

No. 09-\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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KRISTER SVEN EVERTSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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Date: July 20, 2009

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## QUESTIONS PRESENTED

Krister Evertson was convicted of having knowingly stored or disposed of “hazardous wastes” without a permit, in violation of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)(2)(A). The Ninth Circuit affirmed the conviction. The Ninth Circuit opinion conflicts with holdings of other circuits and raises several questions meriting review.

1. Was the United States required to demonstrate to the jury beyond a reasonable doubt that the materials in question were “hazardous wastes” because they had been abandoned by Mr. Evertson, or was it sufficient – as the district court instructed the jury and the Ninth Circuit affirmed – for the United States to demonstrate that *the Environmental Protection Agency* had determined that the materials were “hazardous wastes?”

2. In order to show that the materials in question were “hazardous wastes,” was the United States required to demonstrate that Mr. Evertson *intended* to abandon the materials?

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Petitioner Krister Sven Evertson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

**OPINION BELOW**

The opinion of the Ninth Circuit (Pet. App. 1a - 8a) is unpublished. The opinion is reported at 2009 U.S. App. LEXIS 5936.

**JURISDICTION**

The Ninth Circuit's opinion was issued on March 20, 2009. On June 2, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 20, 2009. The jurisdiction of this Court is invoked

under 28 U.S.C. § 1254(1).

### **STATUTORY PROVISIONS INVOLVED**

42 U.S.C. § 6928(d)(2)(A) provides in relevant part, “Any person who . . . knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter without a permit under this subchapter . . . shall, upon conviction, be subject to a fine of not more than \$50,000 for each day of violation, or imprisonment not to exceed . . . five years . . ., or both.” Other pertinent statutory provisions and regulations are reprinted in the appendix to this petition. Pet. App. 9a-12a.

### **INTRODUCTION**

Petitioner Krister Evertson established a business in Salmon, Idaho in 2000 for the purpose of manufacturing sodium borohydride, a chemical with numerous industrial uses. Working without salary for two years, Evertson sought to develop a new and cheaper method of manufacturing the chemical. When he ran out of working capital in 2002, he left Idaho in order to earn the funds necessary to continue the business. Before leaving, in August 2002 he placed the company’s materials in long-lasting, 3/8"-thick stainless steel storage tanks at a facility in Salmon, and pre-paid rent to the owner of the facility. He told the owner and others that he planned to return to Salmon as soon as he accumulated the necessary funds. All agree that at least one year’s rent was paid, and there may have been a misunderstanding regarding the length of the oral rental agreement – because the rent actually paid was twice as much as the annual rent provided for under that

agreement. The United States does not contend that the materials ever leaked from the storage tanks or that the materials caused any environmental damage. The U.S. Environmental Protection Agency (EPA) seized the materials in May 2004 (and eventually disposed of them), claiming that they constituted “hazardous wastes” within the meaning of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6903(5).

The parties are in agreement that the stored materials were hazardous; the principal disputed issue at trial was whether the materials should be deemed waste. The United States contended that the materials were waste because they had been abandoned by Mr. Evertson – that he stored them in lieu of disposal, with no intention of ever using them again as part of his business. Mr. Evertson denied that he abandoned the materials, pointing to evidence that he paid rent for storage, that the materials had considerable re-sale value and played an important role in his efforts to manufacture sodium borohydride, and that he told others (including family members) that he planned to return to resume his business when financially able to do so.

Incredibly, however, the jury was not provided an opportunity to determine whether Mr. Evertson had abandoned the materials. The jury instructions regarding the elements of a violation of 42 U.S.C. § 6928(d)(2)(A) never mentioned the word “abandoned” or even suggested that a conviction would be unwarranted in the absence of a finding of abandonment. The instructions stated that the government

was required to demonstrate that Mr. Evertson stored or disposed of “hazardous waste” but never indicated that it was up to the jury to determine whether the materials stored by Mr. Evertson in Salmon were “hazardous waste.” Instead, the instructions indicated that the United States met its burden by demonstrating that EPA had identified the materials as “hazardous waste.”

The Ninth Circuit affirmed Mr. Evertson’s conviction, rejecting his contention that the jury instructions constituted clear error. The Ninth Circuit’s conclusion that the jury instructions properly stated the law is in direct conflict with decisions from other appeals courts, which uniformly hold that in a prosecution under 42 U.S.C. § 6928(d)(2)(A), the United States is required to demonstrate to the jury beyond a reasonable doubt that the materials in question were “hazardous wastes.” And, as the United States has conceded, the materials stored by Mr. Evertson were not “hazardous wastes” if they were not, in fact, abandoned. Review is warranted to resolve the conflict among the federal appeals courts regarding how a jury is to determine whether stored materials constitute “hazardous wastes.”<sup>1</sup>

Review is also warranted to resolve a conflict regarding whether the United States, when it contends that stored materials were “hazardous wastes” because the materials were abandoned, is required to demonstrate that the defendant *intended* to

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<sup>1</sup> Mr. Evertson seeks review of his conviction under the two counts of the Indictment that alleged RCRA violations (Counts 2 and 3). He does not seek review of the conviction under Count 1, which alleged that he violated the Hazardous Materials Transportation Uniform Safety Act, 49 U.S.C. § 5124, when he transported the materials at issue ½ mile from his place of business to the storage facility.

abandon the materials. The Ninth Circuit rejected Mr. Evertson's contention that the United States was required to demonstrate intent; that holding conflicts with the holdings of other federal appeals courts.

