No. 22-126

In The
Supreme Court of the United States

GOULD ELECTRONICS, INC.,

Petitioner,

v.

LIVINGSTON COUNTY ROAD COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

One of the central purposes of the Comprehensive Environmental Response, Cleanup, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq*., is—as the title suggests—facilitating the governmental or private "response" to the release of hazardous substances and thereby promoting their containment, clean up, and remediation. *Kelley* v. *EPA*, 15 F.3d 1100, 1103 (D.C. Cir. 1994). To further that purpose, the statute allows private parties to recover from other liable parties any "necessary costs *of response*" incurred in addressing a release or threat of release. 42 U.S.C. § 9607(a)(4)(B) (emphasis added.) The often-crucial question is some variant of "[w]ho pays" which costs? *Territory of Guam* v. *United States*, 141 S. Ct. 1608, 1611 (2021).

Nearly all circuit courts have recognized that not every cost incurred by a party relating to a CERCLA matter qualifies as reimbursable "necessary costs *of response*." *See*, *e.g.*, *Carson Harbor Village, Ltd.* v. *Unocal Corp.*, 270 F.3d 863, 873 (9th Cir. 2001); *United States* v. *Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992). Instead, only those that are directly addressed to cleanup qualify. *Id*. So, as some examples, expert witness fees, defense-litigation costs, or the expense of lobbying a government for a favorable liability determination are not "necessary costs of response." *See*, *e.g.*, *Dedham Water Co., Inc.* v. *Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 461 (1st Cir. 1992) (cost of consultants retained to evaluate contamination and pursue litigation not recoverable); *Redland Soccer Club, Inc.* v. *Department of Army of United States*, 55 F.3d 827, 850 (3d Cir. 1995)

(cost of experts evaluating contaminated site unrelated to performance of cleanup not recoverable); *Black Horse Lane Association, L.P.* v. *Dow Chemical Corporation*, 228 F.3d 275, 294–96 (3d Cir. 2000) (cost of consulting expert reviewing but not performing cleanup not recoverable); *Hardage*, 982 F.2d at 1447–48 (costs incurred to develop cleanup plan done in defense against litigation were not recoverable even though the plan was adopted). The Sixth Circuit blurred that distinction here, coloring everything an environmental expert does as recoverable under CERCLA. App. 18–20. Because that decision creates a clear circuit split, this Court should intervene.

The Livingston County Road Commission ("LCRC") makes no effort in its brief in opposition to dispute that the Sixth Circuit's opinion created a circuit split. Instead, LCRC sidesteps the issue of whether this case warrants review—effectively admitting it does—and, instead, it debates the merits of Gould's position on skewed terms. First, LCRC mischaracterizes Petitioner Gould Electronics, Inc.'s ("Gould) argument as somehow seeking to exclude as non-recoverable *all* costs that relate to investigative work an environmental consultant performs. Not so. Gould only asks this Court to correct the Sixth Circuit in line with the decisions of several other courts by observing that defense-related and expert witness costs are non-recoverable. (Pet., pp. *i–ii*.)

Next, LCRC misdirects this Court by contending that Gould's own costs recovered in this action would be excluded under the established rule of other

circuits. To the contrary, Gould's costs did not include any expert testimony, lobbying efforts, or other purely defensive litigation efforts. Instead, Gould's costs related to actual investigative and other remedial actions taken to address the contamination on site. App. 70–73. LCRC's argument relies on a false equivalence.

Finally, LCRC wrongly paints Gould's argument as expanding *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 816–21 (1994) ("*Key Tronic*"). Actually, it perfectly aligns with this Court's decision. This Court held in *Key Tronic* that litigation costs (which, by definition, include both attorney's fees ***and*** expert witness fees) must be explicitly granted in a statute because they are presumed not reimbursable under the "American rule." *Id*. at 817. As this Court noted then, CERCLA nowhere suggests the litigation costs are included as "necessary costs of response," and the fact that it addresses such costs elsewhere strongly suggests they are not. *See* 42 U.S.C. §§ 9606(b)(2)(E), 9610(c), & 9659(f). The principles of *Key Tronic* thus require that expert witness fees or other litigation-related expert costs—like attorney's fees—are not recoverable.

