No. 23-328

In the Supreme Court of the United States

WILLIAMS ALASKA PETROLEUM, INC.;
THE WILLIAMS COMPANIES, INC.,
PETITIONERS

v.

STATE OF ALASKA; FLINT HILLS RESOURCES, LLC;
FLINT HILLS RESOURCES ALASKA, LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALASKA SUPREME COURT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

A. The decision below is irreconcilable with this Court's precedents on fair notice 3

B. The Alaska Supreme Court's decision is inconsistent with the decisions of other lower courts 6

C. The award of costs for North Pole's expanded water system violates due process and effectuates a judicial taking 8

D. The Court's review is warranted 10

TABLE OF AUTHORITIES

Cases:

Bell Petroleum Services, *In re*, 3 F.3d 889 (5th Cir. 1993) 9

Christopher v. *SmithKline Beecham Corp.*, 567 U.S. 142 (2012) 4, 8

Eastern Enterprises v. *Apfel*, 524 U.S. 498 (1998) 10

Employer Solutions Staffing Group II, L.L.C. v. *Office of Chief Administrative Hearing Officer*, 833 F.3d 480 (5th Cir. 2016) 7

FCC v. *Fox Television Stations, Inc.*, 567 U.S. 239 (2012) 3

General Electric Co. v. *EPA*, 53 F.3d 1324 (D.C. Cir. 1995) 7

Meriden Trust & Safe Deposit Co. v. *FDIC*, 62 F.3d 449 (2d Cir. 1995) 10

Trinity Broadcasting of Florida, Inc. v. *FCC*, 211 F.3d 618 (D.C. Cir. 2000) 3

United States v. *Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997) 7

Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 3, 4, 7

Welch v. *Henry*, 305 U.S. 134 (1938) 3, 4, 7

Page

Statutes and regulation:

Alaska Stat.:

§ 46.03.760(a) 5
§ 46.03.760(b) 5
§ 46.03.822 ..... 4, 5, 8, 9
§ 46.03.822(a) 4
§ 46.03.826(5) 7
§ 46.03.826(5)(A) 4

Alaska Admin. Code tit. 18, § 75.345(b) 4

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The Alaska Supreme Court imposed over $100 million in liability on petitioners for the release of a chemical the Alaska Department of Environmental Conservation declined to regulate as a hazardous substance during the period that petitioners owned and operated the North Pole refinery. Over $50 million of that bill included upgrades to municipal infrastructure in the absence of any showing that the upgrades were necessary to protect public health and welfare. The Alaska Supreme Court's decision contravenes this Court's precedents on fair notice; creates

tension with other lower-court decisions concerning the imposition of retroactive liability by an agency; and amounts to a judicial taking. The constitutional questions raised by the imposition of such extreme civil liability are exceptionally important and warrant this Court's review.

Respondents throw up a host of irrelevant facts, ask this Court to ignore the obvious constitutional problems created by the decision below, and attempt to downplay the resulting inconsistency. All of their efforts are unavailing.

On the issue of fair notice: the Alaska Supreme Court's decision cannot be reconciled with numerous decisions from this Court holding that, as a matter of due process, a regulated party must be on fair notice of what conduct the law prohibits before being subjected to severe civil liability. Nor can the decision below be reconciled with the decisions of federal courts of appeals that have applied the fair-notice principle to the imposition of strict liability in similar contexts.

On the issue of a judicial taking: respondents barely engage with petitioners' argument that it is entirely arbitrary for state law to permit the imposition of remediation costs unnecessary to protect public health or welfare, based on the release of any level of a chemical treated as hazardous under state law. Such a regime drastically interferes with reasonable investment-backed expectations and cannot be squared with this Court's precedents.

In light of the severe liability imposed by the decision below, this case presents the Court with a particularly suitable opportunity to establish guardrails on the imposition of retroactive strict liability. The petition for a writ of certiorari should be granted.

A. The Decision Below Is Irreconcilable With This Court's Precedents On Fair Notice

Respondents do not meaningfully dispute that due process requires fair notice before the imposition of severe civil liability. See Pet. 17-20. Instead, they attempt to distinguish away the conflict between the decision below and this Court's precedents on fair notice. See Alaska Br. 8-15, 18-22; Flint Hills Br. 23-26. That attempt fails.

1. Alaska argues (Br. 18-19) that the constitutional requirement of fair notice does not apply where the liability imposed is "compensatory" and not "punitive" in nature. But the fair-notice doctrine is not so narrow. For example, this Court has held that the "retrospective aspects of legislation" requiring mine operators to compensate employees injured in the course of their employment are subject to "the test of due process." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). Similarly, the Court has held that a tax can violate due process where, "consider[ing] the nature of the tax and the circumstances in which it is laid," "its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Welch* v. *Henry*, 305 U.S. 134, 147 (1938).

