

No. 25-758

IN THE
Supreme Court of the United States

MORELAND PROPERTIES LLC,

Petitioner,

v.

THE GOODYEAR TIRE & RUBBER COMPANY AND
GOODYEAR FARMS, INC.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state agency's review and approval of a private cleanup establishes a presumption of compliance with the requirements of the National Contingency Plan (NCP), without regard to the degree or nature of state involvement and notwithstanding an overt failure to comply with an express requirement of the NCP.

RULE 29.6 STATEMENT

Respondent Goodyear Farms, Inc. is a wholly owned subsidiary of Respondent The Goodyear Tire & Rubber Company, an Ohio corporation. The Goodyear Tire & Rubber Company (NASDAQ: GT) is a publicly held corporation that owns 100% of Goodyear Farms, Inc.'s stock.

Respondent The Goodyear Tire & Rubber Company (NASDAQ: GT) has no parent corporation. BlackRock, Inc. (NYSE: BLK) owns more than 10% of The Goodyear Tire & Rubber Company's stock. No other publicly held company owns 10% or more of The Goodyear Tire & Rubber Company's stock.

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INTRODUCTION

Petitioner seeks *certiorari* from an unpublished, non-precedential decision that—as Petitioner concedes—never addressed the question Petitioner now seeks to have this Court decide. The petition should be denied. There is no circuit split for this Court to resolve; the case is beset by numerous vehicle problems; and the Ninth Circuit decided the case correctly.

Petitioner is a private landowner that cleaned up contamination on its property and sought to recover the cleanup costs from Respondents as former owners under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The law allows such recovery only if the party seeking it establishes that it followed certain federally-prescribed procedures that ensure the cleanup was necessary, cost-effective, and properly carried out.

In particular, a private party must show both that its costs were necessary and that its cleanup was consistent with the National Contingency Plan (NCP), the federal regulation governing hazardous-waste cleanups. Two specific NCP requirements are relevant here: a party seeking to recover costs must (1) perform a “feasibility study” comparing the effectiveness and cost of a range of cleanup options before selecting a remedy, and (2) provide an opportunity for meaningful “public participation” in the remedy-selection process. 40 C.F.R. § 300.430(c), (e); *id.* § 300.700(c)(6).

Here, after a ten-day bench trial, the district court found that Petitioner satisfied none of those

requirements. It: (1) did not demonstrate that its response costs were necessary, (2) did not conduct a feasibility study evaluating cleanup alternatives, and (3) did not provide a meaningful opportunity for public participation.

The Ninth Circuit affirmed based on Petitioner's complete failure to conduct a feasibility study, noting that Petitioner "submitted no evidence to show that it conducted the required feasibility study or otherwise analyzed remedial alternatives." Pet. App. 9a. The court therefore did not reach the district court's other grounds of decision.

Petitioner now attempts to reframe the case around an issue that was not addressed below. Before excavating its property, Petitioner executed a "settlement" with the Arizona Department of Environmental Quality (ADEQ)—even though there was no pending or threatened administrative action to settle. Petitioner contends that ADEQ's mere approval of its work plan under that settlement created a presumption that its cleanup complied with the NCP, effectively negating the need to comply with regulatory requirements such as a feasibility study. And Petitioner claims this argument implicates a circuit split on the legal effect of state oversight.

The Court should deny the petition for several reasons.

First, there is no circuit split. None of the cases Petitioner cites recognizes the existence of such a split, and in fact the circuits apply the same legal framework—often citing, as good law, cases that are on what Petitioner depicts as the "opposite" side of a

split. NCP compliance is a fact-intensive inquiry that turns on the circumstances of the particular cleanup. Courts sometimes treat government oversight as supporting compliance and sometimes do not, depending on the nature and degree of oversight reflected in the record. Those differing outcomes reflect factual differences, not conflicting legal rules.

In addition, it is particularly clear that there is no split on the issue *presented by this case*—specifically, the holding that Petitioner’s complete failure to do a feasibility study was fatal to its claim. Many of the decisions Petitioner cites concern disputes over whether state oversight may substitute for one particular NCP requirement: public participation. But there is no case holding that state oversight or approval negates the NCP requirement to do a feasibility study or excuses a party’s complete failure to do one.

Second, the petition suffers from serious vehicle problems. Most notably, the Ninth Circuit never decided the question presented. Its opinion did not discuss any presumption, analyze the legal effect of state oversight, or engage with the circuit decisions Petitioner invokes. The court simply held that Petitioner’s failure to perform the required feasibility study was dispositive.

The petition thus seeks review of a legal issue the Ninth Circuit neither analyzed nor decided. Resolving that issue in the first instance would be contrary to this Court’s settled practice as a court of review, not first view.

Equally fundamental, Petitioner would not prevail even if it won the legal issue it presents. Even

assuming state approval could create a presumption of NCP compliance, that presumption would be amply rebutted by Petitioner’s complete failure to satisfy the feasibility-study requirement—the very defect on which the Ninth Circuit’s decision rests. The district court also held, independently, that Petitioner failed to prove its costs were “necessary.” That alternative holding defeats CERCLA recovery on its own and was not disturbed on appeal. And in any event, this case would still be a poor vehicle for resolving any alleged split: the limited state involvement here would not satisfy the standards applied in any of the circuits Petitioner cites.

Finally, the decision below is correct. Nothing in CERCLA supports the judge-made presumption Petitioner seeks. Congress and EPA have created limited presumptions where they intended them—for government cleanups and for EPA-approved private cleanups—but not for state-approved private cleanups. That deliberate omission is dispositive. There is no basis for a presumption that Congress and EPA chose not to create—let alone one that would negate express NCP requirements.

For all these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. Legal Background

Congress enacted CERCLA in 1980 to ensure that hazardous waste sites are cleaned up promptly—and to allocate the costs of cleanup. *See Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 602 (2009); 42 U.S.C. § 9601 *et seq.* Because the EPA cannot manage every cleanup itself, CERCLA allows

private landowners to undertake cleanups and then—if the cleanup satisfies the process required by federal law—sue the original polluter to recover their costs. 42 U.S.C. § 9607(a).

