Nos. 07-1607, 07-1601

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.

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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, CROPLIFE AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

DANIEL M. STEINWAY
THOMAS C. JACKSON
Counsel of Record
MICHAEL MCGOVERN
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Amicus Curiae
(Additional Counsel Listed on Inside Cover)

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

(list of counsel, continued from front cover)

DONALD D. EVANS
LESLIE HULSE
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Blvd.
Arlington, VA 22209
(703) 741-5000

HARRY M. NG
ERIK G. MILITO
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, D.C. 20005
(202) 682-8253

DOUGLAS T. NELSON
JOSHUA B. SALTZMAN
CROPLIFE AMERICA
1156 15th Street, NW
Suite 400
Washington, D.C. 20005
(202) 872-3882

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 637-3000

GREGORY M. SCOTT
NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION
1667 K Street, NW
Suite 700
Washington, D.C. 20006
(202) 457-0480

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of all` sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the state and federal courts, legislatures and executive branches. To that end, the Chamber files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a $664 billion enterprise and accounts for ten cents of every dollar in U.S. exports.

The American Petroleum Institute ("API") is a nationwide, non-profit, trade association headquartered in Washington, D.C., that represents over 400 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, transportation, refining and marketing.

CropLife America ("CLA"), which was organized in 1933, is the nationwide not-for-profit trade organization representing the major manufacturers, formulators and distributors of crop protection and pest control products. CLA is headquartered in Washington, D.C. Its member companies produce, sell and distribute most of the active compounds used in crop protection products registered for use in the United States. CLA represents its members' interests by, *inter alia*, monitoring federal agency

regulations and agency actions and related litigation to identify issues of concern to the crop protection and pest control industry, and participating in such actions when appropriate.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Petrochemical & Refiners Association ("NPRA") is a national trade association that represents more than 450 companies who own or operate most U.S. refining capacity, as well as petrochemical manufacturers with processes similar to refiners. NPRA members supply consumers with a wide variety of products and services used daily in their homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, lubricants and the chemicals that serve as "building blocks" in making everything from plastics to clothing to medicine to computers.

Certain members of the Chamber, ACC, API, CLA, NAM, and/or NPRA have been identified as potentially responsible parties at contaminated sites across the country pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA"), and have participated in cleaning up many such sites. Moreover, many members of these associations are engaged in the manufacture and sale of chemicals and other products containing hazar-

dous substances and utilize common carriers to transport and deliver such products to their customers' facilities. Therefore, these *amici* and their respective members have a substantial interest in the federal courts' proper interpretation and application of the CERCLA "arranger" liability provision set forth in section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), as it relates to situations involving the sale of useful products. These *amici* are also significantly affected by and concerned about the standards adopted by the court below for determining when a defendant in a CERCLA cost recovery action may avoid the imposition of joint and several liability by demonstrating that there is a reasonable basis for apportioning the harm at a contaminated site.[1]

SUMMARY OF ARGUMENT

The Ninth Circuit's decision should be reversed for several reasons. First, the Ninth Circuit's decision widens the already broad net of CERCLA liability to encompass those who sell chemicals or other products in the ordinary course of business based on the assertion that such companies have somehow "arranged for the disposal" of their products at the same time they are delivering them to customers for use. Given the magnitude of the costs typically associated with cleaning up contaminated sites, the imposition of such costs on chemical manufacturers and suppliers places a significant burden on these manufacturers and suppliers. When coupled with the imposition of joint and several liability,

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for any party has authored this brief in whole or in part, that no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

the result can be that a mere seller of a product could be forced to pay the entire cost of cleaning up a site — which in many cases would amount to tens of millions of dollars — to which its product was delivered if any of that product was spilled, even if the spillage was caused by the buyer. Such a result can hardly be said to be in accord with the "polluter pays" principle.

Congress's intent is evident from the plain language of the statute and the Ninth Circuit's decision cannot be reconciled with that language. The statute provides for liability under section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), where a party has "arranged for the disposal" of a hazardous substance. The Ninth Circuit focused on the breadth of the term "disposal" under CERCLA, *id.* § 9601(29), but treated the term as if it were untethered from the remainder of the statutory provision. It thus failed to recognize that in order to be liable under section 107(a)(3) a party must *arrange for* disposal. As other circuits have recognized, determining whether a party has arranged for disposal requires an analysis of the purpose of the transaction and the intent of the seller. Simply put, a party that arranges to sell or transport its products does not "arrange for disposal" of its products. It arranges for disposal of its products only if it intends or desires the products to be disposed of.

The Ninth Circuit's decision also is inconsistent with numerous CERCLA cases involving sales of useful products. The courts have generally held that where the purpose of the transaction was the sale of a useful product, the seller of the product is not liable as an "arranger." The Ninth Circuit suggested that these cases are distinguishable but its opinion in fact represents a significant departure from prior case law — holding a seller of new, ready-to-use pesticides liable for

the cleanup of spills of such pesticides even if the spill occurred at the buyer's facility on the buyer's watch.

The Ninth Circuit's decision in this respect will impose substantial and unwarranted burdens on manufacturers and suppliers of pesticides and a wide variety of other products. The decision will increase the cost of doing business for such suppliers and threatens to disrupt longstanding relationships between suppliers and their customers as they struggle to address and allocate the sizable risks the Ninth Circuit has imposed on ordinary commercial conduct involving sales of products. The Ninth Circuit's decision will also upset relationships between suppliers and the common carriers that deliver their goods. As a result, the Ninth Circuit's decision has the potential to adversely affect the flow of useful products across the U.S., particularly products that are transported by common carrier.