Accordingly, the compensatory aspects of petitioners' liability do not eliminate the fair-notice problem. It is the *imposition* of that liability, not the calculation of damages, that "deprived [petitioners] of property." *Trinity Broadcasting of Florida, Inc.* v. *FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (citation omitted).

Respondents' efforts to limit this Court's fair-notice precedents to their facts are also unavailing. The constitutional requirement of fair notice extends beyond cases in which the imposition of serious civil liability "raise[s] concerns about chilling First Amendment speech." Alaska Br. 20; see *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239 (2012). And while Alaska is correct (Br. 20-

21) that *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142 (2012), involved deference to an agency's interpretative rule, the same principle of fair notice applies where, as here, the agency brings an enforcement action seeking to "impose potentially massive liability" for "conduct that occurred well before [the agency's new position] was announced." *Id.* at 155-156; cf. *Usery*, 428 U.S. at 16-17; *Welch*, 305 U.S. at 147.

2. Respondents next argue (Alaska Br. 8-15; Flint Hills Br. 23-26) that the principle of fair notice does not apply here because petitioners knew that releases of sulfolane could result in liability under Alaska law. But respondents play fast and loose with the question before the Court. That question is whether petitioners had fair notice that the release of sulfolane could subject them to harsh civil liability under the hazardous-substance provision of the Alaska Environmental Conservation Act (Section 46.03.822)—despite the State's decision, at all relevant times, not to regulate sulfolane as a "hazardous substance." See Pet. 25-27.

Petitioners did not know that sulfolane was a regulated "hazardous substance" under the Act. See Pet. 20. The Act imposes strict liability for the release of any "hazardous substance," Alaska Stat. § 46.03.826(5)(A); see *id.* § 46.03.822(a), but neither the statute nor the Department's regulatory table list sulfolane as a hazardous substance, see Alaska Admin. Code tit. 18, § 75.345(b). Even if, as Alaska argues, petitioners were not entitled to rely on the regulatory table as an exhaustive "list of every hazardous substance," Br. 14, the critical point is that the Department did not provide petitioners with any notice (through the list or otherwise) that sulfolane *was* a hazardous substance.

It does not follow from the fact that petitioners handled sulfolane carefully as a business practice, see Alaska

Br. 9-11; Flint Hills Br. 23-24, that they had fair notice that sulfolane constituted a "hazardous substance" under the Act. And contrary to Alaska's suggestion (Br. 9), petitioners did not have fair notice that the release of sulfolane could lead to $100 million in civil liability under Section 46.03.822 simply because their operating licenses or other provisions prohibited the discharge of *any* substance without a permit. Unsurprisingly, the Act's remedial scheme for the release of hazardous substances is far more sweeping than the corresponding scheme for the release of non-hazardous substances. Compare Alaska Stat. § 46.03.760(b) (authorizing uncapped damages for the release of a hazardous substance), with *id.* § 46.03.760(a) (imposing a $100,000 limit on damages for ordinary violations).

Alaska's position (Br. 11-15) that the Department did not reverse course is, on this record, incredible. The Act's "vague" definition of "hazardous substance" appropriately led petitioners to rely on administrative guidance when determining the status of sulfolane under state law. See Pet. App. 28a, 64a. Although the Department had not expressly confirmed that sulfolane was not a hazardous substance, its words and actions had the same effect. During the period that petitioners owned and operated the refinery, the Department took a "casual attitude toward sulfolane," Pet. App. 167a, going as far as to tell petitioners in 2002 that sulfolane did not need to be included in a site plan that, under Alaska regulations, required petitioners to identify the presence of regulated hazardous substances. See *id.* at 184a-185a.[*]

[*] To be sure, that communication came in the form of an e-mail sent by a single employee, but that employee had authority to enforce state environmental law against petitioners, and Alaska conspicuously does not argue that the e-mail did not reflect the Department's position at the time. Br. 12-13.

In 2004, the Department did an about-face, advising Flint Hills by letter that sulfolane was now classified as a "hazardous substance" under state law—without explaining how sulfolane satisfied the statutory standard. See Pet. App. 185a. The Department then sought to impose severe civil liability on petitioners through litigation in state court pursuant to that new interpretation of state law. If that is not a reversal of position, it is not clear what would be.

