No. 07-1607, 07-1601 (Consolidated)

IN THE

Supreme Court of the United States

SHELL OIL COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.

Respondents.

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

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER SHELL OIL COMPANY

HUGH F. YOUNG, JR.
Product Liability
Advisory Council
1850 Centennial Park
Drive
Reston, VA 20191
Tel.: (703) 264-5300

CHARLES H. MOELLENBERG, JR.
(*Counsel of Record*)
LEON F. DEJULIUS, JR.
JEAN M. MOSITES
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2502
Tel.: (412) 391-3939

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Miscellaneous

TABLE OF AUTHORITIES
(continued)

Page

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 125 corporate members (including Shell Oil Company, a Petitioner here) representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 725 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. Appendix A lists PLAC's corporate members.

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

INTRODUCTION

The Ninth Circuit held a product manufacturer liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for having "arranged for disposal . . . of hazardous substances" because a commercial carrier, after the sale of the product, unintentionally spilled a minute portion of the product at the buyer's facility. Based on this tenuous connection, the Ninth Circuit held the manufacturer jointly and severally liable for all contamination at the site—including contamination from products never manufactured or sold by the company. As the eight judges who dissented from the Ninth Circuit's denial of *en banc* review declared, the panel's decision is "novel and unprecedented." *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 952 (9th Cir. 2008) (Bea, J., dissenting from denial of rehearing en banc).

The Ninth Circuit's decision should be reversed. The Ninth Circuit's interpretation of CERCLA cannot be squared with the text of the statute. Rather than interpreting the statute according to its ordinary meaning, in deference to the common-law and with disfavor toward retroactive laws, the Ninth Circuit imposed limitless and uncontrollable liability for manufacturers, without any indicia of congressional intent. The Ninth Circuit's distortion of the meaning of "arranger liability" is modern alchemy, transmuting language of limitation into a pot of gold for the Government.

Moreover, this Court may bring national uniformity to this important area of law only by rejecting the case-by-case multi-factor analysis dictated by the Ninth Circuit's opinion. The courts of appeals have struggled to no avail for almost three

decades to find a common definition of arranger liability. The steady, incremental expansion of liability far beyond the language or purpose of the statute is likely to continue unless the Court bases its decision on the statutory language. This Court should reverse the Ninth Circuit and apply a bright-line rule that requires purposeful intent to dispose of hazardous substances.

BACKGROUND

Shell did not own or operate the facility that is now a Superfund Site. It did not dispose of hazardous substances there. Shell's only connection to the contaminated facility was as the manufacturer and seller over a number of years of the soil fumigant D-D, which is used to kill microscopic worms that attack the roots of crops. D-D was not a waste product, but a valuable and useful commercial product used safely by farmers for decades. D-D was transported to the facility by common carrier trucks, FOB destination. A condition of sale was that the buyer was responsible for the product when it arrived at the facility. *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, Nos. CV-F-92-5068, *et al.*, 2003 WL 25518047, at *5 (E.D. Cal. 2003) (citing Ex. 1199, Conditions of Sale, at 7, section 3).

The district court found that the only releases remotely connected to Shell were from occasional drips and spills of D-D during commercial carriers' transfer of the product at the buyer's facility. Shell was aware that drips could occur and provided instructions to the buyer for safe handling. While the district court found that some drips during the transfer into the buyer's storage tanks were unavoidable, it concluded that the drips were usually

captured as they occurred in five-gallon buckets. *Atchison*, 2003 WL 25518047, at *20. The process of transferring D-D from delivery trucks to the operator's tanks resulted in small quantities of D-D reaching the ground when the carrier or buyer failed to secure or tipped over the buckets. *Id.* at *21, *22. Moreover, the district court found that, even when D-D was spilled, the product would harmlessly evaporate from the soil unless water was present. *Id.* at *9, *13. Significantly more spills, leaks and contamination, however, were due to the operator's subsequent transfer and uses of D-D and other chemicals. *Id.* at *5-9. Here, it is undisputed that 99% of the chemical mass in the groundwater was from the waste pond and sump where the operator rinsed its equipment. *Id.* at *12. Shell had no connection to this contamination source. The court found that the facility owner "was a sloppy operator." *Id.* at *26.

