Nos. 07–1601 & 07–1607 (consolidated)

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, ET AL.,

Respondents.

SHELL OIL COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NEWMONT USA LIMITED AND CANADIANOXY OFFSHORE PRODUCTION CO. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Statement of Interest

Newmont USA Limited ("Newmont") and CanadianOxy Offshore Production Co. ("CanadianOxy") are defendants in lawsuits filed under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 et seq. Both companies are defendants in *Pinal Creek Group v. Newmont Min. Corp.*, No. CIV 91–1764 PHX–DAE (D. Ariz.), and Newmont is also a defendant in *United States v. Newmont USA Limited*, No. CV–5–020–JLQ (E.D. Wash.).[1]

Like the defendants in this case, *amici* face claims alleging joint-and-several liability. Unlike the federal government in this case, however, the plaintiffs in the litigation against *amici* are not innocent parties, but are themselves liable for CERCLA clean-up costs. In the litigation facing *amici,* the courts are considering a legal issue that is *not* raised by this case: whether plaintiffs that are themselves liable under CERCLA may seek joint-and-several recovery under Section 107 of CERCLA, 42 U.S.C. § 9607. *Amici's* sole interest here is to ensure that this Court does not inadvertently prejudge a significantly different legal issue that does not arise in this case.

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[1] Newmont and CanadianOxy submit this brief pursuant to the written consent of the parties, as reflected in the letters the parties have filed with the Clerk. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than Newmont and CanadianOxy have made a financial contribution to its preparation or submission.

Summary of Argument

In *United States v. Atlantic Research Corp.,* 127 S. Ct. 2331 (2007), this Court held that parties that have incurred cleanup costs and are liable under CERCLA, but have not yet been sued under CERCLA, may bring claims under Section 107(a) of the statute to recover an equitable portion of their costs. *Id.* at 2335–39. The Court did not decide whether such claims give rise to joint-and-several or several-only liability. *Id.* at 2339 n.7.

Amici are defendants in pending cases raising the question left open in *Atlantic Research*: whether *liable* parties ("PRPs," in CERCLA parlance) may pursue joint-and-several recovery under Section 107, or instead are limited to several-only recovery. That question is not at issue in the case now before the Court because the claims here were brought by an entirely innocent party: the United States, acting solely in its regulatory capacity. *Amici* therefore urge the Court to resolve the issues before it without prejudging the remedies that are available to PRPs seeking to recover from other PRPs.

Argument

Whether a culpable party, such as the plaintiffs in the cases facing *amici,* may assert joint and several liability is a question very different from the right of an innocent party to obtain such relief.

Section 107(a) of CERCLA allows "any . . . person" who has incurred "costs of response" to seek recovery of costs from an array of potentially responsible parties. 42 U.S.C. § 9607(a). The statute is silent, however, as to whether liability for such costs is

several or joint and several. *See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350 (6th Cir. 1998) (Section 107 "does not specify whether these costs will arise from joint and several liability"). Thus, beginning with the seminal decision in *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), courts have looked to "traditional and evolving principles of common law" as set out in the Restatement (Second) of Torts, "to avoid . . . universal application" of joint-and-several liability "to inappropriate circumstances." *Id.* at 808–10. A "blanket adoption of the joint and several liability standard . . . would be inconsistent with the legislative history of CERCLA." *Id*. at 810.

The common law requires at least two conditions before joint-and-several liability is appropriate: (1) the injured plaintiff must be entirely innocent; and (2) the harm must be indivisible. *See, e.g.*, Restatement (Second) of Torts § 433B cmt. d ("As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former."); *The Atlas*, 93 U.S. 302, 306 (1876) ("common law creates a joint and several liability . . . because by a single and forcible act, which would not have happened except by the concurring negligence of two parties, an injury has been done to an innocent party"); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1125 (5th Cir. 1995) ("concern that the innocent plaintiff receive full recovery" is "one of the primary justifications for joint and several liability").

The first condition is not at issue in this case because the plaintiff (the United States acting solely

in its regulatory capacity) is not alleged to have engaged in any wrongdoing. The United States is thus the quintessential innocent party. The sole question presented in this case is whether the harm is "indivisible" under the traditional standards of the common law. As petitioners argue, if the guidelines of the common law are abandoned, as they were by the Ninth Circuit, there will be no meaningful limit on the reach of CERCLA liability.

