No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Comprehensive, Environmental, Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601 et seq., allows the government to obtain reimbursement for the costs of remediating hazardous waste sites from the owners and operators of land on which a disposal of hazardous substances has occurred. Because even passive landowners may be subjected to CERCLA liability, Congress removed language from early CERCLA bills mandating joint and several liability for multiple defendants who own or operate a particular site. In the present case, the Ninth Circuit nevertheless imposed joint and several liability for the entire cost of a facility's remediation on two landlords, even though they owned only a portion of the overall site for a fraction of its period of operation, and the parcel they owned required no remediation. The question presented is:

Whether the Ninth Circuit erred by reversing the district court's reasonable apportionment of responsibility under CERCLA, and by adopting a standard of review and proof requirements that depart from common law principles and conflict with decisions of other circuits.

LIST OF PARTIES AND RULE 29.6 STATEMENT

BNSF Railway Company ("BNSF"), whose name changed from The Burlington Northern and Santa Fe Railway Company, is the successor in interest to the Atchison Topeka and Santa Fe Railway Company. BNSF has publicly traded debt securities listed on the New York Stock Exchange. BNSF is also a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, which is a publicly held corporation whose common stock is listed on the New York Stock Exchange, Chicago Stock Exchange, and Pacific Exchange. Approximately 18.5% of the stock of Burlington Northern Santa Fe Corporation is owned by Berkshire Hathaway Inc.

Union Pacific Railroad Company ("UPRR") was formerly known as Southern Pacific Transportation Company. Union Pacific Corporation owns 62.6% of UPRR's stock, and also wholly owns Southern Pacific Rail Corporation. Union Pacific Corporation has issued publicly traded securities, and UPRR has issued publicly traded debt securities.

Also petitioning from the decision below, by separate petition for certiorari, is:

Shell Oil Company ("Shell"), a wholly owned subsidiary of Shell Petroleum, Inc.

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OPINIONS BELOW

The amended opinion of the Ninth Circuit and the dissent from the denial of rehearing en banc (Pet.App.-1a–81a) are reported at 520 F.3d 918. The prior opinion of the Ninth Circuit (Pet.App.-263a–310a) is reported at 502 F.3d 781. The amended findings of fact and conclusions of law of the district court for the Eastern District of California (Pet.App.-82a–262a) are reported at 2003 WL 25518047.

JURISDICTION

The Ninth Circuit entered its opinion denying rehearing on March 25, 2008. (Pet.App.-1a). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet.App.-311a–18a) reproduces the relevant text of the Comprehensive, Environmental, Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601 et seq.

STATEMENT OF THE CASE

CERCLA imposes retroactive liability for environmental cleanup on multiple "responsible parties," including the actual polluters but also landowners who did not contribute to the contamination on their property. Courts have uniformly held that CERCLA liability is joint and several only if there is no reasonable basis for apportioning causal responsibility, under principles outlined in §433A of the Restatement (Second) of Torts (1965) ("the Restatement"). This case involves the

relative responsibility of the 29-year operator of an agricultural chemical distribution facility, and two uninvolved landlords who leased that operator a small parcel of land, for approximately half the period, for use as a parking lot and for storage of empty cans and drums. The district court made detailed findings supporting his determination that the landowners' liability could be reasonably (indeed, conservatively) apportioned by reference to the relative sizes of the land parcels, the length of time each was used, and the particular chemicals disposed of on each. After a 27-day trial, the district court made extensive findings and concluded that "[t]he concept that a passive owner of a contiguous parcel, not representing more than 19% in area of a CERCLA site, operated less than 44% of the time, where substantially smaller volumes of hazardous substance releases occurred, should be strictly liable for the entire site remediation ... takes strict liability beyond any rational limit." Pet.App.-245a.

The Ninth Circuit reversed, holding that apportionment requires "records" showing with "precision" exactly what chemicals were spilled, where, and when. Pet.App.-41a. The panel conceded that such records would rarely if ever exist, and that landowners will have a far harder time avoiding joint and several liability under its test than other defendants who were directly involved in causing the contamination. *Id.*

The Ninth Circuit's proof requirements are inconsistent with the governing common law principles, which require only a factual basis for an approximate practical apportionment, upon reasonable assumptions determined by the trier of fact. The panel acknowledged a direct conflict with the Fifth Circuit's decision in *In re Bell Petroleum Services, Inc.*, 3 F.3d

889, 904 & n.19 (5th Cir. 1993), which permits apportionment on the basis of reasonable assumptions even if records are "incomplete," so long as a factual basis exists for a "rough approximation" of each defendant's causal responsibility for the harm. Pet.App.-46a n.32. The panel also acknowledged a separate circuit split over the standard of appellate review, and whether the possibility of apportionment is a question of fact or law. Pet.App.-35a. Eight judges dissented from the denial of rehearing *en banc*, noting that the panel had "applie[d] CERCLA in a novel and unprecedented way to impose impossible-to-satisfy burdens on CERCLA defendants," and that its "unreasonable application of CERCLA apportionment law imposes joint and several liability on CERCLA defendants where Congress did not so intend." Pet.App.-57a (footnote omitted).

This case involves several acknowledged circuit splits on an issue of national importance. This Court has never addressed the basic principles governing apportionment under CERCLA, and the issue involves the proper allocation of hundreds of billions of dollars of liability at thousands of cleanup sites nationwide. Certiorari is warranted.

A. Statutory Background

CERCLA was enacted in 1980. It effected a radical change in the law by imposing retroactive strict liability for environmental cleanup costs on four categories of potential responsible parties ("PRPs"). 42 U.S.C. §9607(a)(1)–(4).[1] Even "'innocent' private

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[1] CERCLA also established the "Superfund," and California established a similar account, to fund remediation of contaminated sites where the responsible party is insolvent or no longer exists.

parties .... not responsible for contamination," such as an uninvolved landlord, "may fall within the broad definitions of PRPs." *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2336 (2007).

CERCLA is silent, however, as to how responsibility for cleanup costs should be apportioned between multiple PRPs. Early draft bills would have imposed joint and several liability, but many Senators criticized that solution because it threatened to "impose financial responsibility for massive costs and damages awards on persons who contributed minimally (if at all) to a release or injury." *See* 126 Cong. Rec. 30972 (1980). Both houses' bills eventually eliminated language concerning joint and several liability "to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases." *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983). Senator Jennings Randolph, sponsor of the bill, explained that "we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable." 126 Cong. Rec. 30932 (1980).

