No.

IN THE

Supreme Court of the United States

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, ET AL, PETITIONERS

v.

DOW CHEMICAL COMPANY, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER AT THE TIME OF THE VIETNAM WAR THE USE OF A HERBICIDE THAT CONTAINED AN EXCESSIVE, AVOIDABLE AND UNNECESSARY POISON VIOLATED CUSTOMARY INTERNATIONAL LAW?

II. WHETHER THE DECISION BY THE COURT OF APPEALS IN AFFIRMING THE GRANT OF A MOTION TO DISMISS UNDER RULE 12(B)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE WAS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS TO REVERSE THE GRANTING OF THE MOTION TO DISMISS IN THIS CASE?

III. WHETHER THE COURT OF APPEALS UNWARRANTED EXPANSION OF *BOYLE* INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE AND SHOULD BE REVIEWED BY THIS COURT?

PARTIES TO THE PROCEEDING

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, PHAN THI PHI PHI, NGUYEN VAN QUY, Individually and as parent and natural guardian of NGUYEN QUANG TRUNG, THUY NGUYEN THI NGA, His children, DUONG QUYNH HOA, Individually and as administratrix of the estate of her deceased child, HUYNH TRUNG SON, On behalf of themselves and others similarly situated, NGUYEN THANG LOI, TONG THI TU, NGUYEN LONG VAN, NGUYEN THI THOI, NGUYEN MINH CHAU, NGUYEN THI NHAM, LE THI VINH, NGUYEN THI HOA, Individually and as parent and natural guardian of VO THANH TUAN ANH, Her child, VO THANH HAI, NGUYEN THI THU, Individually and as parent and natural guardian of NGUYEN SON LINH and NGUYEN SON TRA, Her children, DANG THI HONG NHUT, NGUYEN DINH THANH, NGUYEN MUOI, HO THI LE, Individually and as administratrix of the estate of her deceased husband HO XUAN BAT, HO KAN HAI, Individually and as parent and natural guardian of NGUYEN VAN HOANG, Her child, and VU THI LOAN,

Petitioners

DOW CHEMICAL COMPANY, MONSANTO COMPANY, MONSANTO CHEMICAL CO., HERCULES, INC., OCCIDENTAL CHEMICAL CORPORATION, THOMPSON HAYWARD CHEMICAL CO., HARCROS CHEMICALS, INC., UNIROYAL CHEMICAL CO, INC., UNIROYAL, INC., UNIROYAL CHEMICAL HOLDING COMPANY, UNIROYAL CHEMICAL ACQUISITION

CORPORATION, C.D.U. HOLDING, INC., DIAMOND SHAMROCK AGRICULTURAL CHEMICALS, INC., DIAMOND SHAMROCK CHEMICAL COMPANY, also known as DIAMOND SHAMROCK REFINING & MARKETING CO., also known as OCCIDENTAL ELECTRO CHEMICAL CORP., also known as MAXUS ENERGY CORP., also known as OCCIDENTAL CHEMICAL CORP., also known as DIAMOND SHAMROCK, DIAMOND SHAMROCK CHEMICAL, also known as DIAMOND SHAMROCK REFINING & MARKETING CO., also known as OCCIDENTAL ELECTRO CHEMICAL CORP., also known as MAXUS ENERGY CORP., also known as OCCIDENTAL CHEMICAL CORP., also known as DIAMOND SHAMROCK, DIAMOND SHAMROCK REFINING AND MARKETING COMPANY, OCCIDENTAL ELECTROCHEMICALS CORPORATION, HOOKER CHEMICAL CORPORATION, HOOKER CHEMICAL FAR EAST CORPORATION, HOOKER CHEMICALS & PLASTICS CORP., CHEMICAL LAND HOLDINGS, INC., T-H AGRICULTURE & NUTRITION CO., THOMPSON CHEMICAL CORPORATION, also known as THOMPSON CHEMICAL CORP., RIVERDALE CHEMICAL COMPANY,

Respondents

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The opinions of the court of appeals are reported at 517 F.3d 104 (2nd Cir. 2008) (Appendix 1a-38a, hereinafter cited as "_a") and 517 F.3d 76 (2nd Cir. 2008)(39a-90a). The opinions of the district court dismissing the international and domestic law claims of the petitioners are reported as *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005)(175a - 496a); 304 F. Supp. 2d 404 (E.D.N.Y. 2004) (91a- 69a); 344 F.Supp. 2d 873 (E.D.N.Y. 2004) (170a-174a). The decision of the court of appeals denying petitioners' petition for rehearing en banc is unreported. (497a)

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2008. A timely petition for rehearing en banc was denied on May 7, 2008. On July 22, 2008, Justice Ginzberg extended the time within which to file a petition for a writ of certiorari to October 6, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

RELEVANT PROVISIONS INVOLVED

The Alien Tort Statute, 28 U.S.C. Sec. 1350, provides, in relevant part, that

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, Article 23(a), 36 Stat. 2277, 2301,provides, in relevant part, that

> "[I]t is especially forbidden – a. To employ poison or poisoned weapons."

STATEMENT

In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719-725 (2004), this Court re-affirmed that this country is obligated to abide by and enforce norms of customary international law. The courts below failed to abide by these obligations in this case. This Court has an obligation to grant a writ of certiorari to ensure that the millions of Vietnamese victims of Agent Orange and other poisonous chemicals do not go uncompensated.

For over ten years during the Vietnam War the United States Government sprayed herbicides which contained poisons (mainly dioxin) and which continue to adversely effect the citizens of Vietnam, as well as U.S. veterans. The question before this court is whether the respondents, who manufactured and supplied these chemicals to the government knowing they contained unnecessary and excessively high levels of dioxin, may avoid liability for their conduct.