To recover those costs under § 9607, a private party must establish that (1) the site in question is a “facility”; (2) there was a “release” or threatened release of a hazardous substance; (3) the defendant is a “covered person” under the statute; and (4) the plaintiff incurred “necessary costs of response” that were “consistent with the national contingency plan.” See *Carson Harbor Vill. v. Unocal Corp.*, 270 F.3d 863, 870–71 (9th Cir. 2001) (en banc) (citing 42 U.S.C. § 9607).

This case concerns the fourth element, which has two requirements: the plaintiff’s response costs must be necessary ones, and the cleanup must be consistent with the national contingency plan (NCP), the federal regulatory framework governing hazardous-waste cleanups. See 40 C.F.R. pt. 300. A private party’s cleanup is deemed “consistent with the NCP” if, on the whole, it substantially complies with the NCP’s applicable procedural requirements and “results in a CERCLA-quality cleanup.” 40 C.F.R. § 300.700(c)(3)(i), (4). Two of the NCP’s express requirements are especially relevant here.

First, the party must prepare a feasibility study—a document that develops and compares “appropriate remedial alternatives,” including a no-action alternative, evaluated for “effectiveness,” “implementability,” and “cost”—before selecting a remedy. 40 C.F.R. § 300.430(e). The feasibility study ensures that “relevant information concerning the

remedial action options can be presented to a decision-maker and an appropriate remedy selected.” See 40 C.F.R. § 300.430(e).

Second, the NCP requires meaningful public participation in the remedy selection process. Before cleanup begins, the party must “provide an opportunity for public comment concerning the selection of the response action,” 40 C.F.R. § 300.700(c)(6), including making a “proposed plan” available to the public so that the community may “participate in the selection of [the] remedial action,” *id.* § 300.430(f)(2).

Congress and EPA have created limited presumptions of NCP compliance in carefully defined circumstances. When the United States, a State, or an Indian tribe conducts a cleanup *itself*, CERCLA presumes that the work is consistent with the NCP. 42 U.S.C. § 9607(a)(4)(A). The presumption is not conclusive; it can be rebutted when the cleanup in fact was not consistent with NCP requirements. See, e.g., *Washington State Dep’t of Transp. v. Washington Nat. Gas Co.*, 59 F.3d 793, 799–805 (9th Cir. 1995) (citing failure to satisfy both feasibility study and public participation requirements); *Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019 (8th Cir. 1998) (similar). EPA regulations create a similar presumption when private parties perform cleanups pursuant to an EPA order or consent decree. 40 C.F.R. § 300.700(c)(3)(ii).

Outside those circumstances, a private party seeking cost recovery bears the burden of demonstrating substantial compliance with the NCP. See *Carson Harbor Vill. v. County of Los Angeles*, 433

F.3d 1260, 1265 (9th Cir. 2006) (citing 42 U.S.C. § 9607(a)).

B. Factual Background

This dispute arises from a parcel of land in Goodyear, Arizona, that Respondents The Goodyear Tire & Rubber Company and Goodyear Farms, Inc. (collectively, “Goodyear” or “Respondents”) leased to Marsh Aviation, a crop-dusting company, from 1974 to 1988. Pet. App. 21a.

During that time, Marsh applied pesticides—including toxaphene and arsenic-based herbicides—to the property. Pet. App. 21a–22a. After the Environmental Protection Agency banned those chemicals, the Arizona Department of Environmental Quality (“ADEQ”) ordered Marsh to clean up the site. Pet. App. 22a. When Marsh later went out of business, Goodyear assumed responsibility for the cleanup under ADEQ’s supervision. Pet. App. 22a.

Over several years, Goodyear worked closely with ADEQ to remediate contamination on the property. Pet. App. 23a–24a. After completing the cleanup, Goodyear recorded a Declaration of Environmental Use Restriction (“DEUR”) in 2004, which restricted a certain portion of the property to non-residential use. Pet. App. 25a–26a. In the DEUR, Goodyear reported that the area had been remediated to arsenic and toxaphene concentration levels deemed acceptable for the site’s intended commercial use. Pet. App. 25a–26a.

Years later, a subsequent owner subdivided the property into residential and non-residential parcels, and in 2010 Petitioner Moreland Properties

purchased the non-residential portion (known as Tract D). Pet. App. 26a–27a. Four years later, while preparing to sell the property, Petitioner hired Western Technologies to test the soil, because it could obtain a higher price if the parcel could be approved for residential use, rather than the non-residential (commercial) use stated in the DEUR. Pet. App. 28a.

The resulting report asserted that several samples exceeded Arizona’s non-residential arsenic standard. Pet. App. 28a–29a. It suggested that excavating part of Tract D could achieve residential levels of contaminants and noted that less expensive remediation options might be available, but it did not identify or evaluate any such alternatives. Pet. App. 28a–29a.

In 2017, Petitioner had new consultants begin additional testing. Pet. App. 30a–31a. Petitioner also contacted ADEQ to discuss the elevated arsenic levels and possible next steps, including whether to adopt a site-specific cleanup standard or modify the DEUR. Pet. App. 30a. ADEQ informed Petitioner that, under the statewide non-residential standard, no further cleanup was required for non-residential use. Pet. App. 30a.

Despite those assurances, Petitioner—presumably to enable more lucrative residential use—insisted on pursuing further cleanup and sought the imprimatur of an administrative settlement with ADEQ, Pet. App. 30a–31a, notwithstanding the absence of any pending or threatened enforcement action. Petitioner chose not to participate in ADEQ’s Voluntary Remediation Program (VRP), which agency officials

testified was generally preferred because it provided greater oversight and often resulted in more effective cleanups. Pet. App. 31a, 100a. This decision was made to avoid the costs and requirements associated with the VRP. Pet. App. 31a.

