No. 22-1207

In the Supreme Court of the United States

COLUMBIA FALLS ALUMINUM CO., LLC,
Petitioner,
v.
ATLANTIC RICHFIELD CO.,
Respondent.

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

REPLY BRIEF FOR PETITIONER

SAMIR DEGER-SEN
PETER TROMBLY*
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020

GREGORY G. GARRE
Counsel of Record
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com
Counsel for Petitioner

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INTRODUCTION

ARCO's response confirms that certiorari is warranted. ARCO does not dispute that the circuits are intractably divided (7-3) on whether the ultimate allocation of CERCLA liability is reviewed for abuse of discretion or clear error. BIO 9-11. It admits that "CERCLA contribution cases are undoubtedly important," BIO 17, because potentially responsible parties (PRPs) spend billions of dollars on cleanups in reliance on CERCLA's mechanism for fairly allocating liability, Pet. 4. And it identifies no vehicle problem or other impediment to the Court's review.

Nevertheless, ARCO's central submission—which it repeats in different forms throughout its brief—is that this Court should just ignore the entrenched circuit conflict on this issue (presumably in perpetuity), because abuse-of-discretion and clear-error review are "functionally the same." BIO 11, 17. But that is obviously wrong. Abuse-of-discretion review is fundamentally different than clear-error review, both in terms of the nature of the inquiry and the degree of scrutiny ultimately demanded. And, as cases show, these differences matter. *Infra* at 3-7.

Abuse-of-discretion review focuses on the quality of reasoning and thus is the norm for *discretionary* determinations, where a court must explain its decision. "A district court abuses its discretion when its judgment is arbitrary, capricious, whimsical, or manifestly unreasonable." *Brecek & Young Advisors, Inc. v. Lloyds of London Syndicate 2003*, 715 F.3d 1231, 1240 (10th Cir. 2013). Clear-error review, by contrast, is focused on factual findings and is vastly more deferential. Under clear-error review, an appellate court may only disturb factual findings that

"strike" a panel "as wrong with the force of a five-week-old, unrefrigerated dead fish." *United States v. Bussell*, 504 F.3d 956, 962 (9th Cir. 2007), *cert. denied*, 555 U.S. 812 (2008) (citation omitted). Clear-error review is a complete misfit for a discretionary decision weighing different factors.

ARCO tries to paper over these differences with its own, ad hoc survey of CERCLA cases. But that survey ends up proving the opposite. In virtually every instance of an appellate reversal, the court applied the abuse-of-discretion standard; ARCO identifies *no* case where a court reversed the evaluation of equitable allocation factors as "clearly erroneous." The conflict over the standard of review for CERCLA equitable allocation decisions thus *matters*. This Court regularly resolves disagreements over appropriate standards of review, even where both options can broadly be characterized as "deferential." *See, e.g.*, *Dickinson v. Zurko*, 527 U.S. 150, 153-54, 165 (1999) (holding that "substantial evidence," not "clear error," governs review of PTO factfinding). ARCO's invitation to just let an acknowledged split persist should be firmly rejected.

In short this case implicates an acknowledged circuit conflict on an important and recurring question concerning the proper administration of federal environmental law. Certiorari is warranted.

ARGUMENT

I. The Circuit Split Is Real

ARCO does not deny that the circuits "articulate . . . different" standards of review for the "ultimate" allocation of CERCLA liability under Section 113(f)(1). BIO i, 9, 11. Nor does ARCO dispute that this split is openly acknowledged. BIO 11; *Goodrich*

Corp. v. Town of Middlebury, 311 F.3d 154, 170 n.16 (2d Cir. 2002) (rejecting clear-error review as "inapposite"), *cert. denied*, 539 U.S. 937 (2003). Instead, ARCO argues that the circuit conflict is somehow not "genuine" because clear-error and abuse-of-discretion review are "functionally the same." BIO 1, 11. That is simply wrong.

1. Courts have long recognized fundamental differences between the clear-error and abuse-of-discretion standards of appellate review. Clear-error review is the "strongest deference" a district court can receive. *Rabinowitz v. Kelman*, 75 F.4th 73, 82 (2d Cir. 2023). Under a clear-error standard, "battles . . . will almost always be won or lost in the district court." *United States v. Graciani*, 61 F.3d 70, 75 (1st Cir. 1995). That deference stems from the fact that clear-error review is focused on factual findings, and is based on the understanding that "factfinding is the basic responsibility of district courts, rather than appellate courts." *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974); *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985).

