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

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS[1]

The Association of American Railroads ("AAR") is an incorporated, non-profit trade association representing the nation's major freight railroads. AAR members operate approximately 72% of the rail industry's line-haul mileage, produce 95% of its freight revenues, and employ 92% of rail workers. Amtrak, which carries virtually all intercity rail passenger traffic, is a member of AAR, as are several commuter railroads. In matters of significant interest to its members, AAR frequently appears before Congress, the courts and administrative agencies on behalf of the railroad industry, including by participating as *amicus curiae* in cases that raise issues of vital concern to its membership and the judicial system.

This is such a case. The question presented, as the petition filed by BNSF Railway Company and Union Pacific Railroad Company amply demonstrates, is of surpassing concern to the proper administration of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., generally, and to the railroad industry specifically. For a variety of historical reasons, the Nation's railroads are large passive landowners. The decision below threatens to impose untold liability on such landowners that Congress neither foresaw nor

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* AAR states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief. The parties have consented to the filing of this brief and letters reflecting their consent have been filed with the Clerk of Court.

intended. The Ninth Circuit's decision will make apportionment easier to obtain for the truly culpable polluters but leave passive landowners jointly and severally liable for clean up costs that did not even occur on their own land. This issue implicates the proper allocation of endless billions of dollars of liability, and it presents an important question of federal law upon which the lower courts are divided and the court below radically departed from governing common-law principles.

INTRODUCTION

As Petitioners have thoroughly explained, the decision below richly merits this Court's review. It creates or exacerbates multiple conflicts over the proper interpretation of CERCLA, an important federal statute governing a nationwide cleanup program for which national uniformity is critical. *Amicus* AAR submits this brief to amplify two reasons why this Court should grant certiorari.

First, the decision below represents a marked departure from basic principles of liability apportionment. CERCLA has been interpreted to incorporate common-law principles in this critical area where Congress did not speak, and the common law favors apportionment in circumstances like these. Both the Second and Third Restatements of Torts provide for apportionment among causes when there is any "reasonable basis" to do so. This well-accepted test reflects a long tradition of permitting apportionment upon even rough approximations of comparative causation, and particularly where multiple pollutants or polluters are involved. The Restatements, indeed, highlight pollution and public nuisance as circumstances in which apportionment is especially appropriate, and numerous common-law decisions over the

past century and more have done likewise. The district court's well-reasoned and detailed apportionment analysis falls squarely within this common-law tradition, and the Ninth Circuit's decision to overturn it is a substantial misstep that this Court should reject.

Second, the Ninth Circuit's decision has great practical repercussions for landowners who have done everything that could reasonably be expected of them. Through CERCLA's combination of strict liability, modified causation and retroactive liability, the statute works harsh effects on passive landowners, who "may be required to pay huge amounts for damages to which their acts did not contribute." *U.S. EPA* v. *Sequa Corp. (In re Bell Petroleum Servs., Inc.)*, 3 F.3d 889, 897 (5th Cir. 1993). Railroads are particularly affected by this regime, because many of them possess large land holdings with unbroken fee title stretching back a century or more. As a result, CERCLA often imposes "liability ... upon [them] for conduct predating the enactment of CERCLA, ... even for conduct that was not illegal, unethical, or immoral at the time it occurred." *Id.* This case squarely presents the issue whether those already harsh effects should be multiplied by raising the bar for apportionment so high that joint and several liability is a near certainty. The Ninth Circuit begged this question, asserting that "the basic structure of the CERCLA statutory scheme," *United States* v. *Burlington N. & Santa Fe Ry.*, 520 F.3d 918, 941 (9th Cir. 2008), requires that landowners bear these costs in full. The statute says no such thing, as the Fifth Circuit and the dissenting judges below correctly recognized. The bald inequity that the Ninth Circuit's decision would countenance is further reason that this Court should grant the petition.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS AT ODDS WITH COMMON-LAW PRINCIPLES OF APPORTIONMENT.

