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

REPLY BRIEF FOR PETITIONERS THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY

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ARGUMENT

I. RESPONDENTS CONCEDE THE BASIC LEGAL PRINCIPLES THAT SUPPORT APPORTIONMENT

Respondents effectively concede that the briefs filed by the Railroads and Shell accurately characterize the law governing apportionment under CERCLA.

1. The United States concedes that "common-law principles are to apply unless CERCLA 'speak[s] directly to the question.'" US Br. 18 (quoting *United States v. Bestfoods*, 524 U.S. 51, 63 (1998)). Respondents identify no clear statement in CERCLA that displaces common-law apportionment principles, and they assert that §433A of the Restatement (Second) of Torts supplies the governing test.[1]

The Railroads' opening brief explained that the common law traditionally recognized "pollution as the *paradigmatic* apportionable harm," Pet. Br. 26, and that the Second Restatement represents the "triumph"

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[1] The United States identifies two authorities "suggest[ing]" that CERCLA's structure and purpose require a standard of proof more demanding than common-law principles. US Br. 35 n.16. *United States v. Hercules, Inc.*, 247 F.3d 706, 715-17 (8th Cir.), *cert. denied*, 534 U.S. 1065 (2001), does not modify Restatement principles. *United States v. Capital Tax Corp.*, 545 F.3d 525, 535 (7th Cir. 2008), notes uncertainty about the "fit" between Restatement §433A and CERCLA, but concludes that apportionment is proper if a share of liability "is susceptible to a 'reasonable estimate.'" The United States soundly does not ask this Court to adopt a more demanding standard. *Cf. Norfolk S. Ry. v. Sorrell*, 127 S. Ct. 799, 808 (2007) (statute's broader purposes insufficient to abrogate common-law standard of causation).

of the views of William Prosser, who saw joint and several liability as an outmoded relic only to be applied "when there is no reasonable alternative." *Id.* at 27, 26.[2] Respondents vaguely suggest that pollution from commingled waste is inherently incompatible with apportionment, *see, e.g.*, US Br. 33, but never deny that the common law reached the opposite conclusion.

Petitioners also demonstrated that apportionment requires only reasonable *assumptions* and *estimates*. Common-law courts facing "'practical difficulty'" in apportionment embraced "'an approximation to accuracy'" before saddling a defendant with damages for which he is not causally responsible. Pet. Br. 30 (quoting *Sellick v. Hall*, 47 Conn. 260, 274 (1879)); *see also Fed. Sav. & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 136-37 (4th Cir. 1987) ("'[W]here the extent of the harm or damage inflicted by the separate acts is seemingly incapable of any definite proof or ascertainment by evidence, the apportionment has been left to the fact triers nevertheless.'") (citation omitted). The Railroads highlighted common-law precedent permitting apportionment based on impressionistic eyewitness testimony, Pet. Br. 31-32 (citing *Hill v. Chappel Bros. of Mont., Inc.*, 18 P.2d 1106 (Mont. 1932)), and "'the best possible estimate[s]'" when "'the nature of things'" prevented more precise or authoritative evidence, *id.* at 32 (quoting *Hill*, 18

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[2] Citing §433A comment i, the United States notes that some kinds of harms are by their nature incapable of apportionment. US Br. 33. Comment i, however, refers to harms that are *theoretically* incapable of apportionment. The Ninth Circuit correctly found that the contamination here is not such a harm.

P.2d at 1110); *id.* at 31 (quoting *Powers v. Kindt*, 13 Kan. 74, 76 (1874)). The Railroads also explained that apportionment principles have always been inextricably linked to the common law's equally generous approach to the plaintiff's proof of damages—and that these flexible standards apply whether the plaintiff or defendant bears the burden of proving apportionment. *Id.* at 30-31.

Respondents neither genuinely challenge that explanation of the common-law authorities nor defend the Ninth Circuit's unsupported assertion that apportionment requires "records" separating out with "precision" the chemicals stored and spilled on various areas of the facility over time. Pet.App.-40a-41a. For the most part, Respondents simply ignore both the common-law authorities and the district court's extensive findings, and rely on a factually inaccurate assertion (*see infra* at 7) that *no* evidence or argument pertaining to apportionment was offered at trial.

The handful of assertions that Respondents do make about the common law are all inaccurate. First, DTSC claims that "rough estimates" are permissible only in apportioning between two "distinct harms," as opposed to unitary harms with multiple causes. This argument is raised for the first time in DTSC's brief to this Court and is therefore waived. Regardless, it is meritless. DTSC is simply observing that the phrase "rough estimate" happens to be used in the Restatement comment addressing distinct harms, but not in the one addressing unitary harms. But the Restatement cites a wealth of cases apportioning liability for single harms on the roughest of approximations. *See, e.g.*, *Hill*, 18 P.2d at 1109 (destruction of plaintiff's pasture); *Thomas v. Ohio*

Coal Co., 199 Ill. App. 50, 56-57 (1916) (pollution of plaintiff's creek); *see also* Pet. Br. 31-32 & n.6.

