

No. _____ 10-284 AUG 23 2010

OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

—◆—
CITY OF COLTON,

Petitioner,

v.

AMERICAN PROMOTIONAL
EVENTS, INC. – WEST, *et al.*,

Respondents.

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

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
RODERICK E. WALSTON
(*Counsel of Record*)
GENE TANAKA
DANIELLE G. SAKAI
BEST BEST & KRIEGER LLP
2001 North Main Street, Suite 390
Walnut Creek, CA 94596
Telephone: (925) 977-3300
Facsimile: (925) 977-1870
Roderick.Walston@bbklaw.com
Attorneys for Petitioner

Blank Page

QUESTION PRESENTED

The Ninth Circuit held that the declaratory judgment provision in section 113(g)(2) of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) preempts the Declaratory Judgment Act as applied in the CERCLA context, and that section 113(g)(2) does not authorize CERCLA plaintiffs to assert declaratory relief claims for future cleanup costs if they cannot recover past cleanup costs. Therefore, the Ninth Circuit concluded, the plaintiff could not assert a declaratory relief claim under the Declaratory Judgment Act for its future cleanup costs, because it did not have the right to recover its past cleanup costs. The Ninth Circuit acknowledged, however, that the plaintiff’s declaratory relief claim met the justiciability standards of the Declaratory Judgment Act. The Ninth Circuit acknowledged that a conflict exists among the federal circuit courts concerning whether declaratory relief claims can be asserted for future cleanup costs if past cleanup costs cannot be recovered, and that its decision conflicts with circuit court decisions holding that such claims can be asserted.

The question presented is:

Whether the declaratory judgment provision of section 113(g)(2) of CERCLA preempts the Declaratory Judgment Act as applied in the CERCLA context, thus precluding CERCLA plaintiffs from asserting declaratory relief claims for future cleanup costs if they cannot recover past cleanup costs.

PARTIES TO THE PROCEEDINGS

The petitioner and plaintiff is the City of Colton, a municipal corporation located in San Bernardino County, California.

The respondents and defendants are: American Promotional Events, Inc.-West; Apollo Manufacturing Co.; Astro Pyrotechnics, Inc.; Atlas Fireworks Company, Inc.; Black & Decker, Inc.; California Fireworks Display Company; County of San Bernardino; Emhart Industries, Inc.; Goodrich Corporation; Kwikset Locks, Inc.; Pyro Spectaculars, Inc.; Pyrotronics Corp.; Red Devil Fireworks Company; Thomas O. Peters; The 1966 Thomas O. Peters and Kathleen S. Peters Revocable Trust; Trojan Fireworks, Co.; United Fireworks Manufacturing Company, Inc.; and Whittaker Corporation.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS....	1
STATEMENT OF THE CASE.....	2
A. General.....	2
B. Statutory and Regulatory Background.....	3
C. Procedural Background	6
D. The Ninth Circuit Decision	7
REASONS FOR GRANTING THE WRIT	10
INTRODUCTION	10
I. THE NINTH CIRCUIT ACKNOWLEDGED THAT THERE IS A CONFLICT AMONG THE FEDERAL CIRCUIT COURTS CON- CERNING THE QUESTION PRESENTED IN THIS PETITION, AND THAT ITS DE- CISION CONFLICTS WITH THE DECI- SIONS OF OTHER CIRCUIT COURTS.....	14
II. CONTRARY TO THE NINTH CIRCUIT DECISION, CERCLA SECTION 113(g)(2) DOES NOT PREEMPT THE DECLARA- TORY JUDGMENT ACT AS APPLIED IN THE CERCLA CONTEXT.....	18

TABLE OF CONTENTS – Continued

	Page
A. CERCLA Section 113(g)(2) And Declaratory Judgment Act Apply Differently In The CERCLA Context And Can Be Construed Harmoniously, And Therefore Section 113(g)(2) Does Not Preempt the Declaratory Judgment Act	18
B. There Are Various Legitimate Reasons Why A Plaintiff May Need To Pursue Declaratory Relief Under The Declaratory Judgment Act For Future Response Costs Under CERCLA, Even Though The Plaintiff Does Not Have The Right To Recover Past Costs	24
CONCLUSION	29
 APPENDICES	
Ninth Circuit Decision	App. 1
District Court Decision.....	App. 20
42 U.S.C. section 9613(g)	App. 49
Colton Reply Brief (partial).....	App. 54

TABLE OF AUTHORITIES

	Page
CASES	
<i>Aetna Life Ins. Co. v. Haworth</i> , 300 U.S. 227 (1937).....	28
<i>Arizona v. California</i> , 530 U.S. 392 (2000).....	27
<i>Bobby v. Bies</i> , ___ U.S. ___, 129 S.Ct. 2145 (2009).....	26, 27
<i>Branch v. Smith</i> , 538 U.S. 254 (2003)	23
<i>Cooper Industries, Inc. v. Aviall Services, Inc.</i> , 543 U.S. 157 (2004).....	4, 5
<i>County Line Investment Co. v. Tinney</i> , 933 F.2d 1508 (10th Cir. 1991)	15, 16, 24
<i>Exxon Mobil Corp. v. Allapattah Servs., Inc.</i> , 545 U.S. 546 (2005).....	14
<i>Foster v. United States</i> , 922 F.Supp. 663 (D. D.C. 1996).....	17
<i>Gussack Realty Co. v. Xerox Corp.</i> , 224 F.3d 85 (2d Cir. 2000).....	14
<i>Hinck v. United States</i> , 550 U.S. 501 (2007)	18
<i>Kelley v. E. I. DuPont De Nemours & Co.</i> , 17 F.3d 886 (6th Cir. 1994)	19
<i>Maryland Casualty Co. v. Pacific Coal & Oil Co.</i> , 312 U.S. 270 (1941).....	28
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	12, 23
<i>Posadas v. National City Bank</i> , 296 U.S. 497 (1936).....	23