A. CERCLA is silent on the proper method for apportioning damages among defendants, and so the lower courts generally have relied on "traditional and evolving common law principles," especially as reflected in the Restatements of Torts.[2] See *In re Bell Petroleum Servs., Inc.*, 3 F.3d at 895; *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 185 (2d Cir. 2003); *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983). The common law broadly authorizes the apportionment of damages based upon causation. The familiar rule under the Second Restatement is that harm should be apportioned by cause when there is any "reasonable basis" to do so:

> Damages for harm *are to be apportioned* among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a *reasonable basis* for determining the contribution of each cause to a single harm.

Restatement (Second) of Torts § 433A(1) (1965) (emphases added). The Third Restatement employs the same rule, as do numerous standard authorities. See, *e.g.*, Restatement (Third) of Torts: Apportionment of Liability § 26(b) (2000) (damages to be divided by cause when there is a "reasonable basis" to do so); W. Page Keeton et al., *Prosser and Keeton on the Law of*

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[2] This Court has reserved the question whether CERCLA creates joint and several liability. *United States* v. *Atl. Research Corp.*, 127 S. Ct. 2331, 2339 n.7 (2007).

Torts § 52, at 346, 350 (5th ed. 1984) ("entire liability is imposed only where there is no factual basis for holding that one wrongdoer's conduct was not a cause in fact of part of the harm" and "emphasis is placed on the possibility of reasonable apportionment").[3] The rule embodies simple justice: "No party should be liable for harm it did not cause ...." Restatement (Third) of Torts § 26 cmt. a.

The three-judge panel below initially rejected even this modest and well-established requirement, reasoning that the Restatement principles are a "poor fit" because of the "'super-strict' nature of CERCLA." *United States* v. *Burlington N. & Santa Fe Ry.*, 502 F.3d 781, 792, 795 n.16 (9th Cir. 2007). In amending its opinion, the panel to be sure removed some of its most extreme language. 520 F.3d at 926-29. But the holding does clear violence to the Restatement's rule at every turn, *id.* at 936-38 & n.22, and is foreign to the common-law rule that other courts properly have adopted. *Never* have courts required the sort of "precision" in apportionment that the Ninth Circuit now demands, much less have they required the use of "records" to satisfy the burden of apportionment. *Id.* at 944. As the eight dissenters from denial of rehearing en banc properly put it, "The panel applies CERCLA in a novel and unprecedented way to impose impossible-to-satisfy burdens on CERCLA defendants." *Id.* at 952 (Bea, J., dissenting) (footnote omitted).[4]

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[3] *See also* Restatement (Second) of Torts § 881 cmt. a ("apportionment is made" for "harms ... that afford a reasonable basis for division").

[4] The first amended panel decision would have gone even further, requiring "*perfect information*" "that portions of the contamination are *in no respect traceable* to the portion of the facility that the landowner owned at the time of the disposal." 502 F.3d at 797, 801 (emphases added). Removing this offending

B. To apportion damages, it never has been essential that particular harms be capable of precise attribution to specific causes. Rather, it is well established that the proper question is whether "a factual basis can be found for some *rough practical apportionment*." Keeton et al., *supra*, § 52, at 345 (emphasis added); see also *id.* § 52, at 350 ("The difficulty of any complete and exact proof ... has not been regarded as sufficient justification for entire liability."). Both Restatements require only a "reasonable basis" for apportionment. Restatement (Second) of Torts § 433A(1); Restatement (Third) of Torts § 26(b). As the Third Restatement explains, "[a]s long as there is *some evidence* that would permit [apportionment], courts should permit the factfinder" to apportion damages. *Id.* § 26 rptrs' note cmt. h (emphasis added); *id.* § 26 cmt. f ("The fact that the magnitude of each indivisible component cannot be determined with precision does not mean that the damages are indivisible. All that is required is a reasonable basis for dividing the damages.").

In conflict with the decision below, the Fifth Circuit properly adopted this common-law approach in *In re Bell Petroleum Services, Inc.*, a case arising under CERCLA:

> If the expert testimony and other evidence establishes a factual basis for making a reasonable estimate that will fairly apportion liability, joint and several liability should not be imposed in the absence of exceptional circumstances. The fact that apportionment may be difficult, because each defendant's exact contribution to the harm

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language makes the opinion less inflammatory, but it does nothing to protect the legitimate interests of passive landowners who cannot remotely satisfy the requirements for apportionment imposed here.

