No. 07-1607

IN THE

Supreme Court of the United States

SHELL OIL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA; 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

PETITIONER'S REPLY BRIEF

CISSELON NICHOLS HURD
SHELL OIL COMPANY
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002
(713) 241-0979

MICHAEL K. JOHNSON
LEWIS BRISBOIS BISGAARD & SMITH, LLP
One Sansome Street
14th Floor
San Francisco, CA 94104
(415) 362-2580

KATHLEEN M. SULLIVAN
Counsel of Record
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
51 Madison Avenue
22d Floor
New York, NY 10010
(212) 849-7000

Counsel for Petitioner

September 10, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

No. 07-1607

SHELL OIL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA; 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

PETITIONER'S REPLY BRIEF

ARGUMENT

1. The opposition nowhere disputes the importance of national uniformity in the interpretation of liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), nor the importance of the questions presented to a number of vital American industries. The petitions in this case and in the related case No. 07-1601 have attracted an extraordinary outpouring of amicus support in five amicus briefs from ten parties that in turn represent hundreds of corporations in the chemical, refining, railroad and other sectors of the economy.

As pointed out in the amicus briefs filed by the Chamber of Commerce of the United States, the Product Liability Advisory Council, the International Association of Defense Counsel, and the Civil Justice Association of California, the decision below dramatically expands CERCLA "arranger" liability, which the lower courts have struggled to define for nearly thirty years without the benefit of this Court's guidance, and which the decision below throws into disarray. And as explicated in the amicus brief of the Association of American Railroads, the decision below dramatically increases the likelihood of joint and several liability under CERCLA, contrary both to congressional intent and the principles of apportionment long settled at common law.

The combined effect of the two holdings below is to expose parties with only the most attenuated connection to site contamination to new potential obligations to bear the entire costs of site cleanup under CERCLA. In the words of the Chamber amicus brief, joined by the American Chemistry Council, American Petroleum Institute, Croplife America, National Association of Manufacturers and National Petrochemical and Refiners Association, "[f]or suppliers of chemical and other products, the decision below increases the risk of future CERCLA liability that could be substantial, even crippling." Chamber Amicus Br. at 19. The effect of the decision below on national commerce is amplified by the size and importance of affected industries and shipments in the geographically extensive Ninth Circuit. *See* PLAC Amicus Br. at 17-18.

2. In the petition, Shell demonstrated that the Ninth Circuit's decision below with respect to arranger liability conflicts with decisions from five

other circuits. Prior to the decision below, the courts of appeals addressing the issue had uniformly held that arranger liability may not be imposed upon the sale of useful products where a manufacturer did not have ownership or control over any waste at the time of disposal or intentionally arrange for its disposal by a third party. *See Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 162, 164 (2d Cir. 1999); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 775 (4th Cir. 1998); *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993); *AM Int'l, Inc. v. Int'l Forging Equip. Corp.*, 982 F.2d 989, 992, 999 (6th Cir. 1993); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317, 1319 (11th Cir. 1990).

While stretching to find each of these decisions factually distinguishable, Respondent notably fails to cite a single example of a prior decision finding arranger liability in the absence of intent, ownership, or control. Nor does Respondent cite a single example of a prior decision finding a chemical manufacturer liable as an arranger for shipping a useful product, by common carrier, to a purchaser who handled that product in a sloppy manner after acquiring ownership.

Unable to find any decision factually akin to the decision below, Respondent nonetheless seeks to diffuse any circuit split it creates or exacerbates by suggesting that arranger liability requires fact-intensive inquiry into "all the circumstances" of an arrangement for sale or disposal, and that the decision below is somehow on a continuum with prior decisions because Shell understates its "involvement" and "knowledge" in connection with common carrier deliveries to Brown & Bryant ("B&B") at the Arvin

site. Opp. 14-15. In so doing, Respondent mischaracterizes both prior case law in other circuits and the factual record here.

To begin with, Respondent's own characterization of Shell's supposed activity here illustrates by its choice of terms the Ninth Circuit's departure from prior case law: "involvement" is not ownership and "knowledge" is not intent. Thus, even if Respondent were correct about the factual record, the circuit split created or deepened by the decision below is undeniable.