Second, the United States baldly claims that there is "no authority" to justify an apportionment when "it appears likely that the share overstates [a defendant's] actual contribution," US Br. 42, but it completely ignores common-law precedent explaining that protecting the plaintiff by measuring each defendant's share "with a liberal hand" is preferable to joint and several liability, Pet. Br. 29 & n.5 (quoting *Little Schuylkill Navigation, R.R. & Coal Co. v. Richards's Adm'r*, 57 Pa. 142, 147 (1868)).

Third, Respondents criticize the district court's recognition that joint and several liability would be unduly harsh here. As explained below, *infra* at 12-18, the district court did not improperly import equitable considerations into its causal apportionment. But the cases, which Respondents again ignore, show that the common law's generous approach to causal apportionment was shaped, in part, by a judicial recognition that burdening a defendant with "damages to which he is not legally liable" is unfair and ill-advised when any reasonable basis for division exists. *Sellick*, 47 Conn. at 274. The common law chose "practical justice" to prevent instances in which "the most innocent wrongdoer may, at the mere will of the plaintiff, be held for all the damage" or "by a slight negligence overwhelmed by others in gigantic ruin." *William Tackaberry Co. v. Sioux City Serv. Co.*, 132 N.W. 945, 952 (Iowa 1912); *Little Schuylkill*, 57 Pa. at 146. That is precisely the sentiment that led Congress to excise a proposed mandatory joint and several liability provision from CERCLA in favor of common-law apportionment principles. *See* Pet. Br. 5 (citing 126

Cong. Rec. 30972 (1980)). Respondents' suggestion that the contribution provisions added six years later were Congress's primary gesture toward fairness to PRPs in CERCLA, US Br. 4, is obviously incorrect.

Finally, Respondents have little response to the Railroads' observation that recent common-law cases "increasingly favor[] apportionment," using probabilistic assumptions to apportion even injuries considered theoretically indivisible by the Second Restatement. Pet. Br. 26, 32-33. The United States oddly suggests that the Second and Third Restatement approaches are consistent. US Br. 31 n.14. If so, the United States must endorse the views that even for theoretically indivisible injuries joint and several liability conflicts with the increasing predominance of comparative responsibility, and that "[n]o party should be liable for harm it did not cause, and an injury caused by two or more persons should be apportioned according to their respective shares of comparative responsibility." Third Restatement §10 cmt. a, §26 cmt. a; *see also* §§B18-E19 (offering four alternative "tracks" for apportioning even theoretically indivisible injuries).

Alternatively, the United States argues that this Court should only consider the Second Restatement because it was contemporaneous with CERCLA. US Br. 31 n.14. Congress intended courts to follow "traditional and *evolving*" common-law principles of apportionment. *United States v. Chem-Dyne*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) (emphasis added); *cf. Sorrell*, 127 S. Ct. at 807-08 (2007) (relying on Third Restatement to define liability). And many of the cases demonstrating the common law's increasing flexibility predate CERCLA's enactment or amendment. Pet.

Br. 32-33. Regardless, this issue has little practical relevance here since apportionment is so clearly proper under Second Restatement principles.

2. Respondents also concede that the district court's apportionment should have been reviewed for clear error. *Id.* at 39-40. Clear-error review is consistent with the common law, the intensely factual nature of these determinations, and the way courts review the parallel question of whether damages have been proven with reasonable certainty. *Id.* at 40-41; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969) (stating clear-error standard for reviewing certainty of damages); *Reeves*, 816 F.2d at 136 ("The issue of apportionment [under §433A], in particular, is one on which juries are typically given wide latitude.").

The United States simply—and erroneously—states that the Ninth Circuit applied clear-error review, US Br. 11, effectively conceding that the district court's judgment should be upheld if *any* factfinder could reasonably draw the same inferences. *See Reeves*, 816 F.2d at 137 ("The jury here clearly perceived some basis for differentiating the liability of the three defendants. We see no compelling reason to disturb that assessment.").

DTSC agrees that clear-error review applies to credibility findings but claims that the Ninth Circuit's second-guessing of the district court's factual inferences was justified. DTSC Br. 37 (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985); *United States v. Taylor*, 487 U.S. 326, 337 (1988)). DTSC fails to note *Anderson*'s explicit rejection of their suggestion that clear-error review is

limited to credibility. 470 U.S. at 574. While DTSC's citation of *Taylor* appears to suggest that abuse-of-discretion review, the factual nature of causal apportionment, and its strong connection to proof of damages with reasonable certainty, make clear-error review more appropriate. But neither standard is consistent with the Ninth Circuit's *de novo* review of "whether the party with the burden of proof met that burden," Pet.App.-36a, and the district court's apportionment here would have to be upheld under either.

II. RESPONDENTS' WAIVER ARGUMENTS WERE REJECTED BY TWO COURTS BELOW

The United States relies heavily on the suggestion that the Railroads waived any right to apportionment by pursuing a trial strategy focused on demonstrating that they had no liability. US Br. 35-38. DTSC similarly contends that the Railroads offered "no evidence to support apportionment." DTSC Br. 48. The record flatly contradicts these arguments, which have already been rejected by the district court, by the Ninth Circuit, and at least implicitly by this Court when it granted certiorari over these same objections from the United States. *See* Railroads' Cert. Reply Br. 4-6.