> cannot be proved to an absolute certainty, or the fact that it will require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability.

In re Bell Petroleum Servs., Inc., 3 F.3d at 903.

These authorities reflect a long tradition in which courts have permitted apportionment based on approximations of relative causation. Presented with "evidence which reasonably tends to show the relative proportion" of the tortfeasors' causal responsibility, *Eckman* v. *Lehigh & Wilkes-Barre Coal Co.*, 50 Pa. Super. 427, 432 (1911), courts would "permit the jury, as reasonable men, to make from the evidence the best possible estimate," *Hill* v. *Chappel Bros. of Mont., Inc.*, 18 P.2d 1106, 1110 (Mont. 1932). As early as 1879, the Connecticut Supreme Court expressed a strong preference for apportionment – even rough apportionment – as more appropriate than the alternative:

> It may be very difficult for a jury to determine just how much damage the defendant is liable for and how much should be left for the city to answer for; but this is no more difficult of ascertainment than many questions which juries are called upon to decide. They must use their best judgment, and make their result, if not an absolutely accurate one, an approximation to accuracy.... If the plaintiff is entitled to damages and the defendant liable for them, the one is not to be denied all damages, nor the other loaded with damages to which he is not legally liable, simply because the exact ascertainment of the proper amount is a matter of practical difficulty.

Sellick v. *Hall*, 47 Conn. 260, 274 (1879).[5]

Indeed, far from imposing rigid proof requirements like the specific historical records that the Ninth Circuit demanded here, 520 F.3d at 944, courts often have "relaxed the quality and quantity of evidence required to meet the burden of production." Restatement (Third) of Torts § 26 rptrs' note cmt. h. As Prosser explained in his seminal article:

> The difficulty of assessing separate damages ... is not regarded as sufficient justification for entire liability....
>
> ... It has been said that no very exact proof will be required, and that general evidence as to the proportion in which the defendants contributed to the result will be sufficient to support separate verdicts.

W. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 438-39 (1937).[6]

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[5] *Accord Harley* v. *Merrill Brick Co.*, 48 N.W. 1000, 1002 (Iowa 1891) ("the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not . . . make any one liable for the acts of others"); *Chipman* v. *Palmer*, 77 N.Y. 51, 53-54 (1879).

[6] *See also* W. Prosser, *Handbook of the Law of Torts* § 47, at 328, 334-35 (1st ed. 1941) (whenever "a logical basis [could] be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which he has in fact caused, it [could] be expected that the division [would] be made"); *Ogden* v. *Lucas*, 48 Ill. 492, 494 (1868); *Cal. Orange Co.* v. *Riverside Portland Cement Co.*, 195 P. 694, 695 (Cal. Ct. App. 1920) ("[t]hough in cases of this sort entire accuracy is impossible, and the difficulty of accurately proportioning and assessing the damage done by defendant's mill is great" "the trial court was at liberty to estimate as best it could, from the evidence before it, how much of the total damage caused by the operations

The district court in the decision below went far beyond the "rough practical apportionment" or "best possible estimate" that common-law courts routinely have approved. It held a bench trial that stretched over multiple weeks, after which it entertained multiple motions to amend its findings of fact and conclusions of law. See *United States* v. *Atchison, Topeka & Santa Fe Ry.*, Nos. CV-F-92-5068 OWW, CV-F-96-6226, -6228 OWW, 2003 WL 25518047, at *1 (E.D. Cal. July 15, 2003). It ultimately issued a lengthy order that contained nearly 300 individual findings of fact, *id.* at *2-43, and engaged in a detailed apportionment analysis, in the course of which it evaluated the relative contributions of the various parcels of land, *id.* at *80-96; see Pet. 21-22. If this is a "'meat-axe'" approach, 520 F.3d at 944, the common law has been a butcher for more than a century.