The petitioners are citizens of Vietnam, and an organization which represents them, who suffer from their exposure to dioxin that is still present today in the water they drink, the soil they walk on and the food they eat. The respondents knew at the time that the products they supplied contained excessive and unnecessary quantities of dioxin. This case seeks to

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hold these respondents accountable for their actions under both international and domestic law when they knew they were providing a poison to the United States government which was to be sprayed on millions of people and over vast areas of land in South Vietnam.

The Vietnamese petitioners, reliably estimated to include between 4 and 5 million people of Vietnam, were poisoned. They, and their off-spring, continue to suffer from Agent Orange related disease and birth defects. Large areas of Vietnam remain contaminated with excessive amounts of dioxin in the land and in the water. The law supports petitioners. Whether this Court has the moral courage to rule in their favor remains to be seen.

* * * * * * * * * * * *

In an opinion and order filed on March 28, 2005 (175a - 496a), the Honorable Jack B. Weinstein, Senior United States District Judge for the Eastern District of New York, dismissed petitioners' international law claims. In related actions, (170a - 174a, 175a - 496a), the district court also dismissed the petitioners' domestic product liability claims based on the application of the government contract defense.

Characterizing the poison laced agents manufactured by respondents only as herbicides, the district court dismissed petitioners' Alien Tort Statute ("ATS") claim. The district court reached this conclusion on Rule 12(b)(6) consideration by ignoring the allegations in the amended complaint, as well as the scientific evidence, that Agent Orange, as it was constituted, contained an excessive, dangerous and unnecessary poison whose potential for human harm

was both known to the respondents and readily preventable.[1]

The district court also held, this time on Rule 56 consideration, that petitioners had failed to adduce evidence relating to their domestic tort law claims sufficient to survive respondents' assertion of the government contractor defense, despite extensive record evidence creating genuine issues of material fact as to the elements of that defense. The district court further held, without the benefit of any evidence, that injunctive relief would be inappropriate.

The court of appeals affirmed the district court's dismissal of the petitioners' amended complaint. The

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[1] Like the court of appeals, the district court improperly substituted its own views about the facts in this case for those set forth by the petitioners. Its legal analysis depends upon characterizing Agent Orange as a mere "herbicide" or "defoliant" and not a "poison" despite the factual allegations made in petitioners' amended complaint, that Agent Orange, contaminated as it was with a known deadly toxin at extraordinarily high level, was in fact a poison harmful to human health. (231a-233a) In doing so, the district court ignored allegations and record evidence that the respondents knew of the uses to which their product was being put; knew of the presence and toxicity of dioxin in Agent Orange; knew of the dangers to human health presented by dioxin exposure; knew of the levels of dioxin contained in Agent Orange; and knew that those levels were completely unnecessary in view of existing technology, but delivered the highly contaminated product to the government anyway. Without acknowledging or mentioning the evidence that dioxin is highly toxic even at very low concentration levels, the district court simply concluded, without analysis and based solely on the ratio of herbicide to dioxin in the mixtures sprayed in Viet Nam, that Agent Orange and the other herbicides sprayed in Viet Nam "should be characterized as herbicides and not as poisons." (233a)

court acknowledged that it was reviewing petitioners' international law claims brought pursuant to the Alien Tort Statute, 28 U.S.C. Sec. 1350, under the standards set out pursuant to Rule 12(b)(6). Yet, both the court of appeals and the district court reached their conclusions by radically departing from accepted jurisprudence when evaluating a motion to dismiss, a feat they accomplished by ignoring or mis-characterizing the allegations in the amended complaint.

Although the court of appeals acknowledged that the Vietnamese "Plaintiffs brought this action on behalf of themselves and all other similarly situated who sustained injuries as a result of their exposure to dioxin," (12a), one would not know from the rest of the opinion what dioxin is or why the petitioners characterized it as a poison for purposes of their international law claims.

Choice of words in the decision by the court of appeals is critical. By relegating dioxin to a "small" compound and a mere "component" of 2,4,5,T the court of appeals, much in the same way the district court did, minimizes the significance of this highly toxic and poisonous compound almost to the point that it is removed as an issue from the case.

Having engaged in this legerdemain, the court of appeals then framed the discussion of whether the use of a herbicide, without reference to the poison contained unnecessarily within, violated norms of customary international law in existence at the time of the Viet Nam War. That is, whether the Vietnamese petitioners stated a claim for relief for injuries allegedly caused "by their exposure to Agent Orange,

and other herbicides manufactured" by the respondents. (1a) The court repeated this formulation numerous times throughout its opinion.[2] This formulation of the issue was absolutely improper. This case is not and has never been about whether the manufacture, supply and use of **herbicides** per se to defoliate large areas of Viet Nam violated customary international law. Rather, it is about whether the use of herbicides which respondents knew contained excessive and avoidable amounts of poison (dioxin), and which added nothing to the defoliation process, violated customary international law.

Having redrafted petitioners amended complaint to address a different question than posed by

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[2] See., e.g, 3a (". . . the Plaintiffs have failed to allege a violation of international law because Agent Orange was used to protect United States troops. . ."); 6a ("legality of the use by the United States of herbicides in Vietnam."); 8a (". . . claims arising out of the use by the United States of herbicides, including Agent Orange."); 12a (". . . military's use of Agent Orange violated international, domestic, and Vietnamese law . . ."); 14a (". . . neither the military's use of Agent Orange nor Defendants' agreement to supply it to the military violated a well-defined and universally accepted international norm prohibiting the use of herbicides in war."); 21a (". . . the deployment of Agent Orange violated customary norms prohibiting use of "poisoned weapons" and the infliction of unnecessary suffering."); 24a ("In further support of their claim that the use of herbicides as "poison" violated international law, . ."); 25a ("The sources of international law relied on by Plaintiffs do not support a universally-accepted norm prohibiting the wartime use of Agent Orange that is defined with the degree of specificity required by Sosa."); 30a-31a ("Plaintiffs claim that the use of Agent Orange violated the norm of proportionality and caused unnecessary suffering . . .")