Finally, at a minimum summary reversal is warranted. The Ninth Circuit mischaracterized the district court's jury instructions, ignored settled law, and upheld a criminal conviction in a case in which the jury was essentially directed to find that the stored materials constituted "hazardous wastes" within the meaning of RCRA. The conviction can fairly be characterized as a miscarriage of justice, particularly given the uncontested evidence that Mr. Evertson's conduct caused no harm to the environment, nor was there any imminent threat of such harm.

## **STATEMENT OF THE CASE**

### **The Statutory Framework**

Congress enacted RCRA in 1976 as a "cradle-to-grave" regulatory scheme for toxic materials, providing "nationwide protection against the dangers of improper hazardous waste disposal." H.R. Rep. No. 1491, 94<sup>th</sup> Cong., 2d Sess. 11, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6238, 6249. "RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. KFC Western*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)).

RCRA prohibits the "treatment, storage, or disposal" of any "hazardous

waste” except in accord with a RCRA permit at a RCRA-permitted facility. 42 U.S.C. § 6925(a). RCRA makes it a felony for any person to “knowingly treat[ ], store[ ], or dispose[ ] of any hazardous waste identified or listed under [RCRA] . . . without a permit . . .” 42 U.S.C. § 6928(d)(2)(A).

For purposes of this case, the key term is “hazardous waste.” For material to be “hazardous waste,” it must first be determined to be “solid waste.” Under RCRA, the term “solid waste” includes “garbage, refuse, . . . and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations.” 42 U.S.C. § 6903(27) (emphasis added). EPA has defined “discarded material” to include any material that is “abandoned.” 40 C.F.R. § 261.2(a)(2)(i)(A). “Abandoned” material is material that has been: (1) “disposed of”; (2) “burned or incinerated”; or (3) “accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.” 40 C.F.R. § 261.2(b). The United States asserted at trial that the materials stored by Mr. Evertson in Salmon, Idaho were “abandoned” (and were thus “discarded material” and “solid waste”) because they were being stored “in lieu of being abandoned” – they were of no use to Mr. Evertson business, and/or Mr. Evertson did not intend to return to Salmon and resume his business.

Once material has been determined to be “solid waste,” the United States, in order to obtain a criminal conviction under 42 U.S.C. § 6928(d)(2)(A), must

demonstrate that the waste is “hazardous waste”<sup>2</sup> – defined under RCRA as solid waste which:

[B]ecause of its quantity, concentration, or physical, chemical or infectious characteristics may –

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, illness or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5). As the Court has explained, “RCRA does not identify which wastes are hazardous . . . ; it leaves that designation to EPA. 42 U.S.C. § 6921(a).”

*City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994).

EPA designates solid wastes as hazardous wastes in one of two ways. First, it maintains a list of materials which are automatically deemed to be hazardous wastes (subject to very limited exceptions) once they meet the definition of a solid waste (e.g., the materials have been discarded). 40 C.F.R. §§ 261.30 - 35. Second, it has identified certain characteristics that, if possessed by a solid waste, will cause that solid waste to be deemed a hazardous waste. 40 C.F.R. §§ 261.21 - 24.<sup>3</sup>

The criminal statute under which Mr. Evertson was convicted, 42 U.S.C.

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<sup>2</sup> In the courts below, the parties never seriously disputed that the materials at issue were hazardous. Mr. Evertson asserted that the materials were not “hazardous wastes” because they were not wastes, not because they were not hazardous.

<sup>3</sup> The four characteristics established by EPA are ignitability, corrosivity, toxicity, and reactivity. The regulations provide detailed explanations regarding precisely how strongly a solid waste must exhibit one of the characteristic before it will be deemed a hazardous waste. *Id.*

§ 6928(d)(2)(A), includes as one of its elements that the hazardous waste at issue is either “listed” or “identified” under RCRA; that is, the material in question must either be a chemical listed under 40 C.F.R. §§ 230.30 - 35 or it must possess one of the characteristics identified in 40 C.F.R. §§ 261.21 -24.<sup>4</sup>

Importantly for our purposes, the statute’s “listed” or “identified” requirement does not refer to any EPA determination with respect to the specific materials “store[d]” or “dispose[d] of” by the defendant. Rather, it refers to the EPA regulations, which address categories of materials on a generic basis, not the materials at issue in any single case. Equally importantly, material is not “hazardous waste” simply because it is listed in 40 C.F.R. §§ 261.30 - 35 or because it exhibits one of the characteristics identified in 40 C.F.R. §§261.21 - 24. Rather, such material is “hazardous waste” if and only if it is also a solid waste.

### **Factual Background**

The facts regarding Mr. Evertson’s business activities in Salmon, Idaho in 2000-2002 are largely undisputed. In 2000, he established a business for the purpose of manufacturing sodium borohydride, a chemical with various industrial uses that some scientists view as the key to perfecting hydrogen-powered vehicles. The chemical derives from a mixture of metal sodium with a form of borax.

Mr. Evertson’s business venture was funded by a \$100,000 loan from the

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<sup>4</sup> None of the materials stored by Mr. Evertson in Salmon were “listed” substances. Rather, they were “characteristic” substances – they exhibited hazardous characteristics of the sort identified in §§ 261.21 - 24.

mother of his brother-in-law. In October 2000, he began moving equipment into a rented facility in Salmon, where he intended to process sodium metal into sodium borohydride. In March 2001, he received a shipment of ten metric tons (22,000 lbs.) of pure sodium metal, packed in 55-gallon drums. He worked for the next 16 months without salary to perfect a low-cost method of manufacturing sodium borohydride.<sup>5</sup> By July 2002, he had depleted the \$100,000 investment but had not yet attained the operating temperature necessary to produce sodium borohydride using his technology. In particular, he lacked the funds necessary to purchase the additional propane he would need to achieve that temperature. ER 288.<sup>6</sup>

In August 2002, Mr. Evertson placed all materials he had been using as part of the manufacturing process in storage at a facility in Salmon known as Steel and Ranch Supply. There were three categories of stored materials that the United States deems hazardous: (1) sodium metal, still packaged in the 55-gallon metal drums which were shipped to Mr. Evertson in March 2001;<sup>7</sup> (2) 2,500 gallons of liquid (presumed by all parties to be sodium hydroxide) in two pressurized process tanks; and (3) 11,000 pounds of an amalgam (consisting largely of a mixture of borax,

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<sup>5</sup> Mr. Evertson's novel manufacturing method involved employing a significantly higher temperature during the manufacturing process (450 degrees Celsius) than was typically employed by other manufacturers of sodium borohydride.