C. To be sure, the Ninth Circuit observed that "estimates" may be an adequate basis for apportionment. *Id.* at 943 n.28. But that comment cannot disguise the intolerable fact that now, in the Ninth Circuit, apportionment based on the factors articulated by the district court is unavailable *as a matter of law.* See *id.* at 943 (the district court's "*legal conclusion* that these three factors alone suffice to support apportionment cannot stand" (emphasis added)). This conclusion, too, flies in the face of the numerous authorities that long have recognized that environmental torts (and earlier, so-called "public nuisances") are particularly susceptible of apportionment. See, *e.g.*, G. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 U. Dayton L. Rev. 267, 301 (1996) ("[P]rinciples of comparative

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of the two cement companies was occasioned by defendant's plant, and in doing so might measure with a liberal hand the amount of damage caused by defendant's mill").

causation are especially relevant in the toxic torts area, where measures of toxicity can be applied to determine apportionment."). So, for instance, Prosser explains that

> [n]uisance cases, in particular, have tended to result in apportionment of the damages, largely because the interference with the plaintiff's use of land has tended to be severable in terms of quantity, percentage, or degree. Thus defendants who independently pollute the same stream, or who flood the plaintiff's land from separate sources, are liable only severally for the damages individually caused, and the same is true as to nuisances due to noise, or pollution of the air.

Keeton et al., *supra*, § 52, at 349 (footnotes omitted; citing numerous cases); Restatement (Second) of Torts § 433A cmts. c, d, illus. 5; *id.* § 881 cmt c., illus. 1, 2.[7]

And, indeed, other courts in applying these common-law principles in the precise context of CERCLA have not set the bar nearly so high as the Ninth Circuit as to what constitutes a "reasonable basis" for apportionment. The Sixth Circuit, for instance, has held that courts "should be receptive to any argument for divisibility that provides a reasonable basis" for apportioning harm. *United States* v. *Twp. of Brigh-*

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[7] Apportionment therefore repeatedly was employed in cases closely analogous to this one, in which pollution by multiple tortfeasors harmed a plaintiff's person or property. *E.g.*, *Ralston* v. *United Verde Copper Co.*, 37 F.2d 180, 184 (D. Ariz. 1929), *aff'd*, 46 F.2d 1 (9th Cir. 1931); *Thomas* v. *Ohio Coal Co.*, 199 Ill. App. 50, 56-57 (1916); *see also Woodland* v. *Portneuf Marsh Valley Irrigation Co.*, 146 P. 1106, 1106-07 (Idaho 1915); *Harley*, 48 N.W. at 1001-02.

ton, 153 F.3d 307, 320 (6th Cir. 1998). In line with the common-law authorities – and far from employing the impossibly exacting burden of proof required by the Ninth Circuit – the Fifth Circuit has authorized apportionment on the basis of "a reasonable estimate."[8] *In re Bell Petroleum Servs., Inc.*, 3 F.3d at 903.[9] But compare *United States* v. *Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir. 2001); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992) (burden to prove divisibility is "substantial").

What is more, apportionment has been performed using precisely the factors that the court below rejected here as a matter of law. The Ninth Circuit held that a "simple fraction based on the time that the Railroads owned the land cannot be a basis for apportionment." 520 F.3d at 945. Time, however, long has been recognized as an appropriate basis for apportioning pollution-based harms:

> The harm inflicted may be conveniently severable in point of time. Thus if two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused a separate amount of harm, lim-

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[8] The Ninth Circuit's imposition of arranger liability on Shell under 42 U.S.C. § 9607(a)(3) for the sale and shipment of commercially useful products to the operator, 520 F.3d at 948-52, also stands in conflict with other circuits that recognize that the sale of a useful product is not a basis for imposing arranger liability. *See generally* Shell Oil Co. Pet. for Writ of Certiorari, No. 07-1607. Accordingly, the Court should also grant the petition in 07-1607.

[9] *See also Dent* v. *Beazer Materials & Servs., Inc.*, 993 F. Supp. 923, 946 (D.S.C. 1995) (apportioning CERCLA damages among former owners by distinguishing types of hazardous products and applying causal analysis), *aff'd*, 156 F.3d 523, 530-31 (4th Cir. 1998).

> ited in time, and that neither has any responsibility for the harm caused by the other.

