No. 07-1601, 07-1607

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.

SHELL OIL COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On 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. AAR filed a brief in this case in support of the petition for certiorari.

This is a case of great concern to the proper administration of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. This is true both generally and as it particularly affects the railroad industry. For historical reasons, the Nation's railroads are exposed to substantial potential liability under this regime. Many of them possess large land holdings with unbroken fee title stretching back a century or more, which they hold as passive landowners, and which lessees and adjacent owners have polluted.

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[1] Pursuant to Supreme Court Rule 37.6, 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. The parties have consented to the filing of this brief and letters reflecting their consent have been filed with the Clerk of Court.

The decision below threatens to impose untold liability on passive landowners, like these railroads, that Congress neither foresaw nor intended. Perversely, the decision below will make apportionment easier to obtain for truly culpable polluters, but leave passive landowners jointly and severally liable for cleanup costs for contamination in which they played no part and that did not even occur on their own land. The AAR submits this brief to explain why nothing in the law requires this bizarre result.

INTRODUCTION

As petitioners have thoroughly explained, the decision below radically departs from basic common-law principles that CERCLA did not displace. AAR submits this brief to supplement that submission with regard to two related issues that are fundamental to the error in the decision below.

First, the decision below represents a marked departure from basic principles of liability apportionment. CERCLA incorporates common-law principles in areas like this one 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. Indeed, the Restatements 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 applied this accepted rule. 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 correct.

Second, not only is the Ninth Circuit's heavy bias against apportionment insupportable, it would have extraordinary and untoward practical repercussions for landowners who have done everything that could reasonably be expected of them. For while Congress plainly intended CERCLA to place burdens on certain classes of defendants, these burdens are not without limits. For instance, CERCLA combines a strict liability regime with a modified causation standard and retroactive liability – factors which, taken together, can result in massive cleanup costs. CERCLA thus 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); see also *id.* (CERCLA often imposes "liability … for conduct predating the enactment of CERCLA, … even for conduct that was not illegal, unethical, or immoral at the time it occurred").

But the burdens imposed by the statute were not meant to be unlimited, and the Ninth Circuit erred in concluding that Congress intended such a result. There is no textual basis for concluding that CERCLA's already extreme exposure to liability should be multiplied by raising the bar for apportionment so high that joint and several liability for landowners is a near certainty. In no way does "the basic structure of the CERCLA statutory scheme" require that landowners bear these costs in full. *United States* v. *Burlington N. & Santa Fe Ry.*, 520 F.3d 918, 941 (9th Cir. 2008). The Ninth Circuit reached its conclusion only by mistakenly departing from basic common-law

rules, mistakenly inferring a supposed legislative purpose that landowners rather than taxpayers *always* should bear cleanup costs, and imposing evidentiary burdens that are unmeetable and have no statutory basis. This Court should reject the bald inequity embraced by the decision below, which does violence to the common-law principles that inform a proper reading of the statute.

ARGUMENT

I. COMMON-LAW PRINCIPLES FAVOR APPORTIONMENT IN CASES LIKE THESE.

A. CERCLA is silent on the proper method for apportioning damages among defendants, and so the lower courts have relied on "traditional and evolving common law principles," especially as reflected in the Restatements of Torts. 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).[2] This approach derives from the basic rule that "in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States* v. *Bestfoods*, 524 U.S. 51, 63 (1998) (internal quotation marks and alteration omitted). And, relevant here, 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:

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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).

> 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) (emphasis added); see also *id.* § 881 cmt. a ("apportionment is made" for "harms … that afford a reasonable basis for division"). The Third Restatement endorses 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 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"). The rule embodies simple justice: "No party should be liable for harm it did not cause …." Restatement (Third) of Torts § 26 cmt. a.

Notwithstanding this basic common-law principle, the Ninth Circuit now requires "precision" in apportionment and detailed "records" to satisfy the burden of apportionment. 520 F.3d at 944. To apportion damages, however, it never has been essential that particular harms be capable of precise attribution to specific causes. Neither "precision" nor particular "records" ever have been thought necessary. *See id.* at 952 (Bea, J., dissenting) ("The panel applies CERCLA in a novel and unprecedented way to impose impossible-to-satisfy burdens on CERCLA defendants." (footnote omitted)).

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."). 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. Restatement (Third) of Torts § 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.").

As the Fifth Circuit properly has explained in this very context:

> 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 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.

B. These authorities reflect an abiding tradition in which common-law courts have permitted apportionment based on the fact-finder's approximation of relative causation. Presented with "evidence which rea-

sonably 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 "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 inherently inequitable 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).[3]

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

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[3] *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).