This Court has never determined whether or when CERCLA creates joint and several liability, *see Atl. Research*, 127 S. Ct. at 2339 n.7, but the leading early case held that Congress intended the scope of liability to be governed by "traditional and evolving principles of common law," articulated in §433A of the

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42 U.S.C. §9611; Cal. Health & Safety Code §§25300–25395.45; *see also* H.R. Rep. No. 96-1016(1) pt. 1, at 34 (1980) (defendant establishing divisibility pays only the portion of costs reasonably attributable to him).

Restatement. *Chem-Dyne*, 572 F. Supp. at 808. The legislative history to the 1986 Superfund Amendments and Reauthorization Act endorsed this approach, *see* H.R. Rep. No. 99-253(I) at 74 (1985), *as reprinted in* 1986 U.S.C.C.A.N. 2835, 2856, demonstrating that Congress twice rejected the opportunity to impose a mandatory joint and several liability scheme. The principles of the Restatement have been followed by all subsequent courts to address the issue.

The Restatement provides that "[d]amages 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." Comments explain various methodologies providing a "reasonable basis" for apportionment. One illustration suggests that "where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop," the resulting damages should "be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number." Restatement §433A illus. d. Another example suggests that if two defendants "operating the same plant, pollute a stream over successive periods," responsibility should be apportioned in proportion to the length of time each operated the facility—on the premise that total pollution would be roughly proportionate to length of operation. *Id.* cmt. c. If no "reasonable basis" for apportionment can be identified, even after making "reasonable assumption[s]" like these, the Restatement calls for joint and several responsibility.

B. Factual and Procedural Background

1. Operations at the Arvin Site

This case involves an agricultural chemical facility in Arvin, California. The facility was owned by Brown & Bryant ("B&B"), a now-defunct company that operated in Arvin from 1960 until 1988. Pet.App.-12a, 16a n.9. B&B used its Arvin facility to store, mix, and load into application rigs agricultural chemical products produced by manufacturers such as Shell Oil Company ("Shell"), which B&B sold to local growers. Pet.App.-13a. B&B stored and distributed the weed killer dinoseb, as well as the soil fumigants D-D and Nemagon, which are injected into soil and rapidly disperse to kill nematodes (microscopic worms that attack crop roots). *Id.*

B&B was a "sloppy" operator that actively contaminated its facility and the underlying groundwater. Pet.App.-130a. Leaks occurred when B&B employees transferred bulk shipments of D-D into storage tanks, and when "nurse tanks" were inspected or rinsed out. Pet.App.-92a. Spills also occurred on a daily basis when B&B transferred its products from storage tanks to application rigs. Pet.App.-93a; SER56–57.[2] The storage of these three chemicals also caused leakage from their containers. D-D in particular is a corrosive solvent that "caused numerous tank failures and spills" in the 1960s. Pet.App.-115a.

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[2] SER refers to the Supplemental Excerpts of Record filed by the Railroads in the Ninth Circuit. ER refers to the Joint Excerpts of Record filed by the United States and the State of California.

The entire site was graded toward a drainage pond in the southeast corner of the facility, which collected run-off. ER68; Pet.App.-12a. In 1960, B&B installed a sump, into which as much as 2,000 to 4,000 gallons of rinse water was dumped per month, in the center of its parcel. Pet.App.-111a; ER68, SER331, SER342–43, SER316, SER267, SER365, SER367. The sump was connected to the pond with a pipe. Neither the sump nor the pond were lined until 1979. Pet.App.-111a, 95a. The sump and pond increased the rate at which these chemicals, which were naturally volatile and might otherwise have evaporated, leached into groundwater. Pet.App.-104a–05a.

2. Site Characteristics

Beginning in 1975, for the last thirteen years of the Arvin facility's operation, B&B leased an adjacent 0.9-acre parcel jointly owned by Atchison, Topeka, & Santa Fe Railroad Co. (the predecessor in interest to Burlington Northern & Santa Fe Railway Co.) and Southern Pacific Transportation Co., (the predecessor in interest to Union Pacific Railroad Co. ("the Railroads"). Pet.App.-12a. Including the Railroads' small parcel, B&B's facility occupied 4.7 acres of land. *Id.* The Railroads' parcel was located at the westernmost portion of the Arvin site, adjacent to B&B's warehouse and farthest from the pond in the southeastern corner. Pet.App.-12a.

The Railroads did not have any role in B&B's operations, and all parties agree that the only basis for imposing CERCLA liability against the Railroads is the "owner" provision of 42 U.S.C. §9607(a). Because the parcel leased from the Railroads was used principally for parking fertilizer rigs, Pet.App.-12a, and secondarily for storing empty cans and drums,

Pet.App.-94a, the overwhelming majority of the chemical disposals occurred on parts of the facility not owned or controlled by the Railroads. Pet.App.-247a–48a.

C. District Court Proceedings

In the early 1980s, California's Department of Toxic Substances Control ("DTSC") found evidence of soil and groundwater contamination at B&B's facility. Pet.App.-14a. In 1988, DTSC ordered B&B to correct the violations and the cost drove B&B out of business. In 1989, the Environmental Protection Agency ("EPA") listed the B&B facility on the CERCLA National Priorities List. *See* 42 U.S.C. §9605; 40 C.F.R. pt. 300, app. B. The contamination on the Railroads' parcel did not require remediation, but in 1991 the EPA ordered the Railroads to take measures to prevent future contamination. Pet.App.-14a–15a. In 1996, the United States and California filed suit under CERCLA against the Railroads and Shell for reimbursement of investigation and clean-up expenses. Pet.App.-15a.

After a bench trial, the district court issued what the Ninth Circuit later described as an "exceedingly detailed 185-page" opinion. It found the Railroads liable as owners, and Shell liable as an entity that "arranged" for the disposal of hazardous substances. *See* 42 U.S.C. §9607(a)(3). The court found that the United States incurred response costs of $7,809,683.46 as of June 30, 1997, not including interest or attorneys fees. Pet.App.-230a. As of March 31, 1998, California incurred response costs of $401,827.81. *Id.* The court also entered a declaratory judgment establishing liability for future costs. Pet.App.-231a.

1. District Court Findings

The district court made extensive findings relevant to the apportionment inquiry, the vast majority of which were held to be "factually correct" by the Ninth Circuit. *See* Pet.App.-42a.

