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,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters nationwide. WLF devotes a significant portion of its resources to promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF regularly appears as amicus curiae in the Supreme Court and lower federal courts in cases raising important statutory and constitutional issues, including environmental and other regulatory cases under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9607. *See, e.g., United States v. Bestfoods, Inc.,* 524 U.S. 51 (1998); *United States v. Hercules, Inc*., 247 F.3d 706 (8th Cir. 2001); *United States v. Alcan Aluminum Corp*., 315 F.3d 179 (2d Cir. 2003) (Alcan II).

WLF believes that the lower courts have failed to follow the intent of Congress in assigning liability under CERCLA and have unfairly imposed joint and several liability on American businesses and municipalities. The process used by the courts is result driven and lack reasonable standards. The Ninth Circuit's decision is a textbook example of how this process is fundamentally flawed, and thus demands reversal by this Court.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae state than no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus Washington Legal Foundation and their counsel, contributed monetarily to the preparation and submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

It is beyond dispute that the role of our judiciary is not to make law, but to interpret it. This is especially true in the context of congressional statutes where Congress has made explicit policy choices. Absent having offended a constitutional limitation, it is not the role of the courts to frustrate or change congressional policy choices under the guise of interpreting a statute. The purpose of this brief is to demonstrate to this Court that the case before it is merely one of the more recent examples of the judiciary's attempt to frustrate the well-accepted policy underlying the Comprehensive Environmental Response, Compensation and Liability Act ("CERLCA"), 42 U.S.C. § 9601, *et seq.,* that parties who caused environmental problems should pay for their remediation, and that parties who either did not cause the problem or only caused a portion of the problem should not be responsible for all the liability.

What amicus will demonstrate is that a number of federal courts have developed a simple three-step technique to impose CERCLA liability on parties, not because of what they did, as Congress wished, but because of who they were, and because those courts decided they should pay. The Railroad Petitioners are quite candid about the purpose of the Ninth Circuit which is "to pursue a different conception of public policy" (Pet'r's. Br. 24).

Clearly, these courts have not been candid about their actual intention. However, the parallel conduct between the Ninth Circuit in this case and the other cases described herein puts the real intent of these courts beyond serious dispute.

The process which these courts use involves three steps. The first step is to violate the seminal principle of common law liability, and remove causation as a prerequisite to liability. The second step is to expand definitions that trigger liability to such broad levels that they encompass virtually everything. As the third and final step, these courts create an illusory means of escaping liability that has an aura of fairness, but as a practical matter, can never be established.

This case poses far broader implications than merely the proper construction of CERCLA. It is a case which raises the issue of the proper role of the courts, and whether courts will be allowed to subvert the constitutional role of Congress, by using crafty argument or rhetoric under the guise of statutory interpretation to substitute their policy choices for those of the Congress.

ARGUMENT

I. ELIMINATING CAUSATION AT THE LIABILITY STAGE IS THE FIRST ELEMENT USED TO SUBSTITUTE THE COURT'S LIABILITY POLICY FOR THAT OF CONGRESS

CERCLA was widely-accepted as a statute whose purpose was to implement a clean-up of pollution by making the parties responsible for the problem, remedy that problem. This concept has been aptly described by the Petitioners, who noted that the Congress declined to enact provisions that would make all covered persons jointly and severally liable and instead chose to rely on common law principles to apportion liability. (Shell Br. 32-37).

However, it is axiomatic that in order for courts to apply common law principles to apportion liability, they must as a prerequisite apply common law principles to assign liability. This case and others which amicus will reference demonstrate that a number of federal courts have largely ignored the common law principles in both assigning liability and apportioning liability. They have done this with a simple objective in mind: to impose CERCLA liability on parties that they believe should be liable regardless of the actual contribution to the environmental problem being remedied.

Critical to any effort to assign or apportion liability under traditional concepts of common law is the notion of causation, a concept that many courts have now routinely rejected in an attempt to create their own liability scheme. In *United States v. Alcan Aluminum Corp*., 964 F. 2d 252 (3d Cir. 1992), the Third Circuit tried to explain away the explicit use of the word "causation" in the CERCLA liability scheme. *Id.* at 264-66. It argued that the word "causation" in the statute merely requires that a release of hazardous substances cause the response costs, regardless of whether or not they are the defendant's substances. *Id.* All the defendant must do, according to the Third Circuit, to be subject to liability is simply fall into a category of liable party, even if the particular hazardous substance was wholly unrelated to the release or perhaps even remedied a portion of it. *Id.* That was enough to establish liability in *Alcan*.

