Nos. 07-1607, 07-1601

IN THE

Supreme Court of the United States

SHELL OIL COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF TOXIC SUBSTANCES CONTROL, STATE OF CALIFORNIA,

Respondents.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA AND DEPARTMENT OF TOXIC SUBSTANCES CONTROL, STATE OF CALIFORNIA,

Respondents.

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

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

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICI CURIAE*

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

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

The Court should grant the petitions for writ of certiorari of Shell Oil Company ("Shell") and the Burlington Northern and Santa Fe Railroad Company and Union Pacific Railroad Company (the "Railroads"). The petitions raise issues of substantial importance to companies that sell chemicals and other products — companies that collectively represent a large portion of the Nation's GNP. First, the decision rendered below by a panel of the U.S. Court of Appeals for the Ninth Circuit ("Panel") widens the already broad net of CERCLA liability to encompass those who sell chemicals or other products in the ordinary course of business based on the assertion that such companies have somehow "arranged for the disposal" of their products at the same time they

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for any party has authored this brief in whole or in part, that no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondents were notified of the intent to file this brief at least 10 days prior to the filing of this brief and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

are delivering them to customers for use. Given the magnitude of the costs typically associated with cleaning up contaminated sites, the imposition of such costs on chemical manufacturers and suppliers places a significant burden on these manufacturers and suppliers. Congress did not intend to impose that burden and it can hardly be said to be in accord with the "polluter pays" principle.

That Congress did not intend for manufacturers and suppliers to shoulder these burdens for merely selling their products is evident from the plain language of the statute. The Panel's decision cannot be reconciled with that language. The decision ignores the key role played by the intent of the parties to a transaction in determining whether a seller of goods has "arranged for the disposal" of a hazardous substance and can therefore be held liable under section 107(a)(3) of CERCLA. 42 U.S.C. § 9607(a)(3). The Panel focuses on the breadth of the term "disposal" under CERCLA, *id.* § 9601(29), but treats the term as if it were untethered from the remainder of the statutory provision and fails to recognize that in order to be liable under section 107(a)(3) a party must *arrange for* disposal. As other circuits have recognized, determining whether a party has arranged for disposal requires an analysis of the purpose of the transaction.

The Panel's decision also is inconsistent with the numerous CERCLA cases involving sales of useful products. The courts have generally held that where the purpose of the transaction was the sale of a useful product, the seller of the product is not liable as an "arranger." The Panel suggests that these cases are distinguishable but its opinion in fact represents a significant departure from prior case law — holding a seller of new, ready-to-use chemicals liable for the cleanup of spills of such chemicals that occurred at the buyer's facility on the buyer's watch.

In taking this step, the Panel has put Ninth Circuit law squarely in conflict with decisions of other circuits. For that very reason, nine judges dissented from the decision of the court not to hear the case *en banc*. The law of the Ninth Circuit now directly conflicts with precedent from the U.S. Court of Appeals for the Seventh Circuit holding that a chemical supplier not liable as an "arranger" on very similar facts. The Court should grant the petition to address this clear conflict. In the absence of such resolution by the Court, the Panel's decision will impose substantial and unwarranted burdens on manufacturers and suppliers of chemicals and other products and disrupt longstanding relationships between suppliers and the common carriers that deliver their goods.

The Court also should grant the petitions in order to review the Panel's ruling regarding the standards for apportionment of harm under section 107 of CERCLA. As described at greater length in the Railroads' petition, the heightened evidentiary standards established by the Panel for demonstrating that there is a basis for apportioning harm creates conflicts with decisions from other circuits and will make it more likely that parties will be jointly and severally liable for the entire cost of a cleanup of a site within the jurisdiction of the Ninth Circuit.