TABLE OF AUTHORITIES – Continued

	Page
<i>Reichhold, Inc. v. United States Metals Refining Co.</i> , 522 F.Supp.2d 724 (D. N.J. 2007)	20
<i>State of California v. Neville Chemical Co.</i> , 358 F.3d 661 (9th Cir. 2004)	21
<i>Trimble v. Asarco, Inc.</i> , 232 F.3d 946 (8th Cir. 2000)	14
<i>United States v. Atlantic Research Corp.</i> , 551 U.S. 128 (2007)	4
<i>United States v. Davis</i> , 261 F.3d 1 (1st Cir. 2001)	15, 16
<i>United States v. Occidental Chem. Co.</i> , 200 F.3d 143 (3d Cir. 1999)	14
<i>United States v. USX Corp.</i> , 68 F.3d 811 (3d Cir. 1995)	19, 28
<i>United States v. W.R. Grace & Co.</i> , 429 F.3d 1224 (9th Cir. 2006)	5
<i>Universal Interpretative Shuttle Corp. v. Washington Metropolitan Area Transit Comm’n</i> , 393 U.S. 186 (1968)	23
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981)	23

STATUTES

28 U.S.C. § 1254(1)	1
28 U.S.C. § 2201	<i>passim</i>
42 U.S.C. § 9601	5
42 U.S.C. § 9607	10

TABLE OF AUTHORITIES – Continued

	Page
42 U.S.C. § 9607(a)	25
42 U.S.C. § 9607(b)	25
42 U.S.C. § 9607(a)(1)-(4)	4
42 U.S.C. § 9607(a)(4)(A), -(B).....	4
42 U.S.C. § 9613(g)(2).....	<i>passim</i>

Blank Page

OPINIONS BELOW

The Ninth Circuit decision has been certified for publication but has not yet been officially reported, and is reproduced at Appendix 1. The district court decision is reproduced at Appendix 20.



JURISDICTION

The Ninth Circuit issued its judgment on August 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).



STATUTORY AND REGULATORY PROVISIONS

Section 113(g) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9613(g), is reproduced at Appendix 49. Subsection (2) thereof provides, in part:

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages.

42 U.S.C. § 9613(g)(2); App. 50.

The Declaratory Judgment Act of 1934, 28 U.S.C. § 2201, provides:

(a) In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party, whether or not further relief is or could be sought. Any such declaration shall have the full force and effect of a final judgment or decree and shall be reviewable as such.



STATEMENT OF THE CASE

A. General

The City of Colton (“Colton”) brought an action against several defendants under section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), alleging that the defendants had caused a hazardous substance, perchlorate, to contaminate Colton’s drinking water supply. Colton’s complaint sought (1) recovery of Colton’s past response costs in removing the contaminant from its drinking water supply, and (2) a declaratory judgment under the Declaratory Judgment Act authorizing Colton to recover its future response costs in removing the contaminant. The district court held that Colton could not recover its past response costs – because it had not complied with the National Contingency Plan (“NCP”), as required by CERCLA – and that, because Colton

could not recover its past response costs, it could not obtain a declaratory judgment authorizing recovery of its future response costs.

On appeal, Colton conceded that it could not recover its past response costs under CERCLA – because it had not complied with the NCP – but argued that it was entitled to a declaratory judgment under the Declaratory Judgment Act for its future response costs, if it complied with the NCP in its future response action.

The Ninth Circuit held that Colton’s declaratory relief claim presented an “actual controversy” within the meaning of the Declaratory Judgment Act and thus was ripe for review. The court held, however, that CERCLA section 113(g)(2) preempts the Declaratory Judgment Act as applied in the CERCLA context, and precludes a declaratory judgment for future response costs if past response costs cannot be recovered. The court concluded that since Colton cannot recover its past response costs, it cannot obtain a declaratory judgment for its future response costs.