Over the course of several years, the EPA performed both removal and remediation at the site and sought cost recovery from Shell. Although it is acknowledged that any contamination created by spilled buckets during the transfer of D-D into the buyer's storage tanks was at most a minor contribution to the contamination, the EPA sought to hold Shell jointly and severally liable for the entire cost of the removal and remediation, including products never sold by Shell. Expanding the Ninth Circuit's already "broad" application of arranger liability, the district court found Shell liable, but limited damages to an approximate determination of Shell's small contribution.

Reversing the district court's apportionment of liability, the Ninth Circuit imposed joint and several liability on Shell. Without explaining or adopting a standard of arranger liability, the court stated that the seller of a new product can be an arranger under CERCLA "even if it did not intend to dispose of the product." *Burlington*, 520 F.3d at 949. The court also held that neither control nor ownership at the time of disposal is required, but that those factors are merely "useful indices or clues" for the court to examine. *Id.* at 951. Because Shell owned the product at the time of the sale (although not at the time of the drips), hired a carrier to deliver the product, knew that drips could occur, and provided product instructions for safe handling, the Ninth Circuit upheld Shell's liability as an arranger for disposal. *Id.*

Judge Bea wrote a vigorous dissent from the court's denial of rehearing en banc because "the panel's broad definition of arranger liability . . . impose[s] CERCLA liability where Congress did not intend." *Id.* at 963 (Bea, J., dissenting from denial of rehearing en banc). The dissent contended that, "[b]y imposing arranger liability on a mere seller, the panel stretches the meaning of arranger liability beyond any cognizable limit and creates inter-circuit splits." *Id.* at 961. The dissent recognized that the panel's expansive definition of arranger liability will force product manufacturers to become insurers not only of their products, but also of the sites through which the products may travel, long after the seller has relinquished control. *See id.* at 963.

ARGUMENT

I. ARRANGER LIABILITY SHOULD REQUIRE A PURPOSEFUL INTENT TO DISPOSE OF A HAZARDOUS SUBSTANCE.

A. The Plain Language Of CERCLA Limits Arranger Liability To Intended Disposal.

Although broad, CERCLA is not a limitless statute. CERCLA creates strict liability for specified classes of persons and applies retroactive liability only to those individuals within its reach. CERCLA liability, however, is not and was not intended to be imposed indiscriminately. Congress specifically limited the actors who could be held liable to four classes of persons, including "any person who by contract, agreement, or otherwise *arranged for disposal* . . . of hazardous substances . . . ." 42 U.S.C. § 9607(a)(3) (emphasis added). Without these limitations on persons potentially liable, CERCLA liability literally would be unlimited (and unconstitutional).

In interpreting CERCLA, this Court has turned to the plain meaning of the statutory language. In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), the Court interpreted the contribution provision of the amended statute to adopt the "natural meaning of th[e] sentence" that contribution may only be sought subject to the specified conditions. *Id.* at 166. When both parties argued that the purpose of CERCLA bolstered its reading of the provision, this Court stated that, "[g]iven the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all." *Id.* at 167 (also quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws

rather than the principal concerns of our legislators by which we are governed.").[2]

Likewise, when faced with the meaning of "operator" liability under CERCLA, this Court looked to the "ordinary or natural meaning" of the term. *United States v. Bestfoods*, 524 U.S. 51, 66 (1998) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). Consulting the American Heritage and Webster's New International Dictionaries, the Court concluded that "an operator is simply someone who directs the workings of, manages or conducts the affairs of a facility" and in a CERCLA context, "an operator must manage, direct, or conduct operations specifically related to pollution." *Id.*; *see also United States v. Atl. Research Corp.*, 551 U.S. ___, 127 S. Ct. 2331, 2336, 2339 (2007) (holding that under CERCLA the "plain language . . . authorizes cost recovery actions by any private party, including [Potentially Responsible Parties]").

The ordinary or natural meaning of the statutory language here precludes a company like Shell from being held liable as an "arranger." The operative phrase—"arranged for disposal"—requires purposeful action. According to the American Heritage Dictionary of the English Language, the word "arrange" means "to plan or prepare for." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH

[2] In fact, one's view of the "purpose" of CERCLA depends on the eye of the beholder. It can be used either to support limitless expansion of liability beyond the terms of the statute itself in furtherance of broad environmental goals, or to support a limitation of liability to those situations that prompted the legislation itself, classic disposal sites like Love Canal. Consequently, reference to the "purpose" of CERCLA begs the question.