I. THE PANEL'S DECISION ERRONEOUSLY EXPANDS THE SCOPE OF CERCLA "ARRANGER" LIABILITY AND CREATES A CONFLICT BETWEEN THE CIRCUITS

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

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

CERCLA provides, in relevant part, that an "arranger" is a "person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . ." 42 U.S.C. § 9607(a)(3). The Panel rationalized that it was not necessary to consider Shell's underlying intent in selling its products to B&B because CERCLA defines the term "disposal" to include "such unintentional processes as 'leaking.'" Pet. App. 44a. Without considering the meaning and effect of the related statutory phrase "arranged for," the Panel concluded that the "'disposal' need not be purposeful"[2] for purposes of imposing CERCLA "arran-

[2] Neither of the two court decisions cited by the Panel in support of its conclusion — *Carson Harbor Village Ltd. v. Unocal Corp.*, 270

ger" liability upon a seller for its sale of a useful product. *Id.* As a result, the Panel summarily concluded that "an entity [such as Shell] can be an arranger even if it did not intend to dispose of the product." *Id.*

That analysis is incorrect. As the nine judges who dissented from the denial of a rehearing *en banc* explained, the term "disposal" cannot be considered in isolation but must be read in the context of the entire statutory provision. "[E]ven though the definition of 'disposal' may include unintentional practices, mere 'disposal' does not constitute *arranger* liability." Pet. App. 70a. Rather, under the express terms of section 107(a)(3) of CERCLA "arranger liability requires the defendant to have 'arranged for' such *disposal* (not just arranged for the sale)" and "[t]his connotes an intentional action toward achieving the purpose: disposal." Pet. App. 70a (*citing* Webster's Third New International Dictionary 120 (1993) (defining "arrange" as "to make preparations for")) (emphasis in original). Thus, absent any intent on the part of the seller to dispose of hazardous substances, the mere possibility that leakage of some of the product may occur during the transfer to B&B's storage tanks "cannot mean that Shell, as a seller, *arranged for* such leakage." Pet. App. 71a.

Numerous circuits have applied the well-established "intent" factor to determine whether a seller of a "product" should be subject to CERCLA "arranger" liability under section 107(a)(3). *See, e.g.*, *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160 (2d Cir. 1999) ("*Freeman*"); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769 (4th Cir. 1998) ("*Pneumo Abex*"); *United States v. Cello-Foil*

F.3d 863 (9th Cir. 2001), and *United States v. CDMG Realty Co.*, 96 F.3d 706 (3rd Cir. 1996) — concerned an interpretation of section 107(a)(3) of CERCLA.

Products, Inc., 100 F.3d 1227 (6th Cir. 1996) ("*Cello-Foil*"); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993) ("*Amcast*"); *AM International, Inc. v. International Forging Equipment Corp.*, 982 F.3d 989 (6th Cir. 1993) ("*AM Int'l*"); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990) ("*Florida P & L*"). These cases make clear that the purpose of the transaction plays an essential role in CERCLA "arranger" liability determinations.

For example, in *Cello-Foil* the Sixth Circuit stated that "[n]otwithstanding the strict liability nature of CERCLA, it would be error for us not to recognize the indispensable role that state of mind must play in determining whether a party has 'otherwise arranged for disposal . . . of hazardous substances.'" 100 F.3d at 1231. The court observed that the phrase "otherwise arranged for disposal" "embrace[s] a concept similar to those of 'contract' or 'agreement.'" *Id.* Therefore, it is essential for the court to inquire into "what the parties had in mind with regard to the disposition of the hazardous substance" because "including an intent requirement into the 'otherwise arranged' concept logically follows the structure of the arranger liability provision." *Id.* The inquiry regarding "what the parties had in mind" necessarily must focus on the purpose the transaction, *i.e.*, was it a sale of a useful product or the disposal of waste or other unwanted material.

The Sixth Circuit concluded that an examination of the underlying intent of the parties is not only consistent with the text of section 107(a)(3), but also with the general strict liability nature of CERCLA because "[o]nce a party is determined to have the requisite intent to be an arranger, then strict liability takes effect." *Id.* at 1232. As a result, the Sixth Circuit concluded that, for the purpose of determining whether to impose CERCLA "arranger" liability, an essential inquiry of the court must

be "whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances."[3] *Id.* at 1231. The Ninth Circuit erred in departing from that analysis here.