<sup>6</sup> "ER" refers to the Excerpts of Record created in connection with Mr. Evertson's appeal to the Ninth Circuit.

<sup>7</sup> Eighty drums of sodium metal had been shipped; the 62 drums that had not been opened as of August 2002 were stored at Steel & Ranch.

sodium, silicon, and mineral oil) in a stainless steel, insulated 4,000-gallon reactor tank.<sup>8</sup> The stored materials also included a number of 2,000-pound bags of borax, but they were not mentioned in the Indictment. The United States presented no evidence at trial that any material ever leaked from any of these containers during storage, or that the material caused any environmental damage. *See, e.g.*, ER 236-37 (testimony of Marc Callahan, EPA’s on-site coordinator of clean-up activities, that there was no release of hazardous materials into the soil or the atmosphere).

The parties’ accounts regarding subsequent events differ significantly. Count 2 of the Indictment refers to the storage of items #2 and #3 above (the sodium hydroxide and the process sludge); Count 3 refers to the storage of the 62 drums of sodium metal. The United States contends that the sodium hydroxide and the process sludge were “abandoned” the moment they were deposited at Steel & Ranch (and thus were solid waste) because they were being stored “in lieu of being abandoned by being disposed of, burned, or incinerated” – they were simply “junk” that could not possibly be of any use to Mr. Evertson even if he had resumed his manufacturing operations.<sup>9</sup> In support of that contention, the United States cited testimony from a government agent (disputed by the defense) that Mr. Evertson said

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<sup>8</sup> The United States has referred to the contents of the 4,000-gallon tank as “process sludge.” For ease of understanding, Mr. Evertson will use the same terminology.

<sup>9</sup> If the sodium hydroxide and the process sludge were “abandoned,” then they were solid waste and (because all agree that both sets of materials were hazardous) were also “hazardous waste.”

in 2004 that his efforts to manufacture sodium borohydride had failed.

The United States contends that the drums of sodium metal (Count 3) were “abandoned” no later than August 1, 2003, the date after which it contends that Mr. Evertson was no longer paying rent for storage space at Steel & Ranch. In support of that contention, the United States cited the testimony of Robert Chaffin (the operator of Steel & Ranch) that: (1) he believed that rent was only paid through August 1, 2003; (2) Mr. Evertson told Mr. Chaffin that he would return within a year; (3) he only spoke once by telephone with Mr. Evertson during the 22 months between the date that Mr. Evertson’s materials arrived at Steel & Ranch and the date that they were seized by EPA; (4) he sent emails to Mr. Evertson to inquire about the status of Mr. Evertson’s plans to return to Salmon and take possession of the stored materials, but did not receive a reply;<sup>10</sup> and (5) he spoke with Mr. Evertson’s sister and brother-in-law (who continued to live in Salmon) regarding Mr. Evertson’s plans, but they told him that they had not been in contact with Mr. Evertson.

Mr. Evertson introduced substantial evidence that he had *not* abandoned the materials stored at Steel & Ranch. With respect to the process sludge, he introduced the testimony of an expert witness, Mark Malachowski, who testified that the process sludge was part of an “intermediate process stream.” ER 245. He testified that

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<sup>10</sup> His testimony was *not* that the email addresses supplied to him by Mr. Evertson were incorrect, but that he received no response to the emails he sent to the addresses Mr. Evertson had supplied.

creation of the process sludge (a mixture consisting of borax, sodium, silicon, and mineral oil) was a large step toward the creation of sodium borohydride. ER 247. He testified that even after two years, the mixture could be turned into sodium borohydride by injecting hydrogen into the mixture and heating it to the critical temperature. ER 248-49. He estimated that the process of manufacturing sodium borohydride was 70-80% complete. ER 249. Accordingly, he opined, the process sludge should not be considered junk – it had value because it could be used to complete the manufacturing process. ER 251-53. With respect to the tank containing 2,500 gallons of sodium hydroxide, Mr. Evertson cited the testimony of Mr. Malachowski that it is a common industrial product, ER 255, and the testimony of a prosecution witness that it is the same chemical combination that would make Drano (which is, of course, a common product). ER 240.