1. In pretrial briefing, the Railroads denied that any contamination from their parcel contributed to the groundwater plume, but they also argued that if they were found liable "such harm is reasonably capable of apportionment on the basis of relative mass." US ER 112-13. The Railroads supported this theory with expert testimony and eyewitness accounts at trial. For

example, Kalinowski testified that the costs of the EPA's groundwater remedy were substantially proportional to the amount of groundwater contamination and that responsibility could be apportioned based on relative mass if the court concluded that some contaminants from the Railroad parcel had migrated into the groundwater plume. *See* SER 263-64 (addressing "the divisible contribution to remedial action costs" caused by chemicals originating from "any specific source or specific area" of the facility).

The Railroads' entire case was based on showing how little—if any—groundwater contamination originated from the Railroad parcel and contrasting that with overwhelming evidence of contamination originating from B&B's parcel. The Railroads adduced all available information by questioning nearly a dozen witnesses at trial with first-hand knowledge of activities on the parcels. The Railroads could not document the "precis[e]" volume of spills on the Railroad parcel only because the Railroad parcel was typically used for storing "empty things," Pet.App.-41a; Brown Tr. 1003, and thus few of the witnesses could remember any spills.[3] Respondents also have not contended that the Railroads withheld documents

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[3] *E.g.*, JA-55 ("Q. Did you ever see any chemical spilled over there on the west side while you worked there? A. Not on the west side."); Dickey Dep. 38 (read into record at Tr. 4199) ("Q. Did you ever see anything get spilled on the ground over here on the west side of the warehouse or the maintenance building? A. No. I never seen nothing spilled over here."); JA-222 ("Q. Is it accurate to say that you never actually saw releases from sight gauges on the leased property? A. I can't remember any that I saw.").

relevant to divisibility; very few records survived B&B's closure and the Railroads sought what little did remain through discovery.[4] The soil sampling evidence also proved that there was no direct migration of contaminants from the surface of the Railroad parcel down to the groundwater—which left the Respondents' improbable surface runoff theory as the only way that the Railroad parcel could have contributed to the groundwater contamination *at all*. Pet. Br. 15-16.

In light of that evidence, the Railroads understandably argued that they had *no* responsibility for the groundwater cleanup. (The Railroads assumed responsibility for the study costs on the Railroad parcel itself, totaling $489,727, as well as the future cost of paving over the Railroad parcel. Pet.App.-252a.) But the trial evidence bears strongly on apportionment even if the Railroads fell short of showing that *none* of the groundwater contamination came from their parcel. Accordingly, the Railroads' proposed findings of fact stated, in the alternative, that any share of contamination from the Railroad parcel was "apportionable." US ER 172.[5] Similarly, the United

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[4] Brown testified that while closing down the Arvin facility he destroyed some of the company's business records. Brown Tr. 918. By the time B&B abandoned its secondary facility at Shafter in 1989-90, only 270 documents survived to be microfilmed. *Id.* at 940-41.

[5] The United States contends that the Railroads' apportionment expert, Kalinowski, "assumed that none of the facility's contamination was caused by disposals on the Railroad parcel" and thus "the Railroads' only argument and evidence was that they contributed zero." US Br. 36-37. Kalinowski made clear, however, that his assessment about whether the Railroad parcel

States's proposed findings of fact devoted 26 paragraphs to the issue of whether the Railroads were entitled to apportionment. US Findings of Fact 118-30. And the Governments' Response to the Railroads' Proposed Findings of Fact and Conclusions of Law acknowledged (at 4) that that the Railroads' "first 101 Proposed Findings of Fact generally relate to the issue of the amount of contamination that came from both parcels." Respondents should not have been surprised, then, when the district court found that "*[a]s demonstrated by the Railroads*, the relative mass of chemicals released on the [parcels] is an appropriate factor to take into account in determining the Railroads' apportionable share of the divisible harm." Pet.App.-248a (emphasis added).

The United States's claims of waiver and lack of opportunity to litigate apportionment (US Br. 41) thus were properly rejected by the district court. After the court issued its initial findings and conclusions, Respondents moved to amend, claiming that the Railroads' "scorched earth" litigation strategy waived apportionment, and arguing that the actual apportionment was erroneous. US ER 478-80, 482. The district court explained that it did not "[m]ake up" the apportionment but rather "relied on record evidence" on "duration, volume, and nature of hazardous substance release," *id.* at 482, and held that the issue had not been waived, *id.* at 488. The suggestion that the district court found that the Railroads submitted no evidence on apportionment, US

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contributed to the harm had no effect on his testimony about divisibility generally. JA-303-04, 308.

Br. 8, gets the truth exactly backward. The district court amended its original findings to clarify that such "[e]vidence was offered." US ER 488. Finally, the court considered and rejected Respondents' claim that, on the merits, the apportionment was improperly based on "unproven assumptions." *Id.* at 483-87.

Appellate courts applying the Restatement have affirmed apportionments that were substantially more "unexpected" than the one here. In *Reeves*, for example, the jury apportioned liability even though the plaintiff *only* sought joint and several liability and the instructions "repeated[ly]" told the jurors to "assign damages for each count, *without* a breakdown for each defendant." 816 F.2d at 137 n.8 & 136. The Fourth Circuit nevertheless affirmed because, as here, there was "ample evidence in the record which demonstrates the differing roles and responsibilities of the defendants." *Id.* at 136; *see also Hill*, 1932 Mont. LEXIS 17, at *1 (counsel complaining that "[n]o attempt was made" to differentiate between the damage done by defendant's horses and others').

