No. 10-284

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTORY PROVISIONS

PETITIONER'S REPLY BRIEF

I. CONTRARY TO THE RESPONDENTS' ARGUMENT, THE NINTH CIRCUIT DECISION BELOW WAS NOT CORRECTLY DECIDED.

This case involves the tension between two different rules fashioned by this Court for construction of potentially-conflicting statutes. On the one hand, this Court has held that "a precisely-drawn, detailed statute pre-empts more general remedies." *Hinck v. United States*, 550 U.S. 501, 506 (2007). On the other hand, this Court has held that "[w]hen 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"; otherwise, one statute would impliedly preempt the other and "repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549 (1974); see *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-663 (2007); *Radnazower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). The respondents argue that the *Hinck* line of cases applies here, Res. Br. 16-18, and the petitioner argues that the *Mancari* line of cases applies. Pet. 22-23.

As a general rule, the *Mancari* line rather than the *Hinck* line should apply where potentially-conflicting statutes are capable of harmonious construction, because the *Mancari* line allows recognition of *all* statutes enacted by Congress and the *Hinck*

line does not. A rule of statutory construction that allows recognition of all congressional enactments is preferable to one that does not, assuming that the criteria of the former rule are met.

The statutes in this case – CERCLA section 113(g)(2) and the Declaratory Judgment Act – are capable of harmonious construction; thus, the criteria of the *Mancari* line of cases are met and recognition can be given to all congressional enactments applicable to the controversy. Specifically, section 113(g)(2) *mandates* the grant of a declaratory judgment – *i.e.*, the court "shall" grant a declaratory judgment – for recovery of "further" response costs. Since the declaratory judgment is mandatory, it logically applies only where the plaintiff has established its right to recover past costs, and does not apply where the plaintiff has not established this right. Since the petitioner in this case has not established its right to past costs, CERCLA section 113(g)(2) does not apply here, as the Ninth Circuit held. Pet. App. 16. The Ninth Circuit also held, however, that the Declaratory Judgment Act would otherwise apply because the case presents a "substantial controversy" between the parties. Pet. App. 7. Therefore, CERCLA section 113(g)(2) and the Declaratory Judgment Act are not in conflict as applied here, because the latter applies and the former does not, and the statutes can be construed harmoniously so that effect is given to each. Thus, the *Mancari* line of cases applies and the *Hinck* line does not.

In *Hinck*, this Court held that since Congress had granted the Tax Court specific jurisdiction over tax abatement claims, the Tax Court has exclusive jurisdiction over such claims; therefore, the federal district courts and Court of Federal Claims, although having general jurisdiction over certain federal law claims, do not have jurisdiction over tax abatement claims. *Hinck* holds that where two different statutes apply to the *same* subject matter, as in the case of tax abatement claims, the more specific provision prevails. *Hinck* does not suggest that where the statutes apply to *different* situations, as here, the more specific statute "preempts" the more general statute and effectively "repeals" it.

Notably, the respondents do not respond to the petitioner's argument that the two statutes in this case – CERCLA section 113(g)(2) and the Declaratory Judgment Act – apply to different situations and are capable of harmonious construction.

Instead, the respondents make other arguments in contending that *Mancari* and its progeny do not apply here. They argue, first, that *Mancari* "merely reaffirmed the principle that 'repeals by implication are not favored,'" and the Ninth Circuit "did not hold or suggest that CERCLA section 113(g)(2) has repealed the Declaratory Judgment Act in all of its applications." Res. Br. 20. *Mancari*, however, applies to *all* potentially-conflicting statutes that can be construed harmoniously, not just a statute that might impliedly repeal another statute "in all of its applications." For instance, this Court recently applied

Mancari in holding that the Endangered Species Act (ESA) does not impliedly repeal the Clean Water Act (CWA) as applied to federal approval of state permit programs under the CWA, and the Court did not suggest that the ESA might have impliedly repealed the CWA "in all of its applications." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-663 (2007). Thus, *Mancari* and its progeny fully apply here.

The respondents also argue that *Mancari* is distinguishable because *Mancari* and this case "involve entirely different and wholly unrelated statutory schemes." Res. Br. 20. Although the statutory schemes of the cases are different, *Mancari* established a general rule of statutory construction that applies to all potentially-conflicting statutes that can be read harmoniously, and this Court has applied this general rule of statutory construction in construing other federal statutes, as in *Home Builders*, *Radnazower*, *Watt*, *Posadas* and other cases cited above.

The respondents argue that Colton is attempting to "evade" CERCLA's limitation requirement and secure a "backdoor route" to declaratory relief. Res. Br. 17, 21. On the contrary, Colton is attempting to secure declaratory relief under a statute – the Declaratory Judgment Act – that directly applies here in the absence of the applicability of CERCLA section 113(g)(2). The respondents also argue that Colton's declaratory relief claim would "emasculate" CERCLA's scheme of "requir[ing] NCP compliance and a CERCLA-quality cleanup as a prerequisite" for recovering

response costs. Res. Br. 21. On the contrary, Colton fully agrees that – if it obtains declaratory relief for future response costs – it would nonetheless be required to comply with the NCP and produce a CERCLA-quality cleanup as a prerequisite for obtaining future cost recovery, as the federal courts have held. *United States v. USX Corp.*, 68 F.3d 811, 819 n. 17 (3d Cir. 1995) (plaintiff who obtains declaratory judgment under CERCLA must comply with the NCP in future cleanup as condition for recovering future response costs).