Restatement (Second) of Torts § 433A cmt. c; Prosser, 25 Cal. L. Rev. at 434-45 (same; "[i]n such cases there is available a logical basis for the apportionment of the loss").[10]

In *In re Bell Petroleum Services, Inc.*, for instance, the Fifth Circuit permitted CERCLA apportionment based on a combination of periods of ownership and evidence about what occurred during those periods. 3 F.3d at 903-04. The Sixth Circuit did likewise in *Township of Brighton*. See 153 F.3d at 320 ("if [defendant] can show that it was only an operator after a particular year, and that only a certain percentage of the hazardous material was introduced into the property after that year, it can show divisibility and be held liable only for the releases occurring after it became an operator"); see also *Hercules*, 247 F.3d at 719 (chronological evidence can prove divisibility of harm). That is closely analogous to what the district court did here. See Pet. 21.

Geography likewise supplies a reasonable basis for apportionment of CERCLA liability. Whereas the Ninth Circuit rejected the use of this factor, see 520 F.3d at 943-44, other circuits have held to the contrary. See *Twp. of Brighton*, 153 F.3d at 320 (if an entity can show that its "activities were completely limited to a discrete and measurable section of the property, and that the releases onto or from that section represented a discrete and measurable harm, this would provide a reasonable basis for apportionment"); see *United States* v. *Burlington N. R.R. Co.*, 200 F.3d 679, 700 (10th Cir. 1999) (affirming decision

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[10] *Accord* Restatement (Third) of Torts § 26 rptr's note cmt. f.

dividing credit for a settlement agreement that apportioned liability based on geography).[11]

II. THE NINTH CIRCUIT'S UNYIELDING APPLICATION OF JOINT AND SEVERAL LIABILITY WILL HAVE EXTRAORDINARY AND INEQUITABLE EFFECTS.

The Ninth Circuit's "unreasonable" analysis of CERCLA, 520 F.3d at 953 (Bea, J., dissenting), additionally merits review because it has significant consequences for a category of defendants who already face exceptionally broad liability under the statute: landowners, including passive landowners who have in no way contributed to the need for cleanup. The decision below would multiply those harsh effects, in a way that "Congress did not ... intend." *Id.* Railroads will be particularly adversely affected by any such rule, due to the substantial landholdings that many of them have possessed since the time of the Industrial Revolution.

A. Any discussion of CERCLA liability must begin with the broad ways in which the statute imposes liability. First, liability is effectively strict. It affects four classes of parties including, relevant here, the current owner or operator of the facility, and one who owned or operated the facility "at the time of disposal of any hazardous substance." 42 U.S.C. § 9607(a)(1), (2).[12] Parties who fall into these classes are com-

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[11] *See also Kamb* v. *U.S. Coast Guard*, 869 F. Supp. 793, 799 (N.D. Cal. 1994) (apportioning based on geography and volume of contaminant).

[12] In addition, liability is imposed upon any person that arranged to dispose of its hazardous substances at the facility, and any transporter who delivered hazardous substances to the facility. 42 U.S.C. § 9607(a)(3), (4).

monly referred to as "potentially responsible parties," or "PRPs." The defenses available to PRPs are almost nonexistent – they are limited to showing that the disposal from the facility was caused *solely* by an act of God, an act of war, or the act of a third party with whom the PRP had no direct or indirect contractual relationship. *Id.* § 9607(b). As a result – and while the statute never uses the actual words – courts have held that CERCLA imposes strict liability. See, *e.g.*, *United States* v. *Atl. Research Corp.*, 127 S. Ct. 2331, 2336 (2007); *Alcan Aluminum Corp.*, 315 F.3d at 184; *In re Bell Petroleum Servs., Inc.*, 3 F.3d at 897. At its most fundamental level, this means that the government need not establish that the PRP's acts *caused* the disposal, and common-law defenses such as the exercise of due care are to no avail.