B. Statutory and Regulatory Background

Under CERCLA, a party who has incurred costs – generally referred to as “response costs” – in cleaning up a contaminated site may, under defined circumstances, recover its costs from parties responsible for the contamination. Section 107(a) authorizes recovery of (1) response costs of “removal or remedial action” incurred by the federal government, a state,

or an Indian tribe “not inconsistent with the national contingency plan,” and (2) “all other necessary costs of response incurred by any other person consistent with the national contingency plan.” 42 U.S.C. §§ 9607(a)(4)(A), -(B). Colton’s cost recovery action in this case falls within the second category, *i.e.*, a cost recovery action by “any other person.” Under section 107(a), a cost recovery action can be brought against any person included in the definition of “covered persons,” who are generally referred to as “potentially responsible parties” (“PRP”). *See United States v. Atlantic Research Corp.*, 551 U.S. 128, 131-133 (2007); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 160-163 (2004).¹

Section 113(g)(2) of CERCLA provides for a mandatory declaratory judgment in actions brought under section 107(a) for recovery of response costs. Section 113(g)(2) states:

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent

¹ CERCLA lists four categories of “covered persons,” which generally include (1) the “owner or operator” of the facility, (2) any person who “owned or operated” the facility when the hazardous substances were disposed of, (3) any person who arranged for disposal, treatment or transportation of the hazardous substances, and (4) any person who “accepted” the hazardous substances for transport to the disposal or treatment facilities. 42 U.S.C. § 9607(a)(1)-(4).

action or actions to recover further response costs or damages.

42 U.S.C. § 9613(g)(2); App. 50.

As noted above, CERCLA section 107(a) authorizes private parties to recover costs for removal and remedial actions that are “consistent with” the NCP. 42 U.S.C. § 9607(a). The NCP consists of regulations adopted by the Environmental Protection Agency (EPA) describing procedures that parties must follow in undertaking removal and remedial actions. *Id.* at §§ 9601(31) (defining “national contingency plan”), 9601(23) (defining “removal” action), 9601(24) (defining “remedial” action). *See Cooper Industries, Inc. v. Aviall Services*, 543 U.S. 157, 162 n. 2 (2004); *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1227 n. 3 (9th Cir. 2006). “Removal” actions are generally regarded as “time-sensitive responses” to public health threats, and “remedial” actions are generally regarded as “permanent remedies to threats for which an urgent response is not warranted.” *W.R. Grace*, 429 F.3d at 1227-1228.²

² The *Grace* court recognized, however, that the distinction between removal and remedial actions is “inescapably vague” and that there is “overlap” between the two actions. *Id.* at 1239, 1241. As the court noted, “the triggering factors [for a remedial action] begin to sound virtually similar to the triggering factors for a ‘removal’ action. In fact, two of the triggering factors for ‘removal’ are almost identical to the factors for ‘remedy.’” *Id.* at 1238.

C. Procedural Background

Colton filed a complaint against several defendants, alleging that the defendants had caused a hazardous substance, perchlorate, to contaminate the Rialto/Colton Groundwater Basin in San Bernardino County, California, which is a major source of Colton's drinking water supply. App. 6, 21. The complaint alleged that Colton had incurred past response costs of more than \$4 million in removing the contaminant from the Basin, and that the defendants were liable under CERCLA section 107(a) for Colton's past response costs in removing the contaminant. App. 6-7, 22-26. The complaint also alleged that Colton intended to incur future response costs in continuing to remove the contaminant from the Basin, and that Colton was entitled to a declaratory judgment under the Declaratory Judgment Act stating that the defendants are liable for Colton's future response costs. App. 7, 21.

The district court granted the defendants' motion for summary judgment and dismissed Colton's action. App. 7, 46. The district court held that Colton was not entitled to recover its past response costs because Colton had not established that its past costs were necessary and consistent with the NCP. App. 8, 29-42. The district court held that since Colton could not recover its past response costs, it was not entitled to a declaration under the Declaratory Judgment Act that Colton was entitled to recover its future response costs. App. 8, 42 n. 16.

D. The Ninth Circuit Decision

On appeal, Colton conceded that it could not recover its past response costs under CERCLA section 107(a) because it had not complied with the NCP in its past response action. App. 8. Colton argued, however, that it was entitled to a declaration under the Declaratory Judgment Act that Colton could recover its future response costs, if Colton complied with the NCP in its future response action. App. 9.

The Ninth Circuit held that Colton's declaratory relief claim under the Declaratory Judgment Act was ripe for review. App. 9-11. The court stated that a declaratory relief claim under the Declaratory Judgment Act is ripe if there is "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." App. 9-10 (citation and quotation marks omitted). The court held that Colton's declaratory relief claim met this standard because "the facts establishing Colton's right to declaratory relief have already occurred because there is no dispute that there is perchlorate contamination of the Basin," and there is "no dispute that Colton has incurred costs in responding to the contamination, and that Colton will incur additional costs in the future." App. 11.³

³ The Ninth Circuit also held that Colton's declaratory relief claim was not moot, App. 11-13, and that the court had subject matter jurisdiction over the claim. App. 13-14.

The Ninth Circuit held, however, that Colton could not assert its declaratory relief claim under the Declaratory Judgment Act, because that Act was preempted by the declaratory judgment provision in CERCLA section 113(g)(2), and the latter provision does not authorize a declaratory judgment for future response costs if the plaintiff does not have the right to recover past response costs. App. 14-19.

In holding that CERCLA section 113(g)(2) preempts the Declaratory Judgment Act, the Ninth Circuit stated:

Although Colton's complaint referred to the Declaratory Judgment Act rather than CERCLA section 113(g)(2), the latter provision clearly governs this initial cost-recovery action. Because "a precisely drawn, detailed statute *pre-empts* more general remedies," *Hinck v. United States*, 550 U.S. 501, 506 (2007) (internal quotation marks omitted), we must consider whether Colton was entitled to declaratory relief under CERCLA's more detailed declaratory relief provision.