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).[4]

The district court in the decision below far surpassed the "rough practical apportionment" or "best possible estimate" that common-law courts routinely have accepted as sufficient. 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. *Atchi-*

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[4] *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 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").

son, Topeka & Santa Fe Ry., Nos. CV-F-92-5068 OWW, CV-F-96-6226 OWW, -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 No. 07-1601 Pet. 21-22. If this is a "'meat-axe'" approach, 520 F.3d at 944, the common law has been operating a butcher shop for more than a century.

C. Of particular relevance here, authorities 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 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. Apportionment therefore repeatedly has been

used 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 v. Merrill Brick Co.*, 48 N.W. 1000, 1001-02 (Iowa 1891); *Chipman* v. *Palmer*, 77 N.Y. 51, 53-54 (1879); *Cal. Orange Co.* v. *Riverside Portland Cement Co.*, 195 P. 694, 695 (Cal. Ct. App. 1920); *Eckman*, 50 Pa. Super. at 432.

Courts in applying these common-law principles in the context of CERCLA have properly declined to set the bar anywhere near as high as the Ninth Circuit did in specifying 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 Brighton*, 153 F.3d 307, 320 (6th Cir. 1998). In line with the common-law authorities, the Fifth Circuit likewise has authorized apportionment on the basis of "a reasonable estimate." *In re Bell Petroleum Servs., Inc.*, 3 F.3d at 903.[5]

What is more, apportionment has been performed using precisely the factors that the district court relied upon here. 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

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[5] *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).

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, limited 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"). *Accord* Restatement (Third) of Torts § 26 rptr's note cmt. f.

In *In re Bell Petroleum Services*, likewise, 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 as well 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 *United States v. Hercules*, 247 F.3d 706, 719 (8th Cir. 2001) (chronological evidence can prove divisibility of harm). That is closely analogous to what the district court did here. See No. 07-1601 Pet. 21; No. 07-1601 Pet. App. 253a.

Geography likewise supplies a reasonable basis for apportionment of CERCLA liability. 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"); *United States* v. *Burlington N. R.R.*, 200 F.3d 679, 700 (10th Cir. 1999) (affirming decision dividing credit for a settlement agreement that apportioned liability based on geography); 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).

D. The Ninth Circuit further departed from basic common-law principles when it demanded "records" evincing with "precision" highly particularized proof such as "the proportion of the amount of chemicals stored, poured from one container to another, or spilled on each parcel." 520 F.3d at 944. This extrastatutory rule not only would impermissibly favor direct evidence over circumstantial evidence, but indeed would require the use of a specific kind of direct evidence. Such an inflexible proof requirement runs contrary to the fundamental rule, embodied throughout the law, that any competent evidence will suffice. "[D]irect evidence of a fact is not required." *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). On the contrary, it is a "conventional rule of civil litigation" that proof by "either direct or circumstantial evidence" is permissible. *Desert Palace* v. *Costa*, 539 U.S. 90, 99-100 (2003) (internal quotation marks and alterations omitted); *Merchs.' Mut. Ins. Co.* v. *Baring Bros. & Co.*, 87 U.S. 159, 161 (1873) ("[c]ompetent evidence may be ... direct or circumstantial"). And to "demand[] either direct evidence … or else more substantial circumstantial evidence" improperly usurps the factfinder's duty and power to draw reasonable inferences from the evidence. *Gallick* v. *Balt. & Ohio R.R.*, 372 U.S. 108, 114 (1963).

Precisely because this basic rule holds true throughout the law, statutes and rules are specific when they depart from it by requiring particular forms of proof.[6] The examples of this are familiar. The statute of frauds and its statutory descendents require that certain contract terms be in writing. See, *e.g.*, Cal. Civ. Code § 1624(a) (conveyance of an interest in land requires a writing signed by the party to be charged). The best evidence rule requires that, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." Fed. R. Evid. 1002. *Cf. also* U.S. Const. art. III, § 3, cl. 1 (requiring that treason be proved "on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court").

CERCLA is no different: When Congress means to require specific proof under CERCLA, it does so expressly. This is true of the "innocent purchaser" defense, which exempts from liability defendants who purchased already-contaminated land, and did not know of and had no reason to know of the contamination. 42 U.S.C. §§ 9601(35)(A)(i), 9607(b)(3). In establishing this defense, Congress set forth detailed evidentiary requirements. For example, to establish the "no reason to know" element, the landowner must "demonstrate" that it conducted inquiries of, among other things, "historical sources, such as chain of title documents, aerial photographs, building department records, and land use records," "recorded environ-

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[6] *Cf. Bestfoods*, 524 U.S. at 62-63 (CERCLA incorporates common-law principles when Congress is silent); *Desert Palace*, 539 U.S. at 99 (declining to depart from conventional rules of civil litigation because, among other reasons, the statute was silent).

mental cleanup liens against the facility," and "government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility." *Id.* § 9601(35)(B)(i), (iii)(III), (IV), (V).