Timothy Sundles, Mr. Evertson's brother-in-law, testified that the sodium metal being stored at Steel & Ranch in the original 55-gallon drums had considerable re-sale value. ER 166.<sup>11</sup> To combat prosecutors' claims that he had "abandoned" the materials at Steel & Ranch by storing them "in lieu of being abandoned by being disposed of, burned, or incinerated," 40 C.F.R. § 261.2(b)(3), Mr. Evertson cited: (1) testimony from both Mr. Sundles and Robert Chaffin that Mr. Evertson told them in

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<sup>11</sup> Indeed, Mr. Evertson first came to the attention of federal authorities when, while he was working in Alaska, he offered sodium metal for sale on Ebay in 2004. We do not understand the United States to be seriously disputing that the sodium metal, still packed in the original 55-gallon drums, had significant re-sale value.

the summer of 2002 that he was leaving Salmon solely because he had run out of operating capital and that he planned to return to town as soon as he had earned enough money to resume business operations, ER 163-64, 176; (2) evidence that when Mr. Evertson left Idaho, he went to Alaska and was earning money through mining operations; and (3) evidence that Mr. Evertson may have believed that he had paid rent for two years, not one. ER 177-179, 199-202.<sup>12</sup> Moreover, given the significant value of other materials stored by Mr. Evertson at Steel & Ranch (for example, the three tanks were mounted on trailers with considerable re-sale value, ER 174-75,<sup>13</sup> and numerous valuable sacks of borax were also being stored), it is highly unlikely that an owner would choose to abandon them instead of, at the very least, selling them for a profit.

EPA seized the stored materials in May 2004 and eventually disposed of them. It conducted tests on the materials, determined them to be hazardous, and (because EPA was disposing of them) characterized them as hazardous wastes. It identified the sodium metal and the process sludge as hazardous because of their reactivity. It

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<sup>12</sup> Robert Chaffin testified that at he requested that Mr. Evertson pay him a year's rent in the form of a 1,000-pound sack of borax, which Chaffin knew he would be able to resell. ER 177-179, 199-201. In fact, Mr. Evertson gave him a 2,000-pound sack of borax, suggesting that rent had been paid for two years instead of one. While Mr. Chaffin testified that it was his understanding that the rental agreement was for one year only, he said that there could have been a misunderstanding on that point – given that no portion of the rental agreement was put into writing. ER 202-202. Nor did Mr. Chaffin indicate in his testimony that Mr. Evertson had ever said or done anything suggesting that he was relinquishing his ownership of the stored materials.

<sup>13</sup> The trailers were brand new and had two axles. ER 175.

identified both the process sludge and the sodium hydroxide as hazardous because of their corrosivity – they were measured as having a pH above 12.5.

### **Proceedings Below**

Count 2 of the indictment alleged that Mr. Evertson stored hazardous wastes (namely, the sodium hydroxide and the process sludge) at Steel & Ranch without a permit beginning on August 1, 2002, in violation of 42 U.S.C. § 6928(d)(2)(A). Count 3 of the indictment alleged that Mr. Evertson stored hazardous wastes (namely, the sodium metal sealed in 62 55-gallon drums) beginning on August 1, 2003, also in violation of 42 U.S.C. § 6928(d)(2)(A).

Although Mr. Evertson's defense to the RCRA counts hinged on his contention that he did not abandon the materials that he stored at Steel & Ranch, the trial judge's charge regarding the elements of the RCRA counts made no mention of the word "abandon" or any similar word. Instruction No. 17, which set forth the elements of the crime alleged in Count 2, read as follows:

Count Two of the Indictment charges that, beginning on or about August 1, 2002, and continuing to on or about May 27, 2004, in the District of Idaho, the defendant did knowingly store or dispose of "*hazardous waste*" in above-ground storage tanks at Steel and Ranch Supply without a permit issued by the United States Environmental Protection Agency or the State of Idaho.

To find the defendant guilty of this crime, you must be convinced that the government has proven each and every one of the following elements beyond a reasonable doubt:

(1) The defendant knowingly "*stored*" or "*disposed of*," or knowingly caused others to store or dispose of, "*hazardous waste*" in above-ground storage tanks at Steel and Ranch Supply;

(2) That defendant knew that the material in the above-ground storage tanks at Steel and Ranch Supply had the potential to be harmful to others or to the environment;

(3) That the “*hazardous waste*” was identified as a hazardous waste by the United States Environmental Protection Agency (“EPA”) pursuant to RCRA; and

(4) That defendant had not obtained a permit from EPA or the State of Idaho authorizing the disposal of such “*hazardous waste*” under RCRA.

The government does not need to prove that defendant knew that the waste was listed or identified as “*hazardous waste*” in the EPA regulations or that the defendant knew that he was required to obtain a permit before disposing of the waste. The government is not required to prove that the defendant knew that he was violating RCRA.

If you are convinced that the government has proven all of the elements set forth above, return a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Instruction No. 17 (emphasis in original).<sup>14</sup>

Although the first element of Instruction Nos. 17 and 18 made clear that prosecutors were required to prove that Mr. Evertson had stored a hazardous waste at Steel & Ranch, nowhere did the instructions indicate that it was up to the jury to determine whether the materials that he stored at Steel & Ranch were “hazardous wastes,” or even “wastes.” To the contrary, the third element of those instructions (“the ‘hazardous waste’ was identified as a hazardous waste by the . . . EPA pursuant to RCRA”) indicated that it was up to EPA to determine whether the materials being stored by Evertson were “hazardous wastes” within the meaning of RCRA. That understanding was reinforced by language later in Instruction 17 and 18 that the government did not need to prove that Mr. Evertson knew that “the waste” was

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<sup>14</sup> Instruction No. 18, which addressed the RCRA charge set forth in Count 3, was substantially identical. Pet. App. 12a-14a. Various terms used in Instruction Nos. 17 and 18 were defined in Instruction No. 19. Counsel for Mr. Evertson submitted a different version of the two instructions than the ones ultimately given by the trial court, but counsel did not formally object to the court’s version.

listed or identified by EPA as “hazardous waste” or that he knew that he was required to obtain a permit before disposing of “the waste.” Because the instructions said nothing about a requirement that prosecutors demonstrate that the material stored at Steel & Ranch was “waste,” the instructions’ reference to “the waste” carried the clear implication that the stored material was, in fact, “waste.”