App. 16 (emphasis added).

In holding that CERCLA section 113(g)(2) precludes a declaratory relief claim for future response costs if past response costs cannot be recovered, the Ninth Circuit stated:

The declaratory judgment mandated by section 113(g)(2) pertains to "liability for response costs." 42 U.S.C. § 9613(g)(2). Such "liability for response costs" must refer to the

response costs sought in the initial cost-recovery action, given that the sentence later refers to “any *subsequent* action or actions to recover *further* response costs.” *Id.* (emphasis added). Therefore, if a plaintiff successfully establishes liability for the response costs sought in the initial cost-recovery action, it is entitled to a declaratory judgment on present liability that will be binding on future cost-recovery actions. [¶] Here, Colton has failed to establish present liability because of its conceded failure to comply with the NCP but seeks a declaratory judgment on *future* liability. Section 113(g)(2), however, does not provide such relief. . . . [D]eclaratory relief is available [under section 113(g)(2)] only if liability for past costs has been established under section 107.

App. 16-17 (original emphasis).

In summary, the Ninth Circuit held that Colton’s declaratory relief claim under the Declaratory Judgment Act was ripe for review – because “the facts” establishing Colton’s claim for future response costs “have already occurred,” and there is “no dispute” that Colton had incurred past costs and “will incur additional costs in the future” – but that Colton could not assert its declaratory relief claim because CERCLA section 113(g)(2) preempted the Declaratory Judgment Act as applied in the CERCLA context, and Colton could not assert declaratory relief under section 113(g)(2) because it could not recover past costs.



REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case presents a significant question concerning the relationship between two prominent, widely-applied federal statutes – the Declaratory Judgment Act, 28 U.S.C. § 2201, and CERCLA, 42 U.S.C. § 9607 *et seq.* The question is whether the declaratory relief provision of CERCLA section 113(g)(2) preempts the Declaratory Judgment Act as applied in the CERCLA context, and thus precludes CERCLA plaintiffs from asserting declaratory relief claims for future response costs if they cannot recover past response costs, even though their declaratory relief claims meet the justiciability requirements of the Declaratory Judgment Act. The question whether the CERCLA provision preempts the Declaratory Judgment Act is an important question of federal law that has not been, but should be, decided by this Court, and is appropriate for this Court’s review under Supreme Court Rule 10(c).

The Ninth Circuit acknowledged that there is a conflict among the federal circuit courts concerning this question. The court stated that the Eighth, Second and Third Circuits have held that CERCLA plaintiffs *cannot* assert declaratory relief claims for future response costs if they cannot recover past response costs, and that the First and Tenth Circuits have held that CERCLA plaintiffs *can* assert such declaratory relief claims. The Ninth Circuit, stating that the issue is one of “first impression” in the Ninth

Circuit, adopted the position of the circuit courts holding that such declaratory relief claims *cannot* be asserted, thus acknowledging that its decision conflicts with circuit court decisions holding that such declaratory relief claims *can* be asserted. Because of the conflict among the circuit courts, this case is appropriate for this Court's review under Supreme Court Rule 10(a).

The Ninth Circuit held that plaintiff Colton's declaratory relief claim meets the "actual controversy" requirements of the Declaratory Judgment Act and thus is justiciable under that Act. The Ninth Circuit held, however, that CERCLA section 113(g)(2) preempts the Declaratory Judgment Act as applied to declaratory relief claims under CERCLA, and that section 113(g)(2) precludes the assertion of a declaratory relief claim for future response costs if the plaintiff cannot recover past costs. The court concluded that – since Colton cannot recover its past response costs because it did not comply with the NCP in its past response action – Colton cannot assert a declaratory relief claim for future response costs.

Contrary to the Ninth Circuit decision, CERCLA section 113(g)(2) does not preempt the Declaratory Judgment Act as applied in the CERCLA context. Section 113(g)(2) mandates a declaratory judgment on liability for future cleanup costs if the plaintiff has established its claim for recovery of past cleanup costs. The purpose of the mandatory declaration is to obviate the need for the plaintiff, after having established its claim for past costs, to re-litigate the

liability issue in subsequent actions for future costs. Section 113(g)(2) does not apply where, as here, the plaintiff has *not* established its claim for past costs, and therefore must establish its claim in its future cost recovery action. If the plaintiff has not established its past cost recovery claim, there is no basis for precluding re-litigation of the claim and thus no basis for the mandatory declaration authorized under section 113(g)(2).

Thus, CERCLA section 113(g)(2) and the Declaratory Judgment Act apply differently in the CERCLA context. Section 113(g)(2) mandates declaratory judgments for plaintiffs who establish the defendant's liability, and the Declaratory Judgment Act authorizes declaratory judgments for plaintiffs who do not establish the defendant's liability but whose claims meet the justiciability requirements of the Declaratory Judgment Act. CERCLA section 113(g)(2) expands the rights of plaintiffs to obtain declaratory relief, by providing for mandatory declarations where liability has been established, but does not reduce the existing rights of plaintiffs to secure declaratory relief under the Declaratory Judgment Act, where they would otherwise qualify for such relief.