LANGUAGE: FOURTH EDITION 99 (2006); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 120 (2002) ("arrange" means "to make preparations" to "plan"). The word "for" is used to "indicate the object, aim, or purpose of an action or activity." AMERICAN HERITAGE DICTIONARY: FOURTH EDITION 686; *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 886 ("For" means "as a preparation toward."). In other words, the language of the statute literally requires the defendant to have made plans with the purpose of disposal.

The language cannot be read, as the Ninth Circuit held, to allow liability for a person who sold a product—not for the purpose of disposal, but for productive and permitted uses—where the common carrier or operator accidentally spilled the product at the buyer's facility. Although unintentional spills could be read to constitute "disposal," Congress limited liability to those who " 'arrange for' disposal (not just arranged for the sale)." *Burlington*, 520 F.3d at 961 (Bea, J., dissenting from denial of rehearing en banc). To give the words "arrange for" any meaning, the Court should require a purposeful intent to dispose, not merely knowledge that some product may not be used as intended.[3] *See, e.g.*,

[3] It is difficult to see how the fact that "disposal" includes unintentional spillage has any relevance to this case. The drips from the transfer itself did not cause any contamination, as the drips were collected in a bucket and were supposed to be dumped into the storage tanks for use. The "disposal" of the product occurred only when the carrier or the buyer knocked over the buckets. Shell, however, had no involvement or connection with knocking these buckets over and cannot be said to have "arranged for" these buckets to be knocked over. Shell also had nothing to do with other "sloppy" practices of the

Cooper Indus., 543 U.S. at 166 (rejecting, in CERCLA context, a "reading [that] would render part of the statute entirely superfluous, something we are loath to do"); *Rake v. Wade*, 508 U.S. 464, 471 (1993) ("To avoid 'deny[ing] effect to a part of a statute,' we accord 'significance and effect. . . to every word.'") (citation omitted). As the dissent from rehearing en banc persuasively argued, "[i]t is an oxymoron for an entity *unintentionally* to make preparations for disposal." *Burlington*, 520 F.3d at 961 (Bea, J., dissenting from denial of rehearing en banc).

The Seventh Circuit addressed "arranger" liability in an almost identical situation as here, but followed the statutory language to conclude that a person who arranged for the sale and transport of a consumer product did not "arrange for disposal" of that product when some spilling occurred. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993). The court, in an opinion by Judge Posner, held, "Detrex hired a transporter, all right, but it did not hire it to spill TCE on Elkhart's premises. Although the statute defines disposal to include spilling, the critical words for present purposes are 'arranged for.' The words imply intentional action." *Id.* The court concluded that, though the defendant manufacturer arranged for the delivery of the product, it did not arrange "for spilling the stuff on the ground." Therefore, the manufacturer had no arranger liability. *Id.* As the court held, "[n]o one arranges for an accident, except in the sinister sense, not involved

---

(continued…)

operator that largely caused any contamination here. In fact, it provided information on safe handling of its chemicals.

here, of 'staging' an accident—that is, causing deliberate harm but making it seem accidental." *Id.* Other courts, likewise, have come to similar conclusions regarding the statute's language. *See, e.g.*, *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 775 (4th Cir. 1998) (no arranger liability because "intent" was not for the "treatment" of hazardous substances); *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) (arranger liability requires person to have "intended to enter into a transaction that included and 'arrangement for' the disposal of hazardous substances"). *But see United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (holding the manufacturer, who maintained ownership of the product throughout the processing that resulted in disposal (unlike Shell) liable regardless of intent to dispose).

The Ninth Circuit's opinion contradicts the plain language of the statute and the reasoned analysis of the courts that have required purposeful intent in arranging for disposal. Not only did the Ninth Circuit disavow any intent requirement for arranger liability, the court also rejected the notion that ownership or control of the product at the time of disposal was required. The Ninth Circuit did not follow the statutory language; "arranged for disposal" are words of limitation and definition read out of the statute by the Ninth Circuit analysis. The Ninth Circuit merely concluded that owning the product before the sale (as every manufacturer necessarily does) and knowing that drips and spills may occur (which is why Shell advised that precautions be used) is enough to subject the manufacturer to liability. CERCLA's extraordinary

liability should not be permitted on such a flimsy, innocent ground, at odds with the statutory text.