The respondents argue that the federal courts do not have subject matter jurisdiction over Colton's declaratory relief claim because the Declaratory Judgment Act is "remedial" and does not provide a separate basis for federal jurisdiction. Res. Br. 18. The Ninth Circuit rejected the respondents' jurisdictional argument below, and the issue is not properly before this court. The Ninth Circuit held, correctly, that it had subject matter jurisdiction over Colton's declaratory relief claim because the claim "is predicated on CERCLA, a federal statute providing a private right of action." Pet. App. 13-14. Although the Declaratory Judgment Act does not provide a separate basis for federal jurisdiction, the Act authorizes a declaratory judgment predicated on a right of action authorized under another statute, CERCLA, as the Ninth Circuit held.

The respondents argue that Colton's declaratory relief claim is not ripe, because Colton asserts only a "hypothetical" claim for future costs and a declaratory

relief award would "resolve only some, but not all," of the issues raised in the dispute. Res. Br. 19 n. 9. The Ninth Circuit rejected the respondents' ripeness argument below, and the issue is not properly before this Court. The Ninth Circuit held, correctly, that Colton's declaratory relief claim was ripe because the facts establishing the defendants' potential liability have already occurred – in that the perchlorate contamination has already occurred – and there is no dispute that Colton incurred past costs and will incur additional costs in the future. Pet. App. 9-11.

On the other hand, the respondents' argument that a plaintiff cannot pursue declaratory relief under the Declaratory Judgment Act would obstruct the broad goal of that Act, which "'creates a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to such a remedy fails to sue for it.'" *United States v. Doherty*, 786 F.2d 491, 498 (2d Cir. 1986), quoting Wright, The Law of Federal Courts § 100, at 671 (4th ed. 1983).

As one court has commented, it is "nonsensical" to require a plaintiff to establish his right to recover past costs as a predicate for a declaratory relief claim to recover future costs, because the declaratory relief claim "seeks to fix liability for *future* costs," not past costs. *Foster v. United States*, 922 F.Supp. 663, 664 (D. D.C. 1996) (original emphasis). As the court stated, "[w]hile a claim for recovery of past costs is logically

antecedent to a claim for future costs, it is not a prerequisite." *Id.*

Therefore, the Ninth Circuit decision below was not correctly decided.

II. CONTRARY TO THE RESPONDENTS' ARGUMENT, THIS CASE PRESENTS A CONFLICT AMONG THE FEDERAL CIRCUIT COURTS.

The respondents argue that this case does not present a conflict among the federal circuit courts, because the Tenth Circuit in *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991), and the First Circuit in *United States v. Davis*, 261 F.3d 1, 46 (1st Cir. 2001), did not hold – and at most stated in dictum – that plaintiffs can assert declaratory relief claims for future response costs without having established the defendants' liability for past costs, and that any statements to that effect in the decisions are not applicable here. Res. Br. 8-15.

Whether a conflict exists among the federal circuit courts primarily depends on whether the circuit courts themselves believe that a conflict exists, in terms of how they construe the opinions of other circuit courts and whether they regard such opinions as establishing precedents applicable to the case at hand. More specifically, the question depends on whether a reviewing circuit court regards another circuit court's opinion as establishing an applicable precedent but decides not to follow it, or instead

regards the opinion as *not* establishing an applicable precedent, because the opinion is either distinguishable or makes passing comments that lack precedential weight and value. Simply put, it is the jurisprudence of the circuit courts themselves – which this Court reviews on writs of certiorari – that largely determines whether an intercircuit conflict exists. If the circuit courts decide that a conflict exists but this Court declines to review the decisions because it believes they are distinguishable, the result will be to create confusion and uncertainty in the law. There, this Court should review circuit court decisions if the circuit courts believe that a conflict exists.

Here, the Ninth Circuit's jurisprudence clearly indicates that an intercircuit conflict exists. The Ninth Circuit stated that the issue is one of "first impression in this circuit," but that "[o]ur sister circuits have taken divergent approaches to this issue," in that some have "held or suggested that recoverable past costs are a sine qua non for declaratory relief under CERCLA" and others have "held or suggested that declaratory relief may be available even in the absence of recoverable past costs." Pet. App. 14-15 (citations omitted). Since the Ninth Circuit concluded that an intercircuit conflict exists, and did not attempt to distinguish the decisions with which it disagrees or suggest that the decisions were not applicable precedents, the Ninth Circuit's decision conflicts with the decisions of other circuit courts, as the Ninth Circuit candidly and openly acknowledged.