Activities on the Railroads' Parcel. The district court found that the overwhelming majority of B&B's chemical disposals occurred on land not owned by the Railroads. Pet.App.-247a–48a. 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.-247a. Drums of dinoseb and empty cans of pesticide were stored on the Railroads' parcel, which occasionally resulted in small leakages. Pet.App.-93a–95a. Nemagon drums were also stored on the Railroad parcel, after being emptied of their contents on the B&B parcel. Pet.App.-95a. The district court found that there was only "slight" D-D contamination on the Railroad parcel "as a result of D-D rig and nurse tank storage" there. Pet.App.-251a.

The activities that caused most of the spills—including mixing, formulating, unloading, and transporting chemicals—were predominantly performed on B&B's parcel. Pet.App.-247a–48a. The court also noted that "[i]t is undisputed that the pond, the sump, and the dinoseb spill area, all of which are located on the B&B parcel, were and are the primary sources of the groundwater contamination at the Site." Pet.App.-104a. "[T]he overwhelming contaminant mass is on and under the B&B parcel." Pet.App.-102a.

Timing Of Spills. B&B did not begin leasing the Railroad parcel until 1975, fifteen years into its operation of the Arvin facility. The district court found

that "[i]n the first twenty years of its operations, B&B took almost no precaution to prevent the release of hazardous agricultural chemicals into the environment." Pet.App.-130a. B&B lined the pond and sump in 1979, and began taking greater environmental precautions. Pet.App.-111a.

Chemical Properties of Substances. Not all hazardous substances spills reach the groundwater. D-D and Nemagon are volatile chemicals, designed to evaporate rapidly when injected into soil. The district court found, for example, that "[i]n the absence of added water, a spill of at least 500 gallons (on bare soil) or in excess of 10,000 gallons (on intact asphalt), of a volatile chemical such as 1,2-DCP," one of the constituents of D-D, "would be required on the Railroad parcel, before a spill would reach groundwater in concentrations sufficient to require a remedial response." Pet.App.-98a–99a. "There is no evidence that a single spill of that magnitude ever occurred on the Railroad parcel." Pet.App.-99a.

But while chemicals like D-D and Nemagon "will rapidly volatilize and 'fume' when injected into the soil, or spilled onto the ground, the pure phase D-D which was rinsed into the sump" on the B&B parcel and then flowed directly into the pond "could not readily volatilize due to the pressure of the water overlying it." Pet.App.-105a.

Migration of Spilled Chemicals. The groundwater at the site is divided into three zones, and the nearest drinking water well draws water from the C-zone, or deepest level of groundwater. Pet.App.-87a. Disposals at the Arvin site have contaminated the A-zone, and some of that contamination has reached the

B-zone. The B- and C-zones are separated by an impermeable clay layer. *Id.*

Migration from a surface release is confirmed by sampling results showing a vertical trail of contamination into the groundwater and increased concentrations of contamination in the groundwater. The district court found that soil borings on the Railroad parcel and "[t]he size and shape of the groundwater plumes" indicate that any surface spills on the Railroad parcel did not contribute to the principal groundwater contamination, and that the "most likely explanation" for groundwater contamination below the southern portion of the Railroad parcel is groundwater flow from the sump on B&B's property. Pet.App.-103a–04a. The court found that only a limited amount of contaminated groundwater in the northern portion of the Railroad parcel was likely caused by spills on the Railroad parcel. Pet.App.-112a. It also found that the levels of contamination even in the A-zone groundwater beneath the Railroad parcel are "too low to require remediation." Pet.App.-97a.

According to the United States and California, because a small pipe allowed water on the Railroads' parcel to drain onto B&B's parcel, surface water on the Railroads' parcel could have reached the pond on B&B's parcel. The court found the scientific evidence "inconclusive," but held that "the presence of agricultural chemical spills on the Railroad parcel" contributed to the need to incur costs under CERCLA. Pet.App.-112a–13a.

2. District Court's Apportionment Holding

The district court reasoned that "[t]he burden to show an appropriate basis for apportionment is heavy,"

and that "[t]he evidence supporting divisibility must be concrete and specific." Pet.App.-249a, 237a. The court concluded, however, that the Railroads had satisfied that burden and shown a reasonable basis for apportionment under the Restatement guidelines. It held that "[t]his is a classic 'divisible in terms of degree' case, both as to the time period in which defendants' conduct occurred, and ownership existed, and as to the estimated maximum contribution of each party's activities that released hazardous substances that caused Site contamination." Pet.App.-239a.

The district court apportioned the harm by multiplying the percentage of the overall land that was owned by the Railroads (19.1%), the percentage of the 29 years of B&B's operations during which it leased land from the Railroads (45%), and the percentage of overall site contamination attributable to the two chemicals that meaningfully contaminated the Railroads' land (66%), for an initial allocation of 6%. Pet.App.-251a–52a. It reasoned that an allocation based on these reasonable assumptions was conservative, in the sense that, if anything, it overstated the Railroads' responsibility. "[I]t is indisputable that the overwhelming majority of hazardous substances were released from the B&B parcel," and "[r]elatively fewer activities that could result in releases were conducted on the Railroad parcel." Pet.App.-247a–48a. Indeed, "considerable evidence of the relative levels of activity and number of releases on the two parcels [indicated that] the Railroad parcel *could not have contributed to* more than 10% of the volume or mass of the overall site contamination resulting from B&B's hazardous substance-release producing activities." Pet.App.-252a

(emphasis added). Even allowing for "calculation errors up to 50%," there is "no theory of release of contaminants" under which the Railroads could be causally responsible "for more than 9%" of the overall harm. *Id.* The court therefore increased its initial 6% apportionment figure by half, assigning 9% of the total liability to the Railroads. *Id.* The court also held Shell liable for 6% of the total harm based on the percentage of leakages on the facility that involved Shell's products. B&B, although insolvent, was assigned 100% joint and several liability. Pet.App.-16a.

The district court concluded that "[t]he concept that a passive owner of a contiguous parcel, not representing more than 19% in area of a CERCLA site, operated less than 44% of the time, where substantially smaller volumes of hazardous substance releases occurred, should be strictly liable for the entire site remediation ... takes strict liability beyond any rational limit." Pet.App.-246a.

D. The Ninth Circuit's Opinions

The Ninth Circuit issued an opinion on March 16, 2007. It amended that opinion immaterially in September 2007, and then more substantially in March 2008, in response to a petition for rehearing *en banc*.

1. The September 2007 Opinion

The Ninth Circuit's initial opinion reversed the district court's apportionment and imposed joint and several liability on the Railroads and Shell.