Moreover, contrary to Respondent's suggestion, prior cases had indeed established certain bright-line rules for determining arranger liability. Manufacturers of useful products could use common carriers to deliver those products without fear of being held responsible for a purchaser's conduct after transfer of ownership. Sales of waste could not escape arranger liability merely because processed in such a way as to produce some marginally useful side benefit, as in cases like *Cadillac Fairview/California Inc. v. United States*, 41 F.3d 562, 565-66 (9th Cir. 1994) (cited at Opp. 14-15). Such exceptions, however, do nothing to diminish the brightness of the line that, until now, immunized from arranger liability bona fide sales of useful products that are shipped FOB destination by common carrier so as to effect the transfer of ownership and title to the purchaser upon arrival. The sales here, anywhere outside the Ninth Circuit, would plainly fall on the non-arranger side of that line.

Respondent's characterization of the factual record, in any event, is not correct, further undermining its attempt to dispel the clear and obvious circuit conflict here through purported factual distinctions.

First, Respondent misleadingly emphasizes that, in 1986, B&B and Shell entered into an agreement that provided a monetary deduction based on "shrinkage." Opp. 16, 18. But contrary to Respondent's intimations, this "shrinkage" allowance, while called by various names, was never a "spillage" allowance, nor did the district court ever find as much. Far from showing that Shell anticipated there would be *spills* during the unloading of its product by B&B, the evidence at trial, according to the district court's findings, was that "the various names given a 'sales allowance' were simply euphemisms for a discount to protect the list price of a product, and that whatever the name of the allowance, whether *'evaporation* allowance, promotional allowance, or competition allowance,' the purpose was to give a price discount to meet competition." Pet. App. 119a-120a (emphasis added). Such a device for offering price competition is wholly consistent with Shell's sale of its useful product to its customers. And there was no evidence that Shell ever afforded its customer a monetary allowance for *spilled* products.

Second, contrary to Respondent's assertion (Opp. 16), even if Shell had knowledge of some small spills during B&B's unloading, it does not follow that Shell had knowledge of *disposals* within the meaning of CERCLA. The useful product at issue here, a soil fumigant called D-D, is a volatile chemical that normally vaporizes when it is applied in the soil. Drips and small spills of D-D alone do not necessarily cause contamination. The EPA's own remedial investigation found no contamination at the tank area where the unloading occurred. The evidence showed that the contamination at the Arvin site occurred as a result of B&B's use of an unlined sump

to collect rinse-water and not because of the spillage of small quantities of D-D while B&B unloaded deliveries and transferred the chemical from the common carrier tank trucks into B&B's bulk storage tanks. And even if knowledge were sufficient to support arranger liability, the government agencies have never contended that Shell had any knowledge that B&B was rinsing the D-D into the unlined sump.

Third, contrary to the government's strained interpretation (Opp. 17-18) of *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746 (Posner, J.), that case is factually indistinguishable from this one, and thus the circuit split between the two cannot be reconciled. In *Amcast*, the Seventh Circuit held that the manufacturer did not constitute an arranger to the extent that it, like Shell here, used a common-carrier truck to ship the chemicals, but that it was liable for spillage as part of the delivery process to the extent that it used its own trucks. If, as Respondent contends, arranger liability may turn on mere knowledge of foreseeable consequences, then the manufacturer in *Amcast* had significantly more basis for knowledge of actual spillage than Shell did here, for most of the spills at the facility in the case occurred at the hands of its own employees. The Seventh Circuit's decision that the manufacturer was not liable as an arranger when it shipped chemicals by common carrier therefore is directly contrary to the decision below.

Fourth, Respondent cites Shell's instruction manual and other efforts to promote the safe handling of its useful product as further evidence of its supposed facilitation of and involvement with the deliveries. Opp. 7, 16. Under Respondent's logic, the more responsible Shell is in seeking to promote the appro-