The Sixth Circuit plainly erred. Because this case offers the Court a clean vehicle to answer what is "often the crucial question in a [CERCLA] remedial action" about the scope of cost recovery, *Guam*, 141 S. Ct. at 1611, and to add much-needed definition to the principles expounded in *Key Tronic*, this Court should grant Gould's petition.

REASONS FOR GRANTING THE WRIT

I. LCRC effectively concedes that the Sixth Circuit created a circuit split on whether litigation-related expert costs are recoverable "necessary costs of response" under Section 107(a)(4)(B) of CERCLA.

LCRC wholly ignores the circuit split addressed in Gould's petition. Indeed, it does not address or even cite *any* of those cases. By failing to do so, LCRC effectively concedes that the Sixth Circuit's decision is inconsistent with earlier decisions from the First, Third, Ninth, and Tenth Circuits on this issue. That inconsistency warrants action by this Court.

No circuit court before this case has permitted the recovery of expert witness fees, costs spent by consultants to develop litigation defenses, or expenses to lobby the responsible government agency for a favorable determination. Yet the Sixth Circuit did so here, placing all costs paid to environmental consultants in the recoverable column as "necessary costs of response" and eliding the distinction between those costs that facilitate cleanup and those that do not. App. at 18–20. Worse still, the Sixth Circuit justified its decision in part on a policy-based rationale of "encouraging thorough investigation." *Id*. at 20. And it failed to analyze meaningfully CERCLA's definition of "response," 42 U.S.C. § 9601(25), related statutory definitions, *see* 42 U.S.C. §§ 9601(23) & (24) (defining "remove," "removal," "remedy," and "remedial action"), the statute's use of those terms in other sections, *see*, *e.g.*, 42 U.S.C. § 9604 (providing the government's authority to take

"any . . . response measure . . . which the President deems necessary to protect the public health or welfare of the environment") & § 9605 (providing for establishment of "procedures and standards for responding to releases of hazardous substances"), or even the implementing regulations that set parameters for and further define what constitutes a "response." *See* 40 C.F.R. §§ 300.100–185, 300.400–300.440, & 300.700.

That result contradicts the distinction circuit courts have otherwise uniformly made between the recoverable costs of environmental consultants and non-recoverable such costs. For example, in *Dedham Water Company, Inc.* v. *Cumberland Farms Dairy, Inc*., the First Circuit affirmed a district court's rejection of environmental consultant costs as falling outside of "response costs." *Dedham Water Company, Inc.*, 972 F.2d at 460–61. There, the court noted that the appellant had retained consultants to search for the sources of the pollution and identify polluters from whom it could recover damages. *Id*. at 461. The court held that "[s]uch litigation-related expenses are, of course, not compensable as response costs" under CERCLA. *Id.* It did not matter even that the consultant had performed hydrogeological assessments related to the pollution in dispute. *Id*. at 455–56.

Similarly, the Third Circuit has twice disallowed litigation-related environmental consultant costs. Most recently, in *Black Horse Lane Association, L.P.* v. *Dow Chemical Corporation*, that court rejected the recoverability of fees paid to environmental consultants primarily to review quarterly reports about the

contaminated property and to provide an expert report for litigation. 228 F.3d at 297. The court noted what it observed as the principle of *Key Tronic* that "private parties may not recoup litigation-related expenses in an action to recover response costs pursuant to section 107(a)(4)(B) of CERCLA." *Id*. at 294. And the court observed that, "[g]iven that neither [the consultant] nor [the company] were involved in any capacity in the actual environmental cleanup of the property," none of the fees could be considered as costs of "remedial or response action." *Id*. Its consulting costs therefore were not "necessary costs of response" under Section 107(a)(4)(B). *Id*.; *see also Redland Soccer Club, Inc.*, 55 F.3d at 850.