The Ninth Circuit acknowledged a conflict over the appellate standard of review. The Fifth and Eighth Circuits review *de novo* "whether there is a reasonable basis for apportioning the harm," and then for clear error "precisely how damages are to be divided." Pet.App.-288a. The Sixth Circuit reviews the entire

inquiry as a question of fact. The Ninth Circuit purported to adopt the Fifth and Eighth Circuit standard, with the "refinement," suggested by a *dissenting* judge in one of the Fifth Circuit cases, that "whether the party with the burden of proof met that burden" is always a question of law reviewed *de novo*. Pet.App.-288a–89a.

The Ninth Circuit held that the apportionment principles outlined in §433A of the Restatement are a "poor fit" that require various modifications to comport with the "'super-strict' nature of CERCLA." Pet.App.-278a–79a. The court of appeals noted that the Restatement standard "works nicely" and is "relatively straightforward" when the "defendants are all polluters themselves," so long as the court "can estimate with some confidence the amount of waste that each defendant disposed of" and "has a basis for determining that the extent of contamination is proportional to" disposal. Pet.App.-281a. The panel repeatedly stated that a *landowner* can prove divisibility of harm, however, "only by demonstrating that portions of the contamination are in no respect traceable to the portion of the facility that the landowner owned at the time of disposal." Pet.App.-282a; *see also* Pet.App.-291a (same).

The panel held that apportionment in proportion to land area was a "'meat axe' approach," because B&B's usage of the Railroad parcel as a parking and storage lot may have had the "synergistic" effect of enabling B&B to purchase more chemicals and consequently process and spill a higher volume of contaminants *on its own land.* Pet.App.-294a, 293a. The court of appeals then (inconsistently) acknowledged that comparisons of "the amount of chemicals stored,

poured from one container to another, or spilled on each parcel" might have been "pertinent." Despite the district court's extensive findings about precisely those issues, however, the Ninth Circuit stated that "none of this data is in the record." Pet.App.-293a–94a. The Ninth Circuit faulted the Railroads for failing to produce, for example, "records that separate out, with any precision, the amount of toxic chemicals stored on one part of [the] facility"—while also acknowledging that such records "would have had little utility to B&B ... and none to the Railroads," and that "such information is, as a practical matter, not available for periods long in the past." Pet.App.-294a.

The court of appeals similarly overturned the district court's temporal apportionment, reasoning that it "assumes constant leakage on the facility as a whole or constant contamination traceable to the facility as a whole for each time period," and that "no evidence suggests that to be the case." Pet.App.-295a. Again, the panel ignored the district court's finding that B&B was more careless "[i]n the first twenty years of its operations," which indicates that an assumption of "constant contamination" is reasonable or even conservative. Pet.App.-130a Finally, the panel held that the district court committed a "factual error" in determining that any D-D contamination on the Railroad parcel was too "slight" to contribute to the groundwater contamination that required remediation. Pet.App.-295a, 251a. The panel wrote that there "is no evidence as to which chemicals spilled on the parcel" and "there *is* evidence that there may well have been leakage on the Railroad parcel of D-D." Pet.App.-295a.

In conclusion, the panel again acknowledged that a landlord often "will not be able to prove in any detail

the degree of contamination traceable to activities on its land," and that "[t]he net result of our approach to apportionment ... may be that landowner PRPs, who typically have the least involvement in generating the contamination, will be the least able to prove divisibility." Pet.App.-296a. The panel thought that outcome acceptable because CERCLA is "not ... concerned with allocation of fault" and because joint and several liability should be "the norm" in order "to assure, as far as possible, that *some* entity with connection to the contamination picks up the tab" rather than the taxpayers. *Id.* The panel expressly recognized that there is "something of a circuit split on the degree of specificity of proof" necessary for apportionment, because the Fifth Circuit has "permitted informal estimates or data rather than more exact calculations." Pet.App.-299a n.29. But it thought that conflict not outcome-determinative here because "the district court's extrapolations could not be upheld under even a forgiving standard." Pet.App.-300a.

The panel also held that Shell is strictly liable as an "arranger," and reversed the district court's apportionment analysis (for reasons similar to those deployed against the Railroads) to hold Shell jointly and severally liable. Pet.App.-300a–09a.

2. The Amended Opinion and Dissent from the Denial of Rehearing En Banc

The Railroads and Shell sought *en banc* review. In response, the panel amended its opinion to eliminate some of its obviously incorrect statements, but did not modify its basic reasoning or conclusions. *See* Pet.App.-3a–10a. For example, the panel removed all references to "super-strict liability" or the phrase

"perfect information," and added a footnote stating that, "if adequate information is available, divisibility may be established by 'volumetric, chronological, or other types of evidence.'" Pet.App.-3a–4a, 9a, 24a. But the Ninth Circuit retained all of the language and analysis rejecting the district court's reasonable basis for geographic and temporal apportionment, and maintained the requirement that landowners produce forms of documentary evidence that they have no reason to possess. Pet.App.-40a–41a.

Eight judges of the Ninth Circuit dissented from the denial of rehearing *en banc*, writing that the panel's apportionment reasoning "applies CERCLA in a novel and unprecedented way to impose impossible-to-satisfy burdens on CERCLA defendants." Pet.App.-57a. The dissenters concluded that the panel's discussion of the standard of review was "sleight of hand," and that its opinion "effectively ... disregard[s]" the Restatement test for apportionment. Pet.App.-65a, 59a. In apportioning liability for destroyed crops in proportion to the ownership of escaped cows, for example, "the Restatement, unlike the panel, does not require 'adequate records' of the harm caused by each animal; the farmer is not required to stand by his crop at all times and meticulously record each step taken by each animal, to trace the harm done back to the individual cattle owners." Pet.App.-69a–70a. "Indeed," the dissenters explained, "this is precisely what the 'reasonable basis' standard is designed to avoid ...." Pet.App.-69a. The dissenters cited both the Fifth and Eighth Circuits for the proposition that it is "reasonable to assume that each year of ownership caused an equal amount of contamination, even though the contamination may have been worse in some years

than in others." Pet.App.-73a (citing *Bell Petroleum*, 3 F.3d at 903–04); *United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir.), *cert. denied*, 534 U.S. 1065 (2001).

