No. 07-1601

In the Supreme Court of the United States

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, and UNION PACIFIC RAILROAD COMPANY,

PETITIONERS,

v.

UNITED STATES OF AMERICA

AND

DEPARTMENT OF TOXIC SUBSTANCES CONTROL, STATE OF CALIFORNIA,

RESPONDENTS.

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

PETITIONERS' REPLY BRIEF

CHARLES G. COLE
BENNETT EVAN COOPER
STEPTOE & JOHNSON LLP
1330 CONNECTICUT AVE.
WASHINGTON, DC 20036

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ERICA GOLDBERG
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITY

ARGUMENT

The opposition cannot and does not deny the basic reasons why certiorari is warranted. Respondent concedes that Congress *did not* intend to impose mandatory joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601 et seq., but instead contemplated apportionment under traditional common law principles. Respondent concedes that the circuits are divided both about the types of proof necessary for apportionment, and about the proper standard for appellate review. And respondent (like the Ninth Circuit) does not challenge the vast majority of the district court's extensive factual findings, which led that court to conclude that, even under conservative assumptions, contamination originating on the Railroad parcel could not account for more than 9% of the total harm. Yet the Government claims that it is perfectly fine to impose 100% of the liability on petitioners.

Respondent's argument basically consists of ignoring or misrepresenting the district court's detailed findings, and pretending that the Ninth Circuit articulated the correct legal standards because it cited the Restatement (Second) of Torts §433A (1965) ("Restatement"). But as the eight dissenters from denial of rehearing *en banc* explained, the panel "impose[d] impossible-to-satisfy burdens on CERCLA defendants" in the form of proof requirements that "effectively … disregard" (at least for passive landowners) the Restatement principles that Congress intended to govern. Pet.App.-57a, 59a.

This case presents an ideal vehicle for this Court to resolve the circuit splits over CERCLA

apportionment, as well as the "arranger liability" issue.[1]

1. Respondent claims that the Ninth Circuit's errors involve the "factbound application of the same legal standards that petitioners would apply." Opp.-19. That is facile. The panel's opinion correctly articulates the governing principles only if one ignores most of its reasoning.

First, the Ninth Circuit established requirements for documentary proof that it openly acknowledged are nearly impossible to satisfy, and criticized the district court for relying on "simplistic" assumptions such as that causal responsibility is proportional to land area or time of operation. The Ninth Circuit demanded "records that separate out," with "precision," the toxic chemicals disposed on each parcel, even for "periods long in the past," and even from parties with no incentive to keep such records. *See* Pet.App.-40a–41a. That gloss on the "reasonable basis" standard utterly transforms the Restatement test, which explicitly contemplates apportionment of damage for trampled crops based on the number of escaped cows, and apportionment of harm to a polluted stream based on the time of operation. The Association of American Railroads' amicus brief highlights the ways in which the Ninth Circuit's apportionment standards are inconsistent with the common law's flexibility in accepting reasonable assumptions as a basis for divisibility. *See* AAR Amicus Br. at 4–13. The Ninth Circuit's proof requirements also far exceed what other circuits require. *See* Pet.-26–30. The Ninth Circuit

---

[1] Respondent notes that the Railroads argued against Shell on the merits below, but that is not inconsistent with a belief that the issues it presents merit review.

even acknowledged the "circuit split on the degree of specificity of proof necessary to establish the amount of liability apportioned to each PRP," Pet.App.-46a n.32, although it asserted (unpersuasively) that petitioners would not have prevailed under more forgiving standards.

Second, the Ninth Circuit held that geographic divisibility was a "meat-axe' approach" because of "the synergistic use of different parts of the Arvin site." Pet.App.-40a–41a. Its point was that the non-polluting activities undertaken on the Railroad parcel allowed the facility operator to engage in a higher volume of polluting activities elsewhere. That reasoning articulates an unprecedented legal principle that will always defeat geographic apportionment and is plainly inconsistent with CERCLA's liability structure. *See, e.g., Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 287-88 (2d Cir. 1992) (lessor not responsible for his lessee's off-premises disposal of hazardous materials).