The Ninth Circuit reached a similar conclusion in *Louisiana-Pacific Corp.* v. *ASARCO, Inc.*, 24 F.3d 1565 (1994). Addressing an award including both attorney's fees as well as "expert witness fees" and other litigation-related expenses, the court viewed *Key Tronic* as "instructive." *Id*. at 1577. The court therefore held that, by awarding those costs, "the district court exceeded its authority to the extent the award of litigation costs exceeded those costs recoverable" under the general taxation-of-cost and witness-fee statutes. *Id*.

Finally, the Tenth Circuit in *United States* v. *Hardage* determined that costs incurred by a defendants' steering committee to investigate remedial alternatives for a site were not recoverable. 982 F.3d at 1447–48. Although these costs clearly related to a proposed "remedy"—fitting squarely within the definition of "response," 42 U.S.C. § 9601(25)—the court nonetheless

held that "when a private party incurs response costs in developing its own remedy, solely to defend against the government's § 106(a) injunction action, the private party's responses costs are not 'necessary' within the meaning of CERCLA § 107(a)(4)(B)." *Id*. at 1448.

The Sixth Circuit contradicted each of those rulings here. Painting broadly, the court held that "fees paid to environmental consulting firms" are "*more like* . . . covered 'costs of response' " than unrecoverable "litigation-related costs." App. at 19. The court made no effort to distinguish the above-cited cases. *Id*. at 18–20. Thus, it allowed LCRC to recover costs that included LCRC's consultants' reviewing data reports from Gould's experts, lobbying the state agency on LCRC's behalf for a favorable decision, and testifying in depositions and at trial. App. 122, 145, & 177. All fees were allowed to be recovered despite not being itemized out, *id*. at 177–78—contrary to the requirements of the National Contingency Plan regulations. 40 C.F.R. § 300.160(a)(1). And they were permitted even though LCRC's consultant never proposed any work to treat the contamination. App. 179.

LCRC's only arguments in response are: (1) to mischaracterize this issue as excluding *all* investigative costs; and (2) to claim that this rule would likewise exclude Gould's costs. Neither is true. On the first, the key statutory language is the word "response." 42 U.S.C. § 9607(a)(4)(B); 42 U.S.C. § 9601(25). Courts have recognized that some investigative costs are "*response* costs" that address contamination and prepare the way for a plan of action. *Krygoski Const. Co., Inc.* v.

City of Menominee, 431 F. Supp. 2d 755, 765 (W.D. Mich. 2006). Not all are. *Dedham Water Company, Inc.*, 972 F.2d at 460–61; *Redland Soccer Club, Inc.*, 55 F.3d at 850; *Black Horse Lane Association, L.P.*, 228 F.3d at 297; *Louisiana-Pacific Corp*, 24 F.3d at 1577; *Hardage*, 982 F.3d at 1447–48. Moreover, merely because a consultant is involved in *some* investigative work that may be properly characterized as a "response" does not mean that *everything* the consultant does is a "response" cost. *Id*.

Similarly, on the second, this is a red herring. LCRC has not challenged Gould's costs on appeal, so this issue is irrelevant. But it is also wrong. Gould submitted its consultant's costs but did not include any expert witness fees, lobbying of the agency, or other improper costs—only those that involved true "response." App. 70–73. Further, Gould has installed a pump-and-treat system, implemented a bioremediation plan, and taken other remedial actions on the property. *Id*. In other words, its investigative costs were a prelude to a later-implemented remedy. By contrast, LCRC included "everything related to this case" by its expert. App. 177–78. That meant her testimony in deposition and trial, her lobbying efforts to the state agency for a favorable decision that LCRC sought to use in litigation, and other litigation-related efforts. App. 122, 145, & 177.

Recovery of such litigation-related expert costs is not permitted under CERCLA. The Sixth Circuit erred in deciding this question differently from its sister circuits. The Court should grant Gould's petition.

II. LCRC's position that Gould seeks to expand *Key Tronic* merely highlights the Sixth Circuit's contradiction of *Key Tronic*, which rejected extraordinary costs as non-recoverable under the "American rule."