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the complaint, the court of appeals was able to claim petitioners had not made out an ATS claim that would satisfy *Sosa*. That is, having framed the issue to suit an outcome, the outcome was predictable.

In similar fashion the court of appeals affirmed the district court's grant of summary judgment dismissing the remaining United States veterans' claims based on, as we discuss *infra*, an unwarranted and unprecedented expansion of the government contractor defense

REASONS FOR GRANTING THE PETITION

The decision by the Second Circuit in refusing to recognize a claim by the petitioners pursuant to the Alien Tort Statute, 28 U.S.C. Sec. 1350, conflicts with this Court's decision in *Sosa*. In a decision that gravely undermines the viability of future ATS jurisprudence, the court of appeals ignored well established treaty and customary international law which pre-dated the Vietnam War. It did so contrary to this Court's admonition in *Sosa* that when customary international law norms are well established, specific and definite at the time the conduct took place, the courts of this country have an obligation to enforce such laws. Indeed, it is this very set of circumstances, the use of a herbicide harmful to human beings because it contained an excessive and avoidable amount of poison (dioxin), whose dangers were known to the respondents and whose presence in the herbicide was wholly unrelated to the goal of defoliation, which the United States government itself opined before and after the Vietnam War would constitute a violation of customary international law.

The court of appeals accomplished this result by engaging in fact-finding and fact resolution inappropriate to the procedural posture of the case. The manner in which this case was disposed of by both the courts below was such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers to summarily reverse the granting of the motion to dismiss the petitioners international law claims in this case.

Finally, the decision by the Second Circuit granting summary judgment to the respondents on petitioners' domestic tort claims based on the government contractor defense conflicts with this Court's decision in *Boyle v. United Technology Corporation*, 487 U.S. 500 (1988).

I. AT THE TIME OF THE VIETNAM WAR THE USE OF A HERBICIDE THAT CONTAINED AN EXCESSIVE, AVOIDABLE AND UNNECESSARY POISON VIOLATED CUSTOMARY INTERNATIONAL LAW

The ban on the use of poison, the principal customary international law norm at issue in this litigation, is without question based on a "norm of international character accepted by the civilized world and defined with a degree of specificity comparable to the 18th-century paradigms." *See*, *Sosa*, at 724. Indeed, the court of appeals appeared to accept that proposition when it stated that the petitioners have "alleged a customary international norm proscribing the purposeful use of poison as weapon against human

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beings. . .” (32a)

A finding that petitioners have alleged such a norm should have been dispositive. If the court of appeals admits, as they must, that petitioners have properly alleged the existence of this specific and definitive norm, it should have found that petitioners set forth a valid claim under the ATS. Inexplicably, the court of appeals then concluded, improperly, that this norm is inapplicable to this case. As we argue, *infra*, it achieves this result by improperly recasting the facts of this case into one involving only the legality of the use of a herbicide.

The spraying of a known poison on a human population is unambiguously a violation of both treaty, e.g., the 1907 Hague Convention, as well as customary international law (which was in fact codified in the Hague regulations), regardless of how it is administered. It makes no difference that the poison here was administered as part of a herbicide. The effect is the same whether the poison was simply sprayed alone over Viet Nam or sprayed as part of a herbicide. Article 23 of the 1907 Hague Convention specifically states that it is “especially forbidden . . . to employ **poison or poisoned weapons**,” in war. Even when the court of appeals does discuss the term poison, it mistakenly refers to petitioners’ claims as “the use of herbicides as “poison”’, which it is claimed violated international law, instead of the use of herbicides which contain excessive and unnecessary amounts of poison. (24a)

The court of appeals’s assertion that the prohibition against the use of poison is not specific and

definite enough to pass the *Sosa* test is simply wrong. As set forth at length in petitioners' briefs below, customary international law has long recognized a ban on the use of poison. Indeed, the ban on poison is every bit as specific as the ban on torture, which the court in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980), a case this Court cited approvingly in *Sosa*, noted to be a clear and specific violation of customary international law, and with far greater specificity than one of the 18th century paradigms cited in *Sosa*, "piracy," which 18th century international law defined with no more specificity than "robbery upon the sea." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820).

The same flawed legal analysis was applied to the opinions of Cramer and Buzhardt, who were specifically requested almost 30 years apart to opine on the legality of herbicides. Although the court of appeals gave lip service to the passages from Cramer and Buzhardt which state clearly the illegality of herbicides which are harmful to human beings, (23a), the court of appeals never directly considered this question because it framed the question as a challenge to the use of a herbicide, per se, rather than the use a herbicide with contained an excessive and avoidable amount of dioxin.[3] The court of appeals ignored this

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[3] This is, of course, an important factual distinction. Far from being present in trace amounts as a result of an unintended error in the manufacturing process, the petitioners have alleged that these defendant deliberately and intentionally created a produce that contained excessive and avoidable amounts of poison that has caused untold suffering and misery for generations of US veterans who were exposed to dioxin, as well as Vietnamese combatants and non-combatants alike, whose exposure level, it is undisputed,

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distinction. Finding the proposed target of destruction, enemy crop cultivation, "a legitimate one," (27a), the court of appeals concluded that the Cramer Opinion endorsed the conduct of the respondents in this case.

However, the distinction employed by the court of appeals to discount the impact of the Cramer Opinion is not credible. The language of the Cramer Opinion could not be any clearer:

> the use of chemical agents . . . to destroy cultivations [sic] or retard their growth, would not violate any rule of international law prohibiting poison gas; **upon condition, however, that such chemicals do not produce poisonous effects upon enemy personnel, either from direct contact, or indirectly from ingestion of plants and vegetables which have been exposed thereto.**

(23a) [4]

That is precisely what petitioners alleged in this case, allegations which both the court of appeals and the district court have seen fit to either not discuss or dismiss without any factual or legal analysis.