The Court also should reverse the Ninth Circuit's ruling regarding the standard for apportionment of harm under section 107 of CERCLA. The heightened evidentiary standards established by the Ninth Circuit for demonstrating that there is a basis for apportioning harm are inconsistent with the standards set forth in the Restatement (Second) of Torts, which the Ninth Circuit purported to use as a basis for its approach. The Ninth Circuit's evidentiary requirements also are inconsistent with the approach adopted by other circuits, which accords more closely with the Restatement.

The Ninth Circuit's standards will make it more likely that parties with minimal responsibility for the contamination at a site will nevertheless be required to pay the entire cost of a cleanup of a site. That result is in no respect mandated by the statute and ignores the concerns expressed by Congress in developing the

CERCLA liability scheme. Such a result is also fundamentally unfair, particularly in light of the substantial costs of cleaning up many contaminated sites. The Ninth Circuit approach will unfairly penalize companies that are careful to minimize the extent to which they are involved in any activities that may result in pollution, imposing joint and several liability on those parties with even a minimal connection to site contamination. This approach should be rejected by the Court.

I. THE NINTH CIRCUIT'S DECISION ERRONEOUSLY EXPANDS THE SCOPE OF CERCLA "ARRANGER" LIABILITY TO ENSNARE INNOCENT SELLERS OF USEFUL PRODUCTS

A. The Ninth Circuit's Ruling Subjects a Mere Seller of Useful Products to CERCLA Liability Absent Any Showing That the Seller Intended to Arrange for the Disposal of Hazardous Substances

The decision below erroneously expands the scope of CERCLA "arranger" liability by failing to properly consider Shell's underlying intent in entering into the relevant sales transactions with Brown & Bryant ("B&B"). The Ninth Circuit essentially ruled that a seller of useful products — Shell — was subject to CERCLA "arranger" liability for the inadvertent and unintended leakage of some of the product (a pesticide) during its transfer from the common carrier's tank trucks to the buyer's storage tanks at the buyer's facility. In doing so, the Ninth Circuit misconstrued the language of the statute.

CERCLA provides, in relevant part, that an "arranger" is a "person who by contract, agreement, or otherwise arranged for disposal or treatment, or

arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . ." 42 U.S.C. § 9607(a)(3). The Ninth Circuit rationalized that it was not necessary to consider Shell's underlying intent in selling its products to B&B because CERCLA defines the term "disposal" to include "such unintentional processes as 'leaking.'" Pet. App. 44a.[2] Without considering the meaning and effect of the related statutory phrase "arranged for," the Ninth Circuit concluded that the "'disposal' need not be purposeful" for purposes of imposing CERCLA "arranger" liability upon a seller for its sale of a useful product. *Id.*[3] As a result, the Ninth Circuit summarily concluded that "an entity [such as Shell] can be an arranger even if it did not intend to dispose of the product." *Id.*

That analysis is incorrect. As the nine judges who dissented from the denial of a rehearing *en banc* explained, the term "disposal" cannot be considered in isolation but must be read in the context of the entire statutory provision. "[E]ven though the definition of 'disposal' may include unintentional practices, mere 'disposal' does not constitute *arranger* liability." Pet. App. 70a. Rather, under the express terms of section 107(a)(3) of CERCLA "arranger liability requires the defendant to have 'arranged for' such *disposal* (not just arranged for the sale)" and "[t]his connotes an intentional action toward achieving the purpose: disposal." *Id.* (*citing* Webster's Third New International Dictionary 120 (1993) (defining

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[2] "Pet. App." refers to the appendix filed by petitioner Shell Oil Company in No. 07-1607.

[3] Neither of the two court decisions cited by the Ninth Circuit in support of its conclusion — *Carson Harbor Village Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), and *United States v. CDMG Realty Co.*, 96 F.3d 706 (3rd Cir. 1996) — concerned an interpretation of section 107(a)(3) of CERCLA.

"arrange" as "to make preparations for")) (emphasis in original). Thus, absent any intent on the part of the seller to dispose of hazardous substances, the mere possibility that leakage of some of the product may occur during the transfer to B&B's storage tanks "cannot mean that Shell, as a seller, *arranged for* such leakage." Pet. App. 71a.

Numerous circuits have applied the well-established "intent" factor to determine whether a seller of a "product" should be subject to CERCLA "arranger" liability under section 107(a)(3). *See, e.g.*, *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160 (2d Cir. 1999) ("*Freeman*"); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769 (4th Cir. 1998) ("*Pneumo Abex*"); *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227 (6th Cir. 1996) ("*Cello-Foil*"); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993) ("*Amcast*"); *AM International, Inc. v. International Forging Equipment Corp.*, 982 F.3d 989 (6th Cir. 1993) ("*AM Int'l*"); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990) ("*Florida P & L*"). These cases make clear that the purpose of the transaction plays an essential role in CERCLA "arranger" liability determinations.

For example, in *Cello-Foil* the Sixth Circuit stated that "[n]otwithstanding the strict liability nature of CERCLA, it would be error for us not to recognize the indispensable role that state of mind must play in determining whether a party has 'otherwise arranged for disposal . . . of hazardous substances.'" 100 F.3d at 1231. The court observed that the phrase "otherwise arranged for disposal" "embrace[s] a concept similar to those of 'contract' or 'agreement.'" *Id.* Therefore, it is essential for the court to inquire into "what the parties had in mind with regard to the disposition of the hazardous sub-

stance" because "including an intent requirement into the 'otherwise arranged' concept logically follows the structure of the arranger liability provision." *Id.* The inquiry regarding "what the parties had in mind" necessarily must focus on the purpose of the transaction, *i.e.*, was it a sale of a useful product or the disposal of waste or other unwanted material. The Ninth Circuit erred in departing from that analysis here.