Since CERCLA section 113(g)(2) and the Declaratory Judgment Act apply differently in the CERCLA context, they can be construed harmoniously so that effect is given to each. "When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective." *Morton v. Mancari*,

417 U.S. 535, 549 (1974). Congress provided no indication, in enacting section 113(g)(2), that the provision was intended to preempt the Declaratory Judgment Act, and the provision itself reveals no such congressional intent. Since the CERCLA provision and the Declaratory Judgment Act can be read harmoniously and Congress provided no indication of a preemptive intent, the CERCLA provision cannot properly be construed as preempting the Declaratory Judgment Act.

The Ninth Circuit decision, by holding that CERCLA preempts the Declaratory Judgment Act, categorically precludes the assertion of declaratory relief claims under the Declaratory Judgment Act for CERCLA cost recovery, no matter how compelling the evidence in support of the claims, and even though the declaratory relief claims concededly meet the “actual controversy” requirements of the Declaratory Judgment Act. The decision obstructs the broad goal of the Declaratory Judgment Act to provide a mechanism for parties to obtain a declaration of their rights before their actual causes of action have fully accrued under substantive statutes. The decision creates an exception to the broad reach of the Declaratory Judgment Act that is not supported by the language or purposes of either the Declaratory Judgment Act or CERCLA. Therefore, this Court should grant the petition and reverse.

I. THE NINTH CIRCUIT ACKNOWLEDGED THAT THERE IS A CONFLICT AMONG THE FEDERAL CIRCUIT COURTS CONCERNING THE QUESTION PRESENTED IN THIS PETITION, AND THAT ITS DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS.

The Ninth Circuit acknowledged that there is a conflict among the federal circuit courts concerning whether a plaintiff can seek declaratory relief under CERCLA for future response costs if the plaintiff has not established its right to recover past costs, and that its decision conflicts with the decisions of other circuit courts. The Ninth Circuit stated:

Whether a CERCLA plaintiff's failure to establish liability for its past costs necessarily dooms its bid to obtain a declaratory judgment as to liability for its future costs appears to be an issue of first impression in this circuit. Our sister circuits have taken divergent approaches to this issue. Some have held or suggested that recoverable past costs are a *sine qua non* for declaratory relief under CERCLA. *See, e.g., Trimble v. Asarco, Inc.*, 232 F.3d 946, 858 (8th Cir. 2000), *overruled on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 92 (2d Cir. 2000) (*per curiam*); *United States v. Occidental Chem. Co.*, 200 F.3d 143, 153-54 (3d Cir. 1999). Others have held or suggested that declaratory relief may be available even in the absence of recoverable

past costs. *See, e.g., United States v. Davis*, 261 F.3d 1, 46 (1st Cir. 2001); *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991) (per curiam).

App. 14-15.

As the Ninth Circuit acknowledged in the above passage, its decision conflicts with the Tenth Circuit's decision in *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991). In *Tinney*, the Tenth Circuit stated that a plaintiff can under some circumstances obtain declaratory relief for future response costs under CERCLA even though the plaintiff has not established its claim for past response costs because of its failure to comply with the NCP. The Tenth Circuit stated:

In holding that consistency with the NCP is an element of a private cost recovery claim, we recognize that there are some circumstances in which a CERCLA plaintiff may be entitled to a declaration of the defendant's liability even though the plaintiff has not yet established that all of its claimed response costs were incurred consistent with the NCP. These includes cases . . . in which the factual record does not permit a determination of consistency with the NCP at the time the motion for summary judgment is filed [citations], and those in which the plaintiff seeks only a declaration of the defendant's liability for future costs incurred consistent with the NCP [citations].

933 F.2d at 1513. Elaborating on this point, the court stated:

Early determination of a defendant's liability for as yet unproven CERCLA-cognizable costs . . . can speed the settlement process and thus promote Congress' goal of encouraging private parties to undertake and fund expedited CERCLA cleanups.

Id. at 1513 n. 9. Thus, while the Tenth Circuit held that declaratory relief claims for future costs *can* be maintained even though past costs are not recoverable, the Ninth Circuit held the opposite – that such declaratory relief claims *cannot* be maintained.

As the Ninth Circuit also acknowledged in the above passage, its decision conflicts with the First Circuit's decision in *United States v. Davis*, 261 F.3d 1, 46 (1st Cir. 2001). In *Davis*, the First Circuit held that a CERCLA plaintiff was entitled to declaratory relief for future response costs under the Declaratory Judgment Act, as well as CERCLA section 113(g)(2). 261 F.3d at 45-47.⁴ While the Ninth Circuit held that the Declaratory Judgment Act was preempted as applied to declaratory relief claims under CERCLA, the First Circuit held that the Declaratory Judgment

⁴ The First Circuit in *Davis* held that declaratory relief claims could be asserted not only for cost recovery claims under CERCLA section 107, which is “the vehicle for an innocent party to recover cleanup costs,” but also for contribution claims under CERCLA section 113, which is “the vehicle for a non-innocent party to seek contribution from other polluters.” 261 F.3d at 46.

Act authorizes such claims, thus indicating that the Act is not preempted.