Closer analysis of *Tinney* and *Davis* reveals the existence of an intercircuit conflict, as the Ninth Circuit acknowledged. Turning first to *Tinney*, the Tenth Circuit stated that "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 claim response costs were incurred consistent with the NCP." *Tinney*, 933 F.2d at 1513. This conclusion directly conflicts with the Ninth Circuit's conclusion that a CERCLA plaintiff is not entitled to declaratory relief under these circumstances. Although *Tinney*'s analysis may have been dictum, in that the court denied declaratory relief in that case, the Ninth Circuit did not distinguish *Tinney* on that ground, and instead regarded *Tinney* as taking a "divergent approach[]" with which the Ninth Circuit disagreed. Pet. App. 15. The Ninth Circuit thus regarded *Tinney* as establishing an applicable precedent that the Ninth Circuit chose not to follow.

The respondents argue that *Tinney* is distinguishable because *Tinney* stated that a plaintiff can pursue declaratory relief for future costs without having established the defendants' liability for *all* or *some* past costs, whereas petitioner Colton has not established the defendants' liability for *any* past costs. Res. Br. 11. *Tinney* did not, however, suggest that its analysis applies only where the plaintiff has established liability for all or some past costs, and the logic of its analysis applies equally where the plaintiff has not established liability for any costs. The question whether the plaintiff can pursue declaratory relief without having established the defendants'

liability for at least some past costs goes to the question of whether the plaintiff's declaratory relief claim is ripe, and, as the Ninth Circuit held, petitioner Colton's claim is ripe because contamination has occurred and the petitioner has incurred past cleanup costs and intends to incur future costs. Pet. App. 9-11.

More importantly, *Tinney* explained that Congress' goal of encouraging private parties to clean up hazardous sites is furthered by allowing plaintiffs to seek declaratory relief for future costs without having established the defendants' liability for past costs. *Tinney*, 933 F.2d at 1513 n. 9. As the court stated, "[e]arly 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.* (citation omitted). Thus, *Tinney* recognized that CERCLA's goal of encouraging settlement is furthered by allowing plaintiffs to pursue declaratory relief claims that will establish whether the defendants are liable for costs, and the amount of their respective liabilities. *Tinney*'s explication of this congressional goal directly clashes with the Ninth Circuit's view that allowing the plaintiff to seek declaratory relief under these circumstances "would create little incentive for parties to ensure that their initial cleanup efforts are on the right track," Pet. App. 18, an argument repeated by the respondents in their response. Res. Br. 21. Thus, the Ninth Circuit's view of congressional goals conflicts with *Tinney*'s view of these goals.

Turning to *Davis*, the respondents argue that *Davis* held only that declaratory relief for contribution can be pursued under CERCLA section 113(g)(2) and did not hold that the same relief can be pursued under the Declaratory Judgment Act, and, to the extent that the decision may have suggested that such relief could be pursued, any such suggestion was dictum. Res. Br. 13-15.

In *Davis*, the plaintiff sought declaratory relief for contribution for its future cleanup costs under both CERCLA section 113(g)(2) and the Declaratory Judgment Act. The First Circuit held, first, that the plaintiff could seek declaratory relief under CERCLA section 113(g)(2), because that provision authorized declaratory relief for contribution claims, as well as for non-contribution claims. *Davis*, 261 F.3d at 45-47. The court held, separately, that the plaintiff could also seek declaratory relief under the Declaratory Judgment Act – even though the plaintiff had not incurred any past cleanup costs prior to the close of discovery – because there was an actual "case or controversy" between the parties. *Id.* at 47. Thus, the court held that the plaintiff could pursue declaratory relief under the Declaratory Judgment Act even though it had not established the defendants' liability for past costs at the time of its action, and its analysis was not dictum.

The respondents argue that *Davis* held that the plaintiff's right to pursue declaratory relief under the Declaratory Judgment Act was contingent on his right to pursue such relief under CERCLA section

113(g)(2). Res. Br. 15. In fact, *Davis* held that since the plaintiff had met the requirements for declaratory relief under section 113(g)(2), the plaintiff necessarily met the requirements for declaratory relief under the Declaratory Judgment Act. *Davis*, 261 F.3d at 45-47. *Davis* did not hold that the plaintiff's right to secure declaratory judgment under the latter statute was contingent on its right to secure such relief under the former.

Finally, the respondents argue that neither *Tinney* nor *Davis*, nor any other case than the Ninth Circuit decision below, has directly addressed the interplay between the Declaratory Judgment Act and CERCLA section 113(g)(2). Res. Br. 8-9. Logically, the only way that a CERCLA plaintiff can pursue declaratory relief for future costs if it does not have the right to recover past costs is under the Declaratory Judgment Act – assuming, of course, the correctness of the Ninth Circuit's decision that CERCLA section 113(g)(2) does not authorize such declaratory relief. Thus, although *Tinney* and *Davis* may not have directly discussed the interplay between the two statutes, their analyses were necessarily predicated on this interplay. Indeed, *Davis* expressly held that the Declaratory Judgment Act provides an independent basis of jurisdiction for pursuing declaratory relief under CERCLA, thus addressing, to that extent, the interplay between the statutes. Because of the intercircuit conflict concerning the interplay

between the statutes, this Court should grant review to resolve the conflict and prevent costly litigation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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