2. When Respondents rehashed these arguments on appeal, the Ninth Circuit readily concluded that they were "not supported by the record" and "that the issue of apportioning liability was not waived and is properly before us." Pet.App.-20a-21a n.16. Respondents again cite *Burdett v. Miller*, 957 F.2d 1375, 1380 (7th Cir. 1992), where the district court ruled in a plaintiff's favor on a theory of liability not mentioned in the complaint, pretrial order, pretrial briefing, motion for a directed verdict, or in any post-trial briefing. Both the district court and the Ninth Circuit rejected the factual predicate for such an analogy.

3. Respondents assert that the record contains no evidence bearing on apportionment, but the district court disagreed and Petitioners' opening briefs here contained extensive analysis of, and citation to, the substantial evidence the trial court credited. Respondents' briefs largely ignore the voluminous record at issue here, which includes twenty-seven days of trial testimony. Respondents have the burden of showing clear error, and should be held to the consequences of *their* strategic decision to refuse meaningful engagement with the actual evidence before this Court.

III. THE DISTRICT COURT PROPERLY APPLIED COMMON-LAW PRINCIPLES

1. Respondents argue that the district court conflated causal apportionment with equitable considerations. US Br. 39-40; DTSC Br. 58-59. This is misdirection, as the court of appeals recognized. The Ninth Circuit found an "insufficient logical connection" between the district court's apportionment factors and causation of the harm. It did *not* accept Respondents' argument that the district court improperly used equitable factors to divide liability. Pet.App.-43a; *see* Pet.App-37a-44a.

The district court's actual divisibility analysis (*see* Pet.App.-245a-52a ¶¶472-489) properly focused on comparative causal responsibility alone. The court explained that it was "estimat[ing] the maximum contribution of each party's activities that released hazardous substances that *caused*" the contamination. Pet.App.-239a (emphasis added). Accordingly, it considered: the amount of surface area upon which spills could occur; the intensity of activity and amount

of spills on the Railroad parcel; the amount of time the parcel was used in a manner susceptible to spills; whether and how spills on the Railroad parcel could have reached the groundwater; and which chemicals spilled on the Railroad parcel likely added to the contamination that had to be remedied. Geography, time, and distinctions among contaminants are quintessential factors for *causal* apportionment. *See* Pet. Br. 41-46; DTSC Br. 22. The precedent on which the court primarily relied for its apportionment, moreover, was *In re Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993), which indisputedly follows the common-law causation approach. *See* Pet.App-246a, 248a.

Respondents point to the district court's separate discussion of "equitable apportionment," in which the sole question was the "'extent to which a defendant's liability may be offset by the liability of another.'" Pet.App.-239a (citation omitted). The district court was explicitly referring to *contribution* under CERCLA §113(f)(1), which the court distinguished from apportionment under Restatement principles. *See* Pet.App.-232a-39a.

Respondents are also in no position to complain about the district court's phraseology, because they repeatedly invited it. In their summary judgment briefing, for instance, Respondents argued that apportionment was "discretionary," that "Congress intended federal courts to retain flexibility in determining when to apportion," and that apportionment was "not appropriate under the unique facts of this case" *for equitable reasons*. SER 25-27. Respondents relied on a proposed amendment to CERCLA that would have introduced equitable "Gore

factors" into apportionment analysis. *See id.* The opinion's reference to §113(f)(1) contribution as "equitable apportionment," Pet.App.-239a, which Respondents now attack, traces directly back to their arguments.

Yet the district court did not actually commit the error invited by Respondents. Nowhere in its apportionment analysis does the court apply equitable considerations. One such Gore factor is a party's actual involvement in the contaminating activity. *See United States v. Twp. of Brighton*, 153 F.3d 307, 318 (6th Cir. 1998). The district court, however, explained that the extent of the Railroads' involvement in the spills was irrelevant to apportionment. Pet.App.-246a-47a. Nor does the analysis consider other equitable factors like the Railroads' degree of care, cooperation with government officials, and efforts to prevent harm to the public. *Twp. of Brighton*, 153 F.3d at 318-19; *see* Pet.App.-245a-52a.

2. Respondents criticize the district court's observation that it would be "manifestly inequitable" to require the Railroads to bear the burden of B&B's insolvency. US Br. 39; *see also* DTSC Br. 58-59. Again, that observation played no part in the actual apportionment analysis. The district court was simply rejecting *Respondents'* argument that causal apportionment should yield to equity. SER 25-33. Respondents' real complaint is that they wanted the district court to exercise equitable discretion in *their favor* because of B&B's insolvency.