Instead, Petitioner chose to remediate Tract D through its own work plan. Pet. App. 32a. Petitioner submitted to ADEQ a plan that not only undertook no feasibility study but proposed just a single cleanup approach—one that would allow the property to be used for more valuable residential development: excavating the arsenic- and toxaphene-impacted soil and hauling it away. Pet. App. 32a–36a. It included no new risk assessment and did not analyze—or even acknowledge—any alternative remediation methods, despite Petitioner’s prior consultant having noted that “[l]ess expensive remediation/mitigation alternatives are potentially available.” Pet. App. 9a, 29a–33a. ADEQ approved the plan. Pet. App. 33a.

Two weeks before beginning the work, Petitioner posted signs and distributed flyers announcing the cleanup but did not solicit public comments or hold a public meeting. Pet. App. 34a. Petitioner later reported that post-excavation arsenic and toxaphene levels were below both Arizona’s non-residential and residential soil remediation levels. Pet. App. 8a, 36a.

ADEQ confirmed in October 2020 that Petitioner had completed the remediation consistent with the administrative settlement agreement. Pet. App. 37a. Shortly thereafter, Petitioner filed this suit against Respondents seeking to recover its cleanup costs.

C. Procedural Background

In November 2020, Petitioner sued Respondents, raising, among other things, a CERCLA cost-recovery claim and state-law fraud claims. Pet. App. 4a, 20a. The district court dismissed the fraud and several other claims as time-barred. Pet. App. 4a–6a; D. Ct. Dkt. 117 at 6–10.

At a ten-day bench trial, the evidence indicated “that ADEQ considered Moreland’s remediation to be voluntary,” Pet. App. 50a; that Petitioner chose “not [to] consider any remedial alternatives,” Pet. App. 45a; that ADEQ “did not directly participate in the remediation,” Pet. App. 48a; and that ADEQ’s representatives “were unaware of the extent to which ADEQ verified the accuracy and adequacy of information that Moreland submitted,” *id.*

After trial, the district court made three relevant findings, each of which independently defeated Petitioner’s CERCLA claim: (1) Petitioner’s response costs were not “necessary” under CERCLA because Petitioner failed to show any real risk to human health or the environment requiring remediation (as ADEQ had expressly informed Petitioner), or that Petitioner’s excavation was necessary; (2) Petitioner failed to substantially comply with the NCP because it conducted no feasibility study evaluating alternative cleanup methods; and (3) Petitioner also failed to satisfy the NCP’s public-participation requirement. Pet. App. 42a–50a. Each finding provided a separate and sufficient basis for denying recovery. Pet. App. 42a–53a. Judgment was thus entered for Goodyear. Pet. App. 55a.

On appeal, the Ninth Circuit affirmed in an unpublished memorandum. Pet. App. 1a. On the CERCLA claim, the panel held that Petitioner had failed to substantially comply with the NCP because it had not conducted the required feasibility study. Pet. App. 8a–10a.¹ Because Petitioner was “barred from recovering on that ground,” the court expressly declined to reach the district court’s other, independently sufficient, grounds for denying recovery—that Moreland’s costs were not “necessary” and that Moreland failed to satisfy the NCP’s public-participation requirement. Pet. App. 6a–10a. Nor did the court address whether state agency review and approval alone creates a presumption of substantial compliance with the NCP, regardless of whether the statutory and regulatory requirements were otherwise satisfied. Pet. 12.

Petitioner sought both panel and en banc rehearing but in doing so did not raise the issue it now asks this Court to address. The Ninth Circuit denied rehearing. Pet. App. 2a.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant certiorari to decide whether a state agency’s review and approval of a private cleanup creates a presumption of compliance with the NCP. That request fails for multiple, independent reasons.

¹ The majority also affirmed the district court’s decision that the fraud claims were time-barred. Pet. App. 4a. Judge Graber dissented on that issue but joined in the CERCLA analysis. Pet. App. 11a.

To begin with, there is no circuit split to resolve. The courts of appeals consistently consider the nature and extent of state oversight as part of the fact-intensive evaluation of NCP compliance, and none has adopted the categorical presumption Petitioner proposes. Nor is there any disagreement on the issue actually presented here: no court has held that state oversight can excuse a complete failure to conduct a feasibility study—the ground on which this case was decided.

The petition also suffers from serious vehicle problems. Most fundamentally, the Ninth Circuit never decided the question presented, so there is no ruling on that issue for this Court to review. Equally dispositive, Petitioner could not prevail even if it succeeded on its legal theory: its undisputed failure to conduct a feasibility study is fatal under any standard, and the district court's unreviewed holding that Petitioner's costs were not "necessary" independently bars recovery. And in any event, this case would be a poor vehicle for resolving any alleged split because the limited and atypical state involvement here would not satisfy the standards applied in any of the decisions Petitioner cites.

Finally, the decision below is correct. CERCLA's text and structure require private parties to demonstrate NCP compliance and provide no basis for the judge-made presumption Petitioner seeks. Congress and EPA created specific, limited presumptions in defined circumstances, but chose not to extend them to state-approved private cleanups. Allowing state approval to substitute for compliance—particularly where, as here, Petitioner failed to perform the required feasibility study—

would undermine the statute and the safeguards built into the NCP.

Accordingly, the Court should deny the petition.

I. There Is No Circuit Split.

Petitioner, relying heavily on unpublished decisions and *dicta*, identifies seven circuit decisions and claims they divide 3–4 on whether state oversight of a private CERCLA cleanup creates a presumption of substantial compliance with the NCP. Pet. 2. But there is no split on the question presented, for two independent reasons.

First, the circuits all apply the same legal framework. Across the cases Petitioner cites—none of which recognizes a split among the Circuits—courts evaluate NCP compliance through a fact-intensive inquiry that asks whether the cleanup, viewed as a whole, substantially complied with the regulatory requirements. *See, e.g., Santa Clarita Valley Water Agency v. Whittaker Corp.*, 99 F.4th 458, 481–82 (9th Cir. 2024) (explaining that NCP compliance turns on “the specific facts of th[e] case,” including whether there was “substantial and extensive government agency involvement”). Within that framework, the degree of government involvement—including state supervision—is simply one relevant consideration.