The jury found Mr. Evertson guilty on both Count 2 and Count 3. He was given a 21-month sentence on each conviction, to be served concurrently. Mr. Evertson appealed, arguing *inter alia* that Instruction Nos. 17 and 18 had improperly deprived him of his defense that, because he had never abandoned the materials, the stored materials were not “solid wastes” and thus not “hazardous wastes.” He argued that the third element of the instruction directed the jury to find that the materials stored at Steel & Ranch were “hazardous wastes” if they found that EPA had made such a finding.

The Ninth Circuit affirmed the conviction on March 20, 2009. Pet. App. 1a-8a. The appeals court held that the trial judge had properly instructed the jury regarding the elements of the RCRA offenses. *Id.* at 2a-3a. In particular, it held that the trial judge had properly construed RCRA as requiring prosecutors to prove that “the material” stored by Mr. Evertson had been identified by EPA as a “hazardous waste.” *Id.* at 3a.

The appeals court also rejected Mr. Evertson’s claim that the district court had erred in failing to require prosecutors to prove that he intended to discard/abandon

the materials stored at Steel & Ranch. The court said, “While intent to dispose of materials can be sufficient evidence to show that materials are discarded (and thus waste), we have never held that intent to dispose is required. . . . Disposal (or intent to dispose) can trigger criminal liability, but liability is also triggered when material is stored (without a permit) before or in lieu of disposal.” *Id.* at 6a.

### **REASONS FOR GRANTING THE PETITION**

This case raises issues of exceptional importance. The appeals court upheld a felony conviction under RCRA based on a flawed understanding of that statute, an understanding that conflicts with the interpretation of RCRA adopted by other federal appeals courts.

RCRA is an extremely complicated statute that is viewed by many as a trap for the unwary. That problem is only made worse when, as here, federal courts misinterpret the statute and impose criminal liability based on a tragic misunderstanding of RCRA’s requirements. The Court has never previously addressed criminal liability under RCRA, and the result has been widespread confusion among the lower courts regarding the statute’s requirements. Review is urgently needed to provide guidance to the lower courts in an area of the law that is fraught with danger for citizens who seek in good faith to comply with the laws.

A significant source of confusion has been the regulations adopted by EPA. The titles of those regulations have led some courts (including the courts below) to conclude that EPA maintains lists of substances that are deemed “hazardous

wastes.”<sup>15</sup> EPA does no such thing, nor could it under the terms of RCRA. Rather, EPA identifies characteristics that render a substance hazardous and also maintains lists of specific substances that are deemed hazardous; and *if* those substances are determined to have been handled in a manner that renders them “solid waste,” then they may well qualify as “hazardous waste” under RCRA. *See, e.g.*, 40 C.F.R. §§ 261.21 - 24, 261.30 - 35. But some federal courts have been unable to grasp that distinction, and they refer to particular materials as having been listed or identified under EPA regulations as “hazardous wastes.”

That confusion can be highly prejudicial to criminal defendants because EPA personnel, in addition to adopting regulations that identify/list hazardous substances, also investigate and dispose of potentially hazardous substances. At the conclusion of such investigations, EPA personnel may (as here) come to believe that particular materials it has disposed of are “hazardous wastes.” The facts surrounding such investigations and any EPA determination that the materials in question are “hazardous wastes” are generally placed before the jury in any subsequent criminal trial. But when a court is confused about the nature of the EPA “hazardous waste” regulations, it may (as here) cause jurors to conclude that they are required to defer to EPA’s finding that the defendant’s materials are “hazardous wastes.” And while hazardous materials may, indeed, become “hazardous wastes” as a result of an EPA decision to dispose of the materials, any such determination has no relevance to

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<sup>15</sup> *See, e.g.*, 40 C.F.R. § 261.31 (entitled, “Hazardous wastes from non-specific sources.”).

the issue of whether the materials were “hazardous wastes” when they were in the hands of the defendant. Review is warranted to clear up this persistent confusion.

**I. THE LOWER COURTS IMPROPERLY RELIEVED PROSECUTORS OF THEIR BURDEN OF PROVING THAT PETITIONER’S MATERIALS WERE “HAZARDOUS WASTE” – INCLUDING PROOF THAT HE HAD ABANDONED THOSE MATERIALS**

The Ninth Circuit found no error in jury instructions that relieved prosecutors of their burden of demonstrating that Mr. Evertson had abandoned the materials being stored at Steel & Ranch – a key component of any finding that the materials were “hazardous wastes.” That decision directly conflicts with the decisions of other federal appeals courts, which have held that, in a RCRA prosecution, whether the materials in question were “hazardous wastes” is for the jury (not EPA) to decide. Review is warranted to resolve the conflict.

Mr. Evertson was convicted under 42 U.S.C. § 6928(d)(2)(A), which makes it a felony for any person to “knowingly treat[ ], store[ ], or dispose[ ] of any hazardous waste identified or listed under [RCRA] . . . without a permit.” Thus, conviction required prosecutors to demonstrate that: (1) he acted knowingly; (2) he “stored” materials<sup>16</sup>; (3) the materials were “hazardous waste”; (4) the materials were

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<sup>16</sup> The indictment charged Mr. Evertson with both “storing” and “disposing” hazardous wastes. But prosecutors did not seriously press their “disposing” charge at trial, and the jury was instructed to determine whether Mr. Evertson had stored *or* disposed hazardous wastes. Given the admission of EPA personnel that there was no release of hazardous materials into the soil or the atmosphere, ER 236-37, a “disposing” conviction was not tenable. “Disposal” is defined under RCRA as “the discharge, deposit, injection, dumping, spilling, leaking, or placing any solid waste or

composed of ingredients that were either listed by EPA under RCRA as hazardous or that had characteristics identified by EPA as hazardous; and (5) he lacked a permit for undertaking such storage. Mr. Evertson did not contest #2, #4, and #5 – he admitted that he stored materials at Steel & Ranch, that those materials had characteristics that had been identified by EPA regulations as hazardous, and that he was not issued an EPA permit.<sup>17</sup> His principal defense was that the materials were not “hazardous wastes” because, although hazardous, they were not “solid wastes” – and the materials were not “solid wastes” because he had not “abandoned” the materials.