priate use of its product—including by furnishing product safety information required by law—the greater the CERCLA arranger liability it would face. Such a perverse result would create a moral hazard that is inconsistent with the purposes of CERCLA. *See, e.g., Jordan v. Southern Wood Piedmont Co.*, 805 F. Supp. 1575, 1580 (S.D. Ga. 1992) ("[T]he imposition of liability upon a manufacturer on account of its dissemination of safety-related information is anathematic, even to the broad and salutary remedial purposes of CERCLA."); *id.* (ruling that imposing CERCLA liability for a manufacturer's statements that were intended "to ensure that chemicals it manufactured were properly handled and [were] not [an] attemp[t] to arrange for or control their disposal . . . would discourage chemical manufacturers from offering expertise to those experiencing problems and thereby increase the risk of future hazardous waste incidents. Such a result is decidedly contrary to the intent of CERCLA."); *R.R. Street & Co. Inc. v. Pilgrim Enterprises, Inc.*, 166 S.W.3d 232, 246 (Tex. 2005) (noting the "valid concerns that imposing arranger liability on chemical manufacturers and suppliers for providing technical services and advice will have the adverse effect of discouraging these companies from providing valuable advice to customers regarding the safe use and handling of their products"). No precedent cited by Respondent establishes that such instructions are anything other than ordinary—and salutary—aspects of a sale of a useful product.

Finally, the government's purported distinction between disposals occurring before and after the use of a useful product (Opp. 18) is baseless. There has never been any requirement that the useful product rule applies only after the product has served its

useful purpose. So long as a useful product is sold as such, the rule protects the seller, regardless of whether the purchaser actually uses the product for its intended purpose. Nor does Respondent's invented temporal distinction help to align this case, in which the government seeks to impose CERCLA arranger liability on a seller who transferred ownership of the product, with those cases where a manufacturer uses a formulator whose processes create a hazardous waste. In such formulator cases, like *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989) (cited at Opp. 15, 17), the manufacturer maintained its ownership and control over the chemicals throughout the process, whereas in this and other sale-of-useful-product cases, the seller relinquishes ownership and control according to the terms of the parties' agreement. Here, all sales were "FOB Destination," and B&B was contractually obligated to safely unload the product into B&B's bulk tanks. B&B thus had title, ownership, and full control over the product upon its arrival at B&B's facility, prior to any contamination, and any "disposal" that occurred as the result of small spills or drips during unloading was solely the responsibility of B&B—regardless of whether or when the product was ultimately put to use.

3. Respondent does not deny that the circuits are divided as to the specificity of proof required to show the reasonableness of apportionment of liability among CERCLA parties. Opp. 19. Rather, it contends that the decision below does not present that conflict because of the Ninth Circuit's suggestion that the district court's basis for apportionment would have failed even under the "more forgiving standard" set forth by the Fifth Circuit in *In Re Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993). Opp. 23.

If the district court's lengthy, meticulous findings involving concededly permissible volumetric, temporal and geographic comparisons are insufficient under a forgiving standard, however, it is difficult to see what such findings would suffice. For the reasons set forth in detail in Petitioners' Reply Brief in No. 07-1601, Respondent's attempt to dispel this circuit conflict is unavailing.

Respondent next suggests that the district court findings were inadequately based on evidence presented by the parties. Opp. 20, 21-22. To the contrary, however, the district court's findings were amply grounded in expert testimony and other evidence that Shell presented. Shell's effort to establish that its share of responsibility for contamination was properly zero does not undermine the district court's reliance on that same evidence in order to establish that liability was divisible and Shell's share was 6%. The district court's factual findings are all fully supported by the evidence that was presented at trial. The district court expressly found that the defendants did not waive the issue of apportionment, and that finding was unchallenged by the United States before the court of appeals.

In any event, Respondent is incorrect to suggest that Shell failed to present *evidence* supporting a reasonable basis for divisibility. The district court complained that the parties, including the government, had failed to adduce *argument* concerning how to divide responsibility short of the two sides' competing poles of zero and one hundred per cent, but never denied that *evidence* supporting such analysis had been presented. *See* Pet. App. 239a (noting that "all parties [had] effectively abdicated providing any helpful *arguments* to the court" on

apportionment) (emphasis added). Thus, the Ninth Circuit incorrectly substituted its judgment for the district court's in rejecting 191 pages of detailed findings in order to impose joint and several liability on the defendants.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

CISSELON NICHOLS HURD
SHELL OIL COMPANY
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002
(713) 241-0979

MICHAEL K. JOHNSON
LEWIS BRISBOIS BISGAARD
& SMITH, LLP
One Sansome Street
14th Floor
San Francisco, CA 94104
(415) 362-2580

KATHLEEN M. SULLIVAN
Counsel of Record
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
51 Madison Avenue
22d Floor
New York, NY 10010
(212) 849-7000

Counsel for Petitioner

September 10, 2008