Refusing that invitation was not an abuse of discretion. First, the suggestion in Second Restatement §433A comment h that courts may

equitably impose joint and several liability when one tortfeasor is insolvent does not correctly state the prevailing law. Considerations of fairness inform the flexibility with which parties can prove their divisible share, *supra* at 4-5, but apportionment is a causal inquiry—as Respondents concede. US Br. 33-34; DTSC Br. 58-59. Accordingly, federal courts of appeals have refused to apply comment h under CERCLA, *see Hercules*, 247 F.3d at 718 n.10; *Bell Petroleum*, 3 F.3d at 901 n.13, and Respondents are unable to muster a single case in which a court overrode its causal apportionment based on comment h. The Restatement and its accompanying Reporter's Notes and Appendix cite no authority supporting comment h, and it is clearly inconsistent with the case law underlying the rest of §433A—which endorses generous apportionment standards precisely because it would be unfair to force a minor offender to bear responsibility for the entire harm.[6] Common-law courts have long found apportionment proper even when a plaintiff is unable to secure a judgment from absent defendants. *See, e.g., Dooley v. Seventeen Thousand & Five Hundred Head of Sheep*, 35 P. 1011, 1012-13 (Cal. 1894) (no joint and several liability when "about 2,500 head" of livestock owned by an unknown party inflicted part of the damage); *Hill*, 18 P.2d at 1108 (same); *Anderson v. Halverson*, 101 N.W. 781, 781 (Iowa 1904) (same).

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[6] Section 26 of the Third Restatement, which the United States claims is the indistinguishable counterpart to §433A of the Second Restatement, US Br. 31 n.14, has no equitable override for insolvency.

Second, if the door were to be opened to equitable considerations, there is no conceivable justification for considering only the Respondents' equities. The district court reasonably observed that equity does not require or support the imposition of joint and several liability on "a passive owner of a contiguous parcel, not representing more than 19% in area of a CERCLA site, operating less than 44% of the time, where substantially smaller volumes of hazardous substances releases occurred." Pet.App.-245a.

Third, the use of CERCLA to create retroactive and extreme derogations from the common-law of landowner liability would also make invocation of comment h particularly inequitable in this case. *See Bell Petroleum*, 3 F.3d at 901 n.13 (applying comment h unfair because "[u]nder CERCLA's strict liability scheme, the deck of legal cards is heavily stacked in favor of the government").[7] Landowners are not liable under the common law for their lessees' torts. *See, e.g.*, *Resolution Trust Corp. v. Rossmoor Corp.*, 40 Cal. Rptr. 2d 328, 331 (Cal. Ct. App. 1995); *see also* AAR Amicus Br. 21-22 (collecting authorities). At common law, Respondents would have to prove by a preponderance of the evidence that the *Railroads* caused any contamination, not just that contamination happened to occur on the Railroads' land.

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[7] The United States has no substantive response to the grave constitutional concerns that joint and several liability would raise in this case, *see* Pet. Br. 57-59, preferring again to rest solely on unfounded accusations that the Railroads somehow waived apportionment. US Br. 38 n.18.

Even with the deck stacked in their favor, Respondents barely prevailed. The district court expressly rejected Respondents' trial theory of contamination via "focused infiltration." Pet.App.-248a. Instead, the Railroads were held partially responsible only because they did not disprove the Respondents' merely "plausible" theory of surface runoff. *Id.* The district court was well within its discretion in concluding that "justice" did not recommend finding that passive landlords who collected roughly $14,000 in rent over fourteen years should bear constitutionally dubious, retroactive, joint and several liability, potentially amounting to more than $40 million, simply because they failed to prove that rainfall over a decade of disposal never carried any of B&B's spills from the Railroad parcel to the waste pond on B&B's land. Pet.App.-239a; Pet. Br. 3, 13 n.4.

Finally, policy concerns about the public fisc should not override the common law's preference for apportionment. Pet. Br. 52-57. No clear statement in CERCLA declares that defendants should be denied apportionment when there are orphan shares, and such a rule would nullify congressional intent by denying apportionment whenever it matters most. *See Bestfoods*, 524 U.S. at 62-63. Congress's creation of the Superfund reinforces this conclusion. Pet. Br. 53. The Superfund was financed by environmental corporate taxes and levies on petroleum and chemicals. *Id.* As the United States observes, Congress intended to "place[] the costs of releases ... on the *sector* most responsible for pollution and which benefits most from chemical production." US Br. 30 (quoting 126 Cong.

Rec. 31978 (1980) (emphasis added)).[8] Having the Superfund—not passive landowners like the Railroads—pay for orphan shares does just that.[9]

IV. THE DISTRICT COURT APPORTIONED LIABILITY ON A REASONABLE BASIS

Respondents' factual arguments are no more persuasive than their legal arguments, and betray a complete lack of engagement with the record. The district court's conclusion that the evidence discloses a reasonable basis for apportionment rests on findings and inferences that are well supported by the record and that Respondents never expressly challenge under the clearly erroneous standard. The commonsense nature of the trial court's approach is reflected by a Government expert's testimony that he would base an estimate of the share of contamination originating from the Railroad parcel on "something as simple as weighting the amount of activity at each site and the

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[8] Senator Jeffords's statement, which the United States uses to suggest that apportionment is exceptional, explains that CERCLA as enacted is "weaker with regard to imposing liability" than earlier versions because Congress eliminated mandatory joint and several liability. 126 Cong. Rec. 31978. The United States' repeated citation of S. Rep. No. 96-848 (1980) to cast doubt on apportionment is even more misleading. US Br. 3, 30 n.13. That report accompanied an earlier version of CERCLA that imposed *mandatory* joint and several liability. S. Rep. No. 96-848, at 31.

[9] Congress's failure in 1995 to reauthorize the Superfund taxes is hardly a clear statement that orphan shares should be imposed on solvent defendants.

area on each site and the time it was in operation." Walton Tr. 4077-78.