Under such peculiar logic, a person can dispose of a hazardous substance, sodium hydroxide for example, at a site whose problem is acidic, and be liable if the acidic condition or its consequence, the mobilization

of metals, is released from the site. However, sodium hydroxide is a base and it would actually *remediate* the acidic condition. The result would be to compel a party to pay for the remediation of a site, when its only contribution to the site would have been to partially remediate the condition in the first place. This reasoning is hardly consistent with the principle that *polluters* pay, or with traditional notions of the common law. Rather, it creates a new principle which subsidizes that actual polluter.

The Third Circuit justifies its conclusion rejecting causation by claiming it is the plain meaning of the statute, *id*. at 264—the plain meaning which flips the concept of polluters pay on its head. In fact, the plain meaning which the Third Circuit advocated would render the words in the statute *without* meaning. To argue that causation in the statute means that a liability attaches when a release causes response costs, and not when the party's hazardous substance causes the response costs, is to simply state the obvious. There could never be liability if a release did not cause response costs. What would the liability be for?

Clearly, troubled by the fact that the plain meaning is really not that plain, the Third Circuit offers another explanation – a review of the legislative history, which they claim also supports their view. Notably, the court provides no citation or support from the legislative history to lend credibility to their claim

In fact, the legislative history appears to suggest just the opposite according to the District Court in *United States v. Wade*, 577 F.Supp. 1326 (E.D. Pa. 1983), which explicitly referred to the committee reports on CERLCA, concluding:

> The Committee intends that the usual common law principles of causation, including those of proximate causation should govern the determination of whether a defendant 'caused or contributed' to a release or a threatened release… Thus, for instance, *the mere act of generation or transportation of a hazardous waste or the mere existence of a generator's or transporter's waste in a site with respect to which clean-up costs are incurred would not, in and of itself, result in liability* . . . The Committee intends that for liability to attach under this section *the plaintiff [government] must demonstrate a casual or contributory nexus between the acts of the defendant and the conditions which necessitated response action.*

Id. at 1333-34 (emphasis added).

Some courts, including the Third Circuit, have rationalized the adoption of the elimination of this principle concept of common law liability by claiming that if causation was a requirement to demonstrate liability, it would "underscore the difficulty that CERCLA plaintiffs in a multi-generator site would face." *Alcan*, 964 F.3d 264. The answer is that the problem would be no greater than the problems faced by any plaintiff in a multi-tortfeasor case. We think it highly unlikely that any tortfeasor who suffered an acidic injury could hold the party responsible for a substance with a base pH liable.

However, what makes this position totally incredulous is that proof of causation is essentially required under CERCLA in order to effect a remediation. Plaintiffs are required to undertake a RIFS (Remediation Investigation Feasibility Study), which is required to define all the sources of harm to be

remediated, the routes of release, and the alternative remedies and their feasibility. It is undisputed that the Plaintiffs are obligated to prove the nature of the waste sent to the site. They must demonstrate that it is a hazardous substance. Once they complete that task, even someone with the skill level of a lawyer should be able to match the chemical nature of a particular in-put waste with a similar waste stream that is being remediated, the route of release, and even with some relatively simple math, achieve a reasonably fair allocation, or determine that the input waste is simply irrelevant to the problem being remediated.

The Petitioner's brief expresses the following concern: Joint and several liability without reasonable causal apportionment threatens to sever the liability of CERCLA defendants from the reasons the statute makes them liable. Pet'r's. Br. 24.

The elimination of causation is simply the first step in the Court's attempt to frustrate congressional policy limiting liability of site participants whose waste did not contribute to the harm at all or contributed only to part of the harm, and substitute their personal view as to who should liable. We suggest that certain federal courts, among them the Second and Third Circuits, and in this case, the Ninth Circuit, have determined that CERCLA liability should be imposed based on who they believe should pay, regardless of whether their waste *actually contributed* to the problem.