The categories of covered persons under CERCLA are in fact limitations on liability, and the plain language of the statute provides at least one bright-line rule for arranger liability. This Court should provide much needed predictability and uniformity in CERCLA jurisprudence by concluding that the sale of a useful product is beyond the reach of arranger liability.

B. The Common Law Would Not Permit Manufacturer Liability For The Sale Of A Useful Product Spilled By Others.

The Court should not expand arranger liability in a way that disrupts preexisting law and imposes retroactive liability without a clear expression of congressional intent to do so. Where a statute imposes harsh remedial consequences on persons within its purview, courts should strictly construe the individuals covered by the statute and not seek to expand its coverage beyond the explicit text. *See, e.g.*, 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 61.3 (2001) (citing *In re W.W.*, 454 N.E.2d 207, 209 (Ill. 1983) (reasoning that a statute with remedial features should be strictly construed when determining what persons come within its operation)). The Ninth Circuit erred in construing the statute in favor of the Government and toward more expansive liability, rather than with deference to pre-existing law and the rights of individuals.

First, the Ninth Circuit erred by failing to recognize the legal background under which CERCLA was drafted. As this Court has recognized, statutes are not drafted in a vacuum, but with

knowledge of pre-existing legal principles. *United States v. Texas*, 507 U.S. 529, 534 (1993) ("Congress does not write upon a clean slate"). "'Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *Id.* (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)) (ellipsis in original); *see also Viera v. Cohen*, 927 A.2d 843, 853 (Conn. 2007) ("[T]he operation of a statute in derogation of the common law is to be limited to *matters clearly brought within its scope.*") (emphasis added) (quoting *Matthiessen v. Vanech*, 836 A.2d 394, 405 (Conn. 2003) (quoting *Alvarez v. New Haven Register, Inc.*, 735 A.2d 306 (Conn. 1999); *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 647 S.E.2d 920, 928 (W. Va. 2007) ("[W]here there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law.").

While CERCLA undoubtedly did derogate the common law in some important aspects, for example, imposing strict liability on current property owners regardless of intent or involvement in the contamination, the Court cannot conclude that Congress cast aside *all* common-law principles of liability. "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. at 534. Again, in *Bestfoods*, this Court recognized in the context of CERCLA that Congress still must make clear its intention to abrogate specific common-law principles. *See*

Bestfoods, 524 U.S. at 62 ("[N]othing in CERCLA purports to reject this bedrock principle, [that a parent corporation is not liable for the acts of its subsidiaries] and against this venerable common-law backdrop, the congressional silence is audible."). There, the Court held that a relaxed CERCLA-specific rule for derivative liability could not be read into the statute because it would "banish traditional standards and expectations from the law of CERCLA liability . . . . [S]uch a rule does not rise from congressional silence, and CERCLA's silence is dispositive." *Id.* at 70. *Cf. Key Tronic Corp. v. United States,* 511 U.S. 809 (1994) (requiring congressional intent to alter the American rule that attorney fees related to litigation under CERCLA are not recoverable).

The common-law precursors to CERCLA, such as nuisance,[4] would not have countenanced liability to product sellers such as Shell. Common-law nuisance requires control over the product at the time any harm occurred. *See, e.g.*, *State of Rhode Island v. Lead Indus. Ass'n, Inc.*, __ A.2d __, 2008 WL 2605396, at *15 (R.I. July 1, 2008) ("As an additional prerequisite to the imposition of liability for public nuisance, a defendant must have control over the instrumentality causing the alleged nuisance at the time the damage occurs.") (emphasis omitted); *see also* 2 AMERICAN LAW OF PRODUCTS LIABILITY 3D § 27.6 (2007) ("[A] product manufacturer who builds and sells the product and does not control the enterprise in which it is used is not in the situation of one who creates a nuisance . . . .").

[4] *See, e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91, 106-07 (1972) (noting that common-law public nuisance is used to regulate environmental pollution).

In addition, for liability to attach, a defendant's conduct must be "intentional and unreasonable" or "unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." RESTATEMENT (SECOND) OF TORTS § 822 (1977 & Supp. 2008). There was no finding of legal duty or reckless or dangerous activities by Shell to justify unintentional liability. Nor could there have been. Shell merely sold a product and provided guidance for safe handling. As there is no clear indication that Congress intended to change the common law and sweep product sellers like Shell into CERCLA under arranger liability, the court should have construed the statute in Shell's favor and not with an eye toward filling the Government's coffers.