Respondents thus err by suggesting that petitioners had "reason to suspect" that the release of sulfolane would lead to liability under the Act's hazardous-substance provisions despite agency silence on the issue. Flint Hills Br. 23 (citation omitted). The Department was not silent about its position: it told petitioners that sulfolane was not regulated as a hazardous substance at the time. Regardless, any uncertainty about whether petitioners had "reason to suspect" that the release of sulfolane would lead to liability under the Act's hazardous-substance provisions is no reason to deny review. To the contrary, it is bound up in the merits question this Court will address if certiorari is granted.

B. The Alaska Supreme Court's Decision Is Inconsistent With The Decisions Of Other Lower Courts

Unlike the Alaska Supreme Court, other lower courts have refused to enforce a new agency interpretation of a statute or regulation retroactively against a party that could not have anticipated the new interpretation with sufficient certainty. See Pet. 21-27. Respondents unsuccessfully attempt to distinguish those decisions.

1. Under the approach to fair notice adopted by the Fourth, Fifth, and D.C. Circuits, an agency's interpretation of a statute or regulation violates a regulated party's right to fair notice where, "by reviewing the regulations

and other public statements issued by the agency," the party would not be able to "identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." *General Electric Co.* v. *EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (citation omitted); see *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216, 225 (4th Cir. 1997); *Employer Solutions Staffing Group II, L.L.C.* v. *Office of Chief Administrative Hearing Officer*, 833 F.3d 480, 487-489 (5th Cir. 2016).

The decision below is incompatible with that approach. The Alaska Supreme Court held that the definition of "hazardous substance" in Section 46.03.826(5) could be "vague in some instances," and it acknowledged that the Department informed petitioners in 2002 that sulfolane "was not then regulated as a hazardous substance." Pet. App. 64a-65a. The Alaska Supreme Court nevertheless concluded that petitioners could not rely on the Department's silence and inaction, nor on its statements that sulfolane was not "regulated" as a hazardous substance, to "claim sulfolane was *not* hazardous." *Id.* at 65a (emphasis added). Under the approach of the Fourth, Fifth, and D.C. Circuits, the analysis would come out differently.

2. Respondents attempt to distinguish the decisions of those circuits in various ways. None is persuasive.

Respondents stress that those decisions involved administrative, not judicial, interpretations of a vague statute. See Alaska Br. 21; Flint Hills Br. 30. That is a distinction without a difference. This Court has never suggested that fair notice is limited to administrative interpretations. See *Usery*, 428 U.S. at 16-18; *Welch*, 305 U.S. at 147. And in any event, the agency is the party that initiated the judicial enforcement action here. If an agency informs a party that its conduct does not violate state law, the party is entitled to rely on the agency's position and

not fear that the agency will subsequently initiate an enforcement action against it for the very same conduct.

Respondents next contend that the decisions cited by petitioners did not "involve[] a finding that the party raising the fair notice issue was in fact on notice of the liability in question." Flint Hills Br. 29; see Alaska Br. 22-24. That simply begs the question. This case concerns whether petitioners had notice of "the liability in question" under Section 46.03.822, not whether the decision below comported with due process assuming that petitioners did receive fair notice.

Respondents attempt to distinguish the decisions cited by petitioners on two other grounds: that the decisions concerned only "fines, civil penalties, or other forms of punishment," and that they "involve[d] only the regulated party and the government" and no other "private actor" such as Flint Hills. Flint Hills Br. 31; see Alaska Br. 22. As already explained, see p. 3, the first distinction rests on a faulty premise. And the second is irrelevant. Due process requires the government to provide fair notice when it imposes severe liability, regardless whether that involves money being paid to a private party or the government. See *Christopher*, 567 U.S. at 150-151, 157-158. Because the decision below cannot be reconciled with the approach of other courts, further review is warranted.

C. The Award Of Costs For North Pole's Expanded Water System Violates Due Process And Effectuates A Judicial Taking

The Alaska Supreme Court's decision requiring petitioners to pay for 75% of the cost of the expansion of North Pole's water system, without any showing that the expansion was necessary to protect public health or welfare, violated petitioners' right to due process and constituted a judicial taking. See Pet. 27-30. Respondents' arguments to the contrary lack merit.

1. Respondents first argue the liability here was not retroactive in nature. See Alaska Br. 25; Flint Hills Br. 27. That is so, respondents insist, because petitioners were aware that sulfolane was subject to "regulatory requirements" under other state programs. Alaska Br. 13 (quoting Pet. App. 307a); see Flint Hills Br. 30. But as already explained, see p. 5, potential liability under *other* provisions of Alaska law is not dispositive of whether Alaska impermissibly imposed retroactive liability under Section 46.03.822.