Under those circumstances, one would have expected the trial judge to instruct the jury that it should acquit Mr. Evertson unless it found beyond a reasonable doubt that he had abandoned the materials being stored at Steel & Ranch – in the absence of such a finding, the materials would not be “solid waste” and thus not “hazardous waste.”<sup>18</sup> But the pivotal instructions (Nos. 17 and 18) did not mention the words

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hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.” *See, generally, Sycamore Industrial Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 853-54 (7<sup>th</sup> Cir. 2008) (narrowly construing “disposal” as applied to RCRA claims).

<sup>17</sup> Of course, Mr. Evertson was under no obligation to obtain a permit for storing hazardous waste if the material he was storing was not, in fact, waste.

<sup>18</sup> *See* 42 U.S.C. § 6903(5) (hazardous material cannot be a “hazardous waste” unless it is first found to be a “solid waste”); 42 U.S.C. § 6903(27) (defining “solid waste” as including “other discarded material”); 40 C.F.R. § 261.2(a) & (b) (defining “discarded material” as including “abandoned” material, and providing that materials are “solid waste” if they are “abandoned” by being “accumulated, stored,

“abandoned” or “solid waste,” or even “waste.”

Indeed, the instructions indicated that while it was up to the jury to determine whether Mr. Evertson stored hazardous materials at Steel & Ranch,<sup>19</sup> the jury should defer to EPA’s determination regarding whether those hazardous materials were “hazardous wastes.” The jury’s only guidance regarding how to go about determining whether the stored hazardous materials were “hazardous wastes” appeared in the third element of Instruction Nos. 17 and 18: the jury was instructed to determine whether “the ‘hazardous waste’ was identified as a hazardous waste by [EPA] pursuant to RCRA.” In other words, if the jury found that EPA itself had identified the hazardous materials being stored at Steel & Ranch as hazardous wastes, then the jury was to conclude that the stored materials were, indeed, “hazardous wastes” within the meaning of § 6928(d)(2)(A). As Mr. Evertson readily concedes, the EPA officials who inspected the Steel & Ranch storage facility determined that the materials listed in the Indictment had been abandoned, were hazardous, and (at least by the time they were disposed of by EPA) were “hazardous wastes.” Accordingly, Instruction Nos. 17 and 18 relieved prosecutors of their obligation under the statute to demonstrate to the jury that the stored materials constituted “hazardous waste.”

EPA no doubt will advance a different interpretation of these instructions. It

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or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.”).

<sup>19</sup> An allegation that Mr. Evertson did not deny.

will assert that the third element focused on the closing words of § 6928(d)(2)(A): “identified or listed under [RCRA].” It will assert that the third element conveyed to jurors that they should convict only if the stored hazardous materials were shown by prosecutors to have characteristics (*e.g.*, corrosivity or reactivity) identified in EPA regulations (40 C.F.R. § 261.21 - 24) as indicative of hazardousness. But the words chosen by the district court simply will not bear that interpretation. The instructions refer to EPA examination of “*the* hazardous waste” (emphasis added); the use of the word “the” can only refer to specific materials being stored by Mr. Evertson. The EPA regulations do not focus on any specific materials; on the other hand, the EPA officials who inspected the Steel & Ranch site and who testified at trial clearly did focus on the specific materials stored by Mr. Evertson – and they determined that those materials were “hazardous wastes.” Moreover, the third element of the instructions refers to hazardous waste “identified as a hazardous waste by the [EPA].” The EPA regulations do not “identify” any “hazardous wastes”; they merely identify certain characteristics that, if possessed by a tested substance, render that substance hazardous; and only if the tested substance is independently determined to be a “solid waste” can it be a “hazardous waste.” Accordingly, jurors could not rationally have concluded that the third element of Instruction Nos. 17 and 18 instructed them merely to determine whether Mr. Evertson’s materials exhibited characteristics that EPA in its regulations had identified as indicative of a hazardous substance. Rather, the only plausible

interpretation of the language included in the third element was that the jury should determine that Mr. Evertson's materials were "hazardous wastes" if they were determined to be such by EPA personnel – regardless whether the jury believed Mr. Evertson's claim that he had not abandoned the materials.

The Ninth Circuit did not merely affirm on the basis of absence of "clear error." It affirmatively concluded, "The district court did not err in instructing the jury as to the RCRA offenses." Pet. App. 2a. Moreover, the appeals court provided a clear indication regarding why district courts within the Ninth Circuit have been using RCRA jury instructions of the sort at issue here: the court noted, "The instruction is also nearly identical to the instructions this court upheld in *United States v. Hoflin*, 880 F.2d 1033 (9<sup>th</sup> Cir. 1989), [*cert. denied*, 493 U.S. 1083 (1990)]." *Id.* at 3a. In light of *Hoflin* and the decision below, similarly improper instructions like these are likely to continue to be used in Ninth Circuit RCRA cases unless and until this Court intervenes.

