No. 23-328

In the Supreme Court of the United States

WILLIAMS ALASKA PETROLEUM, INC. and THE WILLIAMS COMPANIES, INC.,
Petitioners,

v.

THE STATE OF ALASKA; FLINT HILLS RESOURCES, LLC; and FLINT HILLS RESOURCES ALASKA, LLC,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALASKA SUPREME COURT

RESPONDENT THE STATE OF ALASKA'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Williams ran an oil refinery under sloppy practices, spilling and leaking oil and other substances. One of those substances was sulfolane, an industrial solvent Williams knew was toxic and knew it could not lawfully release. Williams reported sulfolane spills to the State of Alaska as "hazardous substance" releases.

Williams's spills resulted in a refinery contaminated with many substances and needing long-term characterization and cleanup. When sulfolane was found to have migrated through the groundwater beyond the refinery and into drinking water wells of nearby residents, the State required action to protect the public. But Williams refused to act. It was later held liable in a contribution suit between responsible parties and required to partially reimburse the cost of an alternative water source for properties it contaminated.

The questions presented are:

1. Whether holding Williams liable for the costs of addressing its sulfolane spills violates due process even though Williams knew that sulfolane was hazardous and unlawful to release.

2. Whether making Williams partially reimburse the cost of an alternative water source for people whose properties it damaged by putting a toxic industrial solvent in their groundwater is an unconstitutional taking of Williams's property.

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INTRODUCTION

Williams is the wrong poster child for any concerns about unfair retroactive environmental liability. Williams knew it could not lawfully release sulfolane into the groundwater, and did so only because it was incredibly careless, not because—as the petition implies—it was legal at the time, or the State of Alaska said it was okay. And Williams did not release just "one drop" of this toxic industrial solvent, but "massive amounts." Pet. App. 166a. Then, after the substance contaminated hundreds of nearby drinking water wells, Alaska's courts did not require Williams to pay for ridiculous, unnecessary remedial measures—they simply required it to partially reimburse the cost of an alternative water source so that residents could stop drinking a hazardous chemical which has not been determined safe for human consumption. So even if one could imagine a case in which Alaska's environmental statutes were applied to impose unreasonable costs on a party that lacked fair notice of what it should not do, this is not that case.

The Court should deny the petition because it is a poor vehicle for the questions it poses. Williams was not fined or punished, so "fair notice" is not even clearly implicated. And even if it were, the state court factual findings—which are binding here—show that Williams knew its conduct was illegal and that the State of Alaska never told it otherwise. This is thus not a case of "retroactive" liability for conduct believed to be legal at the time. Nor was the amount of Williams's liability so untethered from its illegal

conduct as to constitute a potential "taking" of its property. On the contrary, the state courts found that hooking residents up to piped water was a reasonable and necessary response to the large, shifting plume of industrial waste that Williams put in their groundwater.

Perhaps because liability under circumstances like these is straightforwardly appropriate, the petition fails to identify any jurisprudential conflict warranting this Court's intervention. This case is easily distinguishable from every case that Williams compares it to, mainly because Williams never had any reasonable basis to believe its conduct was lawful. Alaska's state courts committed no error, and even if they had, it would not represent a meaningful divergence that this Court should step in to resolve.

STATEMENT OF THE CASE

1. Williams operated the North Pole refinery from 1977 to 2004. Due to its "leaking" and "inadequately constructed" equipment, "mismanaged" wastewater system, "poor upkeep," "deficient culture," and "multiple accidental releases," Williams released oil and oil waste into the environment in a "virtually continuous" stream. Pet. App. 165a, 145a, 199-210a. From 1985 on, Williams's stream of waste included the industrial solvent sulfolane. *Id.* at 165a. "[M]assive amounts of sulfolane were released into the ground and groundwater" during Williams's operation. *Id.* at 166a. Williams also released PFAS, another class of toxic chemicals addressed in this case below but not

directly at issue in this petition. *Id.* at 143a, 212-13a, 259-61a.

2. Sulfolane is dangerous. Pet. App. 230-33a, 297-98a. Williams's own emergency medical care protocol identified "life threats" from exposure. *Id.* at 235a, 298a. The manufacturer's safety data sheet identifies "potential reproductive toxicity effects and acute oral toxicity." *Id.* at 235a. Studies show negative effects of sulfolane exposure in various animal species, exposure pathways, and concentrations. *Id.* at 230-33a, 297-98a. In a 1977 study, for example, sulfolane harmed several species of mammals, with squirrel monkeys being "the most susceptible"—raising the level of concern for humans. *Id.* at 230a. The monkeys suffered "continuous convulsions and vomiting, followed by death." *Id.*

3. The State of Alaska did not approve Williams's sloppy practices or authorize its sulfolane releases. Pet. App. 49a, 210-11a, 304a. The Department of Environmental Conservation (DEC) does not issue permits authorizing refineries to spill and leak waste chemicals into the ground. *Id.* at 211a. DEC's spill response program and Williams both treated spills of sulfolane as reportable "hazardous substance" releases. *Id.* at 239a. Over the years, DEC expressed concern and engaged with Williams about spill prevention and remediation at the refinery, including by imposing a compliance order in 1986. *Id.* at 145-46a, 183a. The U.S. Environmental Protection Agency (EPA) likewise identified concerns resulting in orders. *Id.* at 202a.