B. Properly Construed, the CERCLA "Arranger" Liability Provision Precludes the Imposition of Liability on Shell Because of Shell's Underlying Intent With Respect to the Sales Transactions

If the Ninth Circuit had properly considered Shell's underlying intent in its sales of pesticide to B&B, Shell would not be subject to CERCLA liability. Simply put, the record is devoid of evidence that Shell intended to arrange for disposal of hazardous substances. The record amply establishes that Shell entered into the transactions with B&B to sell a product that it had purposely manufactured for sale as a useful product because it had value and a marketplace of customers, such as B&B. The pesticide purposely manufactured and sold by Shell to B&B was one of Shell's principal business products, not a waste or byproduct which had no value and had to be disposed of. There is no evidence in the record that Shell had any intent to dispose of this product at B&B's facility or anywhere else.

Moreover, the substantial safety precautions that Shell undertook in order to ensure that its product was properly delivered to B&B's facility and transferred to B&B's storage tanks belie even an inference that Shell had any "intent" to arrange for the disposal of hazardous substances at B&B's facility. The record evidence shows that: (1) Shell contracted with a common carrier utilizing

suitable tanker trucks to transport and deliver the product to B&B's facility; (2) Shell provided B&B with a rebate for improvements in B&B's bulk handling and safety facilities and required an inspection of such facilities by a qualified engineer; and (3) Shell distributed a manual and created a checklist of the manual's requirements to ensure that the product tanks at B&B's facility were being operated in accordance with appropriate safety requirements. Pet. App. 47a. These actions underscore the lack of any intent on Shell's part to arrange for the disposal of its products at the very time it was delivering those products to B&B for productive use.[4]

Despite the dearth of evidence that Shell had any intent to arrange for the disposal of hazardous substances at B&B's facility, the Ninth Circuit imposed CERCLA "arranger" liability on Shell. The Ninth Circuit acknowledged that intent is a relevant consideration in what it termed "direct arranger liability" cases but argued that there is a separate category of cases — which it labeled "broader arranger cases" — in which intent is not controlling and is not even a particularly useful concept. In these cases, according to the Ninth Circuit, arranger liability is imposed where disposal of hazardous wastes is a foreseeable byproduct of, but not the purpose of, the transaction giving rise to liability. Pet. App. 42a.

However, to the extent such "broader arranger" liability has been recognized by other circuits, *see, e.g.*,

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[4] Indeed, the record shows that the total amount of Shell product that leaked or spilled during transfer operations at the B&B facility was less than one-tenth of one percent (*i.e.*, 81 gallons spilled per year of a total amount of 122,930 gallons delivered per year, or 0.07 percent). Pet. App. 257a.

United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373 (8th Cir. 1989) ("*Aceto*"); *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433 (6th Cir. 2004), no court of appeals had ever extended it to cases involving the sale of useful products such as occurred here. Rather these cases have involved situations such as manufacturing — not sales — of products.[5] For example, in *Aceto* the Eighth Circuit upheld a district court's denial of a motion to dismiss claims against a pesticide manufacturer for costs incurred by the U.S. Environmental Protection Agency ("EPA") in cleaning up contamination at a facility operated by a company that was formulating pesticide products for the manufacturer. The court found that the U.S. had stated a claim for "arranger" liability where the manufacturer supplied the formulator with the materials to be used in the formulation process, retained title to the materials throughout that process, and was aware that disposal of hazardous substances was an inherent part of the formulation process. 872 F.2d at 1379-82.

In contrast, in cases involving sales of useful products, disposal is the antithesis of the seller's goal, which is to get all of its product into the buyer's hands for beneficial use. For that reason, the courts have generally required at least some evidence that a party intended to dispose of hazardous substances found in the material being sold before imposing liability on the seller. *See, e.g.*, *Amcast*, 2 F.3d at 51 (the words "arrange for" imply intentional

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[5] The cases cited by the Ninth Circuit as examples of this broader arranger liability do not involve the imposition of CERCLA liability on sellers of useful products such as Shell. For example, in *Florida P&L,* the court acknowledged the possibility that a manufacturer could be liable for contamination caused by its products but refused to impose liability on a manufacturer of transformers where there was no evidence that the transactions in question involved anything more than a sale of goods. 893 F.2d at 1318-19.

action); *Pneumo Abex*, 142 F.3d at 775-76 (refusing to hold railroads liable as "arrangers" where they did not intend their sales of used bearings to be an arrangement for disposal of hazardous substances). The Ninth Circuit acknowledged that Shell manufactured and sold B&B "a useful product," and that in accordance with the "useful product doctrine" the Ninth Circuit previously "had refused to hold manufacturers liable as arrangers for selling a useful product containing or generating hazardous substances that *later* were disposed of." Pet. App. 45a (*citing 3550 Stevens Creek Assocs. v. Barclays Bank of Cal.*, 915 F.2d 1355, 1362-65 (9th Cir. 1990)). The Ninth Circuit nevertheless attempted to distinguish these other "useful product cases" as inapplicable "where, as here, the sale of a useful product necessarily and immediately results in the leakage of hazardous substances." Pet. App. 45a. The Ninth Circuit therefore held that the "useful product doctrine" was not applicable to the leaked product "that never made it to the fields for its intended use but was disposed of prior to use." Pet. App. 46a-47a.

That purported distinction finds no basis in the "useful product" defense as interpreted by the other circuits. The applicability of that defense has turned on a variety of factors such as whether the material sold was usable in its existing form or required further processing to remove hazardous substances. *See*, *e.g.*, *Pneumo Abex*, 142 F.3d at 775.[6] However, the courts outside the Ninth Circuit have never looked to the timing of the disposal of hazardous substances associated with a product as being

[6] There is no question in this case that, unlike materials such as spent batteries, the chemicals that Shell sold to B&B were intended to be used in the form in which they were sold and did not require further processing prior to use.

relevant to the application of the "useful product" defense. Indeed, such considerations have been effectively rejected. *See Amcast*, 2 F.3d at 751. The Ninth Circuit's opinion therefore undermines the "useful product" defense and further expands the already broad net of CERCLA liability to ensnare innocent sellers of pesticides and other goods that have no intent to dispose of any hazardous substances but are merely selling their goods in the ordinary course of business.