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was much greater than that experienced by the veterans. The presence of dioxin, it is undisputed, had no military necessity, so that the respondents cannot hide behind any argument that its use, that is of dioxin, aided the war effort in any way. Rather, dioxin was present in Agent Orange for the most pedestrian of reasons – pure, unadulterated commercial greed.

[4] The Buzhardt Opinion sets forth the same precise conditions for the use of chemical agents to destroy crops. (24a)

The Cramer and Buzhardt opinions, as well as the 1956 Army Field Manual, (22a, 23a-24a), which itself relies on Article 23 of the 1907 Hague Convention, stand for the proposition that if the herbicides being used to defoliate contain poison, such use would violate customary international law.

The court of appeals erroneously accepted respondents' analysis that the Cramer opinion was based on the proposition that any prohibition against use of poison in war encompassed only substances intentionally used to harm humans. (25a-26a) Because, as the court of appeals erroneously concluded, the "record" supports this conclusion, (32a), that Agent Orange was used as a defoliant and not as a poison designed for targeting human populations, it therefore felt free to conclude that no claim had been made by the petitioners that would be actionable under *Sosa*. However, neither Cramer, nor the other authorities relied on by the petitioners, provide immunity in such a circumstance. The fact that Cramer and Buzhardt specifically limited the legal use of herbicides to defoliate to those which were not harmful to man, or poisonous when ingested, underscores this very point.

The court of appeals also cited to a lack of consensus with respect to whether the proscription against poison would apply to defoliants that had possible "unintended" toxic side effects. (26a) However, petitioners herein have not complained about "unintended" toxic side effect from a defoliant. It is petitioners claim that these respondents knew that a very potent poison, which did not have to be present, was in the agents provided to the government and that they would be sprayed over vast populated areas.

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From this knowledge, a court can easily infer an intent to poison.

The position articulated by Cramer and Buzhardt was that herbicides with such poison are not permitted under the Hague regulations because of their deleterious effect on human beings, irrespective of the intent behind their use. Petitioners are not complaining about an unintended toxic side effect from a defoliant. Petitioners alleged that respondents knew full well that a very potent poison, which did not have to be present, and which provided no military benefit whatsoever, was in the agents provided to the government and respondents further knew they would be sprayed over vast and populated areas. From their knowledge, the court can infer intent to poison even though specific intent is not required. The diseases and birth defects suffered by the Vietnamese are direct effects of exposure to the poisons contained in these agents.

The court of appeals also reasoned that since nations saw fit to violate the Hague prohibition on poison it could not have been specific and universal enough to have risen to the level of customary international law at the time of the Viet Nam war. (30a) However, as *Filartiga* demonstrates, violations of a norm of customary international law does not undercut the existence of the norm.

The question asked of and answered by Cramer, Buzhardt, and the authors of the Field Manual was under what circumstances would herbicide use for wartime purposes be legally permissible under prevailing international law norms, and the answer was

that it was legal only as long as the herbicides did not "produce poisonous effects upon enemy personnel, either from direct contact, or indirectly from ingestion of plants and vegetables which have been exposed thereto." (23a) Far from the hyper-technical analysis of treaty language relating to poisoned and chemical weapons that respondents claim formed the basis of their opinions, these top legal officials for the U.S. military and the U.S. Department of Defense cited the norm of proportionality as well as the poison proscription.

These sources of international law support a universally-accepted norm prohibiting the wartime use of a poison laced herbicide which was then and is now shown to be harmful to human beings, either directly or indirectly. Whether poisoning humans was the intent of the United States military in using these herbicides is of little moment. It is enough if the respondents knew that the herbicide they supplied contained a poison that was harmful to human beings. That is a factual inquiry, as Cramer suggested, that was improperly precluded by the district court and the court of appeals's opinion.

Did the respondents know that the product they manufactured and sold to the government produced poisonous effects because of the presence of dioxin? That is a question which can only be answered after discovery on this issue, discovery which, notwithstanding the voluminous discovery in the Agent Orange cases that precede this one, has not been conducted. It was error for the Court of appeals to preclude this discovery based on the specious argument that customary international law at the time of the Viet Nam war only precluded the use of Agent Orange laced

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with a poison if the government "intended to harm human beings." (26a) Such a conclusion flies in the face of the question which was settled before, during and after the war – that the use of a herbicide that contained a substance, dioxin, a known poison, which "produced poisonous effects" was a clear violation of customary international law.

The court of appeals also misapprehended the reference to the ICJ opinion regarding nuclear weapons which states that there is no definition of poison in Hague and there are different interpretations of the term. The court of appeals improperly extrapolated from this dicta to find that the norm prohibiting the use of poison or poisoned weapons is too indefinite to be enforced. This is not true. Words in treaties just as in legislation are to be interpreted with their plain meaning. Poison is just as specific and unambiguous a term as "torture" or "piracy."

The Second Circuit in *Filartiga v Pena-Irala*, 630 F.2d 876, 880-81 (2nd Cir. 1980), cited approvingly by this Court in *Sosa*, concluded "The prohibition [on torture] is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens." This clear and unambiguous norm does not lose its status as clear and unambiguous even if people may differ over whether a particular act, such as waterboarding, is torture.

In the ICJ, the issue was whether nuclear weapons should be held to be illegal under 23(a) of the Hague Convention or Geneva 1925. The court which ultimately based it opinion that the first use of nuclear weapons violated International Humanitarian Law, did

not find the Hague Regulations inherently ambiguous and indefinite. Just as a disagreement whether water-boarding is torture does not impact the universal prohibition against torture, so would disagreement over whether nuclear weapons are "poisonous weapons" for purposes of Hague Regulation 23(a) not affect the categorical proscription against use of poison or poisoned weapons in war. As noted above, the Hague ban on poison or poisoned weapons in war, codified in treaty form the prior bans on the use of poison or poisoned weapons in war from the Lieber Code, the St. Petersburg Declaration of 1868, the Brussels Declaration of 1874, and the Oxford Manual of the Laws and Customs of War, of 1880.