But through most of its operations, Williams "prioritized profits over compliance and environmental stewardship." *Id.* at 205a. A Williams employee estimated that Williams's leaky wastewater lagoons—a major source of its sulfolane releases—were non-compliant with federal statutes 18-31 percent of the time between 1999 and 2003, potentially subjecting it to criminal charges. *Id.* at 206a, 209a. Williams loaded the wastewater system with sulfolane and then not only allowed its lagoons to fall into disrepair, but also abused them: an employee even "discharged a firearm at a bulbous protrusion of the lagoon liner," further compromising it. *Id.* at 203a, 3a, 44a, 92a, 201-04a.

4. Williams first detected high concentrations of sulfolane in the refinery's groundwater in 1996, but did not tell DEC until 2001 while working on a required facility-wide corrective action plan. Pet. App. 3a, 176a, 209a. At that point, DEC employees, unaware that sulfolane was spreading beyond the contaminated refinery property, "expressed uncertainty and some concern about the substance, for which there was a paucity of toxicity information." *Id.* at 49a, 65a, 167a. In an email from one DEC employee to Williams regarding a draft of the corrective action plan, the employee said that "sulfolane would not be considered a regulated contaminant 'at this time due to the lack of EPA reviewed toxicity data.'" *Id.* at 177a. Still, DEC required Williams to monitor the sulfolane contamination. *Id.* at 49a, 65a, 176-77a. But Williams "prematurely stopped" its monitoring. *Id.* at 250a.

5. In 2004, Flint Hills bought the refinery from Williams. Pet. App. 273a. Flint Hills "exhibited an

enhanced degree of care" in its operations compared to Williams, and attempted to coordinate and cooperate with regulators. *Id.* at 215a. Later that year, DEC set an initial "cleanup level" for sulfolane at the refinery based on limited information and the belief that the sulfolane was confined within the refinery boundaries, where the groundwater was not used for drinking. *Id.* at 167a. A "cleanup level" is the concentration to which a medium like groundwater must be cleaned, taking into account the uses likely to be affected. *See* Alaska Admin. Code tit. 18, § 75.345(c). It is "not an authorization to pollute up to the cleanup level." Pet. App. 211a.

6. In 2009, Flint Hills determined that sulfolane had migrated far beyond the refinery property. *Id.* at 148a. By 2010, sulfolane was discovered in hundreds of local drinking water wells. *Id.* at 170a. Local residents expressed alarm and concern that they had been drinking sulfolane for years. *Id.* at 169a, 187a. DEC required Flint Hills to provide impacted residents with alternative water. *Id.* at 168a.

Investigation ultimately revealed a shifting plume of sulfolane in the groundwater that is two miles wide, three-and-a-half miles long, and over 300 feet deep. Pet. App. 5a, 195a. The plume was roughly the same size in 2004 when Williams sold the refinery. *Id.* at 170a. The plume is migrating through geologically complex ground including discontinuous permafrost, and some areas are increasing in concentration. *Id.* at 170-73a, 195a, 222-23a. The plume "will last a long but indeterminate time." *Id.* at 170a, 198a. PFAS from

the refinery has also been discovered off-site. *Id.* at 189a.

7. DEC advised Williams that as a former owner of the refinery, it was liable for hazardous substance contamination and was expected to help address it. Pet. App. 179a, 188a, 250-51a. But Williams did not get involved in the efforts to study the plume and provide alternative water. *Id.* In 2013, DEC warned Williams that it would need to accept the results of the remedial process if it failed to participate. *Id.* at 251a.

8. In March 2014, the State brought this lawsuit against Williams and Flint Hills seeking damages and declaratory and injunctive relief holding them liable for the contamination under state law, and the companies filed cross- and counter-claims. Pet. App. 10-11a. It soon became clear to DEC and Flint Hills that the best response to the sulfolane contamination would be to extend the local piped water system to residents affected by the plume, providing them a permanent alternative water source. *Id.* at 180a. In February 2017, the State and Flint Hills entered into a settlement agreeing to fund the extension. *Id.* at 12-13a, 157a, 180a.