Indeed, at least two of the decisions Petitioner cites as rejecting the relevance of state oversight *expressly agree* that state supervision *can* support a finding of NCP compliance. They reached different results not because they applied conflicting legal rules, but because the facts differed—particularly in

the degree and nature of the state’s involvement in the cleanup.

Second, even if one accepted Petitioner’s framing, the supposed disagreement does not concern any issue presented in *this* case. The decision below turned on Petitioner’s failure to satisfy the *feasibility-study requirement*. Certain decisions consider whether state oversight can provide public involvement that effectively satisfies the *public-participation requirement*. But no court—on either side of the alleged split—has held that state approval can excuse a failure to conduct a feasibility study. So even on Petitioner’s own terms, there is no division on the holding in this case.

A. The Circuits Apply the Same Legal Framework.

1. Petitioner asserts that the First, Second, and Seventh Circuits adopted a categorical presumption that state “approval” establishes NCP compliance. Pet. 2. None of those courts used that language, and none announced such a rule; indeed, in two of the three decisions the statements Petitioner relies on are dicta. Nor did any of those cases involve the issue here: a complete failure to conduct a feasibility study.

Properly read, those decisions articulate a narrower and consistent principle: when a private party conducts a cleanup under sufficiently thorough substantive monitoring and with the ultimate approval of the relevant state environmental agency—where the state is engaged throughout the remediation process—such oversight can provide

relevant support for a finding of substantial NCP compliance.

The Seventh Circuit's decision in *NutraSweet Co. v. X-L Engineering Co.* illustrates the point. 227 F.3d 776 (7th Cir. 2000). There, the defendant challenged NCP compliance on the ground that test results showed the plaintiff had not effectively cleaned up its property. *Id.* at 790. The court first held that the defendant had waived the NCP issue. *Id.* at 791. It then observed (in *dicta*) that the district court "did not clearly err" in finding the cleanup sufficient, on a record showing substantial state involvement and a specific determination that remediation had "succeeded to the maximum extent possible." *Id.* The court emphasized that its conclusion rested on "this evidence"—the full record of agency involvement—not on the mere fact of state approval. *Id.*

In short, *NutraSweet* established no broad principle that state agency approval negates the need to establish NCP compliance. Rather, it stated—in *dicta*—only that on the evidence of active agency involvement in that case, the district court did not clearly err in concluding that the plaintiff's cleanup had been sufficiently effective.

The First Circuit's decision in *City of Bangor v. Citizens Communications Co.* is even further afield. 532 F.3d 70 (1st Cir. 2008). There, NCP compliance was not challenged on appeal, so the court had no occasion to even decide the issue. *Id.* at 91. Its observation that compliance is "often" established when "the remediation work is carried out under the approval and monitoring of the appropriate state environmental agency" thus appears only in *dicta*.

Id. And even taken at face value, the statement describes a factual pattern that *may* support a finding of compliance—not a categorical presumption.

The Second Circuit’s decisions are no more helpful to Petitioner. In *Bedford Affiliates v. Sills*, the court held only that “extensive involvement of a government agency charged with the protection of the public environmental interest is an effective substitute for public comment,” 156 F.3d 416, 428 (2d Cir. 1998)—a holding limited to the NCP’s public-participation requirement and one that turns on the degree of state involvement. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.* is to the same effect. 596 F.3d 112, 137 (2d Cir. 2010). There, the court described “one way” to establish compliance as conducting the response under state “monitoring” and “ultimate approval.” *Id.*

Taken together, these cases do not establish any presumption that a cleanup complied with the NCP based on “state approval” or “oversight” alone, without regard to the nature of the oversight or the nature of the cleanup. They instead reflect a fact-specific inquiry into the nature and extent of the state’s involvement in a given cleanup. Nor did any of them address—much less hold that state oversight could excuse—the feasibility-study requirement at issue here.

2. Petitioner’s characterization of the other side of the purported split is equally distorted. The Sixth, Eighth, and Tenth Circuits did not recognize any split with the other Circuits and did not hold that state oversight is legally irrelevant to the NCP

inquiry. To the contrary, at least two cited the same cases Petitioner relies on in recognizing that state involvement *can* matter, and a third actually applied a presumption of compliance. The different outcomes instead reflect differences in the facts—particularly the degree of regulatory involvement. But that is a fact-bound inquiry, not a circuit split.

The Eighth Circuit’s decision in *Union Pacific Railroad Co. v. Reilly Industries, Inc.*, 215 F.3d 830 (8th Cir. 2000), is illustrative. The court cited the Second Circuit decision in *Bedford Affiliates* and expressly harmonized its approach, noting that “we do not quarrel” with *Bedford Affiliates*’ position that “comprehensive” state input may satisfy the NCP’s public-participation requirement; and that “critical factual differences between *Bedford Affiliates* and the case at bar warrant different outcomes.” *Id.* at 838. Far from identifying any disagreement, the court treated the cases as applying the same legal standard but concluded that on the facts before it the level of state involvement was insufficient to cure the plaintiff’s failure to comply with the NCP’s public-participation requirements. *Id.*

The Tenth Circuit’s decision in *Public Service Co. of Colorado v. Gates Rubber Co.* follows the same pattern. 175 F.3d 1177 (10th Cir. 1999). The court expressly relied on *Bedford Affiliates*, quoting its statement that “state participation may fulfill the public participation requirement.” *Id.* at 1186. Yet it ultimately concluded that the record before it showed “no record evidence of the state’s comprehensive involvement in [the] cleanup.” *Id.* As in the Eighth Circuit, the court applied the same legal standard and reached a different result based on the facts,

holding only that the cleanup failed to satisfy the NCP's procedural requirements *on that record*.

And the Tenth Circuit's decision in *Morrison Enterprises v. McShares, Inc.*, 302 F.3d 1127 (10th Cir. 2002), found NCP compliance by *applying a presumption* tied to EPA oversight, because the cleanup was conducted under a state consent order as part of an EPA-approved "state deferral pilot program" designed to produce "CERCLA-protective cleanups." *Id.* at 1137–39. But it did not adopt any broader rule. Although it briefly noted that some courts have treated state involvement as sufficient, it neither resolved that issue nor endorsed a general presumption based on state approval alone. To the contrary, the court emphasized that its holding was limited to the particular program and facts before it, rejecting any "blanket presumption" or "sweeping conclusions" about state-led cleanups more generally. *Id.* at 1138–39.