That Congress imposed such requirements in certain provisions of CERCLA speaks volumes about its failure to do so elsewhere. And here, nothing in CERCLA's text imposes any particularized evidentiary requirement or burden to support apportionment. Nowhere does CERCLA demand the use of records like the Ninth Circuit sought here. See 520 F.3d at 958 & n.16 (Bea, J., dissenting). Nor does apportionment generally require any such specialized proof; if anything, common-law evidentiary burdens regarding apportionment are relaxed. See *supra* at 6-9.

Importantly, the special evidentiary requirement adopted by the Ninth Circuit was critical to its decision; it was only by establishing this standard that the court of appeals could hold categorically insufficient the evidence upon which the district court had relied, and so overturn the district court's reasonable apportionment. 520 F.3d at 936 n.18. This is because, as the Ninth Circuit properly recognized, the question of whether harm is apportionable in a particular case is a factual question that is reviewed only for clear error. *Id.* at 942; see Restatement (Second) Torts § 434(2) & cmt. d. It therefore was squarely within the province of the factfinder – the district court judge who heard the evidence – to "draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) ("drawing of legitimate inferences

from the facts" is the task of the factfinder (internal quotation marks omitted)). The Ninth Circuit could overturn the district court's thoughtful apportionment analysis only by holding that the evidence upon which it relied did not "suffice" as a matter of law. 520 F.3d at 943.[7] This conclusion amounts to nothing more than an evasion of the admittedly applicable standard of review. The district court apportioned damages only after a lengthy bench trial that resulted in hundreds of individual findings of fact and a carefully supported apportionment analysis. This manifestly was not clearly erroneous, and nothing in the law of apportionment or the rules of evidence prevented the district court from relying on the competent evidence that was before it as a reasonable basis for apportionment.

II. AN UNYIELDING APPLICATION OF JOINT AND SEVERAL LIABILITY WILL HAVE EXTRAORDINARY AND INEQUITABLE EFFECTS.

The Ninth Circuit's "unreasonable" apportionment standard, see *id.* at 953 (Bea, J., dissenting), 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.* The burden that would be placed on railroads exemplifies the draconian outcome that results from imposing vigorous and unyielding proof requirements for apportionment.

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[7] *See also* 520 F.3d at 945 ("many of the district court's conclusions were factually correct but legally insufficient").

A. Any discussion of CERCLA liability must begin with a recognition of 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, at the time of disposal, owned or operated the facility at which the hazardous substances were disposed of. 42 U.S.C. § 9607(a)(1), (2).[8] Parties who fall into these classes are commonly referred to as "potentially responsible parties," or "PRPs." The defenses available to PRPs are exceedingly limited – showing that the release 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 a landowner can be held liable even if the tenant caused the disposal on the lessor's property, and even if all defendants exercised due care.

These results are exacerbated by the exceptionally broad manner in which EPA has purported to define the term "facility," which is a *sine qua non* of CERCLA liability for owners and operators. See generally 42 U.S.C. § 9607(a)(1), (2) (imposing liability on owners and operators of a "facility"). Much of the land owned by railroads that is at issue in this and similar

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[8] 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).

cases is made up of thin strips of property that, because of common-carrier obligations, are appurtenant to industrial facilities. CERCLA's statutory definition of facility is loose, see generally *id.* § 9601(9)(B), and EPA has in application defined facilities in sweeping ways that often do not track property ownership. See Pet. Br. 48-50; *e.g.*, *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522, 1524-25 (10th Cir. 1995). Simply put, EPA can sweep in an adjacent landowner that has engaged in no culpable conduct whatsoever merely by defining broadly the boundaries of a particular facility, and it has every incentive to do so when such a landowner is a solvent company with deep pockets.

Piling on to this harsh scheme, 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 costs." *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 264 (3d Cir. 1992); see *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 670 n.8 (5th Cir. 1989). Furthermore, courts have concluded that CERCLA liability is retroactive – a PRP will be held 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 – "arrangers" and "transporters" who may at least 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 rea-

sonable form of apportionment, the owner is left "holding the bag." 520 F.3d at 941.