But Williams continued to deny any liability and vigorously litigate. In October 2019, the trial court held a 16-day bench trial. Pet. App. 13a. In January 2020, it issued a detailed 184-page decision resolving the State's claims and the companies' cross-claims. *Id.* at 140a-337a. The court found Williams strictly liable for "hazardous substance" releases under Alaska Stat. § 46.03.822(a) based on its sulfolane releases. *Id.* at

309a. The court held Williams liable to the State for its response costs as well as civil assessments to compensate for the "loss of the right of the public to have access to uncontaminated groundwater." *Id.* at 309-24a. The court equitably allocated responsibility for the sulfolane between Williams and Flint Hills under Alaska Stat. § 46.03.822(j), assigning 75 percent to Williams and holding it liable to Flint Hills in contribution for a corresponding portion of Flint Hills' sulfolane-related costs, including what Flint Hills spent on the piped water system extension. *Id.* at 328-31a.

9. Williams appealed to the Alaska Supreme Court, which in a May 2023 decision affirmed the trial court in all but one respect, remanding its injunctive relief as insufficiently specific. Pet. App. 52-56a. The Alaska Supreme Court affirmed the trial court's finding that sulfolane is "hazardous" and its conclusion that Williams should share responsibility for the costs of responding to its releases and pay civil assessments. *Id.* at 17a, 39a, 50a. The court agreed that the sulfolane response costs (including the piped water system) were "necessary," "cost-effective," and "reasonable resolutions to the sulfolane groundwater contamination." *Id.* at 39a. And it rejected arguments that holding Williams liable would violate due process or effect an unconstitutional taking, explaining that "Williams was on notice of the potential for liability under a gamut of antipollution statutes" and that its "irresponsible waste management" was not "conduct linked to 'reasonable investment-backed expectations' that takings jurisprudence seeks to protect." *Id.* at 64a, 68a.

10. Litigation about Williams's contamination remains ongoing. The scope of injunctive relief is being litigated on remand. Pet. App. 52-56a. The City of North Pole has pending sulfolane claims against Williams in a case that was deconsolidated from this one for trial. *Id.* at 98-99a, 162a. And claims about off-refinery PFAS contamination were remanded to DEC for its administrative process. *Id.* at 162-63a.

REASONS FOR DENYING THE PETITION

I. The facts of this case make it a poor vehicle for addressing the questions in the petition.

To sell this as a case worthy of the Court's attention, Williams must distort the record. Williams casts itself as a cautious operator following administrative guidance that was slapped with an excessive bill for an unnecessary public works project as punishment for releasing "one drop" of a substance it did not know was hazardous. A skim of the trial court's factual findings makes clear that this is not that case.

A. Williams knew its conduct was illegal.

The petition suggests that Alaska's statutory definition of "hazardous substance" is so vague that Williams could not possibly have had "fair notice" that it was illegal to release sulfolane into the ground. Pet. 18, 25, 32. The facts belie any such claimed ignorance. *Cf. Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) ("Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.").

1. First, it was illegal for Williams to release sulfolane into the ground regardless of whether sulfolane was considered a "hazardous substance," and Williams knew this the entire time it operated the refinery. Williams "conceded at trial" that "releasing sulfolane regardless of its official status as a hazardous substance was prohibited by law." Pet. App. 92a. Williams "knew that it was not permitted to simply dispose of the substance in any manner it wished." *Id.* at 64a, 212a. It "agreed that the 'key rule' and the 'regulatory requirement of running a refinery' 'is not to have any release to air, water, or soil without a permit to do so from a regulatory agency." *Id.* at 211a. Williams thus knew precisely what it was not supposed to do.

2. Second, Williams knew sulfolane was hazardous. "Williams itself treated sulfolane as a hazardous substance." Pet. App. 44a, 64a, 292a. The State's spill response program and Williams "considered surface spills of sulfolane, petroleum containing sulfolane, and oil waste containing sulfolane to be reportable hazardous substance releases." *Id.* at 239a, 211a. A Williams employee testified that sulfolane was a "hazardous substance" and that "if it was spilled, it had to be reported." *Id.* at 240a, 292a. He explained that if, for example, Williams spilled naphtha containing sulfolane, the "sulfolane portion would have been treated as a hazardous substance spill." *Id.* at 239a. "Williams managed spills of pure sulfolane as RCRA hazardous waste." *Id.* at 247a. Williams listed sulfolane on its "hazardous chemical inventory" due to its "acute and chronic health hazards." *Id.* at 239a. Williams "treated sulfolane in its emergency medical care policy as

though it were life-threatening." *Id.* at 20-21a, 31a. Later in its tenure at the refinery, Williams paid to transport a dozen railcars of sulfolane-contaminated wastewater offsite as hazardous waste. *Id.* at 207-08a. The evidence thus showed that "Williams was on notice of the potential for liability under a gamut of antipollution statutes, including those related to hazardous substances." *Id.* at 64a. A petition for certiorari is not the place to disagree with these state-court factual findings. *See Chrisman v. Miller*, 197 U.S. 313, 319 (1905) ("In cases coming from a state court, we do not review questions of fact, but accept the conclusions of the state tribunals as final.").