Finally, Petitioner relies on the Sixth Circuit's 30-year-old unpublished decision in *Pierson Sand & Gravel, Inc. v. Pierson Township*, 1996 WL 338624 (6th Cir. 1996). But as an unpublished decision, it is non-precedential and cannot establish Sixth Circuit law—much less create a circuit split. *See In re Miller*, 377 F.3d 616, 622 (6th Cir. 2004). In any event, *Pierson* addressed only one NCP requirement—public participation—and carefully analyzed whether the state procedures at issue were sufficient to satisfy that requirement. 1996 WL 338624, at *3–4. And it addressed no argument that state oversight established a presumption of NCP compliance; rather, it rejected only the more extreme argument

that state supervision entirely negated the NCP requirement of public participation. *Id.* at *5.

3. The Ninth Circuit’s recent decision in *Santa Clarita Valley Water Agency*, 99 F.4th 458, further undermines Petitioner’s claim that the decision below reflects the Ninth Circuit’s categorical rejection of state oversight in the NCP analysis. In *Santa Clarita*, the court credited “extensive” state agency involvement as satisfying the NCP’s public-participation requirement—the very kind of holding Petitioner claims the Ninth Circuit refused to make in this case. *Id.* at 479–81.

The Ninth Circuit’s holding—that “substantial and extensive government agency involvement can satisfy the public participation requirements of the NCP,” *id.* at 480—again illustrates the fact-specific inquiry courts undertake in assessing the relevance of state agency involvement to NCP compliance. That assessment includes a focus on how “substantial and extensive” the agency’s involvement is, and on which NCP requirement is at issue—typically, the public-participation requirement.

4. In short, Petitioner falls far short of showing any split on a question of law. The decisions it cites do not reflect competing legal rules, but rather fact-bound outcomes that turn on the particular circumstances of each cleanup—including the nature and extent of state involvement. Differences in results across those cases reflect differences in the underlying records, not any clear doctrinal disagreement warranting this Court’s review.

B. There Is No Split on the Question This Case Actually Presents.

1. There is a second, independently dispositive reason to deny certiorari: no circuit has addressed—much less divided on—the ground on which this case was decided. So even accepting Petitioner’s characterization of a broader split, that alleged disagreement does not reach the issue presented here.

The Ninth Circuit held that Petitioner failed to satisfy a specific NCP requirement: conducting a feasibility study. 40 C.F.R. § 300.430(e). As the Ninth Circuit noted—and Petitioner largely does not contest—Petitioner “submitted no evidence to show that it conducted the required feasibility study or otherwise analyzed remedial alternatives.” Pet. App. 9a.

Yet, as described above, none of the cases Petitioner cites in support of the alleged split addresses a failure to satisfy that requirement. To the extent those decisions analyze whether state oversight can satisfy a specific NCP obligation, they typically focus on the *public-participation requirement*—the obligation to provide the public with a meaningful opportunity to comment on the proposed remedy. See, e.g., *Carson Harbor*, 433 F.3d at 1266 (“Several other courts ... have held that participation by a public agency is sufficient to demonstrate compliance with the [NCP’s] *public comment requirement*”); *Bedford*, 156 F.3d at 428; *Union Pacific*, 215 F.3d at 836.

And to the limited extent some decisions contain broader language that does not specify particular

NCP requirements, they do so in cases where the party actually performed the required analytical work under state direction—not cases where the party skipped the feasibility study entirely. *See, e.g., Niagara Mohawk*, 596 F.3d at 118–19. No decision on either side of the alleged split holds—or even suggests—that state approval can excuse a party’s complete failure to conduct a feasibility study.

2. This is unsurprising, in that the arguments that might justify treating state oversight as a substitute for one requirement do not apply to the other. Public comment can, at least in theory, be functionally replicated by an engaged public regulator. A state agency that thoroughly reviews a proposed plan and exercises independent judgment about its adequacy may provide scrutiny and accountability comparable to what a public-comment process offers. *See Bedford Affiliates*, 156 F.3d at 428. That logic—whether persuasive or not—underlies the cases Petitioner invokes.

The feasibility-study requirement, however, is fundamentally different. It requires the party conducting the cleanup to identify and compare multiple remedial alternatives—including a no-action option—and evaluate each one for effectiveness, implementability, and cost before a remedy is selected. 40 C.F.R. § 300.430(e); *Carson Harbor*, 433 F.3d at 1268 (explaining that one of the “hallmarks” of the feasibility-study requirement is the comparative analysis of alternatives through evaluation of their costs, implementability, and effectiveness). The requirement ensures that the chosen remedy results from a disciplined comparison of alternatives rather than from convenience or

preference. If the party never identifies or analyzes alternative remedies, a regulator's approval is not a substitute for actually satisfying that NCP requirement.

3. That is exactly what happened here. Petitioner selected excavation from the outset, developed a work plan proposing only that single approach, and submitted that plan to ADEQ for approval. Pet. App. 32a–33a. It did so even though ADEQ suggested evaluating a less costly site-specific remediation standard, and Petitioner's own consultant noted that other, less expensive options might be available. Pet. App. 29a–33a. Yet Petitioner's plan "did not address any alternative remediation methods to soil excavation," reflecting Petitioner's predetermined decision to excavate to a specific level of contaminants. Pet. App. 32a.

ADEQ therefore reviewed a plan containing no comparative analysis. A regulator's approval of such a submission cannot retroactively supply the thorough consideration of alternatives required by the NCP. *See* 40 C.F.R. § 300.430(e); *Carson Harbor*, 433 F.3d at 1268 ("[D]iscussing a single remediation alternative does not establish substantial compliance with the feasibility study requirements of the National Contingency Plan."). And without the comparative analysis, meaningful public participation could not occur because the public had no opportunity to participate in the selection of the remedy.