B. If It Had Properly Interpreted and Applied the CERCLA "Arranger" Liability Provision, the Panel Would Have Considered Shell's Underlying Intent With Respect to the Sales Transactions and Found Shell Not Liable

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

Moreover, the substantial safety precautions that Shell undertook in order to ensure that its product was properly delivered to B&B's facility and transferred to B&B's storage tanks belie even an inference that Shell had any "intent" to arrange for the disposal of hazardous substances at B&B's facility. The evidence in the record regarding Shell's substantial precautions includes, for

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[3] In *Cello-Foil*, the Sixth Circuit remanded the case back to the district court with instructions that it develop further findings regarding the intent of the parties that entered into the transactions at issue. 100 F.3d at 1233-34.

example, the following: (1) Shell contracted with a common carrier utilizing suitable tanker trucks to transport and deliver the product to B&B's facility; (2) Shell provided B&B with a rebate for improvements in B&B's bulk handling and safety facilities and required an inspection of such facilities by a qualified engineer; and (3) Shell distributed a manual and created a checklist of the manual's requirements to ensure that the product tanks at B&B's facility were being operated in accordance with appropriate safety requirements. Pet. App. 47a. These actions underscore the lack of any intent on Shell's part to arrange for the disposal of its products at the very time it was delivering those products to B&B for productive use.[4]

Despite the dearth of evidence that Shell had any intent to arrange for the disposal of hazardous substances at B&B's facility, the Panel imposed CERCLA "arranger" liability on Shell based on a misinterpretation and misapplication of section 107(a)(3) of CERCLA and in disregard of and conflict with decisions by a number of other circuits. The Panel acknowledged that intent is a relevant consideration in what it termed "direct arranger liability" cases but argued that there is a separate category of cases — which it labeled "broader arranger cases" — in which intent is not controlling and is not even a particularly useful concept. In these cases, according to the Panel, arranger liability is imposed where disposal of hazardous wastes is a foreseeable byproduct of, but not the purpose of, the transaction giving rise to liability. Pet. App. 42a.

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

However, to the extent such liability has been recognized by other circuits, *see, e.g.*, *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989) ("*Aceto*"); *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433 (6th Cir. 2004), no court of appeals had ever extended it to cases involving the sale of useful products such as chemicals. Rather these cases have involved situations such as toll manufacturing and related circumstances.[5] For example, in *Aceto* the Eighth Circuit upheld a district court's denial of a motion to dismiss claims against a pesticide manufacturer for costs incurred by the U.S. Environmental Protection Agency ("EPA") in cleaning up contamination at a facility operated by a company that was formulating pesticide products for the manufacturer. The court found that the U.S. had stated a claim for "arranger" liability where the manufacturer supplied the formulator with the materials to be used in the formulation process, retained title to the materials throughout that process, and was aware that disposal of hazardous substances was an inherent part of the formulation process. 872 F.2d at 1379-82.

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

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

2 F.3d at 51 (the words "arrange for" imply intentional action); *Pnuemo Abex*, 142 F.3d at 775-76 (refusing to hold railroads liable as "arrangers" where they did not intend their sales of used bearings to be an arrangement for disposal of hazardous substances). The Panel acknowledged that Shell manufactured and sold B&B "a useful product," and that in accordance with the "useful product doctrine" the Ninth Circuit previously "had refused to hold manufacturers liable as arrangers for selling a useful product containing or generating hazardous substances that *later* were disposed of." Pet. App. 45a (*citing 3550 Stevens Creek Assocs. v. Barclays Bank of Cal.*, 915 F.2d 1355, 1362-65 (9th Cir. 1990). The Panel nevertheless attempted to distinguish these other "useful product cases" as inapplicable "where, as here, the sale of a useful product necessarily and immediately results in the leakage of hazardous substances." Pet. App. 45a. The Panel therefore concluded that the "useful product doctrine" was not applicable to the leaked product "that never made it to the fields for its intended use but was disposed of prior to use." Pet. App. 46a-47a.