Abuse of discretion is a different "species of deferential appellate review." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168-69 (2d Cir. 2001); *see also Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The abuse-of-discretion standard addresses questions of "judgment" that are "guided by sound legal principles." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) (citation omitted). It therefore is not limited to "reviewing questions of fact." *Ornelas v. United States*, 517 U.S. 690, 694 n.3 (1996). This Court has accordingly made clear that abuse-of-discretion review of a court's "application of law to fact . . . requires the reviewing court to undertake more

substantive scrutiny" than review "only for clear error." *United States v. Taylor*, 487 U.S. 326, 337 (1988). As Judge Friendly long ago explained, "appellate review of the application of a legal standard [must be] free of the shackles of the 'unless clearly erroneous' rule." *Mamiye Bros. v. Barber S.S. Lines, Inc.*, 360 F.2d 774, 777 (2d Cir.), *cert. denied*, 385 U.S. 835 (1966); *see also Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union, I.L.G.W.U.*, 494 F.2d 1230, 1244 & n.22 (2d Cir. 1974).

ARCO claims that "[w]hen an appellate court reviews a district court's *factual findings*, the abuse of discretion and clearly erroneous standards are indistinguishable." BIO 11 (alteration in original) (emphasis added) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990)). But that is just a dodge. The standards are fundamentally different when a court is reviewing a discretionary determination and *not* simply factual findings—as is true for CERCLA equitable allocations. Even if review of factual findings is a "component part[]" of abuse of discretion review, *United States v. McComb*, 519 F.3d 1049, 1054 n.4 (10th Cir. 2007) (Gorsuch, J.), *cert. denied*, 552 U.S. 1329 (2008); *accord United States v. Richards*, 674 F.3d 215, 223 (3d Cir. 2012), the nature of that review is fundamentally different than clear-error review of facts alone.

Abuse-of-discretion review assesses "the *manner* in which a trial court exercises its discretion." Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review* § V.A (2018) (emphasis added). As ARCO does not contest, abuse-of-discretion review thus requires rational conclusions, internal consistency, and adequate explanations. Pet. 31-33. Limiting review to clear error eliminates this critical check.

2. Because ARCO cannot seriously dispute that the two standards are *legally* different, ARCO falls back on arguing that there is "no practical difference" between these standards in the equitable allocation context. BIO 12-17. It is wrong again.

ARCO argues that the Ninth Circuit's "clear-error standard" adequately enforces the requirement "to provide a 'reasoned explanation' for [a] decision that is 'internally consistent.'" BIO 14-15 (quoting Pet. 31-32). But ARCO's own cited authority undercuts this claim. To begin with, most of ARCO's so-called clear-error reversals in fact reversed "under an abuse of discretion standard" for erroneous selection of equitable factors. *TDY Holdings, LLC v. United States*, 885 F.3d 1142, 1149 (9th Cir. 2018) (court disregarded "relevant factor in the allocation analysis"); *AmeriPride Servs. Inc. v. Texas E. Overseas, Inc.*, 782 F.3d 474, 488-89 & n.9 (9th Cir. 2015) (failure to "explain the equitable factors [court] considered" precluded determination of whether court "abused its discretion"); *Boeing Co. v. North West Steel Rolling Mills, Inc.*, 2004 WL 540706, at *3 (9th Cir. Mar. 17, 2004) (failure to consider liability shares of "absent parties" as allocation factor was "abuse[of] discretion").[1]

ARCO next overstates the rigor of clear-error review. ARCO's only support for the assertion that

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[1] ARCO also suggests that the split does not matter because every circuit reviews the *selection* of equitable factors for abuse of discretion. BIO 10. But the selection of factors is far different than the ultimate *allocation* based on those factors. Ultimate allocations also demand the exercise of discretion. Neither ARCO nor the Ninth Circuit explains why that decisive determination should be effectively shielded from review under the inapt clear-error standard. *See* Pet. 16-17.

the Ninth Circuit's clear-error standard requires internally consistent allocations is a quote plucked from a *dissent*—a detail ARCO omits. *Compare* BIO 14, *with Mission Linen Supply v. City of Visalia*, 817 F. App'x 336, 339 (9th Cir. 2020) (Collins, J., dissenting). ARCO thus fails to show that this basic requirement of reasoned decisionmaking is actually enforced. ARCO also notes that the Ninth Circuit's clear-error standard corrects "*computational* error[s]." BIO 15-16 (emphasis added). But that is another dodge. As the Ninth Circuit itself recognized, equitable allocations involve *discretionary* determinations, not matters of "mathematical certainty," Pet. App. 4a n.1 (citation omitted).