Second, the Court should not interpret CERCLA arranger liability—which would apply retroactively—to encompass a new category of product sellers or manufacturers in the absence of specific congressional intent. As this Court has stated, retroactivity of legislation is disfavored and will not be applied unless expressly directed by Congress. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies legal doctrine centuries older than our Republic. . . . [T]he 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (footnote omitted) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Applying a statute retroactively "presents problems of unfairness . . . because it can deprive citizens of

legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). Retroactive laws are particularly unfair when the government's actions "affect[] contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf*, 511 U.S. at 271.

Imposing retroactive liability on a manufacturer as an arranger, where the manufacturer has merely sold and transferred its product without any intent for disposal and no longer has ownership, possession, control, or further interest in the product, defeats the settled expectations of the seller. Shell shipped the product in question FOB destination with an understanding and agreement that the buyer take responsibility for the product when it arrived at the facility. *Atchison*, 2003 WL 25518047, at *5. While Congress certainly has some power to disrupt the commercial expectations between the buyer and seller, courts should not assume that Congress intended to discard these time-honored commercial principles and retroactively impose new, staggering burdens—without saying so.[5] *See Landgraf*, 511 U.S. at 284 (noting that the Court will not read a statute "substantially increasing the monetary liability of a

[5] In fact, Congress imposed specific taxes on chemical manufacturers, requiring them to make a contribution to Superfund. *See* 26 U.S.C. §§ 4611, 4661 & 4662. These provisions indicate that Congress did not intend to extend arranger liability to cover past typical sales transactions, but instead intended to recoup costs of environmental clean-up through a direct levy. Had Congress intended to hold companies liable for the mere manufacture or sale of hazardous substances that were spilled in transit or during storage, it would have said so. There is no such category of CERCLA liability.

private party to apply to conduct occurring before the statute's enactment" when Congress had not clearly spoken). The Ninth Circuit should have construed the statutory language to avoid any retroactive, due process concerns.[6]

Ramifications of the Ninth Circuit's decision, if upheld, would extend beyond CERCLA. It could disrupt commercial transactions, increase prices of necessary products, and impact insurance premiums. A product manufacturer who had only minimal contact with a facility would face millions of dollars of liability for a single clean-up. For example, under the court's opinion, a company that sells a storage tank is potentially liable under CERCLA for "arranging for disposal" of a hazardous substance if it knows that the contents of the tank will inevitably drip and spill onto the ground. Additionally, imposing CERCLA liability because a manufacturer provided safety and handling instructions for its chemical products penalizes, rather than promotes, good business practices. *See Jordan v. S. Wood Piedmont Co.*, 805 F. Supp. 1575, 1580 (S.D. Ga. 1992) ("[I]mpos[ing] liability on a manufacturer on account of its dissemination of safety-related

---

[6] Courts have concluded that CERCLA is within the limits of Congress's power because the imposed liability is proportionate and related directly to prior acts of pollution. *See Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 553 (6th Cir. 2001) (concluding that CERCLA's retroactive liability did not violate the Takings Clause because, as applied, the liability was "directly proportional to [defendant's] prior acts of pollution" and the defendant had expressly assumed liability for environmental harms) (emphasis added). Here, the outer limits of constitutionally permissible retroactive liability are being tested, if not trespassed.

information is anathematic, even to the broad and salutary remedial purposes of CERCLA."). *Cf. R.R. St. & Co. v. Pilgrim Enters., Inc.*, 166 S.W.3d 232, 246 (Tex. 2005) ("Imposing arranger liability on chemical manufacturers and suppliers for providing technical services and advice will have the adverse effect of discouraging these companies from providing valuable advice to customers regarding the safe use and handling of their products."). This extraordinary liability under CERCLA based on the Ninth Circuit's unjustified definition of arranger liability should not be permitted.

In short, there is no ambiguity in the statutory language that would allow courts to sweep in product manufacturers such as Shell under arranger liability. Such liability was unknown under the common law and retroactively would foist mammoth and unexpected legal responsibilities on product manufacturers. These results should be presumed *not to occur* unless Congress specifically and clearly requires them, and it has not. This Court should adhere to CERCLA's categories of liability as written and restore reason and logic to CERCLA jurisprudence.