The court of appeals also misrepresented the history of the use of poison gas. It turned a clear violation of the law of Hague into a claim that state practice showed Hague did not outlaw poisonous gases. The use of poison gases by Germany in World War I did not mean that these weapons were not illegal under Hague. It meant that they violated the Hague regulations. Indeed, their use was condemned by many as being a violation of the prohibition of the use of poison. As one authoritative treatise has opined:

> As early as March 1918, representatives of the military authorities of the United States, France, Great Britain, Belgium, Italy and Portugal had informed the International Committee of the Red Cross that they considered the use of toxic and asphyxiating gases as being included in the prohibition of poison, and also in the prohibition of weapons, projectiles, or materials of a nature to cause superfluous injury. From its origin, the

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> rule prohibiting modern types of chemical warfare has been linked to the prohibition of poison.

Stockholm International Peace Research Institute, "The Problem of Chemical andBiological Warfare" (Solna 1975), (hereinafter SIPRI) III SIPRI at 95.

Germany's excuse for using the gases was that the prohibition was against the parties using projectiles rather than cylinders to diffuse the gas. This resort to semantics was noted in *United States v. Alfred Krupp, et al.*, where the IMT at Nuremberg would later point out, with disapproval, the German resort to semantics to deny violations of the laws of war in initiating the use of poison gas. Reprinted in Leon Friedman, "The Law of War, A Documentary History" Vol 1 (Random House 1972) at 1352.

After the war, the Allies appointed a "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" to investigate and recommend action on war crimes. The Commission met in Versailles, the site of the Peace Conference and the conclusion of the Treaty of Peace with Germany on June 28, 1919. The Commission issued its report on March 29, 1919, which recommended that a "High Tribunal" be established to try enemy soldiers who committed "violations of the laws and customs of war and the laws of humanity," and that higher officials who "ordered or abstained from preventing violations of the laws or customs of war" were also to be tried. The law to be applied was "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and

from the dictates of public conscience." Reprinted in *Friedman* at 852-857.

Among the list of offenses to be prosecuted were:. . .(26) Use of deleterious and asphyxiating gases. . . 32) Poisoning of wells. The Commission recommended prosecuting the Kaiser of Germany himself, so as not to undermine the prosecutions against subordinate leaders. Id. at 851-852. Far from being a repudiation of Hague or a finding that state practice meant the Hague regulations were mere aspirational norms during World War I, the history shows that but for "realpolitik" considerations of international relations, the parties to the Versailles Treaty declared the German first use of poison gases, which prompted their retaliation, violated the Hague Regulations.

Finally, the court of appeals wrongly held that petitioners' claims regarding proportionality and superfluous and unnecessary suffering were too indefinite to satisfy the *Sosa* specificity requirement.

Professor Stefan Oeter has discussed the various customs and laws of war which were designed to promote limited warfare, so as to minimize the suffering and destruction of war. Article 23(e) of the Hague regulations prohibits the use of projectiles and materials of war calculated to cause superfluous injury or unnecessary suffering. Superfluous injury and unnecessary suffering are caused by the use of weapons and methods of combat whose foreseeable harm would be clearly excessive in relation to the lawful military advantage intended. Oeter states:

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> Injuries can only be "superfluous" either if they are not justified by any military necessity, or if the injuries normally caused by the weapon or projectile are manifestly disproportionate to the military advantage reasonably expected from the use of the weapon. The first will only rarely be the case, since the intended injuring effect generally serves a military goal..... The second condition will only be fulfilled if the weapon is at least relatively superfluous — which requires a comparative analyis as to how much suffering various weapons cause and whether alternative military means could achieve the same results with less suffering.

Oerter, Stefan, "Methods and Means of Combat," *The Handbook of Humanitarian Law in Armed Conflicts*, at 402.

The presence of the dioxin in Agent Orange contributed nothing to the military use of the defoliant. In this case, therefore, there was no military use for the dioxin present in the herbicide the respondents supplied to the military. This is one of the rare instances where the presence of this potent poison in the herbicide is not justified at all by any military necessity. It was superfluous and the anti-plant weapon in which it was present could have accomplished the same result without the presence of dioxin. There is nothing about this analysis which is too indefinite for a court not to find in this case that the use of the dioxin laced herbicide violated the norm of superfluous injury and unnecessary suffering.

II. THE DECISION BY THE COURT OF APPEALS IN AFFIRMING THE GRANT OF A MOTION TO DISMISS UNDER RULE 12(B)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE WAS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS TO REVERSE THE GRANTING OF THE MOTION TO DISMISS IN THIS CASE.

The manner in which the courts below reached their erroneous conclusions contravenes the responsibility given to the federal courts in ruling on a Rule 12(b)(6) motion to dismiss. That rule permits a court to dismiss a complaint on its face only if the plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corporation v. Twombley*, __ U.S. __, 127 S.Ct. 1955, 1974 (2007).

Regardless whether *Twombley* changed the standard set forth in *Conley v. Gibson* 385 U.S. 334 (1957), it did not alter the long-established companion principles that the court must assume the truth of the well-pled factual allegations of the complaint and must draw all reasonable inferences against the movant, *see, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir.2006); *Still v. DeBuono*, 101 F.3d 888, 891 (2d Cir.1996), and that "the court's function on a motion to dismiss is not to weigh the evidence that

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might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Festa v. Local 3 International Bhd. Of Elec. Workers*, 905 F.2d 35, 37 (2nd Cir. 1990).

The courts below violated these standards for evaluating a motion under 12 (b)(6). Not only did the court of appeals not accept the well-pled allegations in the complaint, it substituted, as did the district court, its own view of the facts for those of the petitioners. The court of appeals has simply ignored the facts set forth in great detail in petitioners' briefs in the district court and in the court of appeals. As noted above, the word "dioxin" only appears in the court of appeals decision as a descriptive term and not for any analytical purpose.