C. Decisions from Other Circuits Properly Applying the "Intent" Factor in the "Sale of Useful Product" Context Underscore the Ninth Circuit's Error

The Ninth Circuit's decision to disregard Shell's underlying intent with respect to its sales of useful product to B&B in determining whether Shell was subject to CERCLA "arranger" liability is facially inconsistent with numerous decisions from other circuits, which uniformly deemed the underlying "intent" of the parties with respect to the relevant transactions an essential factor to consider. In *Amcast*, for example, the Seventh Circuit refused to impose arranger liability in circumstances nearly identical to the circumstances here. In that case, the seller employed a common carrier to deliver its liquid chemical product to a customer's facility. On occasion, the common carrier would spill some of the product during transfer to the customer's storage tanks, resulting in contamination of the groundwater at the facility. 2 F.3d at 747-48. However, in contrast to the Ninth Circuit's decision, in *Amcast* the Seventh Circuit properly applied the traditional "intent" test in the context of the "sale of useful product" defense and held that the seller was not subject to CERCLA "arranger" liability:

> [Seller] hired a transporter, all right, but it did not hire it to spill [product] on [the Buyer's] premises. Although the statute defines disposal to include spilling, the critical words for present purposes are "arranged for." The words imply intentional action. The only thing that [Seller] arranged for [the common carrier] to do was deliver [product] to [Buyer's] storage tanks. It did not arrange for spilling the stuff on the ground.

Amcast, 2 F.3d at 751. The Seventh Circuit thus concluded that "when the shipper is not trying to arrange for the disposal of hazardous wastes, but is arranging for the delivery of a useful product, he is not a responsible person within the meaning of the [CERCLA] statute." *Id.*

Decisions of the Second, Fourth, Sixth and Eleventh Circuits properly considering the "intent" factor in cases involving the sale of useful products further highlight the nature of the Ninth Circuit's error. For example, in *Freeman* the Second Circuit addressed the liability of a pharmaceutical company that sold chemical reagents to a buyer of chemical intermediates. The buyer later stored the reagents at its facility. EPA eventually concluded that there had been a release or threatened release of hazardous substances from the buyer's facility that required a CERCLA cleanup. 189 F.3d at 162. The Second Circuit ruled that the pharmaceutical company that had sold the chemical reagents was not subject to CERCLA "arranger" liability because the underlying intent of the transaction was a mere sale of a useful product. "[I]t is uncontroverted," the Second Circuit stated, "that [the pharmaceutical company] merely sold unused chemicals that it would ordinarily use in its laboratories to [the buyer] so that [the buyer] could use or resell them . . . ." *Id.* at 164.

Pneumo Abex is similar. That case involved a railroad which had sold used journal bearings to a foundry for processing into new bearings. The Fourth Circuit ruled that the railroad was not subject to CERCLA "arranger" liability because the intent of the railroad was to sell a valuable product, not to dispose of unwanted material or waste. *Pneumo Abex*, 142 F.3d at 775-76. In so ruling, the Fourth Circuit noted that "[t]he Foundry paid the [railroad] for the bearings; the [railroad] did not pay the Foundry to dispose of unwanted metal." *Id.* at 775. *See also AM Int'l*, 982 F.2d at 992 ("[l]iability only attaches to parties that have 'taken an affirmative act to dispose of a hazardous substance . . . as opposed to convey a useful substance for a useful purpose"); *Florida P & L*, 893 F.2d at 1315 (no evidence "that the manufacturers intended to otherwise dispose of hazardous waste when they sold the transformers").

Thus every circuit to have considered this issue other than the Ninth Circuit has required an intent to dispose as a precondition to "arranger" liability under section 107(a)(3) of CERCLA where the defendant merely engaged in the sale of a useful product, a precondition rejected by the Ninth Circuit. The Ninth Circuit thus did not merely depart from the statute's text. It departed from the settled understanding of every other court of appeals.[7]

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[7] In its brief in opposition to the petitions for certiorari, the United States essentially ignored this "intent" requirement, choosing to focus instead solely on the involvement of Shell in the process of delivering pesticides to the B&B facility. *See* Brief For the United States in Opposition at 15-17. This myopic approach to "arranger" liability cannot be squared with the language of the statute.

D. The Ninth Circuit's Ruling Threatens to Undermine the Well-Recognized "Sale of Useful Product" Defense That Suppliers Have Come to Rely Upon

The Ninth Circuit's decision threatens to undermine the well-recognized "sale of useful product" defense that suppliers of useful products have come to rely upon. Over the past two decades the circuits have established some level of uniformity with respect to the proper interpretation and application of the CERCLA "arranger" liability provision in the "sale of useful product" context. This uniformity is in no small measure due to the circuits' consistent acknowledgement of the essential nature of the "intent" inquiry and the concomitant premise that a supplier which merely intended to sell a product and not dispose of hazardous substances should not be subject to CERCLA "arranger" liability. The consistency among the circuits resulted in a "sale of useful product" defense that has provided suppliers of pesticides and other products containing hazardous substances with some assurance that they would not be subject to CERCLA "arranger" liability if the intent of their transactions was the mere sale of a useful product.