Finally, the Ninth Circuit's articulation of the governing standards openly reflects a strong bias against apportionment, motivated by the belief that it would "violate the basic structure of the CERCLA statutory scheme" for the government to be left "holding the bag" for cleanup costs. Pet.App.-11a, 33a-34a. But as the petition explained, and respondent essentially concedes, Congress was concerned not just with protecting the public fisc but also with the enormous potential for unfairness inherent in the strict and retroactive nature of CERCLA liability. Pet.-3–5. Congress deliberately chose *not* to put a thumb on the scales of the common law apportionment inquiry. *See, e.g., United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983).

2. Respondent's attempt to reconcile the Ninth Circuit's reasoning with the Restatement ignores or misrepresents the district court's extensive factual findings. *See generally* Pet.App.-82a–262a. Like the Ninth Circuit, respondent pretends that the district court engaged in a "simplistic" estimation of the Railroad's share of responsibility, based on land area and time, without an adequate factual foundation.[2] In fact the district court made more than a hundred pages of detailed findings, supported by extensive evidence, demonstrating that a geographic and temporal apportionment was almost certainly an *overstatement* of the Railroads' responsibility.

Respondent faults the Railroads for not putting on more evidence and argument specifically directed at apportionment. Opp.-20–21. This is a red herring. The district court did not find waiver and had no difficulty resolving the apportionment question and making the supporting findings. The simple reason is that the evidentiary basis of the Railroads' defense to liability—that the spills on the Railroad parcel were modest and did not contribute to the groundwater contamination—encompassed the same evidence that the district court needed for apportionment. The Railroads presented extensive evidence and argument relevant to the apportionment inquiry, including testimony that the volume of spills on the Railroad parcel was far lower, that any spills occurring there did not reach the

---

[2] The district court also found that the Railroads were not responsible for one of the three chemicals. The Ninth Circuit held that was clearly erroneous, but clearly misunderstood the district court's finding. *See* Pet.-12, 22. Respondent repeats the Ninth Circuit's error (Opp.-12 n.4) but conspicuously fails to respond to the petition.

groundwater, and that the harm could be reasonably apportioned based on the relative mass of contaminants released on each parcel. *See* Brief of Appellees at 18-19 (9th Cir. filed Feb. 17, 2005) ("Railroads' Br."); Supplemental Excerpts of Record ("SER")-38–40, 211-12.

The district court held that there was "considerable evidence of the relative levels of activity and number of releases on the two parcels." Pet.App.-252a. It found that "[t]he contributions from spills and releases from the Railroad parcel are significantly less than from the B&B parcel, because the Railroad parcel was only used for vehicle and equipment storage, washing and limited loading-unloading of agricultural chemicals, not active operations or maintenance." Pet.App.-247. It found that B&B took "almost no precaution[s]" to prevent hazardous spills from 1960 to 1980, but that in 1979 it lined the sump and pond and began taking greater precautions. Pet.App.-130a, 111a. (B&B did not lease the Railroad parcel until 1975.) The district court also found that the spills on the Railroads' parcel were unlikely to reach the groundwater, due to site characteristics and the properties of the chemicals. *See* Pet.-10–11; Pet.App.-95a–103a. And it found that the government had not presented evidence as to how any spills on the Railroad parcel *could* reach the groundwater—at least not directly.[3] As a result, it determined that "[p]ast releases at the railroad parcel

---

[3] Respondent describes "a single plume of contaminated groundwater," but the district court found that the modest groundwater contamination under the Railroad parcel (which did not require remediation) was likely caused by migration from contamination originating at the sump on B&B's parcel. Pet.App.-103a–04a.

could not have contributed to more than ten (10%) of the overall site contamination," Pet.App.-247a, and that the most the Railroads could possibly be allocated was 9% of the total harm, Pet.App.-252a.

Respondent (like the Ninth Circuit) does not contest those findings. Its position therefore must be that evidence supporting a conservative *over*estimation of the Railroads' causal responsibility cannot be a "reasonable basis" for estimating their share, and that because we do not have sufficient information to determine with precision exactly what percentage they should be allocated *below 9%* the Railroads therefore must be jointly and severally liable for 100%. That is perverse, and inconsistent with respondent's own concession that an apportionment can be based on a "rough approximation." Opp.-22–23.