Similarly, the District of Columbia district court has held that declaratory relief claims under CERCLA can be asserted for future response costs even though past response costs are not recoverable. *Foster v. United States*, 922 F.Supp. 663, 664 (D. D.C. 1996). The court stated:

Because a claim for declaratory relief seeks to fix liability for *future* costs, it is nonsensical to require that the plaintiff demonstrate that he has already incurred such costs. While a claim for recovery of past costs is logically antecedent to a claim for future costs, it is not a prerequisite.

922 F.Supp. at 664 (original emphasis).

Thus, as the Ninth Circuit acknowledged, there is a conflict among the federal circuit courts concerning whether CERCLA section 113(g)(2) preempts the Declaratory Judgment Act as applied in the CERCLA context, and whether CERCLA plaintiffs can assert declaratory relief claims for future costs if they cannot recover past costs, and the Ninth Circuit's decision conflicts with the decisions of the First and Tenth Circuits. This Court should grant the petition in order to resolve the intercircuit conflict.

II. CONTRARY TO THE NINTH CIRCUIT DECISION, CERCLA SECTION 113(g)(2) DOES NOT PREEMPT THE DECLARATORY JUDGMENT ACT AS APPLIED IN THE CERCLA CONTEXT.

A. CERCLA Section 113(g)(2) And The Declaratory Judgment Act Apply Differently In The CERCLA Context And Can Be Construed Harmoniously, And Therefore Section 113(g)(2) Does Not Preempt The Declaratory Judgment Act.

As noted above, the Ninth Circuit held that CERCLA section 113(g)(2) preempts the Declaratory Judgment Act as applied here because “a precisely drawn, detailed statute pre-empts more general remedies.” App. 16, quoting from *Hinck v. United States*, 550 U.S. 501, 506 (2007). The Ninth Circuit cited nothing in the language of section 113(g)(2) indicating that the provision preempts, or was intended to preempt, the Declaratory Judgment Act.

Although it is true that a precisely-drawn, detailed statute preempts more general remedies, as the Ninth Circuit held, this principle applies only where the two statutes apply to the same subject and cannot be construed congruently. Here, CERCLA section 113(g)(2) and the Declaratory Judgment Act apply differently in the CERCLA context and can be construed harmoniously.

Section 113(g)(2) provides that a declaratory judgment is mandatory – *i.e.*, that the court “shall”

grant declaratory relief, 42 U.S.C. § 9613(g)(2) – on the issue of liability, if the plaintiff has established the defendant’s liability for the plaintiff’s past response costs. *United States v. USX Corp.*, 68 F.3d 811, 819 (3d Cir. 1995); *Kelley v. E. I. DuPont De Nemours & Co.*, 17 F.3d 886, 844 (6th Cir. 1994). The purpose of the mandatory declaration is to ensure that a plaintiff who has prevailed on its past cost recovery claim will not be required to re-litigate the defendant’s liability when the plaintiff seeks recovery of its future response costs in subsequent litigation. As the Third Circuit and Sixth Circuit have explained, in describing section 113(g)(2):

In providing for the recovery of response costs, Congress included language to ensure that a responsible party’s liability, once established, would not have to be re-litigated. . . . The entry of [a] declaratory judgment as to liability is mandatory.

USX Corp., 68 F.3d at 819; *Kelley*, 17 F.3d at 844. Thus, if a plaintiff has established the defendant’s liability for *past* response costs, section 113(g)(2) mandates the court to grant declaratory relief for *future* response costs, so that the defendant’s liability will not have to be “re-litigated” when the plaintiff seeks future cost recovery.

Since the mandatory declaration provided in section 113(g)(2) applies where the plaintiff has previously established the defendant’s liability, the provision does *not* apply where, as here, the plaintiff has *not* previously established the defendant’s liability. If the

defendant's liability has not been previously established, there is no basis for precluding re-litigation of the liability issue and thus no basis for a mandatory declaration. Section 113(g)(2) simply has no application or meaning where the plaintiff has not established its past cost recovery claim.

Since section 113(g)(2) does not apply where the defendant's liability has not been previously established, section 113(g)(2) cannot properly be interpreted as preempting the Declaratory Judgment Act as applied in such situations. If the plaintiff's declaratory relief claim meets the "actual controversy" requirements of the Declaratory Judgment Act in such situations, the plaintiff has the right to pursue its declaratory relief claim under the Declaratory Judgment Act, even though the plaintiff has not established its right to recover past costs. Cf. *Reichhold, Inc. v. United States Metals Refining Co.*, 522 F.Supp.2d 724, 728 (D. N.J. 2007) (holding that since plaintiff cannot seek declaratory judgment under CERCLA section 113(g)(2) for contribution costs, plaintiff has right to seek declaratory judgment for contribution costs under Declaratory Judgment Act). Here, the Ninth Circuit held that Colton's declaratory relief claim met all the justiciability requirements of the Declaratory Judgment Act. Thus, Colton should have been allowed to pursue its declaratory relief claim under the Act.