This purported distinction finds no basis in the "useful product" defense as interpreted by the other circuits. The applicability of that defense has turned on a variety of factors such as whether the material sold was usable in its existing form or required further processing to remove hazardous substances. *See*, *e.g.*, *Pneumo Abex*, 142 F.3d at 775.[6] However, the courts outside the Ninth Circuit have not looked to the timing of the disposal of hazardous substances associated with a product as being relevant to the application of the "useful product" de-

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

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

C. The Panel's Decision Creates a Direct Conflict With Decisions From Other Circuits That Applied the Well-Established "Intent" Factor For the Purpose of Determining Whether a Seller Qualifies For the "Sale Of Useful Product" Defense To CERCLA "Arranger" Liability

By disregarding this essential "intent" factor in determining whether Shell's sales of a useful product to B&B should subject Shell to CERCLA "arranger" liability, the Panel's decision creates a split among the circuits because its decision directly conflicts with the decisions of other circuits. That conflict is particularly evident with respect to the Seventh Circuit's decision in the *Amcast* case that dealt with nearly identical circumstances. In *Amcast*, the seller employed a common carrier to deliver its liquid chemical product to a customer's facility. On occasion, the common carrier would spill some of the product during transfer to the customer's storage tanks, resulting in contamination of the groundwater at the facility. 2 F.3d at 747-48. However, in contrast to the Panel's decision, in *Amcast* the Seventh Circuit properly applied the traditional "intent" test in the context of the "sale of useful product" defense and held that the seller was not subject to CERCLA "arranger" liability due to the spillage of

product during transfer operations. The Seventh Circuit stated as follows:

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

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

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

Similarly, *Pneumo Abex* involved a railroad which had sold used journal bearings to a foundry for processing into new bearings. The Fourth Circuit ruled that the railroad was not subject to CERCLA "arranger" liability because the intent of the railroad was to sell a valuable product, not to dispose of unwanted material or waste. *Pneumo Abex*, 142 F.3d at 775-76. In so ruling, the Fourth Circuit noted that "[t]he Foundry paid the [railroad] for the bearings; the [railroad] did not pay the Foundry to dispose of unwanted metal." *Id.* at 775.

In *AM International*, the Sixth Circuit addressed a situation in which a company sold a manufacturing facility and left at the facility various chemicals that were used in the manufacturing operations. When some of these chemicals later became a source of the contamination at the facility, a CERCLA action ensued and the seller was alleged to be subject to CERCLA "arranger" liability. *AM Int'l*, 982 F.2d at 992. However, focusing on the seller's underlying intent in the sale, the Sixth Circuit noted that "[l]iability only attaches to parties that have 'taken an affirmative act to dispose of a hazardous substance . . . as opposed to convey a useful substance for a useful purpose," and therefore ruled that the seller was not liable because "the chemicals were not left at the facility with disposal in mind." *Id.* at 999.

Finally, in *Florida P & L*, the Eleventh Circuit dealt with a circumstance in which a company manufactured and sold PCB-containing transformers. When those transformers were later sold as scrap and the reclamation of the transformers resulted in spillage of the PCB-contaminated mineral oils. *Florida P & L*, 893 F.2d at 1315. Affirming the district court's summary judgment in favor of the manufacturer, the Eleventh Circuit examined the record for evidence of the manufacturer's intent in entering into the sales transactions, and concluded that there was no evidence "that the manufac-

turers intended to otherwise dispose of hazardous waste when they sold the transformers." *Id.* at 1319.

The conflict between the Panel's decision and the decisions of these other circuits could not be clearer. The other circuits require an intent to dispose as a precondition to "arranger" liability under section 107(a)(3) of CERCLA where the defendant merely engaged in the sale of a useful product, a precondition rejected by the Ninth Circuit. Moreover, the conflict between the Panel's decision and the decisions of these other circuits is not some minor legal distinction or nuance; rather, the Panel's decision conflicts with these other decisions in a fundamental and material respect. The disparity in the Panel's decision as compared to the Seventh Circuit's decision in the *Amcast* case — despite nearly identical circumstances — simply underscores the stark nature of the conflict created by the Panel's decision.