The dissenters also explained that "[t]he district court's findings of fact, which the panel does not find to be clearly erroneous, contradict the panel's appellate factfinding." Pet.App.-70a. For example, "the district court's assumption of constant contamination over the entire period not only provides a reasonable basis to apportion liability, but, if anything, *overestimates* the contamination attributable to the Railroad parcel" because of the district court's finding that B&B took steps to reduce contamination after leasing the Railroad parcel. Pet.App.-73a.

The dissenters concluded that "[i]f this evidence does not provide a 'reasonable estimate' for apportionment of liability, I do not see how—short of 'perfect information' sufficient to trace every molecule of pollution to the landlord's parcel—apportionment could ever be possible under CERCLA." Pet.App.-59a.

REASONS FOR GRANTING THE WRIT

As the eight dissenters from denial of rehearing *en banc* explained, the Ninth Circuit's opinion adopts proof requirements for apportionment of harm under CERCLA that are so onerous and unrealistic that liability will almost never be apportioned. The Ninth Circuit made no secret of its motivation: to ensure that CERCLA liability is essentially always joint and several, so that EPA and the States can always collect the "orphan" shares of any insolvent PRPs from private parties rather than spreading those costs across society as a whole. The Ninth Circuit also candidly admitted that its approach to apportionment

perversely punishes the least culpable PRPs while permitting others with more direct involvement in the contamination to escape joint and several liability if they keep detailed enough records.

The Ninth Circuit's demand for precise documentation, and its rejection of apportionment on the basis of reasonable assumptions, conflicts with the Restatement principles embraced by every other circuit, and particularly with the Fifth Circuit's decision in *Bell Petroleum*. Its belief that those Restatement principles must be distorted to ensure that government agencies never have to absorb "orphan" cleanup costs also conflicts with decisions of the Fifth and Eighth Circuits, and with all available evidence of Congress's intent. The Ninth Circuit's approach to appellate review conflicts with several other circuits by according essentially no deference to the district court's apportionment decision and factual findings. And, as explained in detail in the separate petition filed by Shell, its interpretation of "arranger" liability under CERCLA conflicts with other circuits.

Liability must be apportioned when reasonable assumptions can be used to approximate a defendant's contribution to the harm. Where, as here, a district court has carefully analyzed specific and concrete evidence, based its determination on reasonable assumptions, and calculated the maximum possible contribution of a PRP to the environmental harm, deference should be afforded to that apportionment decision.

This Court should grant this petition as well as the separate petition for certiorari filed by Shell, and consolidate both petitions for argument.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH GOVERNING COMMON LAW PRINCIPLES AND THE DECISIONS OF OTHER CIRCUITS

A. The Ninth Circuit's Proof Requirements Are Inconsistent With Restatement Principles

Congress chose to leave the question of how CERCLA costs would be divided or apportioned to the courts, applying evolving common law principles. Following the seminal decision in *Chem-Dyne*, every court to address these issues has agreed that the relevant principles are embodied in §433A of the Restatement. The decision in this case marks a dramatic departure from those principles, in the service of the Ninth Circuit's misguided and incorrect view of the policies underlying CERCLA.

The Ninth Circuit faulted the district court for relying on "simplistic" assumptions, including that the Railroads' responsibility for the overall contamination was roughly proportional to the size of their parcel and the time period it was leased. But the Restatement expressly contemplates reliance on "reasonable assumption[s]," such as the assumption that the damage done by escaped cows will be roughly proportional to their numbers (comment d). Individual cows certainly act differently, but those differences are not likely to matter in the aggregate and simply cannot be reconstructed from any form of evidence likely to be available. The Restatement also expressly endorses the reasonable assumptions that environmental damage to a polluted stream is roughly proportional to the volume of pollution discharged by each defendant

(comment d) or the length of time each operated a polluting plant (comment c).

The district court's assumptions here were at least as reasonable as the Restatement assumptions and supported by extensive findings. For example, the district court did not simply assume that contamination was evenly distributed. It found that "[r]elatively fewer activities that could result in releases were conducted on the Railroad parcel," and that "the predominant activities conducted on the Railroad parcel through the years were storage and some washing and rinsing" of equipment, whereas "[m]ixing, formulating, loading and unloading of ag-chemical hazardous substances, which contributed most of the liability causing releases, were primarily carried out by B&B on the B&B parcel." Pet.App.-247a–48a. Overall, "[t]he volume of the hazardous substance releasing activities on the B&B site is at least ten times greater than" on the Railroad parcel. Pet.App.-179a. The district court also carefully evaluated the expert evidence and determined that the "overwhelming contaminant mass is on and under the B&B parcel," Pet.App.-102a, and that no remediation is necessary at this time on the Railroad parcel, Pet.App.-101a–02a, 112a–13a. Against that backdrop, the district court's assumption that the Railroads' causal share of the harm was proportionate to parcel size was not just reasonable but plainly conservative. The district court made similar findings supporting its division on the basis of time, and its conclusion that the Railroads are

causally responsible for contamination associated with only two of the three chemicals spilled at the facility.[3]

The Ninth Circuit held that CERCLA apportionment requires specific "records that separate out," with "precision," the volume of toxic chemicals stored or spilled on each parcel. The Restatement does not require either "records" or "precision," but contemplates rough apportionment based on reasonable *assumptions*. *See* W. Page Keeton et al., *Prosser & Keeton on The Law of Torts* §52, at 345 (5th ed. 1984) (apportionment requires only "a factual basis ... for some rough practical apportionment").

The Ninth Circuit recognized that the documentation it required will never, "as a practical matter, [be] available for periods long in the past," and that keeping such records "would have had little utility to B&B, the operator of the facility, and none to the Railroads." Pet.App.-41a. The court's requirement of "precis[e]" documentation therefore makes the apportionment contemplated by the Restatement impossible, at least for landlords. As the Ninth Circuit candidly conceded, "[t]he net result of our approach to the apportionment of liability, consequently, may be that landowner PRPs, who typically have the least direct involvement in generating the contamination,

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[3] The Ninth Circuit held that the district court committed a "factual error" by holding the Railroads responsible for only two of the three chemicals, because "there *is* evidence that there may well have been leakage on the Railroad parcel of D-D." Pet.App.-42a. That is a non-sequitur. The district court found that any such leakage was so "slight" and incidental that it could not have reached groundwater or contributed causally to the contamination—particularly in light of the chemical properties of that substance. *Supra*, at 10–11.

will be the least able to prove divisibility." Pet.App.-43a.