However, the Ninth Circuit's wholesale disregard of this well-established "intent" inquiry threatens to undermine the "sale of useful product" defense, eroding the degree of certainty and protection that it has provided suppliers of chemicals and other products. With the Ninth Circuit's decision, the gray area of the CERCLA "arranger" liability provision has now enveloped mere sales of useful products; under that decision the sale of useful products may qualify as an arrangement for disposal of hazardous substances if, for example, unintentional and inadvertent leakage of some

of the product occurs while the common carrier and the buyer transfer the product to the buyer's tanks. As a result of the Ninth Circuit's decision, every sale and delivery of a useful product could potentially subject the supplier to crippling CERCLA liability if any leakage occurs. While the web of CERCLA liability is necessarily far-reaching to effectuate the purposes of the statute, it is quite evident that CERCLA was never intended to ensnare innocent suppliers who harbored no intent to dispose of hazardous substances in conducting their sales of useful products.

A recent federal district court case applying the Ninth Circuit's ruling demonstrates its far-reaching effects. In *United States v. Lyon*, No. CV F 07-0491 LJO GSA, 2007 WL 4374167 (E.D. Cal. Dec. 14, 2007), EPA sued the owners of a dry cleaning establishment to recover costs incurred and to be incurred in cleaning up perchlorethylene ("PCE") contamination resulting from the dry cleaning operations. The owners filed a claim for contribution under CERCLA against a number of PCE manufacturers. Those manufacturers were not alleged to have had any direct contact with the owners of the dry cleaning shop or any authority or control over the disposal of PCE by the owners. Nevertheless, the district court — citing the Ninth Circuit's decision — declined to dismiss the claims against the PCE manufacturers based simply on an allegation that leakage of PCE was somehow inherent in the process of transferring PCE to the dry cleaning establishment and that the manufacturers somehow had knowledge of and control over the transfer process. *Id.* at *5. Thus, chemical manufacturers that had no contact with the ultimate purchasers of their products have now been enmeshed in what will undoubtedly be expensive CERCLA litigation based on the Ninth Circuit's opinion.

II. THE NINTH CIRCUIT'S STANDARDS FOR APPORTIONMENT OF HARM ARE OVERLY RESTRICTIVE AND PRODUCE HIGHLY INEQUITABLE RESULTS

The Ninth Circuit's decision also must be reversed because the barriers it erected to demonstrating apportionment of harm are inconsistent with the Restatement standards the court purported to follow and create the kind of harsh results and unfairness that Congress intended to avoid. The Ninth Circuit acknowledged that the imposition of joint and several liability is not mandatory and that apportionment is available in appropriate circumstances. Pet. App. 12a-13a. Moreover, the Ninth Circuit agreed with other courts that (i) the standards for determining when harm may be apportioned in CERCLA cases are drawn from Section 433A of the Restatement (Second) of Torts and that (ii) harm may be apportioned where there is a reasonable basis for divisibility of a single harm or where there are distinct harms. *Id.* at 16a.

However, the Ninth Circuit's application of these principles puts it at odds with the Restatement and other courts of appeals that have applied the Restatement approach in the CERCLA context.[8] In particular, the Ninth Circuit imposed standards of proof that are not required to establish a *reasonable* basis for apportionment and that will be impossible to meet in most instances. For example, the Ninth Circuit held that in order for the Railroads to establish that the harm attributable to them as owner of a parcel that B&B

[8] As the dissent to the denial of petition for rehearing *en banc* noted, "although the panel's amended opinion pays lip service to the Restatement test, the panel then proceeds effectively to disregard it." Pet. App. 53a.

leased for a portion of its operations, the Railroads would have had to keep records that would allow a comparison of the amount of chemicals stored on the Railroad parcel and the amount stored on B&B's own property, the amounts of chemicals transferred between containers and the amounts of chemicals actually spilled on each parcel. *Id.* at 34a. The Ninth Circuit imposed these requirements even though it recognized that the kind of records it demanded "would have had little utility to B&B . . . and none to the Railroads . . . ." *Id.* Moreover, the Ninth Circuit required a particular kind of evidence to justify apportionment — records of chemical storage, transfer and release — even though the Restatement simply requires evidence without limiting the nature of the evidence that could support divisibility.

At the same time, the Ninth Circuit rejected various factors that were used by the trial court in establishing a reasonable basis for divisibility of the harm at the site, such as the period during which the Railroad parcel was leased for use in B&B's operations as compared to the total period of B&B's operations and the proportion of the parcel owned by the Railroads to the total area of the site. The Ninth Circuit concluded that these factors were inadequate to support apportionment because they were "simple"[9] and allegedly did not take into account the "dynamic nature" of B&B's operations, Pet. App. 31a-34a, even though the district court concluded after a detailed and careful review of the evidence that the use of these factors was warranted and in fact conservative because if anything they tended to overstate the amount

[9] These factors are no more simple than the factors endorsed in the comments to the Restatement, such as the relative number of cows owned by a defendant. Restatement (Second) Torts, § 433A, comment d.

of contamination that could be attributed to the use of the Railroad parcel, *id.* 254a-255a.

A. The Ninth Circuit's Approach to Apportionment Is Inconsistent with the Restatement and Precedent

The Ninth Circuit's approach to apportionment is inconsistent with the Restatement. Section 433A of the Restatement provides that damages for harm can be apportioned among two or more causes where there is a reasonable basis for determining the contribution of each. The comments to Section 433A indicate that apportionment of distinct harms may be made based on a "rough estimate" that will "fairly apportion" the damages, that a single harm may be divisible if there is a "reasonable and rational basis" which results in a fair apportionment and that "reasonable assumptions may be used." Restatement (Second) of Torts, § 433A, comments (b), (d) (1965). Likewise, Dean Prosser (who served as the Reporter for the Second Restatement) states that where there is a basis for a "rough practical apportionment," it is likely that such apportionment will be made. W. Page Keaton, *et al.*, *Prosser and Keaton on the Law of Torts* 345 (5th ed. 1984). Thus, the thrust of the common law approach around the time of CERCLA's enactment in 1980 was to apportion damages if there was a rough but rational way of doing so which achieved a result that was generally fair.[10] The courts applied the Restatement approach accordingly. *See, e.g., Federal Savings & Loan Ins. Corp. v. Reeves,* 816 F.2d 130, 135-36 (4th Cir. 1987); *Fidelity Savings & Loan Ass'n v.*

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[10] The Court has noted that the state of the law at the time a statute was enacted is the most important consideration in determining what common law liability concepts are incorporated in a statute. *Norfolk & Western Ry. Co. v. Ayers,* 538 U.S. 135, 164 (2003).