Looking beyond the Ninth Circuit does not help ARCO either. ARCO claims that the overall reversal rate is higher for "circuits applying clear error to the ultimate allocation decision" than for abuse-of-discretion circuits. BIO 16-17. That is another mischaracterization. ARCO's list of reversals includes (at 16 n.3) abuse-of-discretion reversals, *supra* at 5, and reversals for reasons unrelated to the district court's ultimate allocation, *see Minyard Enters., Inc. v. Southeastern Chem. & Solvent Co.*, 184 F.3d 373, 387 (4th Cir. 1999) (court "improperly placed" burden of proof); *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 300-01 (5th Cir. 2010) (court abused discretion by admitting settlement communications). ARCO's argument thus gives the clear-error standard undue credit.

But in the end, most telling is that ARCO cannot identify a *single case* where a court conducting clear-error review has meaningfully examined a district court's application of equitable principles. In abuse-of-discretion circuits, by contrast, courts routinely

reverse when a court's ultimate allocation of CERCLA liability does not reflect reasoned decisionmaking. Pet. 21-22 & n.6 (collecting cases). That fact confirms that the conflict is not only real, but having a real impact on the law—and results—in these circuits.[2]

II. The Question Presented Is Exceptionally Important And Warrants Review Here

ARCO argues that the circuit conflict on the standard of review is unimportant and not implicated by this case. ARCO is wrong on both scores.

1. ARCO dismisses the question presented as a "narrow issue" that is just "one aspect of contribution allocations." BIO 17, 19. But the "ultimate question of what percentage of the cleanup costs each party must bear" is the most fundamental question in a contribution case. BIO 24. Tens or even hundreds of millions of dollars hang in the balance in each equitable allocation case. *See, e.g.*, *ASARCO LLC v. Atlantic Richfield Co.*, 975 F.3d 859, 864 (9th Cir. 2020) (allocating $111,403,743). The question of "what standard of review should apply" to this "decisive determination" under CERCLA is exceptionally important. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 965-66 (2018). ARCO's contention that this issue is "unimportant" thus hinges on the notion that abuse-of-discretion and clear-error review are "functionally the same." BIO 10-11, 18-19. But, as explained, that is incorrect.

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[2] To be sure, some allocations could withstand either standard of review. *See* BIO 12-14 (comparing affirmances). But that does not mean the standards are indistinguishable, only that rational, consistent, and explained allocations meet *both*.

ARCO next argues that appeals of equitable allocations are too rare for the question presented to warrant review. BIO 17-18. But the fact that ten circuits have already weighed in on the proper standard of review for equitable allocations alone proves this issue arises frequently. Pet. 23. And, as Superfund sites and contribution actions proliferate, this question will only continue to recur. Moreover, the absence of *more* appeals is likely explained in part by several circuits' erroneous use of the clear-error standard, which, as this case underscores, effectively denies meaningful appellate review of allocations.

The standard of review also has a significant effect on whether a party decides to settle, which goes to the heart of CERCLA's purposes. A clear-error standard undermines the fairness of ultimate allocations of liability among PRPs, diminishing incentives for PRPs to bear cleanup costs voluntarily. As long as the split persists, the contribution remedy designed to promote prompt remediation of Superfund sites also will operate differently from circuit to circuit, Pet. 25-26, undermining "CERCLA's 'policy favoring national uniformity.'" *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 952 (9th Cir. 2008) (Bea, J., dissenting) (citation omitted), *rev'd*, 556 U.S. 599 (2009). Indeed, the two circuits with the most CERCLA sites in the country apply different standards of review, creating two different systems of appellate review for the same determination. Pet. 4.

This Court frequently grants certiorari to resolve conflicts over the proper standard of review. Pet. 24-25. That review is urgently needed here.

2. ARCO's passing attempt to identify a vehicle problem also crumbles on examination.

ARCO argues that the clear-error standard was not outcome determinative here. But as CFAC explained, because it limited its review to clear error, the Ninth Circuit ignored blatant inconsistencies and unexplained leaps at the heart of the district court's counterintuitive decision to allocate most of the liability to CFAC, even though the district court itself recognized that *ARCO* was the "primary contributor to Site contamination." Pet. App. 139a; *see* Pet. 33-35.