II. THE PANEL'S RULING WILL HAVE A SUBSTANTIAL AND DETRIMENTAL IMPACT ON SUPPLIERS OF CHEMICALS AND OTHER PRODUCTS CONTAINING HAZARDOUS SUBSTANCES

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

The Panel's decision threatens to undermine the well-recognized "sale of useful product" defense that suppliers of useful products have come to rely upon. While many of the CERCLA statutory provisions have been routinely criticized in the jurisprudence as inartfully written, vague and ambiguous, over the past two decades the circuits have established some level of uniformity with respect to the proper interpretation and application of the

CERCLA "arranger" liability provision in the "sale of useful product" context. This uniformity is in no small measure due to the circuits' consistent acknowledgement of the essential nature of the "intent" inquiry and the concomitant premise that a supplier which merely intended to sell a product and not dispose of hazardous substances should not be subject to CERCLA "arranger" liability. The consistency among the circuits resulted in a "sale of useful product" defense that has provided suppliers of chemicals and other products containing hazardous substances with some assurance that they would not be subject to CERCLA "arranger" liability if the intent of their transactions was the mere sale of a useful product.

However, the Panel's wholesale disregard of this well-established "intent" inquiry threatens to undermine the "sale of useful product" defense, eroding the degree of certainty and protection that it has provided suppliers of chemicals and other products. With the Panel's decision, the gray area of the CERCLA "arranger" liability provision has now enveloped mere sales of useful products; under that decision the sale of useful products may qualify as an arrangement for disposal of hazardous substances if, for example, unintentional and inadvertent leakage of some of the product occurs while the common carrier and the buyer transfer the product to the buyer's tanks. As a result of the Panel's decision, every sale and delivery of a useful product potentially subjects the supplier to crippling CERCLA liability if any leakage occurs. While the web of CERCLA liability is necessarily far-reaching to effectuate the purposes of the statute, it is quite evident that CERCLA was never intended to ensnare innocent suppliers who harbored no intent to dispose of hazardous substances in conducting their sales of useful products.

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

B. The Panel's Ruling Increases These Suppliers' Risk of Potentially Substantial Future CERCLA Liability

For suppliers of chemicals and other products, the decision below increases the risk of future CERCLA liability that could be substantial, even crippling. The Panel's ruling creates the prospect that CERCLA liability for the costs to clean up an industrial facility may be imposed on a supplier due merely to inadvertent and unintentional leakage of some of the supplier's product at the facility. Given the Panel's decision, it is reasonable to predict that CERCLA plaintiffs may target such suppliers and creatively use the Panel's decision to seek

to impose CERCLA "arranger" liability on an ever-increasing number of suppliers whose sole "crime" was the innocent sale of useful products. In fact, the Panel's decision may prompt EPA and state environmental agencies to begin to routinely identify any suppliers that sold or delivered products to the contaminated site at issue as potentially responsible parties ("PRPs"), thereby subjecting otherwise innocent suppliers to the Pandora's box of potential CERCLA liability, transactional costs and other problems that often befall a person or company formally designated as a PRP at a particular site.

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

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

Thus, a company that did no more than supply a useful product could end up bearing the entire cost to clean up a contaminated site, notwithstanding the supplier's limited

and debatable nexus to the contamination. The magnitude of these costs cannot be understated; studies have indicated that the average cost of cleaning up the sites on EPA's National Priorities List was approximately $12 million in 2001, although the cost of cleaning up some sites was much higher. *See* Resources for the Future, Superfund's Future: What Will It Cost? (RFF Press 2001), at xxv, available at http//www.rff.org/rff/RFF_Press-/CustomBookPages/Superfunds-Future.cfm. The financial implications of the Panel's decisions for a wide range of businesses are therefore quite serious.

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

In addition, many suppliers ship their products nationwide by common carrier to various customers.

These suppliers may have to tailor their contractual arrangements with common carriers by means of special liability provisions and insurance protections with respect to the shipments that will involve the delivery of products to customers located in states within the jurisdiction of the Ninth Circuit. Some of these suppliers may simply cease shipment of goods to these states if the special liability provisions and insurance protections become cost prohibitive. Such artificial constraints on interstate commerce are anathema to our integrated national economy and are a powerful reason for this Court to grant review and restore uniformity in this important area of federal law.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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