3. Respondent argues that the Restatement's example apportioning harm for crops damaged by cattle is "misplaced" because "Petitioners did not introduce evidence, through expert testimony or otherwise, to establish that divisibility based on area owned, period of ownership, or leakage volume was a reasonable basis for apportionment." Opp.-22. Respondent contends, in particular, that the evidence here did not establish "how many cows each farmer had in the field." Opp.-22 n.9. Again, respondent's argument simply ignores the district court's extensive findings establishing, in effect, that the cows owned by the Railroads represented *at most* 9% of the cows loose in the overall field, did not even have access to 90% of the crops, and were less hungry and more listless than those owned by the facility operator B&B.

Respondent also describes the cattle example as "inapt" because "the causation analysis here involves considerably more variables (*e.g.* multiple hazardous

substances, pollution over time, different activities), than the cattle example." *Id.* Of course this case is more complicated than cows destroying crops. But as the dissent below explains, the Restatement contemplates division based on reasonable assumptions and does not require the precise documentation demanded by the Ninth Circuit panel. Since no one has ever claimed that the three hazardous substances at issue here interacted synergistically, this is not like *United States v. Monsanto Co.*, where "the commingling of hazardous substances" made apportionment impossible without information regarding "the interactive qualities of the substances deposited there." 858 F.2d 160, 172 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). And the Restatement expressly states that the same principles apply "where the pollution of a stream, or flooding, or smoke or dust or noise, from different sources, has interfered with the plaintiff's use or enjoyment of his land." Restatement §433A cmt. d.

4. The Ninth Circuit acknowledged "something of a circuit split" regarding the specificity of proof necessary to establish a reasonable basis for apportionment. Pet.App.-46a–47a n.32. Respondent points to the panel's statement that it "need not weigh in on this dispute, as the district court's extrapolations could not be upheld under even a forgiving standard." *Id.*; Opp.-23. As the dissent explained, however, that statement is simply disingenuous. The Ninth Circuit's demand for "records that separate out," with "precision," the volume of toxic chemicals disposed on each parcel, Pet.App.-40a–41a, is in direct conflict with the Fifth Circuit's holding in *In re Bell Petroleum Servs., Inc.* that "significant assumption factors" are permissible even if records have been lost, and that

"[e]vidence sufficient to permit a rough approximation is all that is required under the Restatement," 3 F.3d 889, 904 & n.19 (5th Cir. 1993). The evidence presented here provided, if anything, a *stronger* basis for divisibility than in *Bell*. Pet.-26–28. Respondent suggests that the assumptions in *Bell* were supported by experts, Opp.-23 n.10, but the district court here also relied on expert testimony. *See* Pet.App.-85a–112a. Respondent's contrary implication must be based on its observation that petitioners introduced that testimony primarily for the purpose of contesting liability rather than apportionment. But of course the testimony is relevant to both issues.

Respondent argues that *United States v. Rohm & Haas Co.*, 2 F.3d 1265 (3d Cir. 1993), is "the most factually analogous court of appeals decision to have addressed apportionment of CERCLA liability." Opp.-24. But in *Rohm & Haas*, the district court did not even address the issue of divisibility. *See* 2 F.3d at 1279–80; *United States v. Rohm & Haas Co.*, 790 F. Supp. 1255, 1264 (E.D. Pa. 1992). And the Third Circuit rejected divisibility based on land ownership because the defendant presented no evidence of "what portion of the harm may fairly be attributed to it." *Rohm & Haas*, 2 F.3d at 1280. By contrast, the district court here relied on extensive evidence of activities performed on each parcel, site characteristics, and chemical properties of the substances spilled. Respondent also incorrectly states that *Rohm & Haas* "rejected apportionment based on temporal factors." Opp.-24. The Third Circuit actually rejected the defendant's argument that it should not be liable for *any* of the harm because "'the contamination was caused solely by a third party.'" 2 F.3d at 1280 (citation omitted). The Third Circuit affirmed that the

defendant had simply failed to prove that case, as a factual matter. *Id.*

5. There is a square conflict over the appellate standard of review. The Ninth Circuit explained that "[t]hree circuits have addressed the question, and two separate approaches have emerged." Pet.App.-35a. It adopted a third approach that the dissent from denial of rehearing *en banc* accurately characterized as "sleight of hand." *See* Pet.App.-65a.