The "facts" which the court of appeals relied on to affirm the dismissal of petitioners' claims make no mention of the high levels of dioxin in the herbicides manufactured by the respondents, nor of the harms which the respondents knew or had reason to know could be caused by them. The court of appeals made no mention of the petitioners' factual contention that respondents consciously and deliberately used a manufacturing process that insured high levels of dioxin was present in Agent Orange so as to increase their profits, and no mention that the presence of dioxin in the herbicide did nothing to aid the defoliation process. The court of appeals made no mention that dioxin was present in Agent Orange in excessive and avoidable amounts and that the evidence is clear that respondents' knowing inclusion of this toxic substance in the herbicides manufactured by the respondents has resulted in a public health crisis in Vietnam of

mammoth proportions.

The court of appeals made the same error concerning the issue of intent. The crux of the court of appeal's holding was that since the government's intent was not to spray a poison on humans, and that the dioxin contamination was an "unintended" consequence of spraying Agent Orange, there was not a sufficient level of intent necessary to demonstrate a violation of customary international law.[5] Petitioners allege otherwise in their amended complaint, at least insofar as the chemical company respondents are concerned. Petitioners clearly allege throughout the complaint that the respondents had actual knowledge of both the hazards and preventability of dioxin in Agent Orange yet delivered it anyway, knowing how it would be sprayed over vast inhabited areas. The court of appeal's error in this regard is made apparent when it writes that "**the record before us** supports the conclusion that Agent Orange was used as a defoliant and not as a poison designed for or targeting human populations." (26a) (Emphasis supplied). There was, in fact, no record before either the district court or the court of appeals on Rule 12(b)(6) consideration. The court of appeal's language is that of a court resolving a factual issue as a finder of fact, not that of a court considering a motion to dismiss based upon the allegations of the complaint.

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[5] This is critical because the court of appeals acknowledged at the oral argument that had the petitioners alleged that the respondents, or the United States government, intended by the use of these products to poison the Vietnamese, the petitioners would have stated a claim for violation of customary international law.

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The customary international law norm prohibiting the use of poison or poisoned weapons is a norm that prohibits the use of poison because of its effects. The norm is not limited solely to the circumstance where poison is used with the specific intent to harm human beings. It is sufficient that the respondents knew, as the petitioners' have alleged, that dioxin was present in excessive and avoidable amounts, that supplying a product to the United States Government which contained this poison created a substantial risk of harm to human beings, and that, despite this knowledge, the respondents consciously and deliberately chose to manufacture and supply the government with a poisoned product.

This is one case where this Court is compelled to act on the grounds that the courts below have radically departed from the usual course of their judicial powers and cases decided by the Supreme Court concerning the proper role for a federal court in deciding motions to dismiss filed pursuant to Rule 12(b)(6). Under the circumstances, summary reversal is appropriate because the decision of the court of appeals "directly contravene[s]" Supreme Court precedent. *Horn v. Banks*, 536 U.S. 266, 267 (2002). See also, *Gonzales v. Thomas*, ___ U.S. ___, 126 S.Ct. 1613, 1614 (2006); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (summary reversal appropriate where decision is "flatly contrary to this Court's controlling precedent").

III. THE COURT OF APPEALS UNWARRANTED EXPANSION OF *BOYLE* INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE AND SHOULD BE REVIEWED BY THIS COURT

Petitioners' domestic law claims were addressed by the court of appeals in the companion cases filed by United States veterans. (39a-90a) This decision conflicts with and constitutes an unwarranted expansion of the decision of this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The impact of the court of appeal's decision involves a question of exceptional importance. By markedly expanding the government contractor defense, not only will victims of Agent Orange lose their rights but so might thousands of others with valid claims against government contractor's who withhold important information from the government.

Although the court of appeals technically affirmed the district court's ruling, it rejected all of its key findings of fact. Once these factual findings were reversed,[6] *Boyle* required the court of appeals to hold that summary judgment could not be granted on the government contractor defense. Instead, the court of appeals radically expanded the "government contractor

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[6] For example, the district court found that the government knew the respondents' manufacturing processes were producing 2,4,5-T with high levels of dioxin. The court of appeals found that the government did *not* know what processes Respondents used to manufacture 2,4,5-T. *Compare* 304 F. Supp. 2d at 438, 443 with 73a-75a.

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defense," beyond recognition, adding new grounds inconsistent with *Boyle*.

In *Boyle* at 511, the Supreme Court set forth a three pronged test which a government contractor must satisfy to benefit from the defense: reasonably precise specifications, manufacturer conformity with those specifications, and whether the United States knew as much or more than the contractor about the risks of dangers of the product being supplied. In at least two respects, the decision by the court of appeals constitutes an unwarranted extension of *Boyle*.

First, the court of appeals' expressly found that the evidence relating to whether the United States knew as much or more than respondents *did not* support summary judgment. For example, the court of appeals held as follows:

> We doubt that the defendants can establish as a matter of law on the present record. . .that they shared the knowledge of the dangers of which they were aware with the government and that the government had far more knowledge about the dangers of Agent Orange in its planned use. Each is intensely factual and hotly disputed. . . ..

(69a, see also, 76a, 88a-89a) Indeed, these findings directly contradicted the district court's ruling that the government's knowledge and information was at all times greater than that of defendants. (139a-140a)

This should have ended the summary judgment inquiry, as *Boyle* was intended to prevent contractors from withholding potential health risks. The equal knowledge requirement is imposed because,

> in its absence the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability.'

(52a)

Instead, the court of appeals jettisoned *Boyle's* objective comparative knowledge determination, opting for what amounts to a *pre-Boyle* subjective determination of whether the undisclosed information was "substantial enough to influence the military decision" regarding the purchase and use of Agent Orange. This constitutes a dangerous and unwarranted expansion of *Boyle*.