II. EXPANDING DEFINITIONS OF STATUTORY TERMS TO EVISCERATE CONGRESSIONAL INTENT CREATE THE SECOND CONDITION FOR COURTS TO SUBSTITUTE THEIR POLICY ON LIABILITY

Shell Oil Company neither disposed of any waste at the site nor owned or operated the site. Its only connection was that it sold a new product which was delivered to the site. The Ninth Circuit ensnared Shell into the liability scheme by claiming that it was an arranger, because it could foresee that some of its product might be spilled when unloaded.

Unfortunately, the Ninth Circuit conduct is not unique in CERCLA and is merely the most recent iteration of attempts by many federal courts to construct liability schemes to implement their policy agendas. In *United States v. Alcan Aluminum Corp.,* 990 F.2d 711 (2d Cir. 1993) and *United States v. Alcan Aluminum Corp.,* 964 F.2d 252 (3d Cir. 1992), the Second and Third Circuits did a similar thing. They simply interpreted the term "hazardous substance" so broadly as to include everything in the universe. They even admitted it, acknowledging that "[t]here is some force to Alcan's argument that the definition of hazardous substance is so broad it encompasses virtually everything and thereby eviscerates the meaning of hazardous." 964 F. 2d. at 255, n. 13. *See also*, *Alcan*, 990 F.2d at 716 (2d Cir. 1993).

In the *Alcan* cases, the only hazardous substances were below background levels of common metal compounds, such as copper and zinc, that existed in far higher concentrations in common breakfast cereals such as Kelloggs Special K. These would now be included as CERCLA hazardous substances.

The Ninth Circuit's expansion of "arranger" has the same effect of eviscerating the meaning of the term since suppliers of any product could foresee it that could be spilled or disposed of at some point. *United States v. Burlington Northern & Santa Fe Ry. Co.*, 502 F.3d 781 (9th Cir. 2007).

III. CREATING AN ILLUSORY MEANS TO ESCAPE LIABILITY TO DISGUISE THE JUDICIARY'S INTENT IS THE THIRD WAY TO IMPOSE ITS OWN POLICY FOR THAT OF CONGRESS

The judges who registered their dissent to a re-hearing en *banc* in this case noted that the panel had crafted a standard that imposes "impossible-to-satisfy burdens" on CERCLA defendants. (Shell Br. 12.). The Second and Third Circuits in the *Alcan* cases did substantially the same thing.

The Third Circuit adopted the following standard for escaping liability: "In sum . . . if Alcan proves that the emulsion did not or could not when mixed with other hazardous wastes, contribute to the release and resultant response costs, then Alcan should not be liable for any costs." 964 F.2d at 270.

After remand, the EPA completed the RIFS, which described in detail all the hazardous substances and the remedy. It did not identify metals of any kind as a source of a problem at the site. In cross-motions for summary judgment, the trial court did not grant summary judgment in Alcan's favor as one might expect. *United States v. Alcan Aluminum Corp.*, 892 F.Supp. 648 (M.D.Pa. 1995). Instead it created a new legal standard to escape liability that had the requisite characteristic of being incapable of proof. *Id.* In reinstating joint and several liability the District

Court acknowledges that neither the "hazardous substances" or even the emulsion contributed to the response costs, but created an entirely new standard that the waste was not "environmentally benign." *Id.* at 655-56. In doing so, that court explained that "[i]n this case, Alcan presented neither evidence nor argument that its used emulsion was environmentally benign. While the constituents that bring it within CERCLA's ambit may not have contributed to the harm, Alcan has not argued that its used emulsion was harmless." *Id.* at 655.

The simple answer is, of course, it is not harmless; it depends on the exposure conditions since even the water which comprised 95% of the waste can be toxic. The District Court had constructed the very conditions to avoid liability that the *en banc* dissenters described in the case before this court. It devised a legal standard not capable of ever being satisfied. There is no such thing as something that is environmentally benign or harmless any more than a hazardous substance can be described independent of the conditions of exposure. As Professor M Alice Ottoboni states in her book THE DOSE MAKES THE POISON (2d ed. 1997): "Every chemical has a set of exposure conditions in which it is toxic and, conversely every chemical has a set of exposure conditions in which it is not toxic." *Id.* at 25.