3. The petition tries to deflect by arguing that even though Williams knew releasing sulfolane was illegal, it lacked notice "that leaving the sulfolane in the ground would subject [it] to such harsh civil liability" or "that [it] would be held strictly liable for the presence of *any* amount of sulfolane in the groundwater." Pet. 25, 26. But Williams clearly knew the sulfolane it left in the ground was a source of potential liability, as evidenced by the specific carveout for on-refinery sulfolane contamination that it negotiated in its purchase agreement with Flint Hills. Pet. App. 275-79a. In any event, Williams was held liable for releasing the sulfolane in the first place, not for "leaving the sulfolane in the ground." Alaska's statutes clearly prohibit unpermitted releases of hazardous substances and provide strict liability for them. *See* Alaska Stat. §§ 46.03.745 (prohibiting unpermitted hazardous substance releases); 46.03.822 (providing strict liability for unpermitted releases or even a "substantial threat of an unpermitted release"); 46.03.710 (prohibiting

pollution); 46.03.760 (providing civil damages for violations). Nothing in the language of these statutes would have supported a reasonable belief by Williams that it could illegally release sulfolane for decades but avoid liability after the fact just by hoping the substance would become diluted over time. The groundwater concentrations of sulfolane decades after Williams's violations are thus irrelevant to "fair notice."

4. Ultimately, Williams released sulfolane because of carelessness, not confusion on the law. It caused the contamination through "'unreasonable' conduct." Pet. App. 44a, 68a. Indeed, Williams was so careless that its releases can hardly even be called "unintentional." Pet. 3. As the Alaska Supreme Court put it,

> Williams knew sulfolane was at least toxic if not "hazardous." Yet the "care" that Williams exercised included storing sulfolane-containing waste in a leaky, decommissioned lagoon, some of whose many holes were crudely "patched" by nailing two-by-fours to the liner. Pet. App. 92a.

The case of a careless party that had actual knowledge that its conduct was illegal provides a poor vehicle for exploring "fair notice" or "retroactive" liability.

B. The State did not reverse course.

Williams likewise must completely revise history to cast itself as a cautious operator following the guidance of an agency that later "reversed course." Pet. 4, 18.

1. Williams did not release sulfolane into the ground in reliance on any official position of the State that sulfolane was not "regulated." Williams had already been illegally leaking and spilling sulfolane for nearly two decades before it received a context-specific email about the substance from a single DEC contaminated sites employee in 2002. Pet. App. 165-66a. Even assuming this email could be characterized as "administrative guidance," Williams obviously could not have relied on it when releasing sulfolane from 1985 through 2002. Again, Williams knew releasing sulfolane was illegal. It released sulfolane "[d]ue to poor upkeep" and "multiple accidental releases," not because it thought it was legal. *Id*. at 3a.

2. Timing aside, the 2002 email—which is Williams's only basis for saying the State "reversed course"—is a thin reed for the arguments Williams rests on it. *See* Alaska S. Ct. E.R. ("E.R.") 22-25. As the Alaska Supreme Court explained, the State never "promulgated prior interpretations about sulfolane in legal briefs, regulations, or adjudications that Williams might have relied on" to claim it was not hazardous. Pet. App. 65a. The 2002 email—which in no way resembles the formal legal interpretations in the cases Williams analogizes—could not reasonably have been construed as a decree that the State had "ultimately concluded [sulfolane] was not hazardous." *Id*.

To the contrary, the 2002 email was sent by a single DEC contaminated sites employee in the context of discussions about monitoring and cleanup obligations for the host of contaminants at the refinery. The employee said that sulfolane was "not considered [a]

regulated contaminant[] at this time due to the lack of EPA reviewed toxicity data," and told Williams to monitor it rather than including it in that particular site plan. E.R. 23. But as Williams admitted, the substance was indeed "subject to regulatory requirements even during Williams's operations—such as requirements to report and cleanup spills," Pet. App. 307a, 238-40a, tasks that are concomitant with sulfolane's status as a hazardous substance. Alaska Stat. § 46.09.010, .020 (requiring reporting and cleanup of hazardous substance releases). Thus, DEC's spill response program clearly "regulated" sulfolane as a hazardous substance, notwithstanding the email. Pet. App. 239a. And the 2002 email cannot reasonably be read as retroactive permission for years of prior releases or a promise never to require Williams to address sulfolane even if it migrates into drinking water.[1] *Id*. at 306-07a. The employee who sent it does not even have authority to issue discharge permits. *Id*. at 211a.