Yet, even under this entirely new standard, there is abundant evidence that the respondents thought this undisclosed information would be highly material to the government's decision-making process. As respondent Hercules wrote in summarizing a secret meeting with respondent Dow, AS32, A5681[7]:

> They are aware that their competitors are marketing 2,4,5-T acid which contains alarming amounts of acnegen and if the government learns of this the whole industry will suffer. They are particularly fearful of a congressional investigation and excessive restrictive legislation. . .

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[7] These cites are to the record in the U.S. Veterans appeal.

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At the same time, without telling the government, Dow developed a "test to determine dioxin levels" and started to implement some "techniques to reduce dioxin levels during the manufacturing process" that it had long known about. In Re: Agent Orange , 565 F. Supp. 1263, 1268-1270. Based on this record, an earlier panel of the Second Circuit had denied summary judgment on the very basis the court of appeals granted it. *See In Re: Agent Orange Product Liability Litigation* 818 F.2d 145 (2nd Cir. 1987), *cert denied*, 484 U.S. 1004 (1988).

The court of appeal's speculative conclusion that full and complete disclosure would not have made a difference cites no testimonial support. By contrast, the evidence offered below was to the contrary, Wayne Vandeventer, an Air Force officer responsible for contract specifications for Agent Orange, testified that he would have wanted to have known about dioxin and expected the chemical companies to have told him about its existence in 2,4,5-T. SR20, A6454-2. When first informed of the presence of the toxic contaminant dioxin in 1970, Dr. Robert Darrow, one of those responsible for recommending 2,4,5-T, stated that he and other relevant government personnel were "surprised when we got the information" and that "the feeling was there it should have been disclosed before." A6064-6065. Nor does the court of appeals explain why, in direct response to this revelation, 2,4,5,-T use was suspended in April 1970. RS84.

The court of appeals attempts to justify the vast amount of information not disclosed to the government about the "systemic problems" and the potential of dioxin being a "potent carcinogen" by concluding that

these are "not enough to convince a reasonable fact-finder that . . .the defendants knew that trace amounts of dioxin in Agent Orange might prove to be a carcinogen for those not involved in manufacturer or direct handling."[8] (89a) This attempt to justify the respondents' intentional secrecy goes beyond the scope of *Boyle* and ignores the district court's ruling that foreseeability would neither be a part of the summary judgment determination nor even a subject upon which the petitioners would be allowed to conduct discovery. On January 26, 2004, the district court stated: "I am not going to address causation either on the motion to remand or on the motion for summary judgment. . ." (A11607)

Second, the court of appeals eviscerates the *Boyle* requirement of reasonably precise specification. As noted in the court of appeals decision, (52a-53a), petitioners maintained that the exact contours of Agent Orange were *not* considered by the Government because: 1) the contracts included no specifications regarding the toxic impurity dioxin; and 2) the defect

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[8] Factually, this analysis suffers in several ways. First, the suggestion that dioxin was only present in "trace" amounts is wrong and demonstrates the court of appeals improper fact finding. Second, many service personnel did directly and regularly handle Agent Orange during the course of its widespread spraying in Vietnam. Third, even if respondents did not know for *certain* that dioxin caused cancer, they *did* know that dioxin's toxicity was positively scary: "one of the most toxic materials known," and "the most toxic chemical they have ever experienced." AS 34, 41. It is preposterous to rule, as a matter of law, that the government contractor defense did not require them to tell this to the government, or that, if the government had known, it would not have acted differently..

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was caused by the respondents' chosen manufacturing methods. (AB8, AS7). Petitioners were supported by the unchallenged affidavits of two experts, Dr. Harry Ensley, a chemical expert on the manufacture of 2,4,5-T (A3241-3243, A3966, A147-48), and Ralph Nash, a nationally renowned authority on government contracts (A6989-A7000, A10347-A10355, A146-47). The court of appeals agreed entirely with petitioners.

> The defendants do not contest that the government's contractual specifications for Agent Orange are silent regarding the method of manufacturing or that the government harbored no preference, expressed or otherwise, regarding how the herbicides were to be produced. . .
>
> Indeed, they admit that they were under no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.

(60a)

The court of appeals then concluded that this would have made a difference.

> [There is a] triable issue of fact as to whether the defendants could have complied with their contractual obligations to the government while using what the plaintiffs contend was a process that would have resulted in a defoliating agent substantially less dangerous to military personnel.

(62a) Again, this should have ended the inquiry. Respondents failed to establish the necessary "significant conflict" between contract specifications and state law duties regarding design required by Boyle.[9] 487 US at 508-509. AS25.

Instead, the court of appeals disregarded both its quotation of *Boyle* at 52a ("assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself.") and at 54a (government must have "made a discretionary determination about the material it obtained that related to the defective design feature at issue."). It held that because the government's unsophisticated testing of the product showed "no health hazard," (65a), even though their tests could not even detect dioxin[10] and were not designed to show dioxin's long term health effects – the government somehow *retroactively* implicitly approved "the design feature in question." (66a-68a) Thus, the court affirmed the grant of summary judgment even though "defendants do not rely on a contractual duty to demonstrate the required

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[9] Petitioners, supported by the affidavit of Dr. Ensley, contended that the respondents should have manufactured their 2,4,5-T with lower temperatures and longer hold times, which would have resulted in a far safer product. AS22, AS25, RS11, RS57-58, A3953-A3966. Petitioners describe this as a manufacturing defect. AB43-56. At 85a, the court of appeals redefines this as a "design defect." However it is described, the evidence is clear that it was never considered by the government.

[10] All of the respondents regularly tested their products for the level of dioxin contamination. The government by contrast did not know even that such a test could be performed until 1970. AB37-AB38, RS28.