The Ninth Circuit concluded that the district court's jury instructions had imposed on prosecutors the burden of establishing that the materials stored by Mr. Evertson were "hazardous waste." But imposing such a burden is of little solace to a RCRA defendant if prosecutors can meet that burden by demonstrating that EPA has determined that the materials stored by the defendant are hazardous waste. The Ninth Circuit approved that very aspect of the district court's instructions; it held that prosecutors were required to demonstrate that the material stored by Mr.

Evertson was “hazardous waste,” but it indicated that prosecutors could meet that burden by demonstrating that “the material” (*i.e.*, Mr. Evertson’s material) had been “identified” as hazardous waste by EPA. Pet. App. 3a.

The Ninth Circuit’s approach conflicts sharply with the approach of other federal appeals courts with respect to the burden of proof imposed on prosecutors in RCRA cases. For example, in *United States v. McDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1<sup>st</sup> Cir. 1991), the First Circuit addressed a claim that the material in question (soil contaminated with the chemical toluene) was not “hazardous waste” for purposes of RCRA. Although the court upheld the defendants’ convictions under RCRA for treating, storing, and disposing of hazardous waste without a permit, it made clear that whether the material in question was “hazardous waste” was for the jury to decide, not one to be decided by reference to EPA findings. *McDonald & Watson*, 933 F.2d at 40-41.

Similarly, the Eleventh Circuit has approved jury instructions in RCRA prosecutions under § 6928(d)(2)(A) that require prosecutors separately to prove each element of a claim that the material treated, stored, or disposed of was a “hazardous waste.” *United States v. Greer*, 850 F.2d 1447, 1450 (11<sup>th</sup> Cir. 1988); *United States v. Goldsmith*, 978 F.2d 643, 645-46 (11<sup>th</sup> Cir. 1992) (explicitly approving the jury instructions set forth in *Greer*). The Eleventh Circuit jury instructions require prosecutors attempting to show that the defendant knowingly treated, stored, or disposed of a “hazardous waste” to prove that the defendant’s material was a

“waste,” that the waste was “listed or identified” as hazardous under EPA regulations, and that the defendant “knew that the chemical waste had the potential to be harmful to others or to the environment.” *Greer*, 850 F.3d at 1450.

The Court should grant review, to resolve the conflict between the Ninth Circuit’s interpretation and the interpretation of both the First and Eleventh Circuit, as well as to correct the Ninth Circuit’s clear and persistent error in interpreting 42 U.S.C. § 6928(d)(2)(A).

## **II. THE LOWER COURTS IMPROPERLY RELIEVED PROSECUTORS OF THEIR BURDEN OF DEMONSTRATING THAT PETITIONER *KNEW THAT HE HAD ABANDONED THE MATERIALS THAT HE PLACED IN STORAGE***

The jury instructions were deficient for the additional reason that they relieved prosecutors of their burden of demonstrating that Mr. Evertson acted *knowingly* with respect to the elements of the offense. Prosecutors contended that Mr. Evertson “abandoned” the materials he stored at Steel & Ranch, and thus that those materials should be deemed waste. Accordingly, prosecutors should have been required to prove that Mr. Evertson acted knowingly when he allegedly abandoned those materials. The jury instructions were silent regarding such a requirement; the trial court’s failure to include an instruction to that effect was clear error.<sup>20</sup>

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<sup>20</sup> Instruction Nos. 17 and 18 (Pet. App. 12a-14a) stated that prosecutors were required to demonstrate that Mr. Evertson “knowingly ‘stored’ or ‘disposed of’ . . . ‘hazardous waste’” at Steel & Ranch. Those instructions cannot plausibly be read as requiring a finding beyond a reasonable doubt that Mr. Evertson’s abandonment of the materials at Steel & Ranch was knowing. The Ninth Circuit made no effort to argue that such a reading is plausible.

Review is warranted on this issue because the Ninth Circuit did not simply affirm on the basis of a clear error analysis. Rather, in response to Mr. Evertson's assertion on appeal that prosecutors should have been required to demonstrate that he knowingly abandoned or disposed of the materials, the Ninth Circuit determined as a matter of law that § 6928(d)(2)(A) imposes no such knowledge requirement. The appeals court held:

Evertson incorrectly asserts that the RCRA violation requires a showing that he intended to dispose of the materials. While intent to dispose of the materials can be sufficient evidence to show that materials are discarded (and thus waste), we have never held that intent to dispose is required. . . . Disposal (or intent to dispose) can trigger criminal liability, but liability is also triggered when material is stored (without a permit) before or in lieu of disposal. *See* 40 C.F.R. § 261.2(b); 42 U.S.C. § 6928(d).

Pet. App. 6a.

That holding conflicts with the holdings of other federal appeals courts, which have held that § 6928(d)(2)(A)'s "knowingly" requirement extends at a minimum to all actions that cause the materials in question to be deemed "solid waste." Moreover, the Ninth Circuit's holding is based on a misreading of the relevant statutes and regulations. In support of its contention that prosecutors need not prove that the defendant "knowingly" disposed of the materials in question, it cited 40 C.F.R. § 261.2(b), the EPA regulation that defines "abandoned." That regulation provides that materials are solid wastes if they are "abandoned" by being, *inter alia*, "[a]ccumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated." That regulation cannot

plausibly mean that materials can be deemed “abandoned” (and thus “solid wastes”) in the absence of any intent to eventually dispose of, burn, or incinerate the materials. Otherwise, the mere storing or accumulating of any material would be sufficient for the material to be deemed “solid waste,” because any such storage or accumulation would by definition be occurring “before” any later disposal.