3. The petition repeatedly implies that the State of Alaska maintains a "comprehensive" "list" or "table" of all "hazardous substances," but this is inaccurate. *See* Pet. I, 3, 7, 19. Unlike federal CERCLA regulations, no Alaska statute or regulation "lists" hazardous substances (and even CERCLA reaches unlisted substances). *See* 40 C.F.R. § 302.4. The State has a regulation governing groundwater cleanup with a

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[1] Nor does the record remotely support the suggestion that if not for the 2002 email, Williams would have kept the sulfolane (which it had been releasing for nearly two decades) from spreading beyond the refinery. Pet. 19. Williams did not even comply with the email's monitoring instruction. Pet. App. 250a.

table of default cleanup levels for substances with enough toxicity data for DEC to establish such default levels. *See* Alaska Admin. Code tit. 18, § 75.345(b)(1). The purpose of this table is to facilitate cleanup of sites contaminated with those substances. Pet. App. 48a. It is not a list of every hazardous substance, nor has the State ever presented it as such. Indeed, the same regulation sets out procedures for setting cleanup levels "for a hazardous substance not listed" on the default table.[2] Alaska Admin. Code tit. 18, § 75.345(b)(3), (4). Accordingly, the fact that sulfolane is not on the list does not constitute an agency position that it is not "hazardous." Indeed, sulfolane is more toxic than about half of the substances that currently have default groundwater cleanup levels. Pet. App. 19a, 237a.

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[2] The petition notes that DEC amended its regulations after this litigation began. Pet. 7 n.1. But contrary to Williams's inference, the pre-amendment regulations still allowed DEC "to deviate from the listed cleanup levels." *Id.* They provided that contaminated groundwater must meet the default cleanup levels "or" a "cleanup level based on an approved site-specific risk assessment" and allowed DEC "to require a more stringent cleanup level." Alaska Admin. Code tit. 18, § 75.345(b)(1)-(2), (c) (June 17, 2015). The amendments clarified that alternative cleanup levels for compounds without default cleanup levels could be proposed by responsible parties or independently adopted by DEC. Alaska Admin. Code tit. 18, § 75.345(b)(3)-(4) (current). And they codified DEC's authority when "toxicity information is insufficient to establish a cleanup level," to "require a responsible person to provide an alternative source of drinking water for the affected parties or implement other institutional controls." *Id.* § .345(d). That was coextensive with existing requirements that responsible parties contain releases, Alaska Stat. § 46.09.020, and "prevent, eliminate, or minimize potential adverse impacts to human health, safety, and welfare." Alaska Admin. Code tit. 18, § 75.325(f)(1)(D).

Nor is a cleanup level, when DEC sets one, an authorization to pollute up to that level. *Id.* at 211a, 308a.

In sum, this is not a case in which a regulated party reasonably relied on formal agency guidance in attempting to conform its conduct to the law, nor a case of "retroactive" liability for conduct legal at the time.

C. The response costs were necessary.

Also belied by the record is the claim that it was unreasonable for the State and Flint Hills to provide piped water to properties whose groundwater Williams contaminated with its toxic industrial solvent.

1. Contrary to the petition, the courts below did not hold that the State could recover "for any remediation projects [it] sees fit," nor did they require Williams to share the cost of the piped water system "in the absence of any finding" that it "was necessary to protect public health or welfare." Pet. 31, 3, 16, 29. In fact, the trial court rejected Williams's position that the piped water system was "unreasonably expensive and unnecessary," finding that it was "reasonable and not arbitrary and capricious," "a reasonable response to the contamination," and "more sustainable and protective than other alternative water solutions." Pet. App. 33a, 265-66a, 309-10a. The Alaska Supreme Court agreed that the response costs (including the piped water system) were "necessary," "cost-effective," and "reasonable resolutions to the sulfolane groundwater contamination." *Id.* at 39a. Williams believes that these findings were wrong, but it cannot

accurately assert that the lower courts made no such findings at all.

2. Not only did both courts below find that the piped water system was reasonable and necessary, but Williams waived (by not raising in the Alaska Supreme Court) challenges to many of the factual findings that undergird this conclusion. The trial court determined (in findings Williams did not appeal) that the sulfolane plume "threatened and harmed public welfare" and negatively affected local residents. Pet. App. 299-300a, 25a n.50 ("Williams does not challenge the court's factual findings about the impact on North Pole residents"). The trial court also found (again in findings Williams did not appeal) that "[c]lean water is a key component to the desire to live in the area," and that the plume impeded development, caused property values to drop, led to a mandatory pollution disclosure in real estate transactions, and caused residents to worry about their health. *Id*. at 244-45a, 300a. A case where the petitioner waived challenges to important factual findings makes a poor vehicle for review.