The declaratory relief provision of section 113(g)(2) is included in a provision establishing the limitation period for bringing an action to recover

response costs; under the provision, a cost recovery action must be brought within six years after “initiation” of a remedial action. 42 U.S.C. § 9613(g)(2); App. 50. Since the limitations period is triggered by the initiation of the remedial action rather than its completion, Congress was evidently concerned that a plaintiff may be required to bring its cost recovery action before its remedial action is completed, and resolved the problem by allowing plaintiffs to obtain a mandatory declaratory judgment of liability that would allow future cost recovery once the future costs were incurred. *See State of California v. Neville Chemical Co.*, 358 F.3d 661, 668 n. 4 (9th Cir. 2004). By allowing plaintiffs to obtain mandatory declaratory judgments of liability where their past costs were NCP-compliant, Congress did not thereby preclude plaintiffs from obtaining declaratory judgments under the Declaratory Judgment Act in situations where their past costs were not NCP-compliant, assuming that their claims otherwise meet the justiciability requirements of the Declaratory Judgment Act.

It is thus clear that CERCLA section 113(g)(2) and the Declaratory Judgment Act apply differently and address different subjects in the CERCLA context. Section 113(g)(2) mandates a declaratory judgment where the plaintiff has established its right to recover past costs, and the Declaratory Judgment Act authorizes a declaratory judgment where the plaintiff has not met this burden but is able to meet the “actual controversy” requirements of the Declaratory Judgment Act. Contrary to the Ninth Circuit decision,

section 113(g)(2) does not provide a “detailed” remedy that “pre-empts” the “general” remedy of the Declaratory Judgment Act, but instead addresses an entirely different situation in the CERCLA context.

Stated differently, CERCLA section 113(g)(2) *expands* the rights of plaintiffs to obtain declaratory relief, by mandating such relief for plaintiffs who establish the defendant’s liability, but does not *reduce* the rights of plaintiffs to obtain declaratory relief under the Declaratory Judgment Act, by denying such relief for plaintiffs who do not establish the defendant’s liability but meet the requirements of the Declaratory Judgment Act. Section 113(g)(2) creates greater rights for declaratory relief claimants but does not preempt their existing rights.

The Ninth Circuit’s decision, in holding that CERCLA preempts the Declaratory Judgment Act, violates the well-established rule of statutory construction that repeals by implication are not favored, and that statutes should be construed harmoniously, to the extent possible, so that effect is given to each statute. As this Court has stated:

[T]he cardinal rule is that repeals by implication are not favored. . . . In the absence of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. . . . When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each

as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal must be clear and manifest.

Morton v. Mancari, 417 U.S. 535, 549 (1974) (citations and quotation marks omitted). *See also Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion); *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Universal Interpretative Shuttle Corp. v. Washington Metropolitan Area Transit Comm’n*, 393 U.S. 186, 194 (1968); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

Here, the two statutes – the Declaratory Judgment Act and CERCLA section 113(g)(2) – can be read harmoniously so that effect is given to each, because the CERCLA provision provides for mandatory declaratory judgments in certain situations and the Declaratory Judgment Act provides for declaratory judgments in different situations. Nothing in the language of CERCLA section 113(g)(2) suggests that it preempts the Declaratory Judgment Act as applied in the CERCLA context, and Congress provided no indication of any preemptive intent in enacting section 113(g)(2). Under traditional rules of statutory construction, section 113(g)(2) cannot properly be construed as preempting the Declaratory Judgment Act, contrary to the Ninth Circuit decision.

B. There Are Various Legitimate Reasons Why A Plaintiff May Need To Pursue Declaratory Relief Under The Declaratory Judgment Act For Future Response Costs Under CERCLA, Even Though The Plaintiff Does Not Have The Right To Recover Past Costs.

As the Tenth Circuit explained in *County Line Investment Co. v. Tinney*, 933 F.2d 1508 (10th Cir. 1991), there are various reasons why a plaintiff may need to obtain a declaratory judgment under the Declaratory Judgment Act for recovery of future response costs under CERCLA, “even though the plaintiff has not yet established that all of its claimed response costs were incurred consistent with the NCP.” *Tinney*, 933 F.2d at 1513. For example, the “factual record” may “not permit a determination of consistency with the NCP at the time the motion for summary judgment is filed.” *Id.* Also, the plaintiff – without having incurred any past costs – may “seek[] only a declaration of the defendant’s liability for future costs incurred consistent with the NCP.” *Id.*

As *Tinney* recognized, a CERCLA plaintiff may need to seek a declaration of the defendants’ liability for future costs even though the plaintiff has not incurred NCP-compliant past costs. For example, the plaintiff may need to determine the defendants’ potential liability before undertaking a future response action, in order to determine whether the response action should be undertaken. The declaratory relief action may determine various aspects of the

defendants' liability, such as whether the defendants caused the contamination, whether they are "covered persons" within the meaning of CERCLA, 42 U.S.C. § 9607(a), whether the defendants have available defenses under CERCLA,⁵ whether the statute of limitations bars the cost recovery action, and other such matters. The determination of these issues may guide the plaintiff in deciding whether to commence a response action.

The instant case presents an example of precisely why a plaintiff may need to secure a declaratory judgment for future response costs even though the plaintiff has not established its right to recover past costs. If Colton is unable to obtain a declaratory judgment for future cost recovery because it cannot recover past costs, Colton may be unable to recover its future costs from all defendants potentially responsible for the contamination of Colton's drinking water supplies. As the Ninth Circuit stated, "Colton faces a potential statute of limitations bar with respect to its claims against certain defendants. . . ." App. 12. More specifically, some defendants argue that Colton cannot initiate a new cost recovery action against them because any such action is time-barred.⁶

⁵ Under CERCLA, defendants are not liable for response costs if the contamination was caused by an act of God, an act of war, or the acts or omissions of third parties. 42 U.S.C. § 9607(b).