Piling on to this harsh scheme, CERCLA has been interpreted as employing a greatly relaxed causation standard. Courts have held that a CERCLA plaintiff need not "establish a specific causal connection between [the] defendant's hazardous substances and the release or the plaintiff's incurrence of response

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Relevant to railroads, a transporter is liable only if it affirmatively selected the facility. *Id.* § 9607(a)(4). This stands as Congress's recognition of the unique commercial relationships between railroads and their customers. Even under a regime based on strict liability, *see infra*, it would be inappropriate to impose liability on a common carrier that does not select the receiving facility, but rather is bound by its customers' delivery instructions. *See Tippins, Inc.* v. *USX Corp.*, 37 F.3d 87, 95 (3d Cir. 1994). The Ninth Circuit's expansive approach, however, undermines this exclusion from liability. The railroads' lessees are commonly their customers as well, leasing property along rail lines to facilitate shipping. Section 9607(a)(4) exempts railroads from liability for their shippers' acts of disposal; the Ninth Circuit's rule expands the railroads' liability for those same acts.

costs." *Alcan Aluminum Corp.*, 964 F.2d at 264; see also *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 670 n.8 (5th Cir. 1989) ("a plaintiff need not prove a specific causal link between costs incurred and an individual generator's waste"). Furthermore, courts have concluded that CERCLA liability is retroactive – *i.e.*, that a PRP is responsible for cleanup costs stemming from conduct that predates enactment of the law in 1980. *Alcan Aluminum Corp.*, 315 F.3d at 188 (collecting cases).

The weight of this liability regime sits heaviest on the shoulders of the landowner. Unlike the categories of PRPs in (a)(3) and (a)(4), for instance, who may have had *some* role in disposal of the waste, the owner may be liable for wholly passive conduct – *i.e.*, doing nothing more than owning land that someone once polluted. The government's proof is reduced to the simple question of fee ownership, and absent any reasonable form of apportionment, the owner is left "holding the bag." 520 F.3d at 941.

B. These aspects of CERCLA liability fall with special force on railroads, which are quintessential passive landowners. Due in large measure to the land-based nature of their business, railroads possess substantial landholdings, much of which follows the 140,000 or more miles of right-of-way railroad track throughout the country. In the mid-19th Century, for instance, certain railroads (including predecessors to the petitioners here) received land grants from the federal government (in exchange for discounted hauling of federal freight, among other things) in order to facilitate national economic development. See generally *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 670-77 (1979). These landholdings – many of which took the form of checkerboard parcels of land – are broadly geographically dispersed. See *id.* at 672.

The railroads often are – and they historically have been – passive landowners with regard to many of these parcels. In short, the railroads have thousands of lessees. AAR's members collectively have more than 75,000 land leases. One member railroad alone has 7800 land leases in 28 states, with (largely incomplete) records of an additional 28,000 known historical leases. Another member has more than 23,000 land leases, the majority of which are smaller than one acre. What is more, because much of this property is in proximity to rail lines, the railroads' lessees are often commercial and industrial concerns that require access to these transportation facilities.

For railroads, therefore, all of the harshest elements of CERCLA liability line up against them. They are fee owners of thousands of pieces of commercial and industrial property, with title stretching back decades and beyond. (The railroad land grants, for instance, took place between 1850 and 1871.) The odds that one of those tenants spilled or disposed of hazardous substances is high, as is the possibility that the offending tenant is no longer in existence. Under the holding below, then, the railroads are not just left "holding the bag"; they are left holding a ticking time bomb of potentially massive liability. Review by this Court is critical to avoid this sweeping and unjust result.

C. For all of these reasons, the evidentiary requirements imposed by the decision below, which find no support in the common law and conflict with the decisions of other courts of appeals, threaten to work extraordinary effects on railroads and other landowners like them. The extreme proofs now required by the Ninth Circuit effectively guarantee that liability will be joint and several, including in circumstances when – as discussed above – the common law rou-

tinely prefers apportionment. The Ninth Circuit demanded evidence of "the proportion of the amount of chemicals stored, poured from one container to another, or spilled on each parcel." 520 F.3d at 944. For instance, the court sought "adequate records" by which "to estimate the amount of leakage attributable to activities on the Railroad parcel, how that leakage traveled to and contaminated the soil and groundwater under the Arvin parcel, and the cost of cleaning up that contamination." *Id.*

It comes as no surprise that "none of this data is in the record," *id.*, because such data rarely exists. The panel recognized as much, conceding that "[i]t may well be that such information is, as a practical matter, not available for periods long in the past, when future environmental cleanup was not contemplated." *Id.* The same is true for more recent records as well, because typical commercial leases do not require tenants to retain and disclose the detailed records that the Ninth Circuit now demands, much less do they require this for *adjacent* properties. And therein lies the problem. The passive landowner is the *least* likely party to have access to any such detailed records that – if they ever were kept at all – belonged to the site operator. Of course, it is implausible to think that many (if any) commercial enterprises kept detailed records of spills or leaks in the years before modern environmental regulations required such information. And it is unthinkable that the lessor would have done so.