Under Petitioner's approach, an agency's approval of a single-option cleanup plan would retroactively create a presumption that the party conducted the

comparative analysis the NCP requires—even though no alternatives were ever identified or evaluated. That is not a rule the courts of appeals have adopted, or even debated. It is a novel proposition for which Petitioner cites no authority at all.

For this reason, too, there is no conflict for this Court to resolve. Granting certiorari to address a question the circuits have never divided on—in a case where that question was not even reached below—would serve none of the institutional purposes that the certiorari process is meant to advance.

II. This Case Has Multiple Vehicle Problems.

Even setting aside the illusory split, the petition should be denied because this case presents multiple, serious vehicle problems.

A. The Ninth Circuit Did Not Decide the Question Presented.

1. The petition’s threshold defect is that it asks this Court to review a question the court below never decided.

This Court has repeatedly emphasized that it is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Consistent with that principle, the Court does “not decide in the first instance issues not decided below.” *NCAA v. Smith*, 525 U.S. 459, 470 (1999); *see also United States v. Williams*, 504 U.S. 36, 41 (1992) (noting that the “traditional rule” “precludes a grant of certiorari” when the issue was not “passed upon below”). That rule “maintain[s] the integrity of the process of certiorari,” *Taylor v. Freeland & Kronz*,

503 U.S. 638, 645–46 (1992), and serves “a constellation of practical considerations, chief among which is [the Court’s] need for a properly developed record on appeal,” *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79–80 (1988) (refusing to resolve a question about punitive damages limitation in the first instance).

Accordingly, the Court declines to address questions that the court below did not decide, even when those questions were raised by the parties and fully briefed. *See, e.g., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (dismissing certiorari as improvidently granted where lower court had not passed on the question the Court wished to address).

2. The question presented here asks whether “a private party whose cleanup is reviewed and approved by a State likewise enjoys a presumption of substantial compliance with the National Contingency Plan.” Pet. i. But the Ninth Circuit did not address that issue. Its opinion never analyzed the legal significance of state approval, never used the word “presumption,” and never engaged with the circuit decisions Petitioner claims create a conflict.

The absence of any discussion of this issue is unsurprising. In the Ninth Circuit, Petitioner did not clearly present its presumption theory as a basis for reversing the judgment. Indeed, the word “presumption” appears nowhere in its briefing below. At most, the idea surfaced as a secondary fallback point—and one that was never clearly tied to the feasibility-study requirement. *See* Brief for Plaintiff-Appellant at 28–29, *Moreland Properties, LLC v.*

Goodyear Tire & Rubber Co., No. 24-2451, 2025 WL 2452372 (9th Cir. 2025) (noting that Petitioner’s cleanup substantially complied with the NCP “because the approval of state regulators can establish compliance with the NCP ... or at least with its public-participation requirements.”).

Nor did Petitioner explain how a presumption of any sort could excuse the defect the district court and Ninth Circuit ultimately found dispositive—its complete failure to conduct a feasibility study. Whatever role state oversight might play in evaluating NCP compliance, the absence of any feasibility study would have defeated Petitioner’s claim even if such a presumption applied. In those circumstances, the court of appeals had no need to address the presumption theory, because Petitioner’s failure to conduct a feasibility study—as the district court found, Petitioner “made no attempt to develop a feasibility study” and in fact made a “decision to not consider any remedial alternatives,” Pet. App. 43a, 45a—would have been fatal under any standard. *See also infra* at 32–34.

3. Petitioner concedes that “[t]he Ninth Circuit did not address” the question presented and that if this Court were to decide the issue, the case might have to be remanded because the Ninth Circuit “said nothing on the topic.” Pet. 27, 30. Petitioner nonetheless argues that the courts of appeals’ silence makes the question “all the tidier.” Pet. 30.

The Ninth Circuit’s silence does not make the issue tidy; it underscores why review would be premature. No court—trial or appellate—has evaluated whether ADEQ’s involvement here would

satisfy the NCP under any legal standard this Court might adopt. The record was therefore not analyzed through the lens of the rule Petitioner asks this Court to announce, and there is no lower-court reasoning applying that rule to the facts of this case.

That posture is precisely why this Court ordinarily declines review in such situations. When a court of appeals leaves an issue undecided, there is no ruling on that issue for this Court to review and no lower-court analysis showing how the proposed rule would operate in practice. Granting certiorari here would therefore require the Court to decide the question in the first instance, without the benefit of judicially tested reasoning applying the rule to the facts. The Court's usual practice is the opposite: to allow legal questions to be tested and refined in the lower courts before intervening. *See, e.g., NCAA*, 525 U.S. at 470; *Taylor*, 503 U.S. at 645–46; *Bankers Life*, 486 U.S. at 79–80.

In short, the petition seeks review of a legal issue that the Ninth Circuit in a non-precedential, unpublished decision neither analyzed nor decided. Granting certiorari would therefore require this Court to resolve that issue “in the first instance,” contrary to the Court's consistent practice. *NCAA*, 525 U.S. at 470.

B. Petitioner Cannot Prevail Even If It Wins the Legal Issue It Presents.

Even if Petitioner were to prevail on the issue it raises, it still would not be entitled to relief, because a presumption would make no difference here: the record establishes beyond dispute that Petitioner never conducted a feasibility study at all.

Under CERCLA, even when the state itself is the plaintiff and enjoys the strongest available presumption of NCP compliance, that presumption is rebuttable—and it is overcome by evidence that the governmental plaintiff failed to conduct an adequate feasibility study. *See, e.g., Washington State Dep’t of Transp.*, 59 F.3d at 799–805; *Abrams Metals*, 155 F.3d at 1024–26. If a state agency’s own presumption of compliance cannot survive its failure to perform an adequate feasibility study, then *a fortiori*, a private party’s borrowed presumption cannot survive the complete absence of one.

That is precisely the situation here. The district court found—and the Ninth Circuit affirmed—that Petitioner “submitted no evidence to show that it conducted the required feasibility study or otherwise analyzed remedial alternatives.” Pet. App. 9a. Accordingly, under any standard, the complete failure to conduct a feasibility study is fatal to Petitioner’s claim.