⁶ The basis of the defendants' argument that a new action would be time-barred is explained more fully in Colton's reply brief in the Court of Appeals, at pages 27-28, and note 8. The

(Continued on following page)

If their argument is correct, Colton's only basis for recovering its future response costs from them is by assertion of its declaratory relief claim in this case. The Ninth Circuit, by precluding Colton from asserting this claim, may preclude Colton from obtaining future cost recovery from these defendants, even though they are allegedly responsible for the contamination of Colton's drinking water supplies.

Conversely, a CERCLA plaintiff would always prefer to obtain a declaratory judgment under CERCLA section 113(g)(2) rather than under the Declaratory Judgment Act, if the remedy is available to the plaintiff, because a declaratory judgment under section 113(g)(2) affords a stronger remedy than under the Declaratory Judgment Act. Section 113(g)(2) provides that "the court *shall* enter a declaratory judgment on *liability* for response costs or damages that will be *binding* on any subsequent action or actions." 42 U.S.C. § 9613(g)(2) (emphasis added). Since the mandatory declaratory judgment establishes "liability" that is "binding" in the subsequent action, the defendant must raise all available defenses in the initial action or lose them in the subsequent action. By contrast, a declaratory judgment under the Declaratory Judgment Act is collateral estoppel in the subsequent action only on issues that are "actually litigated and determined" by a valid judgment. *Bobby*

relevant portions of the reply brief are included in the Appendix, at pages 54-55.

v. Bies, ___ U.S. ___, 129 S.Ct. 2145, 2152 (2009); *Arizona v. California*, 530 U.S. 392, 414 (2000). Therefore, the defendant in such an action is free to raise and litigate issues in the subsequent action that it did not raise in the initial action. Nonetheless, although the mandatory declaration provided in section 113(g)(2) provides a stronger remedy for the plaintiff, the plaintiff should have the right to pursue the lesser remedy provided in the Declaratory Judgment Act, if the stronger remedy of section 113(g)(2) is not available.

It is thus clear that CERCLA section 113(g)(2) and the Declaratory Judgment Act establish different sets of rights and obligations concerning the plaintiff's ability to seek declaratory relief in the CERCLA context. Section 113(g)(2) allows the plaintiff to obtain a mandatory declaratory judgment of liability that is binding in the subsequent action, and the Declaratory Judgment Act allows a plaintiff who cannot qualify for declaratory relief under section 113(g)(2) to nonetheless obtain a declaratory judgment that will have a collateral estoppel effect on the actually-adjudicated issues. Contrary to the Ninth Circuit's view, the statutes do not impose conflicting requirements applicable to the same situation, but instead provide complementary remedies in different situations. Thus, there is no basis for the Ninth Circuit's conclusion that the CERCLA provision preempts the Declaratory Judgment Act.

The Ninth Circuit decision categorically precludes all such plaintiffs in the foregoing situations

from obtaining declaratory relief for future cost recovery under the Declaratory Judgment Act, no matter how compelling the evidence in support of such relief, and even though the claims concededly meet the “actual controversy” requirements of the Declaratory Judgment Act. Under the Ninth Circuit decision, all that matters is that the plaintiff cannot recover its past costs. In fact, there is no inherent nexus between the right to recover past costs and the right to recover future costs in terms of NCP compliance; a plaintiff who has failed to comply with the NCP in its past response action may fully comply with the NCP in its future response action. See *United States v. USX Corp.*, 68 F.3d 811, 819 n. 17 (3d Cir. 1995). If the plaintiffs in these situations fully comply with the NCP in their future response actions and are able to meet the stringent “actual controversy” requirements of the Declaratory Judgment Act – which requires the existence of an immediate and actual controversy, and not a hypothetical or abstract one, *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937) – the plaintiffs should be allowed to assert their declaratory relief claims under the Declaratory Judgment Act, even though they cannot recover past response costs.

Nothing in the Declaratory Judgment Act suggests that declaratory relief claims for future cost recovery under CERCLA cannot be maintained before the work is actually performed and the costs actually incurred, assuming that the Act’s “actual controversy”

requirements are met. On the contrary, the Act specifically authorizes parties to obtain judicial declarations of their rights, “whether or not further relief is or could be sought.” 28 U.S.C. § 2201. Similarly, nothing in CERCLA section 113(g)(2) suggests that it preempts, or was intended to preempt, the Declaratory Judgment Act as applied to such declaratory relief claims. Therefore, under traditional rules of statutory construction, the proper conclusion is that CERCLA section 113(g)(2) does not preempt the Declaratory Judgment Act as applied in the CERCLA context, and the Ninth Circuit erred in concluding otherwise.

◆

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

RODERICK E. WALSTON
(Counsel of Record)

GENE TANAKA
DANIELLE G. SAKAI
BEST BEST & KRIEGER LLP
Attorneys for Petitioner

Blank Page