EPA's broad discretion to define the boundaries of the "facility" aggravates these problems. By virtue of leasing a small adjoining parcel to B&B, the Railroads were held jointly and severally liable here for contamination *not even occurring on their land*, that the Railroads had no realistic ability to monitor or document, let alone prevent. B&B's activities also occurred in large part before CERCLA was even passed.[4] Congress intended for courts to develop sensible apportionment principles grounded in the common law. Requiring documentation that landowners could not have kept, and had no reason to keep, is inconsistent with the Restatement and completely disregards Congress's wishes.

The Ninth Circuit grounded its rigid insistence on precision and unavailable documentation on a slanted conception of the policy considerations informing CERCLA apportionment. The Ninth Circuit's opinion repeatedly emphasized its belief that joint and several liability must be the norm under CERCLA, and apportionment the rare exception, because the government should not be left "holding the bag for a great deal of money" if one PRP is insolvent. *See*

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[4] Because CERCLA has been interpreted to apply retroactively, PRPs have been held liable for chemical spills that occurred a century ago. *See Continental Title Co. v. Peoples Gas Light & Coke Co.*, 959 F. Supp. 893, 894 (N.D. Ill. 1997) (applying CERCLA retroactively for the disposal of hazardous substances that occurred at a gas plant between 1894 and 1930). Applying the Ninth Circuit's onerous burden of proof in cases where liability is retroactive raises serious questions about CERCLA's fundamental fairness, akin to those underlying this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

Pet.App.-11a. The Ninth Circuit's standard reflects a strong bias in favor of joint and several liability that departs dramatically from both CERCLA and the Restatement. The court reasoned that any "perceived unfairness" to individual PRPs is a result of the statute's strict liability nature, and that CERCLA seeks first and foremost to assure that cleanup costs fall on "those with *some* connection to the contamination," as opposed to "those with *none*, such as the taxpayers." Pet.App.-33a. "Any court-created structure that would allow PRPs to whittle their share to little or nothing and leave the taxpayers holding the bag," the Ninth Circuit held, "may seem more equitable to some PRPs but would violate the basic structure of the CERCLA statutory scheme." Pet.App.-33a–34a.

The Ninth Circuit's freelance policymaking draws no support from the statute. Congress intentionally chose *not* to mandate joint and several liability under CERCLA, because doing so would "impose financial responsibility for massive costs and damages awards on persons who contributed minimally (if at all) to a release or injury." *See* 126 Cong. Rec. 30972 (1980). Congress chose to leave apportionment of harm to common law principles, rather than to enshrine any overarching policy that protecting the public fisc is more important than fairness to PRPs. It also created the Superfund to cover cleanup costs when the responsible party is missing or insolvent. And the Ninth Circuit's suggestion that the societal burden of cleaning up pollution caused by now-insolvent parties should be borne by private entities who happened to be

in the vicinity of the pollution, rather than by the taxpayers generally, is highly dubious public policy.[5]

The Ninth Circuit also suggested that geographic apportionment was a "'meat-axe' approach" because it assumed that the availability of extra parking and storage space on the Railroad parcel had the "synergistic" effect of enabling B&B to do a higher volume of business, and hence spill more on its own land. Pet.App.-41a, 40a. That reasoning would preclude geographic apportionment in nearly every case, and is inconsistent with the basic premises of landowner liability under CERCLA. The statute imposes strict liability on passive landowners for disposals of hazardous substances on their land—not for disposals of hazardous substances *elsewhere* that were somehow enabled by activities on that land. In *General Electric Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 287–88 (2d Cir. 1992), for example, the Second Circuit explained that the lessor of a service station is not liable for damage caused by his lessee's

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[5] The Ninth Circuit justified that preference by suggesting that PRPs with "some connection" to the contamination probably benefited from it. But the premise of apportionment is that a reasonable basis exists for separating the harm that each PRP is causally responsible for. CERCLA makes the Railroads strictly liable as landowners for any disposals on their own land, but there is no basis in fairness or public policy for holding them responsible for the harm caused by the entirely separate chemical spills *on B&B's land*—or for assuming that the Railroads benefited economically in some way from those spills. And joint and several liability for harms that are beyond a defendant's causal control can actually *decrease* his incentives to make efficient investments in preventing harm. *See, e.g.*, Richard A. Epstein, *Two Fallacies In The Law Of Joint Torts*, 73 Geo. L.J. 1377, 1385–86 (1985); William A. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. Leg. Stud. 517, 543 (1980).

disposal of hazardous substances generated at the leased premises but disposed of elsewhere. Even if a landlord "had the opportunity or ability to control [its lessee's] waste disposal practices" off the leased property, it has no obligation to do so. *Id.* at 286.

B. The Ninth Circuit's Reasoning Conflicts With Decisions Of Other Circuits

The Ninth Circuit's decision conflicts with decisions of other circuits apportioning liability under CERCLA, and apportioning damages under common law principles in other contexts. Indeed, the Ninth Circuit directly acknowledged a circuit split on the "degree of specificity of proof necessary to establish" a reasonable basis for apportionment. Pet.App.-46a n.32. The Ninth Circuit's suggestion that the circuit split is irrelevant to this case is plainly incorrect. The district court's careful apportionment would have been upheld under the standards applied in at least the Fifth Circuit, and likely other courts as well.

In *Bell Petroleum*, three CERCLA defendants successively operated a chrome-plating shop. The district court held that "there was no method of dividing the liability among the defendants which would rise to any level above mere speculation," in part because "each of the proposed apportionment methods involved a significant assumption factor, inasmuch as records had been lost." 3 F.3d at 894. The Fifth Circuit reversed. After surveying the purposes of CERCLA, the Restatement, and the apportionment case law, the Fifth Circuit held that "[i]f 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." *Id.* at 903. The court of appeals held that even though "the records of these activities were not complete," and in some cases had been "destroyed," there was "testimony from various witnesses regarding the rinsing and wastewater disposal practices of each defendant, and the amount of chrome-plating activity conducted by each." *Id.* at 903–04 & n.18.

The Fifth Circuit also permitted "significant assumption factors," so long as "those assumptions are well founded and reasonable, and not inconsistent with the facts as established." *Id.* at 904. And it held that precision in the allocation of responsibility is not required. The defendants need not show with "absolute certainty the exact amount of chromium each defendant introduced into the groundwater," so long as there is "sufficient evidence from which a *reasonable and rational approximation* of each defendant's individual contribution to the contamination can be made." *Id.* at 903 (emphasis added). "[E]vidence sufficient to permit a *rough approximation* is all that is required under the Restatement." *Id.* at 904 n.19 (emphasis added).