3. Other factual findings further support the piped water solution. The sulfolane "contaminated an aquifer that was extensively used for drinking water," Pet. App. 140a, making this case nothing like *Matter of Bell Petroleum Servs., Inc.*, in which there was "not one shred of evidence" that anyone "was actually drinking" the contaminated water. 3 F.3d 889, 905 (5th Cir. 1993) (cited at Pet. 29 n.5). And here, "extensive information in the record" supported the trial court's "conclusion that [sulfolane] presented a danger to public

health" even though "the exact nature" of that risk "remains to be understood." Pet. App. 44a. The trial court found that "at a minimum, sulfolane exposure can reduce white blood cell counts; at a maximum sulfolane exposure can cause death." *Id.* at 298a. It found that sulfolane "injures or degrades" the groundwater, lowers its "quality, purity, and desirability," renders it "impure and unfit for human consumption," and makes it "actually or potentially harmful" to public health, public welfare, and animals. *Id.* at 248-49a, 150a. On top of that, the trial court found that the plume will last a long time. *Id.* at 141a.

4. Williams argues that it could not possibly be "reasonable" or "necessary" to do anything about the sulfolane plume without definitive proof that people are getting sick or that long-term exposure to sulfolane is harmful at current groundwater concentrations. Pet. 5, 29. But the record establishes ample reason for concern about sulfolane and there remains "a lack of human or chronic data" to establish *any* concentration of sulfolane that is actually safe to drink. Pet. App. 190-94a. Some 300 drinking water wells were impacted, "groundwater flows in the area are complex and variable," and concentrations in wells go up and down. *Id.* at 170a, 172a, 183a. The small local population makes it "hard to determine what health problems of residents could be attributable to sulfolane." *Id.* at 235a. The implication of Williams's position is that the people of North Pole should have been treated as human guinea pigs, continuing to drink a toxic chemical (and accept lower property values) until it is conclusively proven unsafe. But the

Constitution contains no right to impose this cost on one's neighbors.

5. Williams asserts that governments might "use strict liability as a pretext" to "upgrade state infrastructure, even where the upgrade bears only the loosest connection to any harm caused by the legal violation," Pet. 31, but that is not what happened here. Indeed, the Alaska Supreme Court thought Williams "border[ed] on bad faith" by using selective quotations to claim that "the State had ulterior motives" other than public health and welfare. Pet. App. 37a n.75. Williams may disagree with that finding, but its factual dispute does not merit certiorari. Moreover, Williams could have—but did not—participate in the problem-solving process or propose any feasible alternative to the piped water system. *Id.* at 310a, 251-52a.

D. The liability imposed was not punitive.

Not only is Williams the wrong litigant for the petition's "fair notice" claim, but a preliminary question that the lower court "assume[d] without deciding" stands as a hurdle to reaching the claim. Pet. App. 61a n.17. That question is whether the compensatory liability here even triggers the "fair notice" doctrine.

1. By relying on cases about civil fines and penalties, the petition implies that the State imposed over $100 million in liability as *punishment* for Williams's violations. Pet. 20-27. But the statutes involved here "are not intended to 'punish' but rather to compensate for environmental damage." Pet. App. 61a n.17. Most of Williams's $100 million liability went to pay back the State and Flint Hills for an equitable share of the

money they spent responding to Williams's mess. *See id.* at 339-42a. Equitable contribution allocates such costs to ensure they are borne by those responsible, not the general public. *See id.* at 85-86a, 89a. Because the State and Flint Hills actually incurred these costs, reimbursing them is not equivalent to punishment. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (recognizing that "compensatory and punitive damages . . . serve different purposes" and that due process "prohibits the imposition of grossly excessive or arbitrary *punishments* on a tortfeasor" (emphasis added)).

2. On top of these response costs, Williams was also subject to about $2.5 million in civil assessments as liquidated damages for hard-to-value environmental harm. Pet. App. 39-51a. The trial court took care to craft this relief to also be compensatory, not punitive. *Id.* at 313-16a. But even if these assessments are viewed as punitive, that makes this a $2.5 million case, not a $100 million case—and one involving a preliminary issue that the lower court did not decide and the petition does not explore. *Id.* at 61a n.17 ("We assume without deciding that the large statutory assessments awarded against Williams may be considered 'penalties' to which fair notice requirements apply.").

In sum, these are the wrong facts—and Williams is the wrong litigant—for the questions in the petition.