Aetna Life & Casualty Corp., 440 F. Supp. 862, 875-76 (N.D. Cal. 1977), *aff'd,* 647 F.2d 933 (9th Cir. 1981). *See also Sauer v. Burlington Northern R. Co.*, 106 F.3d 1490, 1494 (10th Cir. 1996) (rejecting the argument that apportionment of injury had to be precise and holding that apportionment need not be proven with mathematical precision or great exactitude but requires only evidence sufficient to "permit a rough practical apportionment").

A number of circuits have adopted this approach in the CERCLA context. For example, the Fifth Circuit in *U.S. Environmental Protection Agency v. Sequa Corp. (In re Bell Petroleum Serv., Inc.)*, 3 F.3d 889 (5th Cir. 1993), held that joint and several liability should not be imposed under section 107 of CERCLA if the evidence establishes a factual basis for making a reasonable estimate that will fairly apportion liability. The court stated that 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 risking credibility determinations, are inadequate grounds upon which to impose joint and several liability." *Id.* at 903. In fact, the court concluded that "evidence sufficient to permit a rough approximation is all that is required under the Restatement." *Id.* at 904 n.19. The court held that liability should be apportioned in the case before it because there was "sufficient evidence from which a reasonable and rational approximation of each defendant's individual contribution to the contamination can be made." *Id. See also United States v. Township of Brighton,* 153 F.3d 307, 320 (6th Cir. 1998) (district court should be receptive to any argument for divisibility that provides a reasonable basis for distinguishing between the harm caused by the Township and the harm caused

by others); *Coeur d'Alene Tribe v. ASARCO, Inc.,* 280 F. Supp. 2d 1094 (D. Idaho 2003) (Restatement does not require "fingerprinting" of each defendant's hazardous wastes; apportionment of harm at mining site based on estimate of volume of mine tailings produced by each defendant was not perfect but was reasonable based on the facts of the case).

B. Apportionment in This Case Would Be Consistent With the Policies Underlying CERCLA

It is evident that the Ninth Circuit adopted its parsimonious approach to apportionment because of policy considerations, *i.e.*, to ensure that "the taxpayers are not left holding the tab." Pet. App. 35a. While the "polluter pays" principle is by now a familiar one and it is one of the goals that CERCLA is designed to achieve, this Court has acknowledged that no statute pursues its goals at all costs. *Rodriguez v. United States,* 480 U.S. 522, 525-26 (1987) (*per curiam*) (it frustrates rather than effectuates congressional intent to assume that whatever furthers the statute's primary objective must be the law). Acts of Congress are usually the result of compromise among competing goals and "[c]ourts and agencies must respect and give effect to these sorts of compromises." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002). *See also Board of Governors of Fed. Reserve System v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) (invocation of purposes of legislation which takes no account of process of legislative compromise prevents the effectuation of congressional intent). This is certainly true of CERCLA; in fact, this Court has previously recognized that CERCLA reflects an accommodation of several competing policy concerns, including concerns about the potential impacts of the statute on the petrochemical industry. *See Exxon Corp. v. Hunt,* 475 U.S. 355, 371-72 (1986).

One of the concerns of Congress was the potentially harsh impacts of joint and several liability in some cases, which ultimately led Congress to delete any specific reference to joint and several liability in the statute. During the floor debates on the statute, Senator Helms noted that the potential inclusion of joint and several liability in the Act "received intense and well-deserved criticism from a number of sources, since it could impose financial responsibility on persons who contributed only minimally (if at all) to a release or injury." 126 Cong. Rec. at S15004 (Nov. 24, 1980). *See also United States v. Alcan Aluminum Corp.*, 964 F.2d 262, 268 (3d Cir. 1992) (Congress intended to avoid application of joint and several liability in situations where it might produce inequitable results); *United States v. A&F Materials Co., Inc.*, 578 F. Supp. 1249, 1255 (S.D. Ill. 1984) ("both Houses of Congress were concerned about issues of fairness, and joint and several liability is extremely harsh and unfair if it is imposed on a defendant who contributed only a small amount of waste to a site"). The Restatement itself recognizes the potential unfairness of such an outcome and even contemplates that the burden of establishing a defendant's appropriate share of liability in such a case could be shifted to the plaintiff. Restatement (Second) Torts § 433B, comment (e).

Such concerns take on particular force in the CERCLA context. In the typical case of two joint tortfeasors, the parties may be held jointly and severally liable under circumstances where both are culpable to some degree. It is that culpability – as compared to a plaintiff that is often blameless – which supports the notion of joint and several liability, *i.e.*, it is better to impose the entire liability on a defendant who is culpable rather than leave an innocent plaintiff with only a partial remedy if one or more of the defendants is unavailable.

See, e.g., McDermott, Inc. v. AmClyde and River Don Castings, Ltd., 511 U.S. 202, 221 (1994) (when the limitations on the plaintiffs' recovery arise from outside forces, joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall).