C. An Unreviewed Alternative Ground Independently Bars Relief.

Petitioner faces an additional obstacle. To recover under CERCLA, a private party must prove—separate and apart from NCP requirements—that its costs were “necessary.” 42 U.S.C. § 9607(a)(4)(B). The district court held that Petitioner failed to satisfy this requirement. Pet. App. 39a, 49a–50a.

The Ninth Circuit had no need to address that alternative ground because it affirmed on the NCP’s feasibility-study requirement. Pet. App. 9a–10a. As a result, even if this Court granted certiorari and accepted Petitioner’s legal theory about the effect of

state oversight, Petitioner still would not be entitled to judgment.

That posture makes this case an especially poor candidate for review. When unresolved threshold issues could independently preclude relief, this Court’s consideration of the question presented would be “advisory or academic.” *Medellín v. Dretke*, 544 U.S. 660, 664 (2005) (dismissing writ as improvidently granted on that basis); *accord Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121–24 (1994) (same where “it is not clear that our resolution” of the relevant “question will make any difference even to these litigants”).

That problem is especially acute here because the “necessary costs” issue is itself fact-bound and case-specific—and, following a bench trial, the district court’s findings are reviewed only for clear error. *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 578 (9th Cir. 2018). The district court found that Petitioner presented no analysis of the arsenic’s threat to human health or the environment, did not perform the risk assessment that would have supported any necessity determination, and disregarded ADEQ’s suggestion that it explore site-specific soil remediation levels before proceeding with excavation. Pet. App. 49a–50a. The court further found that “ADEQ considered [Petitioner’s] remediation to be voluntary.” Pet. App. 50a. Those findings underscore the basic point: the issue Petitioner seeks to have this Court address would not change the outcome.

**D. This Case Is a Poor Vehicle for
Evaluating the Role of State Oversight.**

Even setting aside the defects described above, this case would still be a poor vehicle for an additional reason: its facts do not cleanly present the legal issue Petitioner asks the Court to resolve—and Petitioner would lose even under the standards it invokes.

To begin with, the State’s involvement here was limited, contested, and far removed from the kind of oversight reflected in the cases Petitioner relies on. Petitioner did not proceed under Arizona’s formal VRP, which provides structured and robust state supervision. Instead, it chose an administrative settlement to avoid the additional costs and procedures associated with the VRP. Pet. App. 31a. As a result, ADEQ “did not evaluate the Work Plan as vigorously as it would have under the VRP program.” Pet. App. 33a–34a.

ADEQ’s role was correspondingly narrow. It reviewed and approved the work plan and later confirmed compliance with the settlement, but it did not supervise the remediation, never visited the site, and its own officials testified they were unaware of the extent to which the agency verified the accuracy of Petitioner’s submissions. Pet. App. 31a, 48a. The district court accordingly found that the agency’s involvement was no different from the “very limited” participation the Ninth Circuit previously deemed insufficient in *Carson Harbor*. Pet. App. 48a; see 433 F.3d at 1266.

The cases Petitioner cites only underscore the gap. In *NutraSweet*, the state agency approved the plan,

supervised the cleanup as it progressed, and determined when it had succeeded. 227 F.3d at 791. In *Bedford Affiliates*, the agency was extensively involved throughout the remediation. 156 F.3d at 428. And in *Niagara Mohawk*, the cleanup proceeded under a formal consent decree with ongoing state direction. 596 F.3d at 137. Nothing comparable occurred here. Because Petitioner could not prevail even under the standards it invokes, this case offers no meaningful vehicle for resolving the supposed conflict.²

Compounding the problem, the “state approval” Petitioner invokes did not even satisfy Arizona’s own statutory requirements. State law permits approval only if a remedy is “reasonable, necessary, cost-

² Petitioner’s proposed rule suffers from a related problem: it never explains what “state approval” actually means. State agencies participate in cleanups in many different ways—through informal consultation, review of investigation reports or work plans, issuance of permits, periodic reporting requirements, or final closure letters. Petitioner does not specify which of those actions would qualify as “approval,” what level of oversight would be required, or when the supposed presumption would arise. Would approval of a work plan suffice? A permit? A no-further-action letter issued years later? Nor does Petitioner explain whether the presumption would be rebuttable, and if so, by what evidence. These basic features of Petitioner’s proposed rule remain entirely undefined. And the fact that none of the decisions Petitioner cites attempts to answer those questions only underscores the absence of a genuine doctrinal divide: the courts have not confronted competing formulations of such a rule because none of them has adopted one. Instead, they have consistently treated state involvement as one fact relevant to the broader, case-specific inquiry into whether the cleanup substantially complied with the NCP.

effective and technically feasible,” Ariz. Rev. Stat. § 49-282.06(A)(3), and requires consideration of alternative remedies, *id.* § 49-282.06(C)(6). ADEQ’s approval letter did not make those findings; it merely stated that excavation would reduce contamination below applicable thresholds, without addressing reasonableness, necessity, or cost-effectiveness. Petitioner likewise failed to submit the required analysis, *see* Ariz. Admin. Code § R18-16-407(C)(2)(c), and its own consultant acknowledged that less expensive alternatives were available.

That matters because Petitioner’s proposed rule—that “state-approved” cleanups should carry a presumption of NCP compliance—presupposes meaningful state review. Where, as here, the agency did not perform the analysis its own law requires, the case is a particularly poor vehicle for announcing such a sweeping rule.

E. Further Percolation Is Warranted.

Finally, the petition relies on only a small handful of circuit decisions spread across nearly three decades. That limited body of case law underscores that the issue has produced no entrenched or recurring conflict among the courts of appeals. And the decision below—an unpublished memorandum disposition resolving a fact-specific dispute about one cleanup—does not reflect the kind of considered appellate judgment that would typically justify this Court’s intervention.