The only plausible interpretation of § 261.2(b) is that storage can constitute “abandon[ment]” of materials only if the defendant: (1) has a fixed intent to dispose of the materials at some time in the future and is storing them until that time arrives; or (2) is storing the materials with an intent of never taking them out of storage (*i.e.*, storage “in lieu of” disposal). Under either scenario, material will not be deemed “abandoned” (and thus “solid waste”) unless the defendant can be said to have acted knowingly and to have, for all practical purposes, intended to dispose of the material.<sup>21</sup> The Ninth Circuit’s holding to the contrary is based on an implausible interpretation of relevant statutes and regulations.

That holding is also contrary to the holding of other federal appeals courts, which have held that § 6928(d)(2)(A)’s “knowingly” requirement extends at a

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<sup>21</sup> Moreover, a definition of “abandoned” that did away with any intent on the part of the defendant to ultimately dispose of the material would run afoul of the statutory definition of “solid waste,” which is limited under RCRA to “discarded material.” 42 U.S.C. § 6903(27). The word “discarded” connotes volition on the part of the actor. *See Webster’s New Collegiate Dictionary* (1981) (to “discard” is “to get rid of as useless or unpleasant”). As the D.C. Circuit has observed, “Our analysis of [RCRA] reveals clear Congressional intent to extend EPA’s authority only to materials that are truly discarded, disposed of, thrown away, or abandoned.” *Assoc. of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1053 (D.C. Cir. 2000).

minimum to all actions that cause the materials in question to be deemed “solid waste.” *See, e.g., United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668 (3d Cir. 1984), *cert. denied, sub nom., Angel v. United States*, 469 U.S. 1208 (1985); *United States v. Dee*, 912 F.2d 741, 746 (4<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); *United States v. Sellers*, 926 F.2d 410, 412 (5<sup>th</sup> Cir. 1991); *United States v. Kelly Technical Coatings, Inc.*, 157 F.3d 432, 441 (7<sup>th</sup> Cir. 1998).<sup>22</sup> Review is warranted to resolve the conflict between the Ninth Circuit on the one hand and the Third, Fourth, Fifth, and Seventh Circuits on the other hand.

Moreover, Mr. Evertson was severely prejudiced by the trial judge’s failure to instruct the jury that any abandonment had to be “knowing.” For example, the government argued that the 11,000 pounds of “process sludge” should be deemed abandoned because it was “junk.” It argued (contrary to the testimony of Mr. Evertson’s expert witness) that it was scientifically implausible that the process sludge could ever be converted into sodium borohydride and thus that it was simply a matter of time before Mr. Evertson would have been forced to dispose of the process sludge.<sup>23</sup> Mr. Evertson argued, to the contrary, that the process sludge was valuable and was 70-80% on its way to becoming sodium borohydride. Because the trial judge

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<sup>22</sup> The ruling is also in tension with rulings from this Court that statutory crimes carrying severe penalties are presumed to require that a defendant know the facts that make his conduct illegal. *See, e.g., Staples v. United States*, 511 U.S. 600, 619-20 (1994).

<sup>23</sup> Thus, prosecutors argued, the process sludge should be deemed “abandoned” under 40 C.F.R. § 261.2(b) because it was being stored indefinitely “in lieu of” being disposed of.

failed to instruct the jury that Mr. Evertson could be found guilty only if he “knowingly” abandoned the materials stored at Steel & Ranch, the jury may well have convicted him simply because it sided with prosecutors on the scientific dispute, even though it may have thought that Mr. Evertson honestly believed that the process sludge could be converted into sodium borohydride.

### **III. SUMMARY REVERSAL IS WARRANTED**

This case merits plenary review, but at a bare minimum should be summarily reversed.

A brief review of the record will demonstrate that an appalling injustice was done here. EPA presented no evidence at trial that any material ever leaked from any of Mr. Evertson’s containers during the time they were stored at Steel & Ranch, or that the material caused any environmental damage. ER 236-37. Mr. Evertson is an entrepreneur with no prior criminal record. He worked without pay for two years to develop a less expensive means of producing a chemical with various industrial uses and with significant promise for bettering the environment (if it ultimately proves to hold the key to perfecting hydrogen-powered vehicles). All the evidence indicates that the only obstacle that prevented him from continuing with his enterprise was the depletion of his working capital – and he left Salmon, Idaho (promising others that he would return) for the purpose of earning money so that he could invest new funds in the enterprise. He found an established location at which to store his materials and pre-paid the rent, for at least one year and arguably for

two – hardly the actions of someone who intended to abandon his materials. He had been away for less than two years when EPA dashed his entrepreneurial dreams by precipitously and unnecessarily destroying and disposing of the materials that Mr. Evertson was storing in Salmon; it did so without providing him with advance notice.

The trial court's jury instructions regarding what prosecutors were required to prove under the RCRA counts were indefensible, even taking into account the failure of Mr. Evertson's counsel to raise specific objections to them. Those instructions utterly deprived Mr. Evertson of the ability to defend himself based on a claim that he had not abandoned the materials stored at Steel & Ranch (and thus that the materials were neither "solid waste" nor "hazardous waste"). The instructions directed the jury to find that Mr. Evertson's materials were "hazardous waste" if it found that EPA itself had determined that the materials were "hazardous waste." And it was inevitable that the jury would make that latter determination, given that the EPA official in charge of clean-up operations testified that EPA had, indeed, determined that the materials were "hazardous waste." Moreover, the jury instructions deprived Mr. Evertson of the ability to defend himself based on a claim that even if he were found to have "abandoned" the materials, he had not done so "knowingly."

With respect, and with an appreciation for the limits of this Court's role, the administration of justice would benefit from a reminder that despite the unpopularity of defendants alleged to have violated environmental laws, they are still

entitled to basic fairness.

**CONCLUSION**

The petition for certiorari should be granted.

Respectfully submitted,

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