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conflict between federal interests and state law," (87a), and abandoned *Boyle* in holding that the government contractor defense does not require "a conflicting express contractual duty." (66a) The court of appeals concluded that the "reasonably precise specification" prong could be jettisoned whenever the government later reorders "the same product **with knowledge of its relevant defects,**" because this "plays the identical role in the defense as listing specific ingredients, processes, or the like." (66a) (Emphasis added).

Boyle says nothing of the kind. It concerned itself with disclosure at the time the contract is formed. Moreover, the court of appeals never explains what "defect" the government supposedly retroactively approved; indeed, the court of appeals stated that the government approved the product precisely because *it did not find a defect.* (65a) It is axiomatic that the government cannot ratify a defect which it **fails** to discover.[11] Ruling that mere reordering without knowledge of a defect, without requiring the contractor to perpetuate the defect, as a "precise specification" stretches *Boyle* beyond any conceivable breaking point. Any government reorder of a defective product would satisfy the government contractor defense, even if the defect was not mandated by the contract and the

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[11] The court of appeals asserted defect ignores the court of appeal's own conclusion that the manufacturers never told the government of the multiple health hazards of dioxin contamination in 2,4,5-T, nor how the government's conclusion that Agent Orange was harmless resulted in part from the manufacturers' blatant misrepresentation that none of the workmen in their factories have shown any ill effect." *Compare* 73a-74a with A4624, AS43, RS73, RS80.

government was ignorant of the defect, merely because the product passed any inadequate government safety test. This too constitutes a dangerous and unprecedented extension of *Boyle*.

The court of appeals attempted to justify this gross deviation from *Boyle* by relying on *Lewis v. Babcock and Wilcox*, 985 F.2d 83 (2d Cir. 1993), which held that once the government tests a chemical product in *any* way for *any* harm, it immunizes the manufacturer. This is a tortured reading of the word "any" in the *Lewis* decision.

> We hold that when the [g]overnment reordered the specific Babcock cable, with the knowledge of its alleged design defect, the [g]overnment approved reasonably precise specifications for that product such that the manufacturer qualifies for the military contractor defense for *any* defects in the design of the product.

985 F.2d at 89.

The word "any" in the quote above can only mean "any design defect known to the government when it reordered the product." The facts in *Lewis* makes this clear. That is, once the government specifically ordered a part knowing the precise nature of the design specification, and hence the "defect," *Boyle* was satisfied.

Even more significant, the court of appeal's conclusion is irreconcilable with *In Re: Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626, (2d. Cir. 1990) ("*Grispo*"). In *Grispo*, the

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defendants, asbestos manufacturers, had a far stronger defense than that offered here. The Navy was fully aware of both the dangers posed by asbestos and that the manufacturers provided no warnings on the packaging, but it still independently decided not to provide this information to the workers. 897 F.2d at 631-633. Indeed, when the asbestos manufacturers offered to issue warnings on the packaging specified by the contract, the Navy responded that "we do not believe any specification changes are needed". *Id* at 633. Nonetheless, the *Grispo* court ruled that the first element of the government contractor defense, requiring the government to approve "reasonably precise specifications," can only be invoked where the government's specifications limit "the contractor's ability to accommodate safety in a different fashion." Because the government did not "(stand) in the way of manufacturers issuing warnings on their own," they were not entitled to summary judgment on the government contractor defense. *Id* at 633.

Yet, the court of appeals here disregards the exact same finding:

> [There is a] "triable issue of fact as to whether the defendants could have complied with their contractual obligations to the government while using what the plaintiffs contend was a process that would have resulted in a defoliating agent substantially less dangerous to military personnel."

(62a)

Clearly, it is *Grispo's* holding, not the court of appeal's, which is consistent with *Boyle's* mandate that the government contractor defense does not apply if "the contractor could comply with both his contractual obligations and the state prescribed duty of care." 487 US at 509. This includes manufacturing methods, as stated in *Grispo* at 631: "government contracts often may focus upon product content and design while leaving other safety-related decisions, such as the method of product manufacture." This is certainly true here where the government did not even know how the respondents manufactured their 2,4,5-T. Under *Grispo*, this fact, on its own, would have been more than sufficient to defeat summary judgment.

As the *Grispo* court held, "Boyle's requirement of 'reasonably precise specifications' mandates that the federal duties be imposed upon the contractor. . .. Stripped to its essentials, the military contractor's defense under Boyle is to claim 'The government made me do it.'" *Id.* At 630, 632. Here, the court of appeals dispensed with what *Grispo* described as the essence of the defense by granting judgment to the respondents even though it acknowledged that there was an issue of fact over whether the government "made them do it." Because the court of appeal's ruling cannot be reconciled with *Grispo*, asbestos manufacturers, and other companies which supply defective products to the government will now be shielded from liability whether or not their contracts allow them to "accommodate safety in a different fashion".

Most importantly, the court of appeals held that no reasonable factfinder could find that the respondents had knowledge of a danger (e.g. chloracne or liver

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damage) "that might have influenced the military's conclusion that "operational use" of Agent Orange posed "no health hazard ... to men or domestic animals," (75a)

This statement stands in stark contrast to history. That is, the government ordered an end to the use of agent orange in 1970, not on the basis of human epidemiology or health effects in humans, but rather on the evidence of teratogenicity in mice found (in the mid 1960's) by researchers at the Bionetics laboratory which was commissioned by the National Cancer Institute to study the health effects of these chemicals. Evidence in the record shows Dow at least was aware of and had conducted animal studies showing similar information which was not disclosed. The Bionetics Study was suppressed primarily by respondent Dow until 1969. Given that the government stopped the use of Agent Orange based on animal data, there is simply no basis to support the court of appeal's conclusion that the government would have required more evidence of toxicity in humans to have stopped its use.

CONCLUSION

The court of appeals decision in these cases are plainly wrong and contribute to a jurisprudence of impunity. This Court should grant the petition for certiorari and either summarily reverse or set the case for briefing and argument.

Respectfully submitted,

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