As explained, on the parties' contract, the district court initially recognized that the Acquisition Agreement *did not shift* CERCLA liability but later inexplicably relied on the contract *to shift* CERCLA liability—a complete about-face. Nevertheless, applying clear-error review, the Ninth Circuit simply excused this jarring flip-flop in the district court's reasoning. Pet. App. 3a-4a. Under abuse-of-discretion review, such a glaring and unexplained inconsistency would require reversal. Pet. 31-32.[3]

And, as to contamination, the Ninth Circuit itself recognized that the district court should "have explained more fully each party's relative contribution to the need for [the slurry wall]." Pet. App. 5a. But the Ninth Circuit affirmed anyway, holding that the district court did not "*clearly err[]* in finding that the slurry wall was occasioned by both ARCO's and CFAC's contamination." *Id.* (emphasis

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[3] ARCO argues that the contract ruling was subject to abuse-of-discretion review for factor selection. BIO 20-21. But the Ninth Circuit reviewed the ultimate "equitable allocation of CERCLA costs" based on the Agreement only "for clear error." Pet. App. 2a-3a. Moreover, the problem is not the selection of the contract *as a factor*, but rather the district court's inconsistent reasoning as to whether the contract justified shifting costs.

added). ARCO tries to paint this as a "factor-selection question," BIO 21, but the Ninth Circuit addressed whether the district court "err[ed] in *applying* the Gore Factors," Pet. App. 4a (emphasis added).[4]

Those inexplicable rulings would readily flunk abuse-of-discretion review; yet the Ninth Circuit simply rubber stamped them under its clear-error standard. This case therefore provides an ideal vehicle to answer the question presented.

III. The Ninth Circuit's Rule Is Wrong

ARCO's cursory treatment of the merits further underscores the need for this Court's intervention.

At the outset, ARCO simply ignores the statutory text. Section 113(f)(1) provides that "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). This text is conspicuously absent from ARCO's merits argument—an omission that essentially concedes that Section 113(f)(1) "command[s]" abuse-of-discretion review. *Pierce*, 487 U.S. at 558; Pet. 27-29.

ARCO's main defense of clear-error review is a policy argument: that "the trial court is 'better suited

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[4] ARCO's suggestion (at 21-22) that CFAC "waived" its objection to the economic-benefit ruling is meritless. The Ninth Circuit "passed upon" the issue, necessarily rejecting ARCO's waiver argument below. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted); *see also* Pet. App. 6a; CA9 Appellee Br. 46-47, ECF No. 29; CA9 Reply Br. 27 n.7, ECF No. 38. ARCO's defense of the Ninth Circuit's clear-error ruling fares no better; it just parrots the panel's backfilled rationale for affirming the district court's irrational economic-benefit ruling. Pet. 35; *compare* Pet. App. 6a, *with id.* at 147a-50a.

to resolve'" equitable allocation determinations. BIO 23 (citation omitted). But that is no reason for allowing determinations that are irrational, inconsistent, or unexplained to stand, as the Ninth Circuit's clear-error standard does. Moreover, even if a trial court were better suited to make a determination in the first instance, that is no reason for rubber stamping such determinations on appeal.

ARCO asserts that clear-error review is appropriate because allocation decisions are "fact-intensive." *Id.* But ARCO does not deny that an allocation under Section 113(f)(1) is an "equitable determination," not a "question of fact." *Goodrich*, 311 F.3d at 170; *Rabinowitz*, 75 F.4th at 82 (abuse-of-discretion review applies when courts "balanc[e] competing factors"). Such a determination is not subject to clear-error review simply because there are "conflicts in the evidence that the court must resolve on its way to exercising discretion." *United States v. Bonas*, 344 F.3d 945, 948 n.3 (9th Cir. 2003). ARCO neither explains why a district court's balancing analysis should (or even could) be subject to clear-error review, Pet. 28, nor offers any comparable example of balancing being reviewed for clear error.

The history of appellate practice reinforces this conclusion. ARCO does not dispute that for hundreds of years, courts have properly reviewed other equitable balancing determinations for abuse of discretion. Pet. 29-31. ARCO argues that analogies to other contexts are "inapposite." BIO 25. But again, it misses the point. Courts conduct the same *type* of balancing determination when equitably allocating CERCLA liability as they do in other exercises of equitable discretion. Pet. 28-29. ARCO offers no reason why a different standard should govern here.

All of the factors that this Court uses to determine the proper standard of review—text, history, and sound policy—point in favor of abuse-of-discretion review of CERCLA equitable allocations.

* * *

ARCO admits that the circuits currently apply "different[]" standards of review (BIO 9, 11) to the recurring issue of the validity of CERCLA equitable allocations—a matter that ultimately implicates billions of dollars in response costs. This Court's intervention is needed to resolve that conflict.

CONCLUSION

The petition should be granted.

Respectfully submitted,

SAMIR DEGER-SEN
PETER TROMBLY*
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020

GREGORY G. GARRE
Counsel of Record
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com
Counsel for Petitioner

August 29, 2023

* Admitted to practice in Virginia only.