Respondent argues that the split is not presented because the Ninth Circuit agreed that the harm was capable of apportionment, and reviewed the rest of the apportionment decision for clear error. But the Ninth Circuit also held that "an aspect of clear error review is the legal determination whether the party with the burden of proof met that burden," Pet.App.-36a, effectively converting the entire apportionment inquiry into a question of law reviewed *de novo*. The court of appeals accepted virtually all of the district court's findings, yet ultimately held that "the party advocating apportionment has not come forward with the minimum showing needed to meet its burden of proof as to the proper division of liability" *as a matter of law*. *Id.* Contrary to respondent's suggestion (at 25), the Ninth Circuit's convoluted and disingenuous approach to the standard of review makes this the perfect case for this Court to resolve the conflict.

Respondent also argues that the Railroads waived the issue by failing to present it below. Opp.-25 n.11. But the Railroads argued for the standard applied in *United States v. Township of Brighton*, 153 F.3d 307, 318 (6th Cir. 1998). Railroads' Br. at 25. Although the opposition correctly quotes the Railroads as stating that "'[w]hether there is sufficient evidence to permit the trier of fact to apportion harm also is a question of

law,'" *see* Opp.-25 n.11, the Railroads explained in their brief that "[t]he party seeking apportionment has the burden of proof and is entitled to have the trier of fact decide the issue so long as there is *some evidence* permitting an apportionment." Railroads' Br. at 26-27 (emphasis added). But once that low "threshold is reached, whether damages can be divided by causation is a question of fact." *Id.* at 27. Just as before this Court, the Railroads thus argued below that the district court's apportionment decision is "reviewable under the clearly erroneous standard." *Id.* at 28.

6. Respondent has no real response to the petition's demonstration that the Ninth Circuit erred, and broke with at least the Eighth Circuit, by casting apportionment as a highly disfavored and unusual outcome that is somehow inconsistent with the policies underlying CERCLA. *See* Pet.-29. Respondent argues that the Ninth Circuit's reasoning "does not evidence any *undue* bias in favor of joint and several liability under CERCLA." Opp.-25–26 (emphasis added). But respondent embraces the radical and incorrect view that the purpose of CERCLA is to hold "potentially responsible parties" strictly liable for "all" response costs incurred by the United States (i.e., to ensure that the public never has to absorb "orphan shares"). Opp.-26. That position is clearly inconsistent with the text and legislative history of CERCLA, and with decisions of other circuits.

7. The opposition's argument (at 26-27) that the availability of contribution will mitigate the draconian burdens placed on CERCLA defendants by the Ninth Circuit is incorrect—as even respondent seems to acknowledge. The majority of CERCLA sites have a significant orphan share left by an insolvent defendant. *See* Pet.-35. The Ninth Circuit just believed it was

more appropriate to leave private parties "holding the bag" than the government, even if those private parties were simply landlords with no involvement in the contamination, much of which did not even occur on their land or during the time period their property was leased. Pet.App.-33a–34a.

The opposition wrongly asserts that the district court considered the equitable factors articulated in the "Gore amendment" in making its apportionment determination. *See* Opp.-8–9, 19, 27. The district court actually addressed these equitable factors *after* making its apportionment decision, when analyzing the issue of contribution and when it refused to apportion the orphan share left by B&B to the Railroads. *See* Pet.App.-233a–36a, 239a, 245a, 257a, 259a–60a. Petitioners do not contend that the "Gore" factors should be considered in making apportionment determinations. It is fair to point out, however, that there are equitable considerations underlying the Restatement test, and that the Ninth Circuit's break from that test produces results that are so inequitable as to be absurd. Even the Ninth Circuit acknowledged that its approach penalizes the parties with the least direct or moral responsibility for the contamination. Surely Congress did not want that.

8. Respondent has essentially no response to the arguments of the Railroads, Shell, and their *amici* that this case presents issues of national importance. As demonstrated by the Association of American Railroads, the Ninth Circuit's standard, in conjunction with CERCLA's expansive liability scheme, will impose crippling burdens on passive landowners. *See* AAR Amicus Br. at 13-20. CERCLA has been on the books for nearly thirty years, it imposes (at least) hundreds of billions of dollars in unprecedented

retroactive strict liability, and Congress explicitly left the most fundamental questions about apportionment of that liability to judicial development under common law principles. Yet this Court has never addressed the issue, despite substantial confusion and conflicts in the lower courts. The time is now.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

CHARLES G. COLE
BENNETT EVAN COOPER
STEPTOE & JOHNSON LLP
1330 CONNECTICUT AVE.
WASHINGTON, DC. 20036

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ERICA GOLDBERG
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

Counsel for Petitioners