A. Theoretical Divisibility

Respondents make two threshold arguments regarding whether the harm at issue in this case is divisible at all. Both are raised for the first time in this Court and are therefore improper for review. Regardless, they have no merit. Pollution has always been regarded as the paradigmatic divisible harm, despite commingling and overlap in the necessary cleanup activities, unless there are synergistic harms of a kind not present here.

First, the United States speculates that surface runoff of contaminants from the Railroad parcel—which the district court found to be only "plausible," not proved—would have caused enough groundwater contamination to require the full EPA remediation efforts even without *any* contribution from the B&B parcel. US Br. 43. Since the Railroad parcel required *no* soil remediation, Pet. Br. 13, and the court found that *none* of the spills on the Railroad parcel reached the groundwater by downward migration, Pet.App.-96a-97a, that speculation defies credibility. Respondents' own expert regarding surface runoff, Walton, declined to opine as to whether the possible contamination originating from the Railroad parcel was sufficient to require *any* remediation. Walton Tr. 183.

Even granting Respondents' premise, however, the harm attributable to the Railroad parcel would be apportionable. The EPA's A-zone groundwater remedy, based primarily on the use of granulated activated carbon ("GAC") to absorb chemical contaminants, is "a mass-driven removal scheme" in

that the amount of GAC required depends on the mass of the targeted contaminants. JA-288-89, 355-58. The cost of reducing the groundwater contamination levels to the EPA's "cleanup goal," Pet.App.-148a, is accordingly tied to the mass of chemicals above the remediation threshold, which is plainly divisible.

The common law has long found apportionment proper in similar circumstances. In *Johnson v. City of Fairmont*, for instance, a sewer and a canning factory independently and intermittently polluted the plaintiff's stream. 247 N.W. 572, 572 (Minn. 1933). The sources produced "different offensive odors" with varying degrees of frequency and pungency that would "mingle and fuse" on the plaintiff's farm. *Id.* Further, "the evidence [was] sufficient to establish a cause of action based on the nuisance against either defendant." *Id.* at 573. Nevertheless, the defendants could be held liable only for their contributions to the nuisance. *Id.* In *Thomas v. Ohio Coal Co.*, a defendant owned 18 of approximately 80 wells whose deposits of oil and saltwater destroyed the plaintiff's stream. 199 Ill. App. at 56. The pollution rendered the water unpotable for the plaintiff's cattle, "made the cows' bags greasy and hard to get the milk," and damaged his pastures. *Id.* at 53-54. *Thomas* found it reasonable to assume that the defendant's share of harm to the creek, cattle, dairy production, and pasturage roughly tracked its proportional share of salt, water, and oil. *See id.* at 53-57.

Second, Respondents speculate that variation in the toxicity and remediation costs of the contaminants here precludes apportionment. US Br. 44-45. Respondents simply ignore the undisputed facts, made clear in Petitioners' opening brief, that there are no synergistic

effects at issue and that the EPA's remedy "can treat all three chemicals with a common process." Pet. Br. 38 & n.9. It was thus perfectly reasonable (and certainly not clearly erroneous) for the district court to find that the harm attributable to the Railroad parcel was proportionate to *or less than* its share of the total contamination.

B. Geography

Respondents contend that geographic divisibility is only appropriate in circumstances involving non-contiguous areas or distinct plumes of groundwater contamination. US Br. 46. The Restatement includes no such limitation: Petitioners need only show that a "reasonable basis exists for determining the contribution of each cause to a single harm." Petitioners have demonstrated that geography provides a suitable proxy for relative responsibility "so long as (1) spill-producing activities on the defendant's land were proportionate to land area, or less; and (2) the spills on the defendant's land were not more likely to cause remediable harm than spills elsewhere." Pet. Br. 41. Ample record evidence supports those premises here, and distinguishes this case from *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993), *overruled on other grounds by United States v. E.I. DuPont De Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005) (en banc), where a defendant sought geographic apportionment based solely on its percentage ownership of the facility.

Respondents do not seriously challenge the district court's finding that spills on the Railroad parcel were

(at worst) proportionate to its size.[10] Instead, Respondents argue that, due to variables such as the presence of water, "the district court had no reasonable basis for assuming whether those spills were more or less likely to contaminate the subsurface." US Br. 47. The record indicates, however, that these variables were either constant across the facility or were exacerbated on the B&B parcel. There is no doubt, for instance, that the B&B facility was exposed in equal measure to sun, wind, and rain. Respondents demand the "timing and location" of each release, *id.* at 48, but the geography of the facility made spills on the Railroad parcel far less likely to contaminate the