Compounding the harm embodied in its core ruling embracing inflexible joint and several liability, the Ninth Circuit imposed special additional requirements on landowners. It held that whereas Restatement principles "work[] nicely" when "several defendants are all polluters themselves," a landowner can

only "establish divisibility by demonstrating a reasonable basis for concluding that a certain proportion of the contamination did not originate on the portion of the facility that the landowner owned at the time of the disposal." *Id.* at 937, 938. This inverts logic; it would place the greatest burden on the least culpable party, who also is the least likely to possess or control the information that the court now would demand.

The practical result of this is that joint and several liability is a near certainty. Accordingly, any "orphan shares" attributable to defunct parties will become the responsibility of the remaining viable PRPs. In a case like this one, the railroad, whose only act was to lease its land, ends up jointly responsible for all cleanup costs, picking up the shares not only of former tenants that actually *caused* the problem, but of all nearby landowners whose land constituted part of the same facility onto which a disposal occurred.[13]

And this, of course, is precisely what the Ninth Circuit intended. The panel was absolutely clear that any "perceived unfairness" in "hold[ing] a partial

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[13] The opportunity to seek contribution from other PRPs – held out by the Ninth Circuit as a means to blunt these inequities, 520 F.3d at 940-41, 945 – provides small comfort in these situations. Contribution allocates liability among viable PRPs. But when the landowner is one of the few (or only) viable PRPs, it takes on the orphan shares of defunct, culpable parties.

In fact, the government's practice of picking the easy targets further compounds the inequities. *See* Kathleen Segerson, Reason Found., Policy Study No. 187, *Redesigning CERCLA Liabilty: An Analysis of the Issues* § VI.B.1 (Apr. 1995), *available at* http://www.reason.org/ps187.html (government targets certain PRPs for expediency, particularly based on their ability to pay). Empowered by joint and several liability, the U.S. can sue the landowner and others whose liability is easily proved, shifting to those defendants the burden of prosecuting contribution actions against the tough cases.

owner liable for all of the contamination cleanup costs" is justified by "CERCLA's expansive statutory liability scheme." *Id.* at 940-41. According to the panel, "[a]ny court-created structure that would allow PRPs to whittle their share to little or nothing and leave the taxpayers holding the bag may seem more equitable to some PRPs but would violate the basic structure of the CERCLA statutory scheme." *Id.* at 941. This passage lays bare the panel's hostility to the Restatement principles that it purports to adopt. There is, however, nothing in CERCLA to support this curious notion that because the statute's liability regime is "expansive" in some regards, it is without limitation in all other respects. As the dissenters below explained, Congress did *not* make the statute expansive *in this regard*; it did not speak to this issue at all. *Id.* at 957 n.12 (Bea, J., dissenting). And this is precisely why the Fifth Circuit explained – in clear conflict with the Ninth Circuit's approach – that Congress's silence "left it to the courts to fashion some rules that will, in appropriate instances, ameliorate this harshness." *In re Bell Petroleum Servs., Inc.*, 3 F.3d at 897. What is clear is that an identical site in New Orleans would not subject a railroad to the liability imposed on the railroads here simply because they do business within the states encompassed by the Ninth Circuit.

An appropriate division of harm among PRPs provides some measure of proportionality for the passive landowner. Apportionment will not, in the normal situation, exculpate a PRP entirely, but for the landowner it holds out the possibility that its final responsibility will in some measure reflect its relationship to the site. The decision below, however, departs from common-law principles, imposes an unyielding form of liability that Congress never wrote into the

statute, and would impose untold liability where it is entirely unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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