Circuit restated its standard of review without discussion, and denied rehearing en banc without dissent.

Moreover, the question presented is not outcome determinative. The Ninth Circuit offered no indication that whatever minor delta exists between the two standards would make any difference to its unpublished affirmance.

To the contrary, CFAC's own petition underscores the irrelevance of the question presented by calling out other purported errors in the Ninth Circuit's analysis, none of which turn on the question presented. CFAC argues that the Ninth Circuit overlooked three errors in the district court's order that would have otherwise amounted to an abuse of discretion: (1) the district court's consideration of the Acquisition Agreement as an equitable factor, (2) the district court's consideration of each party's contribution to the cost of the remedy as an equitable factor, and (3) the district court's conclusion that the economic benefit factor did not favor either party. Pet. 33-35.

The first two objections have nothing to do with the question presented. First, while CFAC objects to the district court's consideration of the Acquisition Agreement as an equitable factor, all agree that the

selection question is reviewed for abuse of discretion. Accordingly, the Ninth Circuit found that the district court acted "within its discretion" in "consider[ing] the Agreement." Pet. App. 3a. CFAC got its preferred standard of review on this question and lost.

Second, CFAC argues that the district court inadequately explained why the fact that Atlantic Richfield was the purported "'primary contributor' to contamination at the Site" did not lead to more liability for Atlantic Richfield. Pet. 34. But as the Ninth Circuit recognized, district courts are not "required to allocate costs based on each party's respective contamination of the Site." Pet. App. 5a. Instead, the district court was free to "consider[] the practical effect of the proposed remedial measure … alongside the Gore Factors." Pet. App. 5a. While CFAC claims to take issue with the district court's "lack of explanation," Pet. 34, CFAC's real disagreement is with the district court's consideration of those practical effects at all. CFAC wanted the district court to just look at contamination, but the district court considered remediation costs too. Again, that is a factor-selection question where CFAC got its abuse-of-discretion standard and lost.

Third, CFAC takes issue with the district court's conclusion that economic benefits to both parties weighed neutrally instead of in CFAC's favor. To start, CFAC waived this objection by arguing for this very result at trial. In its proposed conclusions of law and findings of fact, CFAC argued that this "potential equitable factor [was] irrelevant to the Court's allocation analysis." [ECF No. 125 at 138 ¶ 411].

CFAC cannot complain now about a supposed error it invited.

Regardless, abuse-of-discretion review would hardly have affected this issue. CFAC claims this factor should have favored it because Atlantic Richfield netted more profit from the Site. But as the Ninth Circuit explained, profit was only one piece of "the totality of the economic picture." Pet. App. 6a. The district court found that both parties made "millions of dollars in profits" and CFAC got other benefits like Atlantic Richfield's capital investment in the Site, a $1 purchase price, and CFAC's minimal spending on capital improvements. Pet. App. 6a. That nuanced analysis was abundantly reasonable under any standard of review.

CFAC's focus on the economic benefits analysis also underscores that this dispute is not certworthy. That analysis was but one factor out of eight, and the district court ultimately concluded it favored neither party. This Court does not grant review to flyspeck subcomponents of multifactor tests in a class of rare cases. More broadly, the fact that most of CFAC's fact-bound objections have nothing to do with the question presented underscores that this case would be a poor candidate to resolve that question.

III. The Ninth Circuit Applies the Correct Standard of Review.

This Court's precedent amply supports the Ninth Circuit's review of a district court's evaluation of its selected factors in a CERCLA contribution case for clear error.

1. It is "well-settled" that "factual findings are reviewable only for clear error." *U.S. Bank*, 138 S. Ct.

at 966. That same standard applies to "mixed question[s]" of law and fact when the trial court is "better suited to resolve" a question. *Id.* at 66-69.

A district court's evaluation of its chosen equitable factors in CERCLA cases is analogously fact-intensive and should be reviewed for clear error. For example, to apply the Gore Factors, a district court must first determine the following facts:

1. Whether the parties' respective hazardous waste is distinguishable;
2. The amount of the hazardous waste involved;
3. The degree of toxicity of the hazardous waste involved;
4. Whether and to what extent the parties were involved in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
5. Whether and to what extent the parties exercised care with respect to the hazardous waste concerned;
6. Whether and to what extent the parties cooperated with government officials to prevent harm to the public health or the environment.

See Boeing, 207 F.3d at 1187.

In this case, the district court also considered the effect of the Acquisition Agreement and the parties' relative economic benefits. Those factors required further fact-finding, including the parties' contractual

intent, the relative benefits received by the parties from their ownership and operation of the facility, and the financial benefit CFAC would gain from the cleanup of the site.

Only after finding the requisite facts, "consider[ing] them as a whole," *U.S. Bank*, 138 S. Ct. at 968, and "ascribing the proper force to each," *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960), can district courts determine the ultimate question of what percentage of the cleanup costs each party must bear. Because CERCLA contribution allocations require district courts to "take[] a raft of case-specific historical facts, consider[] them as a whole, [and] balance[] them one against another," clear-error review is appropriate. *See U.S. Bank*, 138 S. Ct. at 968.

2. None of CFAC's authorities forecloses a clear-error standard. *See* Pet. 27-33. Many hold that, where a district court is tasked with exercising its judgment, courts of appeals should apply a deferential rather than independent standard of review. *See Pierce v. Underwood*, 487 U.S. 552, 562 (1988) (district court's determination of whether the United States' position in an action under the Equal Access to Justice Act was "substantially justified" is reviewable for an abuse of discretion rather than *de novo*); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (overturning application of a bright line rule regarding the issuance of permanent injunctions in favor of abuse of discretion); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) ("district courts whose equity powers have been properly invoked indeed have discretion in fashioning

injunctive relief"). The Ninth Circuit's deferential clear-error standard fully aligns with these authorities.

CFAC also relies on older cases from various inapposite contexts to argue that a "long history of appellate practice" requires abuse-of-discretion review for CERCLA allocation decisions. Pet. 29 (quoting *Pierce*, 487 U.S. at 558). For example, CFAC notes that lower courts have reviewed alimony determinations, *Kenemer v. Kenemer*, 26 Ind. 330, 332 (1866) (cited at Pet. 29), or breach-of-contract contributions, *Baptist Health v. Smith*, 536 F.3d 869, 872 (8th Cir. 2009) (cited at Pet. 31), for abuse of discretion. But CERCLA's technical, fact-bound framework is hardly analogous to a state-law divorce or contract dispute. Because no "historical tradition exists," a "pattern of appellate review of other questions" is not helpful in "yield[ing] the correct answer." *Pierce*, 487 U.S. at 558. Instead, CERCLA's fact-heavy nature warrants a clear-error standard, as the Ninth Circuit correctly applied here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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