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[10] DTSC makes several incorrect and misleading statements about spills on the Railroad parcel. First, DTSC claims that B&B employees rinsed out nurse tanks on the Railroad parcel. DTSC Br. 7. In fact, the district court opinion and related testimony make clear that "B&B's employees rinsed out nurse tanks at the wash rack on the B&B parcel." Pet.App.-92a; *see also* JA-85-86. There were no water or hose fittings on the Railroad parcel. JA-134. Second, DTSC claims that B&B employees also checked nurse tank filters on the Railroad parcel. DTSC Br. 7. Although Merryman testified that B&B employees sometimes checked nurse tank filters on the Railroad parcel, the court found that they "preferred to check the [nurse tank] filters near the wash rack due to the effect D-D could have on the employees' skin." Pet.App.-92a; *see also* JA-141-42. Finally, DTSC states that D-D rigs could spill out as much as half a tank on the Railroad parcel when their sight gauges broke. DTSC Br. 7. Perhaps that was true on the B&B parcel, but Brown testified that B&B used the Railroad parcel to store "empty things," so the breakage of a D-D rig sight gauge on the Railroad parcel would presumably result in small spills, and Brown confirmed that he never saw a large spill on the Railroad parcel. Brown Tr. 1002-05. Neither did anyone else. Pet. Br. 11.

underlying groundwater. The only way for non-evaporated spills to migrate to the groundwater would have been through surface runoff of sufficient force to carry contaminants across the Railroad parcel, through a small pipe underneath the rail spur, and over two hundred feet of land with a "slight downward slope" on the B&B parcel.[11] Pet. Br. 15; Trial Ex. 1464A at RI-3-1. By contrast, the primary sources of non-rainfall water—the pond and sump—undisputedly were on the B&B parcel alone. Pet.App.-104a. Considerable testimony established that contaminants were washed into the sump on the B&B parcel—sometimes as much as 20 gallons at a time—on a *daily* basis. Pet. Br. 9-10. As Merryman explained, the wash rack on the B&B parcel was in use "*every hour [B&B] was open*" during the busy season. JA-130 (emphasis added). The district court thus had more than enough evidence to find that the Railroad parcel did not disproportionately contribute to the site contamination and so geographic apportionment was an appropriate basis for divisibility.

C. Time

Respondents contend that temporal divisibility is only appropriate in circumstances of "*successive* operation of the *same* harm-causing activity." US Br. 48. Again, the Restatement imposes no such conditions; the rate of contamination over time need only be constant enough to provide a "reasonable basis" for apportionment.

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[11] DTSC erroneously states that the Railroad parcel was connected to the pond by a pipe. *Compare* DTSC Br. 49 *with* Pet.App.-95a.

Respondents also claim, without any record support, that "it is more reasonable to assume that the facility *increased* its contaminating activities after the Railroads became involved, such that temporal divisibility would *underestimate* their contribution." *Id.* at 49. But the district court's conclusion that time was a reasonable proxy for causal responsibility on this record has ample evidentiary support. Petitioners' opening brief detailed evidence that B&B's activities were reasonably consistent for the duration of its operation. Pet. Br. 17. For instance, evidence documenting B&B's annual D-D purchases indicates that the Railroad parcel did not substantially expand the operations at the facility. US SER 1019.[12] Further, all three contaminants at issue were banned before B&B's closure in 1988. *See* JA-408 (Nemagon (1979); D-D (1984); dinoseb (1986)). Such a total cessation of activity would likely offset any hypothetical increase in volume after B&B's lease of the Railroad parcel.

Moreover, Respondents ignore the "dramatic" changes B&B implemented to promote environmental compliance soon after leasing the Railroad parcel, including lining the sump and pond with "impermeable" materials, constructing a concrete can enclosure, building a containment system around the primary D-D

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[12] DTSC calls into question the five years of D-D delivery information cited by the district court, suggesting that this data is insufficient to presume a steady rate of operations and releases over the entire time period. DTSC Br. 51. DTSC fails to respond to the additional documentary evidence cited by Petitioners demonstrating that the court's assumption held true over nearly the entire period at issue. Pet. Br. 17.

tank, and installing a leak detector system. Brown Tr. 783, 974; Pet. Br. 16-17; SER 315, 331. Or, more accurately, they ignore such measures when convenient, but not when the United States dismisses as "simplistic" the district court's calculation of Shell's divisible share because it does not account for the "much lesser likelihood of groundwater contamination" after the sump was lined in 1979. US Br. 52. Respondents equally overlook evidence of B&B's disproportionate contamination during the early years of its operations. Brown described the "big problems" B&B experienced storing D-D in the early 1960s before getting Teflon seals and stainless steel tanks, resulting in "big leaks" on a constant basis. Brown Tr. 757-60. Thus, even if the facility experienced a marginal increase in activity after B&B leased the Railroad parcel, the associated contamination would be far less relative to the harm caused during B&B's first fifteen years of operation, when "B&B took almost no precaution to prevent the release of hazardous agricultural chemicals into the environment." Pet.App-130a.

Respondents also raise a new argument, not presented to the Ninth Circuit, that temporal apportionment contravenes CERCLA because it might result in a zero assignment of liability for current owners, which "could not have been what Congress had in mind." US Br. 49. In fact, Congress amended CERCLA in 1986 to provide additional protections for certain current owners because "confusion … in the case law" was exposing innocent landowners to unintended liability. 131 Cong. Rec. 34716 (1985) (statement of Rep. Daub); 42 U.S.C. §9601(35); *see also Rohm & Haas*, 2 F.3d at 1280 (A zero apportionment

might be proper if a current owner "were able to prove that none of the hazardous substances found at the [owner's parcel] were fairly attributable to it.").[13] Regardless, this case does not remotely present that issue. The Railroads are not new landowners seeking to escape liability for a cleanup on their land by attributing all of the causal responsibility to prior owners or operators. They owned the Railroad parcel all along, and the "temporal divisibility" issue here is that the Railroads should not be liable as landowners for cleanup *on B&B's land* that is causally attributable to a 15-year period when the two parcels could not have been considered parts of the same "facility." Put differently, if Respondents had brought this cleanup action in early 1975 they would have had no statutory basis for imposing *any* liability on the Railroads for the then-existing contamination on B&B's parcel. That result should not change simply because Respondents delayed this suit.