Respondents next contend that this case does not involve one-drop strict liability, because more than one drop of sulfolane was released, and that the Alaska Supreme Court found that the piped-water system was reasonable, cost-effective, and not arbitrary. See Alaska Br. 15, 24; Flint Hills Br. 24, 27. But that contention only underscores the arbitrariness of the decision below. On the one hand, the Alaska Supreme Court treated the determination of whether a substance is "hazardous" as independent from the substance's concentrations in the environment—which is why the release of even one drop of sulfolane would suffice. See Pet. App. 28a-30a. On the other hand, the court concluded that it did not need to determine whether the levels of sulfolane in the groundwater "have caused adverse health effects" in order to determine whether the piped-water system was "reasonable" or "necessary." *Id.* at 36a.

The record lacks the "essential information" that a piped-water system would reduce any adverse health effects from sulfolane. *In re Bell Petroleum Services*, 3 F.3d 889, 906 (5th Cir. 1993). And as a result of its erroneous reasoning, the Alaska Supreme Court forced petitioners to shoulder the burden for an unproven solution to an unproven problem. The result is the imposition of liability that is quintessentially "arbitrary and irrational."

Eastern Enterprises v. *Apfel*, 524 U.S. 498, 537 (1998) (plurality opinion).

2. Respondents next argue that the imposition of liability in this case cannot constitute a judicial taking because the release of sulfolane was "not conduct linked to 'reasonable investment-backed expectations.'" Flint Hills Br. 27 (citation omitted); see Alaska Br. 25. But petitioners took the Department at its word in 2002 when it informed them that it did not view sulfolane as a hazardous substance under the Act. Petitioners reasonably expected that they were not required to take remedial steps at that time and acted accordingly, relying on the Department's guidance. See Pet. 19. Once sulfolane was retroactively classified as a hazardous substance—only *after* petitioners sold the refinery to Flint Hills—petitioners were left with "no options to avoid the loss" that the new classification imposed. *Meriden Trust & Safe Deposit Co.* v. *FDIC*, 62 F.3d 449, 454 (2d Cir. 1995). That is enough to give rise to a judicial taking.

D. The Court's Review Is Warranted

The questions presented in this case are exceptionally important. See Pet. 30-32. Respondents fail to identify any valid obstacles to this Court's review.

1. Respondents contend that the decision below is too "fact-specific" and "factbound" to warrant review. See Alaska Br. 27; Flint Hills Br. 22. That is a puzzling contention, because the Alaska Supreme Court's resolution of petitioners' constitutional arguments was grounded in errors of law. See Pet. App. 59a-68a. Even if those questions arise on the particular facts here, this case provides the Court with an opportunity to elucidate the broader constitutional principles limiting the imposition of strict liability.

2. The Flint Hills respondents argue that other issues of state law "played a significant role" in the Alaska Supreme Court's decision, rendering this case a poor vehicle for review. Br. 32. That is incorrect.

The Flint Hills respondents specifically point to the Alaska Supreme Court's statement that petitioners forfeited a challenge to the trial court's finding that sulfolane threatens "public welfare." Br. 32. That conclusion, however, does not affect whether petitioners had fair notice of liability for sulfolane under Alaska's hazardous-substance statute; it simply means that there are alternative bases to treat sulfolane as hazardous under state law. Petitioners are not challenging that state-law determination before this Court. See Pet. 20.

The Flint Hill respondents also note (Br. 32-33) that the Alaska Supreme Court gave weight to petitioners' statement in their initial answer that sulfolane was hazardous, even though petitioners clarified in their amended answer that the question whether sulfolane qualified as a "hazardous substance" was a legal question. See Pet. 13-14. But the Alaska Supreme Court did not treat that point as dispositive on the constitutional issues. See Pet. App. 23a, 31a-32a. To the contrary, it proceeded to address those issues without referring to the supposed evidentiary admission. See *id.* at 32a-37a, 59a-68a.

Finally, the Flint Hills respondents observe (Br. 33) that the Alaska Supreme Court declined to decide whether sulfolane qualifies as a "hazardous substance" under other prongs of the state statute. See Pet. App. 32a n.66. Yet the possibility that a state court might reach the same conclusion on different grounds on remand is hardly a bar to this Court's review.

In the end, this case represents strict liability run amok. The decision below, imposing over $100 million in liability on petitioners, contravenes precedents from this

Court and lower courts on fair notice and effectuates a judicial taking. The Court should grant the petition and take this opportunity to provide much-needed guidance on the necessary limits of strict liability.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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