Although not at issue in this case, the distinct question whether *liable* parties may pursue joint-and-several recovery under Section 107 is percolating in the lower courts. In *Atlantic Research,* this Court held that liable parties that *have* incurred cleanup costs but have *not* been sued under CERCLA may bring claims under Section 107(a) to recover an equitable portion of their costs. 127 S. Ct. at 2335–39. The Court left for another day, however, the question whether such claims give rise to joint-and-several or several-only liability. *Id.* at 2339 n.7 ("We *assume without deciding* that § 107(a) provides for joint and several liability.") (Emphasis added). In the wake of *Atlantic Research*, liable parties asserting Section 107 claims have sought to pursue joint-and-several recovery. *Amici* are defendants in two such cases,[2] and other similar cases are

[2] In *Pinal Creek Group v. Newmont Mining Corp.*, No. CIV 91–1764 PHX–DAE (D. Ariz.), two plaintiffs that are admittedly liable for the contamination (and in fact were sued by and settled with the State of Arizona) have moved for reconsideration of a prior order restricting them to several-only recovery against *amicus* CanadianOxy. Although the district court denied the motion, it certified the question for interlocutory appeal pursuant to 28 U.S.C.

pending.[3]

At common law, in cases brought by one tortfeasor against other tortfeasors, each is responsible only for its equitable portion of the harm. *See* Restatement (Second) of Torts § 886A(1) ("when two or more persons become liable . . . for the same harm, there is a right of contribution among them"); *id.* § 886A(2) ("No tortfeasor can be required to make contribution beyond his own equitable share of the liability."). As this Court has recognized in another context, the rationale for imposing joint-and-several liability disappears when the plaintiff itself is a liable party. *See Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 88 (1981) ("when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to

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§ 1292(b). A petition for permission to appeal is pending before the Ninth Circuit.

In *United States v. Newmont USA Limited*, No. CV–05–020–JLQ, (E.D. Wash), Newmont was recently held jointly and severally liable for two-thirds of the cleanup costs even though the plaintiff (the United States) was itself found liable for one-third of the costs. Newmont plans to file an appeal in that matter.

[3] *E.g.*, *In re Dana Corp.*, 379 B.R. 449 (S.D.N.Y. 2007) (granting motion to withdraw the reference from bankruptcy court to allow the district court to determine if the federal government could pursue joint-and-several liability under Section 107 where it was alleged to be a liable party); *Raytheon Aircraft Co. v. United States*, 532 F. Supp. 2d 1306 (D. Kan. 2007) (allowing PRP to allege joint-and-several liability against the federal government).

deter all wrongdoers by reducing the likelihood that any will entirely escape liability").

Consistent with the common law, the circuit courts thus far have limited liable parties to several-only recovery under Section 107. *See, e.g.*, *Atl. Research Corp. v. United States*, 459 F.3d 827, 835 (8th Cir. 2006) ("a liable party may not use § 107 to recover its full response cost"), *aff'd*, 127 S. Ct. 2331 (2007); *Pinal Creek Group v. Newmont Min. Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997) (under either Section 107 or 113 of CERCLA, "a PRP does not have a claim for the recovery of the totality of its cleanup costs against other PRPs, and a PRP cannot assert a claim against other PRPs for joint and several liability"), *overruled in part on other grounds, Kotrous v. Goss-Jewett Co.*, 523 F.3d 924 (9th Cir. 2008). No circuit has authorized PRPs to recover jointly and severally from other PRPs under Section 107 of CERCLA.

Because of this precedent and the clarity of the common law, *amici* expect that other courts facing claims by PRP plaintiffs will likewise limit any recovery to several-only relief. Because the present case does not raise the issue, however, *amici* merely urge the Court to tailor its language and analysis in this case to avoid inadvertently prejudging the issue.

Conclusion

The Court should resolve the issues raised in this case without prejudging the distinct question of the remedies available under Section 107 of CERCLA to PRPs that seek recovery from other PRPs.

Respectfully submitted,

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