At a minimum, the issue would benefit from further percolation in the lower courts—particularly given that none of the decisions to date has even identified a division of authority. Additional

decisions—particularly precedential ones addressing the role of state oversight in the NCP analysis—would allow the question to develop in a fuller doctrinal and factual context. If the issue is truly important and recurring, it will arise again in a case that squarely presents it and produces a precedential decision from the courts of appeals. Until then, the Court should allow the issue to continue to develop rather than grant review in this unpublished, fact-bound dispute.

III. The Decision Below Is Correct.

Finally, this Court’s review is unwarranted because the Ninth Circuit’s decision is correct. Even if there were a genuine circuit conflict, this case would still not warrant review because Petitioner’s position finds no support in CERCLA’s text, structure, or policy.

1. CERCLA’s text and structure foreclose Petitioner’s proposed presumption. Congress made a clear choice: when private parties seek to recover cleanup costs from others, they must show that their actions were “consistent with the national contingency plan.” 42 U.S.C. § 9607(a)(4)(B). Government plaintiffs, by contrast, may recover costs so long as they are “not inconsistent” with the NCP. *Id.* § 9607(a)(4)(A). That asymmetry reflects Congress’s judgment that private parties must affirmatively demonstrate compliance before shifting costs to others.

EPA’s regulations reinforce that structure. The NCP creates a presumption of compliance for private cleanups only if conducted under EPA orders or consent decrees. 40 C.F.R. § 300.700(c)(3)(ii). State-

supervised cleanups are not included. EPA considered the role of states when promulgating the NCP and chose not to extend the presumption beyond situations involving direct federal oversight. There is no basis for courts to create a new judge-made presumption that both Congress and EPA specifically declined to adopt.

2. The statute's requirements independently confirm that the decision below was correct. CERCLA conditions private cost recovery on a showing that the party's response action was "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). The NCP, in turn, requires parties undertaking remedial actions to conduct a feasibility study that identifies and compares remedial alternatives—including a no-action option—and evaluates each for effectiveness, implementability, and cost before a remedy is selected. 40 C.F.R. § 300.430(e).

Petitioner's argument would undo that requirement. Its position is that state involvement can excuse its complete failure to perform a feasibility study. But nothing in CERCLA or the NCP supports that result. The statute does not authorize state agencies to waive federal requirements, and the regulations do not permit state approval to substitute for the analytical work the NCP requires the remediating party itself to perform.

And for good reason: a state agency may approve a proposed remedy because it is acceptable, without determining whether another approach would achieve the same level of protection at lower cost.

Allowing state approval to excuse the requirement entirely would effectively read it out of the NCP for any cleanup that receives a state agency's sign-off.

This case illustrates the problem. Petitioner simply ignored the NCP requirement of a feasibility study, and state "approval" does nothing to cure that defect. ADEQ's review simply confirmed that the plan Petitioner proposed was acceptable, not that it was the most appropriate or cost-effective option among available alternatives. Accordingly, no one conducted the comparative analysis that the NCP requires before choosing a remedy. For that reason, state approval cannot substitute for the feasibility study the NCP requires.

3. Petitioner's policy arguments are equally unpersuasive. Petitioner invokes CERCLA's "cooperative federalism," citing *Atlantic Richfield Co. v. Christian*, 590 U.S. 1, 24 (2020), to argue that state oversight should effectively determine NCP compliance. Pet. 31. The Arizona Legislature and 18 States echo this theme in their amicus brief, contending that the Ninth Circuit's ruling "threatens State-led cleanups" by discouraging voluntary cooperation and diminishing state cleanup programs. Br. of *Amici Curiae* Arizona Legislature and 18 States, at 16–25.

But cooperative federalism operates within the framework of federal law, not outside it. CERCLA establishes federal standards governing private cost recovery. State agencies may participate in and oversee cleanups, but they are not authorized to waive federal requirements or create new presumptions of compliance. Nothing in *Atlantic*

Richfield suggests that state approval can displace the conditions Congress imposed on private cost recovery.

Nor is there any evidence that requiring NCP compliance would discourage cooperation with state regulators, as amici speculate. Property owners already face strong, independent incentives to remediate contamination—including regulatory enforcement, potential tort liability, and the economic consequences of leaving contaminated property unaddressed (such as reduced property values and lost tax revenue, which amici themselves emphasize). *See id.* at 22–25. State programs also offer their own incentives, including liability protections, covenants not to sue, and “no further action” letters. *See, e.g.,* Ariz. Rev. Stat. §§ 49-181(B), 49-292(B)–(C).

Requiring parties to demonstrate NCP compliance does not undermine those programs. It simply ensures that parties seeking reimbursement have conducted cleanups that meet federal standards—consistent with CERCLA’s design, not in tension with it.

4. This case illustrates why the NCP’s safeguards matter. CERCLA allows a private party to shift potentially substantial cleanup costs to another party through § 9607. The NCP’s feasibility-study and public-participation requirements ensure that those costs reflect a reasoned, cost-effective cleanup that accounts for community interests.

Petitioner’s proposed presumption would undermine those safeguards. If a private party could obtain presumptive NCP compliance simply by

securing state approval of its chosen remedy, it could bypass the NCP's comparative analysis of alternatives, select the most expensive acceptable remedy, and then seek reimbursement from another party. That would transform CERCLA cost recovery into an open-ended reimbursement mechanism rather than a disciplined system for ensuring environmentally sound and cost-effective cleanups.

Here, Petitioner chose excavation without evaluating alternatives, did not provide meaningful public participation in remedy selection, and then sought reimbursement from another party. Those are precisely the kinds of shortcomings the NCP is designed to prevent when private parties seek to impose cleanup costs on others.

In the end, Petitioner asks this Court to adopt a sweeping rule that neither CERCLA nor the NCP supports. Nothing in the statute or regulations suggests that state approval relieves a private party of its obligation to demonstrate NCP compliance. To the contrary, CERCLA places that burden squarely on the party seeking reimbursement. Petitioner's proposed presumption would invert that framework—allowing a party to bypass the NCP's safeguards and then shift its costs to others based on state approval alone. Because that approach is inconsistent with the statute, the regulations, and the purposes of the NCP, the decision below was correct and certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

April 3, 2026

Respectfully submitted,

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