In contrast, under CERCLA a party may be held strictly liable for the cost of a cleanup regardless of fault. *See, e.g., United States v. Hardage*, 761 F. Supp. 1501 (W.D. Okla. 1990) (strict liability imposed without regard to fault or state of mind). Thus, in a CERCLA case the equities cannot be said to lie with an innocent plaintiff as compared to a culpable defendant because the CERCLA defendant may well be blameless.[11] As the Fifth Circuit noted:

> Often, liability is imposed upon entities for conduct predating the enactment of CERCLA, and even for conduct that was not illegal, unethical, or immoral at the time it occurred . . . . We also recognize, however, that CERCLA, as a strict liability statute that will not listen to pleas of "no fault," 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. Congress recognized such possibilities and left it to the courts

[11] Some might argue that even if a defendant company in a CERCLA cost recovery case is not culpable in the traditional sense, the equities still weigh in favor of requiring the defendant to pay the costs of the cleanup because the defendant profited from the waste-generating activity. In this case, the Railroads charged B&B $410 per year in rent for a period of approximately 15 years, see Brief For Petitioners the Burlington Northern and Santa Fe Railway Co. and Union Pacific Railroad Co. at 9, resulting in total revenue for the Railroads of approximately $6,150. This represents a mere pittance when compared to the more than $11 million in cleanup costs for which the Railroads could be liable under the Ninth Circuit decision.

> to fashion some rules that will, in appropriate instances, ameliorate this harshness.

Bell Petroleum, 3 F.3d at 897. *See also United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983) (the term joint and several liability was deleted from the express language of the statute in order to avoid its universal application to inappropriate circumstances); *United States v. Wade*, 577 F. Supp. 1326, 1337 (E.D. Pa. 1983) (deletion of reference to joint and several liability was intended to avoid mandatory application of the standard to a situation where it would produce inequitable results).

Thus, in CERCLA cases the rationale for apportionment as a means of ameliorating the harsh effects of joint and several liability is even stronger than in the joint tortfeasor case, particularly where the alternative is to impose substantial liability on a party with limited responsibility of any kind for the contamination at a site. This is just such a case in which it would be quite unfair to require the Petitioners to pay millions in cleanup costs when their contribution to the contamination at the site is quite limited. The district court found that Shell was liable for 6% of the harm at the site and that the Railroads were liable for 9%. Pet. App. 255a, 260a. Nevertheless, under the Ninth Circuit's ruling these parties – collectively responsible for less than 1/6 of the harm – will be required to pay the entire bill of over $11 million to clean up the site.

Contrary to the assertion of the Ninth Circuit, neither the language of the statute, the policies underlying CERCLA nor the equities involved dictate such a result. The Ninth Circuit made clear its preference for having "*some* entity with connection to the contamination" rather than the taxpayers pick up the tab for

contamination attributable to parties – such as B&B – that are insolvent. Pet. App. 36a-37a. However, applying the Restatement approach in an appropriate manner the district court found that the Railroads and Shell were not responsible for the remaining 85% of the contamination. Stated differently, the district court found that the Railroads and Shell did not have a "connection" to the vast majority of the contamination at the site. Therefore, under the Ninth Circuit's own reasoning, the Railroads and Shell should not be required to "pick up the tab" for contamination for which they are not responsible. Throwing up roadblocks to achieve the opposite result does not comport with basic notions of fairness and yields exactly the type of harsh results about which Congress was concerned.

Moreover, Congress created a mechanism to address precisely this type of situation. The Hazardous Substances Superfund was created in part because Congress recognized that EPA and State environmental agencies would face situations where contamination needed to be addressed but the responsible party was not available to pay for it. *See* S. Rep. No. 96-848 at 13 (1980) (identifying "providing a fund to finance response action where a liable party does not clean up, cannot be found or cannot pay the costs of cleanup" as one of the "basic elements" of the statute). Congress also recognized that requiring companies such as Shell to pay to establish the Superfund while at the same time imposing joint and several liability on such companies to pay massive costs to clean up particular sites with which they had only a minimal connection would be "grossly unfair." 126 Cong. Rec. at S15004 (Nov. 24, 1980) (statement of Senator Helms). The use of the fund to pay for some of a cleanup where the owner/operator who was responsible for the vast majority of the contamination is not available to pay

would be entirely consistent with the purposes for which the Superfund was established.

In fact, such uses of the Superfund – even though implicating some taxpayer dollars – would result in a more equitable sharing of the risk among all segments of society that benefit from the activities leading to the contamination. Accordingly, the Court should overturn the Ninth Circuit's attempt to discourage the use of apportionment in an overzealous and inappropriate effort to protect the public fisc.

III. THE NINTH CIRCUIT'S RULING INCREASES SUPPLIERS' RISK OF POTENTIALLY SUBSTANTIAL FUTURE CERCLA LIABILITY

The decision below increases the risk of future CERCLA liability that could be substantial, even crippling for suppliers of pesticides, chemicals and other products shipped by common carrier such as ethanol, water treatment products, antiseptics and other cleaning products, paints and primers, printing ink, etc. The Ninth Circuit's ruling creates the risk that a blameless supplier may become liable for the costs to clean up an industrial facility merely because of inadvertent and unintentional leakage of some of the supplier's product at the facility. Given the Ninth Circuit's decision, it is reasonable to predict that CERCLA plaintiffs may target such suppliers and creatively use the Ninth Circuit's decision to seek to impose CERCLA "arranger" liability on an ever-increasing number of suppliers whose sole "crime" was the innocent sale of useful products. In fact, the Ninth Circuit's decision may prompt EPA and state environmental agencies to begin to routinely identify any suppliers that sold or delivered products to the contaminated site at issue as potentially responsible

parties ("PRPs"), thereby subjecting otherwise innocent suppliers to the Pandora's box of potential CERCLA liability, transactional costs and other problems that often befall a person or company formally designated as a PRP at a particular site.