II. The petition identifies no conflict to resolve.

The petition identifies no jurisprudential conflict that requires this Court's intervention. This case is easily distinguishable from every case the petition

compares it to, and even if it were not, it would not represent a meaningful rift warranting certiorari.

A. There is no conflict with this Court's fair notice precedent.

To show that the decision below is "irreconcilable with this Court's precedents on fair notice," the petition cites four cases nothing like this one. Pet. 17-20.

1. In *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), the FCC announced a standard that fleeting expletives and nudity were not indecent, changed its mind, and then applied its new indecency standard retroactively to fine Fox Television for fleeting expletives and nudity. But that case involved civil penalties and its context raised concerns about chilling First Amendment speech. 567 U.S. at 253-54. This case, by contrast, involves only compensatory liability, and spilling industrial chemicals is not a protected activity that raises any concerns about "chilling." Even more fundamentally, whereas in this case the lower courts found that Williams *knew* that its conduct was unlawful, there was no such finding in *Fox*.

2. The petition goes on to claim that *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), means the "relevant question" here is whether DEC had announced its view that sulfolane meets the statutory definition of "hazardous" before Williams released it. Pet. 20. But *Christopher* does not say that a court cannot enforce a statute unless an agency has previously announced an interpretation of it. Rather, *Christopher* says that when and how an agency announces its interpretation is relevant to whether a

court should *defer to* the agency's interpretation—not whether the statute itself is enforceable. *See* 567 U.S. at 155-61. If the Court in *Christopher* had thought the statute (there, the Fair Labor Standards Act) applied to the conduct at issue, it would have enforced the statute—the Court just refused to defer to the agency's view on the matter. *See id.* at 161-69. *Cf. F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 253–54 (3d Cir. 2015) (explaining that if a court is not deferring to an enforcing agency's interpretation of a statute, "the ascertainable certainty standard does not apply. The relevant question is not whether [the defendant] had fair notice of the [agency's] *interpretation* of the statute, but whether [the defendant] had fair notice of what the *statute itself* requires." (emphasis in original)).

Here, the Alaska Supreme Court interpreted and applied the statutory language using its "independent judgment," just like this Court in *Christopher*. Pet. App. 27a-32a. It also correctly observed that unlike the agency in *Christopher*, "DEC did not cause Williams unfair surprise." *Id.* at 64a n.131. In *Christopher*, "the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA." 567 U.S. at 157. Here, by contrast, Williams knew all along that releasing sulfolane was illegal.

3. The petition's other citations are even farther afield. In *United States v. Williams*, 553 U.S. 285 (2008), the Court *rejected* a First Amendment vagueness challenge to a statute criminalizing child pornography and recognized—even in that very different

context—that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.* at 304 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

4. As for *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the cited footnote merely comments (in a case about the Contracts Clause) that due process "generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive.'" *Id.* at 17 n.13. This passing observation is not relevant in this case, which involves neither "retrospective civil legislation" nor "harsh and oppressive" consequences. In any event, this standard "does not differ from the prohibition against arbitrary and irrational legislation." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984).

The petition thus fails to show a conflict with any decision of this Court.

B. There is no conflict among lower courts.

This case is similarly distinguishable from the decisions the petition cites from three courts of appeals to try to show a lower court conflict. Pet. 21-27. Williams asserts that these courts have "declined to apply a new agency interpretation of a statute or regulation retroactively." *Id.* at 21. But the Alaska Supreme Court did not apply an "agency interpretation" at all, much less "retroactively"—it interpreted the statute itself. Pet. App. 27a-32a. And in the cited court of appeals cases, regulated parties were punished despite reasonably thinking their conduct was lawful. Not so for Williams, which was not punished and knew

(indeed conceded) that its sulfolane releases were not lawful. Pet. App. 92a; *see also id.* at 209-12a, 238-40a.

1. In *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995) and *Rollins Environmental Service (NJ) Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991), the D.C. Circuit held that the EPA could not punish companies with fines for violating regulations about PCB disposal when they reasonably believed, given the regulations' language, that their methods of dealing with PCBs were allowed. *General Electric*, 53 F.3d at 1328-34; *Rollins*, 937 F.2d at 654. These cases followed *Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154 (D.C. Cir. 1986), in which the court emphasized the "penal" context of its holding that a company could not be fined because a vague regulation did not make clear what was prohibited. *Id.* at 156-57. Similarly in *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), the court reversed the FCC when it punished a TV station (by denying its license renewal) for violating an unclear regulation. *Id.* at 628-31. Williams is unlike the companies in all these cases for the same two reasons: it was not punished and it had no reasonable basis for thinking its conduct was legal.