Justice Stephen Breyer makes the same point in his book BREAKING THE VICIOUS CIRCLE TOWARDS EFFECTIVE RISK REGULATION (Harvard University Press 1999): "How does risk of harm vary with the person's exposure to that substance? The question is critically important, for as Paraclesus pointed out over four hundred years ago, 'the dose alone determines the poison. Drinking a bottle of iodine is

deadly; putting diluted iodine on a cut is helpful.'" *Id.* at 9 (footnote omitted).

Even water is toxic if consumed in large quantities; a boy at the State University of New York died from being forced to drink too much water as fraternity prank *See* Alex Cuken, May 3, 2003, *available at* http://www.upi.com/.cfm?StoryID=20030503-034748-7643r.

Thus, even though Alcan could establish that its waste did cause the response costs at the site, it could never prove its waste was environmentally benign any more than it could prove that pure water is environmentally benign. A different panel at the Third Circuit affirmed the District Court without opinion, 96 F.3d 1434 (1996), and this Court denied certiorari, 521 U.S. 1103 (1997).

The Second Circuit achieved the same result for the Alcan waste emulsion by somewhat different means. It had established an exception to the liability scheme that was limited to substances that were below background concentrations. When it became clear that the Alcan was going to establish that the metals in its waste were below background, the government tried to insert into PCB's into the emulsion. However, even if PCB's were in the waste it was undisputed that they were not above background levels. In fact, PCB's are ubiquitous in the environment, even the polar ice caps. *See* WASHINGTON POST, May 17, 2001 at A17. PCBs travel naturally in "ocean currents, or in the winds falling in places where they have never been used . . . . More that 6 tons of PCBs reach the Artic each year this way." *Id.*

Faced with this dilemma, the potential that Alcan would escape liability, the Second Circuit quickly re-

crafted its below-background exception to liability to add an exception to that exception. *Alcan*, 990 F.2d 711. The court said that the exception did not apply to manmade substances—a condition that did not exist in its original decision. *Id.* at 716. Since all manmade substances have background levels, otherwise waste streams could not have concentrations that were the same or lower. The Second Circuit now constructed an exception that could never be attained.

The Ninth Circuit's obvious effort to reject every reasonable basis of apportionment identified by the District Court in this case, geographical allocation, temporal allocation, and distinctions among contaminants, has a character that is more than vaguely reminiscent of the objective of the courts in the Alcan cases—reject any standard that has any prospect of limiting the defendant's liability.

* * * *

By eliminating traditional common law concepts of causation, the courts expand the potential range of responsible parties. By expanding traditional meanings of words that describe classes of potentially responsible parties, the courts have further undermined the limitation to liability intended by Congress. And finally, by creating faux exceptions to liability that create the illusion that a court is being fair, the courts have been able to implement their policy choices as to who should be liable.

Do courts engaged verbal calisthenics to achieve ignoble ends? Judge Richard A. Posner in his book OVERCOMING LAW (Harvard University Press 1995), expresses that concern most eloquently in his chapter entitled "The Profession in Crisis": "[E]xtraordinary

plasticity of legal rhetoric . . . . enables a clever judge to find a plausible form of words to clothe virtually any decision." *Id.* at 157.

Why would courts subvert Congressional intent? Wilbur Ross explains in his book MUTED FURY—POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 (Princeton University Press 1994):

> The fact that courts have failed to apply legal doctrine in a manner consistent with traditional expectations and instead have yielded to the perceived public sentiment of the day is not new, nor is it a phenomenon that is likely to disappear as long as men and women occupy the bench: "A court is sometimes so swayed consciously, more often unconsciously because the pervasive sympathy of numbers is irresistible even by elderly lawyers."

Id. at 315.

However, understanding how and why the courts have been subverting Congress' intent to limit CERCLA liability, does not excuse the conduct.

CONCLUSION

Amicus respectfully asks this Court to reverse the Ninth Circuit and to make it clear to all federal courts that not applying the intent of Congress in the context of statutory interpretation, no matter how noble they believe to be their motive, is not merely reversible error, but it is conduct that undercuts both the legitimacy of and respect for the judicial system.

Respectfully submitted,

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