Not only does LCRC effectively concede a circuit split, but it has no answer to the allegation that the Sixth Circuit's ruling contradicts *Key Tronic*. LCRC accuses Gould of trying to expand *Key Tronic*, but Gould's position aligns with this Court's reliance in that case on the "American rule" about litigation costs. Indeed, several of the circuit court decisions discussed above invoked *Key Tronic* in support of excluding any litigation-related environmental consultant costs from "necessary costs of response." *See Black Horse Lane Association, L.P.*, 228 F.3d at 294; *Redland Soccer Club*, 55 F.3d at 849, n. 12; & *Louisiana-Pacific Corp.*, 24 F.3d at 1577. They did so for a good reason.

Specifically, *Key Tronic* relied on the "American rule" "that attorney's fees generally are not a recoverable cost of litigation 'absent explicit congressional authorization.'" *Key Tronic*, 511 U.S. at 814. Against that backdrop, this Court adopted two holdings. First, it held that private cost-recovery actions did not constitute "enforcement activities" (within the definition of "response" in 42 U.S.C. § 9601(25)). *Id.* at 816–19. In doing so, it noted that neither 42 U.S.C. § 9607 nor § 9613 "expressly calls for the recovery of attorneys' fees by the prevailing party." *Id.* at 817. And that contrasts with 42 U.S.C. § 9659(f) (which allows prevailing parties to recover "reasonable attorney and expert

witness fees" in citizen suits), 42 U.S.C. § 9606(b)(2)(E) (allowing recovery of attorney fees in some circumstances in abatement actions), and 42 U.S.C. § 9610(c) (allowing recovery of fees in employee-actions based on discrimination). *Id*. Second, the Court allowed that "some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response . . . under the terms of 107(a)(4)(B)," but that did not include "work . . . primarily protecting [a litigant's] interests as a defendant in the proceeding. . . ." *Id*. at 820–21.

Undoubtedly, *Key Tronic* factually applied directly to attorney's fees in that case. But it involved broader principles and recognized both that: (1) in the absence of explicit text to the contrary, the "American rule" applies to CERCLA; and (2) "response" under CERCLA does not include litigation-related actions. Because the "American rule" applies equally to both expert-witness fees and attorney's fees, *Kansas* v. *Colorado*, 556 U.S. 98, 102–03 (2009), the Sixth Circuit's decision here contradicts *Key Tronic*'s principles by allowing recovery of litigation-related expert witness costs. App. 18–20.

III. This case is an ideal vehicle to clarify the scope of CERCLA's undefined phrase "necessary costs of response."

Finally, nothing LCRC says in response to Gould's petition undermines the fact that this case presents an ideal vehicle for the Court to further expound the

phrase "necessary costs of response" for the purpose of CERCLA's cost-recovery actions. 42 U.S.C. § 9607(a)(4)(B). Just the opposite. In its own conditional cross-petition in Case No. 22-272, LCRC decries CERCLA's lack of clarity, quoting cases calling it "[a] hastily drafted piece of legislation . . . viewed nearly universally as a failure." *United States* v. *A&N Cleaners & Launderers*, 854 F. Supp. 229, 239 (S.D.N.Y. 1994); *see also* John Copeland Nagle, *CERCLA's Mistakes*, 38 Wm. & Mary L. Rev. 1405, 1406–07 (1997). Because the statute is such a knaggy knot, this Court decides CERCLA cases as frequently as a doctor sees her most often-complaining patients.

Yet in almost 30 years since *Key Tronic*, this Court has not considered the scope of the phrase "necessary costs of response" even though that is quite regularly the fulcrum on which private cost-recovery claims swing. Here, LCRC was allowed recovery of a variety of expert-related costs, including expert-witness fees, lobbying expenses, and litigation-related defense efforts. Following trial, the district court made an uncontested finding that LCRC's costs were incurred "in efforts . . . aimed at exonerating [the Road Commission] from liability as opposed to mitigating the spread of contamination." App. 130. All that remains is the *de novo* interpretation of CERCLA and the application of law to facts. Thus, this case presents an ideal vehicle for the Court to step in, resolve the circuit split, and clarify this issue for lower courts.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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