II. THE COURT SHOULD INTERPRET CERCLA IN A MANNER THAT CREATES UNIFORMITY AND CONSISTENCY.

No other circuit has interpreted arranger liability as expansively as the Ninth Circuit, and no other would permit arranger liability based on the sale of a product alone. But even among the courts that would reject the Ninth Circuit's expansive application of arranger liability, the courts of appeals are confused as to the scope and proper interpretation of arranger

liability. Courts and commentators have long lamented the inconsistent application of arranger liability based on the multitude of different factors. *See* Roger K. Ferland & Marilyn D. Cage, *Using RCRA to Interpret CERCLA Liability: What is "Arranging For Disposal"?*, 23 ARIZ. ST. L.J. 445, 447 (1991) ("[T]he lack of guidance has resulted in a myriad of interpretations of "arranged for" liability that has been both inconsistent and confusing."); *see also* Sarah E. Stevenson, Casenote, *Broadening Arranger Liability Under Alaska State Law: The Ninth Circuit's Interpretation of* Berg v. Popham, 17 VILL. ENVTL. L.J. 477, 511 (2006) ("Interpreting arranger liability provisions has plagued both state and federal courts for the past twenty-five years.").

Courts have struggled to interpret arranger liability consistently since CERCLA was passed almost three decades ago. Most courts have promulgated non-exhaustive factors to examine. *See, e.g.*, *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 676 (3d Cir. 2003) (citing cases from the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits in an attempt to set a standard). The variety of non-exhaustive, non-dispositive factors has created a unique, *ad hoc* determination so that outcomes differ from case to case and from circuit to circuit.

The Third Circuit, for example, adopted a standard that requires the plaintiff to demonstrate (1) ownership or possession, and (2) either knowledge or control. *Id.* at 677. But, the court also conceded that "[i]t is certainly possible that other factors could be relevant to this analysis in any given case, and we encourage consideration of those as well." *Id.* at 679;

see also United States v. Hercules, Inc., 247 F.3d 706, 721 (8th Cir. 2001) (declining to adopt a "bright-line" rule and instead examining the totality of the circumstances to determine whether the facts of a given case fit within CERCLA's scheme); *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1319 (11th Cir. 1990) (rejecting a *per se* rule in interpreting CERCLA liability); and Stevenson, *supra*, at 497 (noting that to determine liability some courts will examine multiple factors including "strict liability, specific intent, totality of circumstances, obligation to control, and actual involvement"). As the Ninth Circuit's decision demonstrates, these *ad hoc* determinations tend to build on one another, leading the courts far afield from the statutory language itself.

Notwithstanding the courts' inability to agree on how to interpret arranger liability, the courts do agree that national uniformity in this area is absolutely necessary. *Burlington*, 520 F.3d at 935 (citing cases regarding the need for uniformity in the application of joint and several liability under CERCLA). Uniformity is required to allow corporations and individuals plan for and protect against unintended arranger liability. Indeed, uncertainty and inconsistency breed only unfair settlements and costly litigation.

Under the *status quo*, it is impossible to determine the circumstances under which selling a product could lead to arranger liability—no small inconvenience considering CERCLA's harsh consequences—and impossible to tailor one's prospective behavior to accord with the law. The only way to achieve consistency and uniformity is to reject

the application of multi-factor, non-exclusive analyses and interpret the statute according to its plain meaning. The Court should apply a bright-line rule that arranger liability attaches only when the defendant has the purposeful intent to dispose of hazardous substances.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

HUGH F. YOUNG, JR.
Product Liability
Advisory Council
1850 Centennial Park
Drive
Reston, VA 20191
Tel.: (703) 264-5300

CHARLES H. MOELLENBERG, JR.
(*Counsel of Record*)
LEON F. DEJULIUS, JR.
JEAN M. MOSITES
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2502
Tel.: (412) 391-3939

Counsel for Amicus Curiae

November 21, 2008

APPENDIX A

PLAC CORPORATE MEMBERS

3M
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Holding, Inc.
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
Daimler Trucks North America LLC

The Dow Chemical Company
E.I. DuPont De Nemours and Company
Easton-Bell Sports, Inc.
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.

Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company

Smith & Nephew, Inc.
St. Jude Medical, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.