D. Contaminants

Respondents argue that the district court incorrectly reduced the Railroads' liability by one-third "based on its assumptions that none of the D-D contamination requiring remediation originated on the Railroad parcel and that the other two chemicals

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[13] A current owner who acquired land that it knew or should have known was contaminated would presumably stand in the shoes of its predecessors, and thus could be ineligible for a zero apportionment. *See* Second Restatement §839 & cmt. d (possessors of land have responsibility to abate—and might otherwise be liable for—nuisances on their land, even if nuisance conditions were caused by previous possessors).

(dinoseb and Nemagon) contributed to 2/3 of the overall contamination." US Br. 49.

Respondents seek to undermine the first assumption by claiming that "significant D-D spills occurred on the Railroad parcel" due to B&B employees checking filters on D-D rigs. *Id.* at 49 n.24.[14] Although the Ninth Circuit found that the district court erred by excluding D-D, it did not deem clearly erroneous the finding that D-D spills were "slight." It reasoned that "[t]here is no evidence as to which chemicals spilled on the parcel, where on the parcel they spilled, or when they spilled. Yet, there *is* evidence that there may well have been leakage on the Railroad parcel of D-D." Pet.App.-42a. The Ninth Circuit's critique rested on a misstatement of the governing evidentiary standard and basis for divisibility.

The district court's conclusions do not depend on a complete absence of D-D spills on the Railroad parcel. They are instead supported by undisputed testimony demonstrating the implausibility of Respondents' theory that any "slight" D-D spills ever migrated across the Railroad parcel, through the pipe at its edge,

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[14] The record established that no more than a quart would spill when filters were checked, Pet.App.-91a, and the district court could have properly credited evidence indicating that the filters were primarily checked on the B&B parcel. Brown testified that D-D rigs were "typically parked" in an area to the west of the main gate that spanned both parcels, Brown Tr. 926; Trial Ex. 391, and Merryman testified that B&B employees preferred to check filters near the wash rack due to the corrosive nature of D-D, Pet.App.-92a.

over the entire length of the B&B parcel, and into the pond, in volumes sufficient to contribute to more than a *de minimis* share of the groundwater contamination there. *Supra* at 23. The D-D spills at issue were small, and Respondents' expert conceded that the constituent of concern[15] would evaporate "very, very easily very rapidly." Walton Tr. 23. Even a gallon spill—four times more than the spills associated with checking filters on the rigs (Pet.App.-91a)—would likely evaporate in less than an hour. Connor Tr. 2987. And the chances of any rainfall within an hour of a D-D spill in this "hot, desert area" (Walton Tr. 4111) were quite remote, *see* Pet. Br. 15, let alone a rainfall heavy enough to carry the spill more than 200 hundred feet.[16] Respondents also have no answer to the district court's finding, cited in Petitioners' opening brief, that the

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[15] Regarding the other D-D constituents, 1,3-DCP evaporated even more quickly than 1,2-DCP and the EPA found 1,2,3-TCP to be non-hazardous. Pet.App.-85a, 105a.

[16] The implausibility of Respondents' theory of runoff D-D contamination is underscored by the fact that the little rain that fell in Arvin usually came in the winter, Trial Ex. 1464A at RI-3-2 ("Rainfall occurs primarily from November through April …."), while B&B's D-D work took place "mostly" in the "dry summers," Pet.App.-91a; Trial Ex. 1464A at RI-3-2. Merryman also testified that B&B "never" applied D-D in the rain. JA-164. And Respondents' expert conceded that, due to rapid evaporation, a "small spill" such as a gallon of D-D would not reach the pond on a "hot summer day" without a "fluke rainstorm." Walton Tr. 157-58. Walton acknowledged that his surface runoff calculations did not account for this seasonal variation, admitting that "the more you put the small spills in the hot, dry months or separated from rain, then the lower is the probability or amount of the spill that gets captured and goes to the groundwater." *Id.* at 226, 4129-30.

relative concentrations of D-D's chemical constituents found in the groundwater are inconsistent with a "surface spill" origin. Pet. Br. 16. Viewed under the correct evidentiary standard, it was not clearly erroneous to attribute all of the D-D contamination to the B&B parcel, where, for nearly twenty years, large quantities of D-D were poured into an unlined earthen sump with at least four feet of standing water on a daily basis. *Id.* at 8-10.

Regarding the court's second assumption, it was undisputed that dinoseb and Nemagon likely constituted far less than two-thirds of the contaminant mass in the groundwater plume. JA-362. If anything, then, the court overestimated the harm caused by the Railroad parcel by only reducing the Railroads' liability by one-third to account for D-D.

CONCLUSION

The decision of the Ninth Circuit should be reversed, and the district court's judgment should be reinstated. There is no need for a remand.

Respectfully submitted,

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