2. The cited Fourth Circuit case, *United States v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997), is another example of the same thing. There, the court held that the EPA could not impose "quasi-criminal" penalties on a company for failing to comply with benzene regulations because the company had reasonably thought it fell within an exemption. *Id.* at 224-26. That case is not remotely analogous. DEC did not fine Williams for not including sulfolane in its 2002 corrective

action plan, which was the subject of the 2002 email that Williams relies on as a source of ambiguity. Instead, Williams's liability here—which was not punitive—stemmed from its sulfolane releases, which it knew were illegal. Pet. App. 92a, 290-92a, 303-09a.

3. Finally, the Fifth Circuit in *Employer Solutions Staffing Group II, L.L.C. v. Office of Chief Administrative Hearing Officer*, 833 F.3d 480 (5th Cir. 2016)—like this Court in *Christopher*, 567 U.S. 142—simply refused to defer to an agency's interpretation that had not previously been made clear, instead interpreting the laws itself. *Id.* at 487-91. The Alaska Supreme Court interpreted the law here too. Pet. App. 27a-32a.

The petition thus reveals no "uncertainty in the law of fair notice" needing resolution. Pet. 27.

C. There is no conflict with this Court's takings precedent.

The petition tacks on a "takings" argument, but fails to identify any conflict there either. Pet. 27-30. Even if it would be "quintessentially arbitrary"—as the petition claims—for the State to require a company that released "one drop" of sulfolane to "upgrade state infrastructure" in a way that "bears only the loosest connection to any harm caused by the legal violation," that is simply not what happened here. Pet. 29, 31.

1. The petition criticizes "retroactive" liability, Pet. 27, but as explained above, the liability in this case was not retroactive. *Supra* at 8-15. Williams's irresponsible practices were illegal at the time it owned

and operated the refinery. The Alaska Supreme Court did not even decide whether retroactive hazardous substance liability would be an unconstitutional "taking" because there was "no retroactive liability imposed here." Pet. App. 68a n.138.

2. Regardless of retroactivity, the petition identifies no takings problem. As the Alaska Supreme Court observed, "Williams's irresponsible waste management and sulfolane releases are not conduct linked to 'reasonable investment-backed expectations' that takings jurisprudence seeks to protect." Pet. App. 68a. Requiring Williams to help address the mess it left behind is neither "arbitrary and irrational" nor "substantially disproportionate" to Williams's experience, nor does it interfere with "expectations that any reasonable business owner would have." Pet. 27-28. The record shows Williams to be far from a "reasonable business owner," and as explained above, the remediation costs were reasonable, not "arbitrary." *Supra* at 15-18.

3. For all these reasons, this case is easily distinguishable from the only takings precedent the petition tries to analogize. Pet. 27-30. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a plurality of the Court invalidated, as an unconstitutional taking, a retroactive law that required a former coal operator to pay into pension plans for certain retired former employees. *Id.* at 529. The statute was explicitly retroactive and the newly imposed pension costs were unconnected to the former coal operator's activities. *Id.* at 533-36. Here, by contrast, Williams's liability was not retroactive and a straight line can be drawn between the

remediation costs and Williams's illegal releases of "massive amounts" of sulfolane. *See* Pet. App. 166a. Not only that, but the *Eastern Enterprises* plurality recognized that the former coal operator *could have* permissibly been held responsible if its circumstances had been more analogous to Williams's, just as coal companies were required to compensate coal miners for death or disability due to black lung disease in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *See Eastern Enterprises,* 524 U.S. at 536 ("Eastern might be responsible for employment-related health problems of all former employees whether or not the cost was foreseen at the time of employment, [] but there is no such connection here." (internal citation omitted)).

At bottom, the aim of the takings clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Here, "fairness and justice" dictate that the burden of the sulfolane plume should be borne by those who created it, not by "the public as a whole." The Constitution does not protect any "property right" to put industrial solvents in your neighbors' drinking water wells.

III. This Court's review is not warranted.

Williams asks the Court to take this case to "establish guardrails" on strict liability, but that is just another way of asking for error correction. Pet. 17, 30. This is not an error-correction court, and Williams's belief that it should not have been held liable under

this set of facts is not enough to warrant certiorari. If the principles the petition raises are "important in the context of" environmental laws like CERCLA and the Clean Water Act, Pet. 31, the Court can wait for a case under those major federal statutes with better facts.

Williams predicts that the Alaska Supreme Court's decision will "erode the fair-notice doctrine" and become a "roadmap" for states to "impose crushing and unforeseeable liability on regulated parties." Pet. 21, 31. But even accepting Williams's inaccurate spin on this case, the Alaska Supreme Court is not such a trendsetter that this Court needs to step in before any such thing happens. Nothing in the petition indicates that this Court's "guidance" is "much-needed" or that lower courts need the kind of "guardrails" that this fact-specific case could establish. Pet. 32.

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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