B. Railroads, which are quintessential passive landowners, serve as a vivid illustration of the extremely harsh manner in which these aspects of CERCLA operate. Due in large measure to the 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 such 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 are high, as is the possibility that the offending tenant is no longer in existence. For all of these reasons, CERCLA works particularly harsh effects on landowners like railroads.

C. That Congress contemplated these particular aspects of the CERCLA regime is clear. What is equally clear is that the strict evidentiary requirements imposed by the decision below find no support in CERCLA or in the common law. And, they would work extraordinary and inequitable hardship on railroads and other landowners like them. The Ninth Circuit rejected the district court's thoughtful apportionment among causes, and instead 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, it 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.* This is an understatement. Because CERCLA operates retroactively, it may impose massive liability on passive landowners whose title to landholdings stretches back a century or more, to a time when "future environmental cleanup" indeed "was not con-

templated." There would have been no cause for *anyone* to keep the records demanded by the Ninth Circuit – if such records ever existed – and certainly no cause to believe that a landowner/lessor would have a *lessee's* records of its activities.

The same is true for more recent activities as well, because commercial leases do not typically require tenants to retain and disclose the detailed records that the Ninth Circuit now demands. Much less do they require this for *adjacent* properties, as in this case. 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. The Ninth Circuit was totally at ease with this inequitable result. 520 F.3d at 945 ("The net result of our approach to apportionment of liability, consequently, may be that landowner PRPs, who typically have the least direct involvement in generating the contamination, will be the least able to prove divisibility."). But there is not one piece of evidence that Congress intended any such result.

D. 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.

Not only is this illogical; it is fundamentally inconsistent with the basic common-law principle that lessors are not usually held responsible for the actions of lessees. See Restatement (Second) of Torts § 355. The common law recognized that a lessee assumes the obligations of ownership, with few exceptions. And, of particular relevance here, lessors were not held liable for nuisances created by lessees unless the intended purpose of the lease would necessarily result in a nuisance. As Prosser explained, the lessor is "not responsible for activities to which he did not consent and which he had no reason to contemplate or expect, or for dangers created by the tenant which he has not authorized." W. Prosser, *Handbook of the Law of Torts* § 63, at 403 (4th ed. 1971) (footnote omitted).[9] Here, there is nothing in the record to reflect, nor any basis to believe, that by leasing land to an agricultural chemical storage and distribution facility, a nuisance necessarily would occur. As Holmes put it, "the landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being

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[9] *Accord Edgar v. Walker*, 32 S.E. 582, 584 (Ga. 1899) ("As a general rule, a landlord is not liable to third persons for any injury they sustain, occasioned by the wrongful act of his tenant in keeping the rented premises in a dangerous or unhealthy condition. The only exceptions to this rule are (1) When the landlord has contracted with the tenant, to repair; (2) when he has let the premises in a ruinous condition; (3) when he has expressly licensed the tenant to do acts amounting to a nuisance.").

used in such a way." *Clifford v. Atl. Cotton Mills*, 15 N.E. 84, 87 (Mass. 1888).[10]

Regardless of CERCLA's modification of the base common-law rule regarding liability, there is no justification for adopting a rule that landowner/lessors – who would not have been liable at all under the common law – now will be subject to special burdens when apportionment among causes is at issue. There is nothing in CERCLA to support the Ninth Circuit's notion that because the statute's liability regime is "expansive" in some regards, it is without limitation in all other respects. On the contrary, Congress did not make the statute expansive *in this regard*; it did not speak to this issue at all. 520 F.3d at 957 n.12 (Bea, J., dissenting). Through its silence, Congress "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.

The practical result of the Ninth Circuit's rule 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 potentially the shares of all nearby landowners whose land falls within EPA's definition of the "facility" on which disposals oc-

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[10] Furthermore, contrary to the approach taken by the Ninth Circuit, even when a lessor is held liable, liability may be apportioned between the lessor and lessee. *E.g.*, *Arthur Richards, Inc.* v. *79th Fifth Ave. Co.*, 441 N.E.2d 1114 (N.Y. 1982)

curred.[11] An appropriate division of harm among PRPs, by contrast, provides some measure of proportionality. It does not in the normal situation exculpate a PRP entirely, and indeed in this case the district court's apportionment would leave the railroads responsible for millions of dollars in past and projected cleanup costs. See Pet. Br. 13 n.4. Reasonable apportionment simply holds out for the landowner the possibility that its final responsibility will in some measure reflect its relationship to the site. The decision below, by contrast, departs from common-law principles, imposes an unyielding and overwhelming form of liability that Congress never wrote into the statute, and would impose untold liability where it is entirely unfair.

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[11] 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 PRPs, against whom recovery is far less likely, or indeed impossible.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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