The resulting liability and costs can be onerous. First, at sites (such as the B&B site) where the owner/operator of the facility is no longer viable, the Ninth Circuit's ruling creates the possibility that EPA or the relevant state agency may not only designate any former supplier of products to the facility as a PRP at the site, but pursue the former supplier as the primary PRP and seek to hold the supplier jointly and severally liable for all the cleanup costs at the site.

Moreover, in view of the heightened evidentiary standards imposed by the Ninth Circuit with respect to divisibility of harm, any CERCLA liability imposed on such a supplier is likely to be joint and several. The Ninth Circuit's decision creates standards for demonstrating divisibility of harm that may be impossible to meet and that go well beyond the reasonable basis for apportionment required by other circuits. Given these strict standards parties that have a limited nexus to a site may be forced to pay huge amounts for damages to which their acts did not contribute.

Thus, a company that did no more than supply a useful product could end up bearing the entire cost to clean up a contaminated site. The magnitude of these costs cannot be understated; studies have indicated that the average cost of cleaning up the largest sites on EPA's National Priorities List was approximately $140 million, while the average cost of cleaning up other sites on the NPL was $12 million in 2001. *See* Resources for the Future,

Superfund's Future: What Will It Cost? (RFF Press 2001), at xxv, available at http//www.rff.org/rff/RFF_Press-/CustomBookPages/Superfunds-Future.cfm. The financial implications of the Ninth Circuit's decisions for a wide range of businesses are therefore quite serious.

Moreover, the Ninth Circuit's decision may upset the mutually beneficial business relationship between suppliers and the common carriers that deliver their products. A key aspect to the continued health of this relationship is that suppliers must be able to rely on common carriers to deliver the products without concern that the supplier may incur CERCLA liability for the carrier's actions during delivery of the products. *See Amcast*, 2 F.3d at 751 ("It would be an extraordinary thing to make shippers strictly liable under the Superfund statute for the consequences of accidents to common carriers or other reputable transportation companies that the shippers have held in good faith to ship their products."). For ordinary risks, the supplier and common carrier may simply allocate the risk of this potential liability between themselves or assume additional insurance requirements in their contractual arrangement. However, where the potential liability at issue is CERCLA liability that may easily rise to the millions of dollars rather than merely the cost of lost product, mutual satisfactory contractual arrangements may not be quite as easy to achieve and will undoubtedly increase the parties' costs of doing business.

In addition, many suppliers ship their products nationwide by common carrier to various customers. These suppliers may have to tailor their contractual arrangements with common carriers by means of special liability provisions and insurance protections with respect to the shipments that will involve the delivery of products to customers located in states within the

jurisdiction of the Ninth Circuit. Some of these suppliers may simply cease shipment of goods to these states if the special liability provisions and insurance protections become cost prohibitive. Such artificial constraints on interstate commerce are anathema to our integrated national economy and are a powerful reason for this Court to overturn the Ninth Circuit decision and restore uniformity in this important area of federal law.

Likewise, the Ninth Circuit's approach to apportionment of harm may have a substantial impact on a wide variety of businesses. The Ninth Circuit approach clearly disfavors apportionment and sends a strong signal to trial courts to err heavily on the side of imposing joint and several liability on defendants in all CERCLA cost recovery cases, even where a company with a minimal connection to the contamination at a site may end up footing the bill for the cleanup of the entire site because the parties that are responsible for the contamination are insolvent or otherwise unavailable. The attitude that a business should always be made to pay for a cleanup rather than the public at large cannot justify such inequitable results, particularly given the high costs of site cleanups.

Indeed, the "make the polluter pay at all costs" approach embodied in the Ninth Circuit decision will only serve to further disrupt relationships between suppliers of products and their customers and between lessors and lessees of commercial and industrial property. The specter of joint and several liability being imposed for the cleanup of any site to which a company's products are shipped or on the lessor of any property used even minimally for a business operation substantially raises the stakes for allocation of risk in any such business relationship. Moreover, the imposition of joint and several liability in such circumstances may unfairly

penalize companies that devote significant resources to environmental compliance but may nevertheless be forced to shoulder the entire burden of a multi-million dollar cleanup because of a minimal connection to a site and a failure to keep records that it would never occur to any business to maintain in the normal course of its operations.

Under the Ninth Circuit approach, liability becomes a form of roulette, making losers of — and even bankrupting — companies based simply on a limited or even tangential connection to a contaminated site. As other courts have recognized, Congress intended for apportionment to ameliorate these harsh effects of a joint and several liability regime. The Ninth Circuit has effectively declared that it prefers a different balance. This Court should reverse the Ninth Circuit and restore the balance intended by Congress.

CONCLUSION

For the foregoing reasons the decision below should be reversed.

Respectfully submitted.

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5337

DANIEL M. STEINWAY
THOMAS JACKSON
Counsel of Record
MICHAEL MCGOVERN
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

DONALD D. EVANS
LESLIE HULSE
AMERICAN CHEMISTRY COUNCIL
1300 WILSON BLVD.
ARLINGTON, VA 22209
(703) 741-5000

HARRY M. NG
ERIK G. MILITO
AMERICAN PETROLEUM INSTITUTE
1220 L STREET, NW
WASHINGTON, D.C. 20005
(202) 682-8253

DOUGLAS T. NELSON
JOSHUA B. SALTZMAN
CROPLIFE AMERICA
1156 15TH STREET, NW
SUITE 400
WASHINGTON, D.C. 20005
(202) 872-3882

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 PENNSYLVANIA AVE., NW
WASHINGTON, D.C. 20004
(202) 637-3000

GREGORY M. SCOTT
NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION
1667 K STREET, NW
SUITE 700
WASHINGTON, D.C. 20006
(202) 457-0480

Counsel for Amici Curiae

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