The Fifth Circuit also articulated an understanding of the policies underlying CERCLA apportionment that is directly contrary to the Ninth Circuit's view in this case. The Fifth Circuit explained in *Bell* that Congress recognized that CERCLA "can be terribly unfair in certain instances in which parties may be required to pay huge amounts for damages to which their acts did not contribute," and "left it to the courts to fashion some rules that will, in appropriate instances, ameliorate this harshness." *Id.* at 897. The

Fifth Circuit expressly rejected any suggestion that the insolvency of a defendant could be relevant to the apportionment analysis, "especially when the plaintiff is the government," because "the deck of legal cards is heavily stacked in favor of the government" already. *Id.* at 901 n.13.

If this case had arisen in the Fifth Circuit, the district court's careful apportionment analysis would have been affirmed. The Fifth Circuit in *Bell* specifically rejected the suggestion, central to the Ninth Circuit's analysis here, that apportionment requires contemporaneous written records showing the defendants' respective activities with great specificity. It also held that "testimony and other evidence establish[ing] a factual basis for making a reasonable estimate," *id.* at 903, "reasonable and rational approximation," or "rough approximation," is enough. The Fifth Circuit specifically endorsed reliance on reasonable assumptions, and the assumptions it approved were, if anything, less well supported than those the district court employed here.[6] And it rejected any proof requirements that "would be the equivalent of a mandate of joint and several liability in all CERCLA cases," *id.* at 904 n.19, like the requirements adopted by the Ninth Circuit here.

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[6] As explained by the dissent in *Bell Petroleum*, the Fifth Circuit held that the evidence permitted a reasonable apportionment, even though (1) a PRP's expert assumed that the electrical usage for its plating operations was 30% of its electrical usage, but 50% of the electrical usages for two other PRPs, (2) only "scattered invoices" were available to demonstrate sales records, (3) expense records were available only for one 3-month period out of the 6-year period during which defendants operated, and (4) a PRP's expert assumed that there was no waste disposal after a catch tank was installed at the site. 3 F.3d at 911.

The Ninth Circuit's decision also rejects both geographic and temporal divisibility even though other courts have endorsed both approaches. *Compare, e.g., United States v. Township of Brighton*, 153 F.3d 307, 320 (6th Cir. 1998) ("[T]ime seems the most obvious and probable way that an operator can show divisibility."); *United States v. Hercules, Inc.*, 247 F.3d 706, 719 (8th Cir. 2001) ("A defendant need not prove that its 'waste did not, or could not, contribute' to any of the harm at a CERCLA site ... because it is also possible to prove divisibility of single harms based on volumetric, chronological, or other types of evidence.")

The Eighth Circuit has also embraced a view of the general policies underlying apportionment that is consistent with the Fifth Circuit's opinion in *Bell*, and inconsistent with the Ninth Circuit's decision in this case. The Eighth Circuit held in *Hercules* that apportionment is "both compatible with the text and the overall statutory scheme of CERCLA and a sensible way to avoid imposing on parties excessive liability for harm that is not fairly attributable to them." 247 F.3d at 716–17. Like the Fifth Circuit, it also "reject[ed] any suggestion that the financial condition of the parties should play a role in a CERCLA divisibility analysis." *Id.* at 718 n.10.

The Ninth Circuit's decision is also clearly inconsistent with decisions of other circuits apportioning harms under common law principles in other contexts. In *Sauer v. Burlington Northern Railroad Co.*, 106 F.3d 1490, 1494 (10th Cir. 1996), for example, the Tenth Circuit permitted apportionment under the Federal Employers' Liability Act between a pre-existing injury and aggravation of that injury resulting from negligence, and held that "[t]he extent

to which an injury is attributable to a preexisting condition or prior accident need not be proved with mathematical precision or great exactitude." And the Fourth Circuit held that apportionment was appropriate in a suit for mismanagement of loans against former officers of a federally insured bank, so long as "'a factual basis can be found for some *rough practical apportionment*.'" *Fed. Sav. & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 136 (4th Cir. 1987) (emphasis added) (citing Restatement §433A cmt. d).

C. The Circuits are Further Divided on The Appellate Standard of Review

The Ninth Circuit's decision also deepens an acknowledged circuit split over the standard of appellate review in CERCLA apportionment cases.

The Fifth and Eighth circuits first review *de novo* whether there is a reasonable basis for apportioning harm, and then examine the district court's allocation as a question of fact, reviewed under the clearly erroneous standard. *See Hercules*, 247 F.3d at 718–19; *Bell Petroleum*, 3 F.3d at 896, 902. The Sixth Circuit reviews for clear error the district court's finding of a "'reasonable basis for determining the contribution of each cause to a single harm.'" *Township of Brighton*, 153 F.3d at 318 (citation omitted).

The Ninth Circuit purported to adopt the Fifth and Eighth Circuit standard, with "a refinement suggested by Judge Parker's dissent in *Bell Petroleum*." Pet.App.-35a. But as the dissent from denial of rehearing *en banc* explained, in practice the Ninth Circuit's standard of review appears to involve "sleight of hand." Pet.App.-65a. The Ninth Circuit held that as a legal matter the harm in this case was capable of

apportionment, and it largely agreed with the district court's fact-finding. *See* Pet.App.-38a ("[W]e do not fault the district court's factfinding—its numbers are mostly correct ...."). With only one exception (and that one an error, *supra* n.3) the Ninth Circuit did not hold that any of the district court's careful findings were clearly erroneous. Instead it essentially held that the district court erred as a matter of law by apportioning liability based on "the simplest of considerations," without refuting (or, for the most part, even acknowledging) the district court's findings that made those "simple" considerations a reasonable basis for apportionment on the facts presented here. *Id.*

Petitioners submit that the Sixth Circuit's deferential standard of review is more appropriate, because whether a factual basis exists for a rough practical approximation is an extremely fact-intensive question. The Sixth Circuit's standard is also consistent with the Third Restatement's view that "[w]hether damages are divisible is a question of fact" and "[t]he magnitude of each divisible part is also a question of fact." Restatement (Third) of Torts: Appropriation of Liability §26 cmt. h (2000); *see also United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) ("As other courts have noted, apportionment itself is an intensely factual determination."). As the dissenters from denial of rehearing *en banc* correctly recognized, a reviewing court giving appropriate deference to the district court's factual findings in this case would have affirmed its apportionment decision.

II. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE THAT REQUIRE GUIDANCE FROM THIS COURT

Although Congress deliberately left all questions involving the division or apportionment of response costs under CERCLA to common law development, this Court has never provided guidance to the lower courts on these crucial issues. The need for national uniformity in the rules governing the apportionment of CERCLA liability has been recognized by every court to address the issue, including the Ninth Circuit. *See, e.g., Chem-Dyne Corp.*, 572 F. Supp. at 802, 809 ("The improper disposal or release of hazardous substances is an enormous and complex problem of national magnitude .... Federal programs that by their nature are and must be uniform in character throughout the nation necessitate the formulation of federal rules of decision."); Pet.App.-22a–23a. And the Ninth Circuit's decision is clearly irreconcilable with (at least) the standards prevailing in the Fifth Circuit.

The appropriate standards for apportionment of liability under CERCLA is also a question of great national importance due to the large number of Superfund sites and the extraordinary expenses of remediation. According to the United States General Accounting Office ("GAO"), "[t]he effort to clean up federal hazardous waste sites is likely to be among the costliest public works projects ever attempted by the government."[7] In 1997, the GAO estimated that

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[7] GAO, *Federal Facilities: Agencies Slow to Define the Scope and Cost of Hazardous Waste Site Cleanups, Report to the Subcomm. on Investigations and Oversight, Comm. on Public*

cleaning up Superfund sites "could amount to over $300 billion in federal costs and many billions more in private expenditures."[8] Some "peg ultimate cleanup costs as high as $1 trillion."[9] "One commentator has described the resolution of insurance coverage for clean-up costs under CERCLA as 'a trillion-dollar question.'"[10] Jill E. Fisch, *Captive Courts: The Destruction of Judicial Decisions by Agreement of the Parties*, 2 N.Y.U. Envtl. L.J. 191, 206 (1993) (citing Roger Parloff, *Rigging The Common Law*, Am. Lawyer 74, 76 (Mar. 1992)).

There are currently 1,255 final sites on the EPA's National Priorities List ("NPL").[11] *See* 42 U.S.C. §9605(a)(8)(B). The Ninth Circuit contains 205.[12] EPA may also bring CERCLA claims against PRPs for the remediation of sites not on the list. The EPA's database lists over 10,000 active non-NPL sites, 1,737

Works and Transp. 7 (Apr. 1994), *available at* http://archive.gao.gov/t2pbat3/151689.pdf.

[8] GAO, *Superfund Program Management*, at 6 (Feb. 1997), *available at* http://www.gao.gov/archive/1997/hr97014.pdf.

[9] GAO, *Consolidating and Restructuring the Executive Branch: Hearing Before the Subcomm. on Gov't Mgmt., Info., & Tech. of the* Comm. *on Gov't Reform and Oversight, 104th Cong.* 55 (1995) (statement of Jerry Taylor, Director of Nat'l Res. Studies, Cato Institute).

[10] The A.M. Best Company and the American Society of Actuaries insurance reported that "total estimated Superfund and environmental cleanup costs (including transaction fees) estimate liabilities at over $1 trillion." Donald Sutherland, *Superfund Awakes in State Supreme Courts*, RiskWorld, (Dec. 5, 1997), *available at* http://www.riskworld.com/news/97q4/nw7aa055.htm.

[11] EPA, NPL Site Totals by Status and Milestone, http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm.

[12] EPA, Superfund Site Information, http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm.

of which are located in the Ninth Circuit.[13] The Ninth Circuit's erroneous and unfair apportionment standard has the potential to impose unwarranted joint and several liability on thousands of PRPs who are actually responsible for only a limited amount of contamination.

CERCLA clean-up costs *on average* exceed $30 million for a site on the NPL, and can be far higher. *N. States Power Co. v. Fidelity & Cas. Co. of N.Y.*, 523 N.W.2d 657, 660 (Minn. 1994). In one case, the Third Circuit noted that remediation of chemical leakage at a rail yard site would likely exceed $53 million. *United States v. Se. Pa. Transp. Auth.*, 235 F. 3d 817, 824 (3d Cir. 2000). Remediation at the Helen Kramer Landfill Superfund Site in New Jersey cost $123 million. *United States v. Kramer*, 19 F. Supp. 2d 273, 276, 287 (D.N.J. 1998). Ohio's Fields Brook Site could cost $100 million. *United States v. Gencorp, Inc.*, 93 F. Supp. 928, 930 n.5 (N.D. Ohio 1996). Although CERCLA cases are often settled through negotiated consent decrees, 42 U.S.C. §9622, the ability to impose joint and several liability on minor parties will affect the value of those settlements and will likely force many PRPs to accept inequitable settlements.

Despite the importance of this issue, this Court has never addressed the standard for CERCLA apportionment in any context. Although this Court has resolved questions regarding *contribution* under 42 U.S.C. §9613(f), *see Atl. Research*, 127 S. Ct. at 2333; *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004), contribution is entirely distinct from apportionment. Contribution allows CERCLA

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[13] EPA, Superfund Site Information, http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm.

defendants to be reimbursed by other *solvent* PRPs based on each party's equitable share of the total damages, and it occurs after joint and several liability has been imposed. Contribution "is not a complete panacea since it frequently will be difficult for defendants to locate a sufficient number of additional, solvent parties." *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989). "Orphan shares" of responsibility attributable to absent or insolvent parties are a common occurrence at CERCLA sites.[14] Moreover, contribution is unavailable against defendants who have resolved their liability against the United States or another state. 42 U.S.C. §9613(f).

This Court should grant review to establish sensible and uniform rules for the apportionment of the (conservatively) hundreds of billions of dollars of cleanup liability imposed by CERCLA.

CONCLUSION

This Court should grant this petition as well as the separate petition for certiorari filed by Shell, and consolidate both petitions for argument.

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[14] In a 1993 EPA study of 78 sites, 52 sites (67 percent) had an orphan share, and the average size of the orphan share was 26.9 percent. Ridgeway M. Hall, Jr. et al., *Superfund Response Cost Allocations: The Law, the Science and the Practice*, 49 Bus. Law. 1489, 1503 n.74 (1994). The EPA has itself said that "[a]t almost every Superfund site, some parties responsible for contamination cannot be found, have gone out of business, or are no longer financially able to continue cleanup efforts." EPA, Superfund Enforcement: Success in Enhancing Fairness and Expediting Settlements, *available at* http://www.epa.gov/superfund/accomp/17yrrept/report3.htm.

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