IN THE SUPREME COURT OF THE UNITED STATES

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BURLINGTON NORTHERN AND :

SANTA FE RAILWAY :

COMPANY, ET AL. :

Petitioners :

v. : No. 07-1601

UNITED STATES, ET AL. :

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and

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SHELL OIL COMPANY, :

Petitioner :

v. : No. 07-1607

UNITED STATES, ET AL. :

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Washington, D.C.

Tuesday, February 24, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:15 a.m.

APPEARANCES:

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P R O C E E D I N G S

(10:15 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 07-1601, Burlington Northern and Santa Fe Railway Company et al. v. United States.

Ms. Sullivan.

ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

ON BEHALF OF THE PETITIONER

IN NO. 07-1607

MS. SULLIVAN: Mr. Chief Justice, and may it please the Court:

The court of appeals in this case untethered CERCLA liability for response costs from the plain statutory language of CERCLA section 107(a)(3), and in so doing also imposed potentially crippling liability on entities with only the most attenuated connection to any harm. 107(a)(3), which was reprinted in the petition appendix in 1607 on page 266a, provides that among the potentially responsible parties under CERCLA are so-called arrangers; that is, those persons who by contract, agreement, or otherwise arranged for disposal of hazardous substances.

The paradigmatic case, of course, would be a generator of hazardous waste calls up "Waste Co." and

asks Waste Co. to take those substances to a landfill or to otherwise dispose of them. Where CERCLA does not define a statutory term -- and there's no definition of "arrange" -- this Court has long said, for example in United States against Bestfoods, that we look to the ordinary meaning of the language, and the plain meaning, the ordinary meaning, of "arrange for" is to make plans or preparations to do something. The ordinary meaning of the word "for" is to refer to a purpose or goal. And the ordinary meaning of "to dispose" is to discard or to throw away. So --

CHIEF JUSTICE ROBERTS: What if your shipper here knew that every time he delivered one of these truckloads of the chemical, one-third of it would end up on the ground and seeping through the ground, and no doubt about it, he knew that, and yet they kept sending it? Wouldn't that be arranging for the disposal of at least a third of the shipment?

MS. SULLIVAN: No, Your Honor. That's not our facts, of course, but even if there -- there had been knowledge here, knowledge is not sufficient to give rise to the specific intent required by the statute. Just as in the criminal law, we wouldn't infer in a specific intent case that one is presumed to know the natural consequences of one's acts. What is required

here is an actual plan to dispose. And --

JUSTICE KENNEDY: Well, suppose that it's Shell's truck -- that isn't this case, but suppose it's Shell's truck, and every time they make a delivery the driver catches the waste in a can, four or five gallons, and dumps it in the creek. Is Shell liable there under the statute?

MS. SULLIVAN: Justice Kennedy, Shell might well be liable there, but not under 107(a)(3), rather under 107(a)(2), which provides --

JUSTICE KENNEDY: I mean, hasn't it arranged for the disposal of the --

MS. SULLIVAN: You wouldn't reach arranger liability there, Your Honor, because as in the Amcast case, when Judge Posner said the truck is a facility, the truck would be a facility that Shell owns or operates in that instance. But in this case, of course, Shell was hiring independent contractor truckers to ship the waste.

JUSTICE KENNEDY: Well, I'm -- I'm not sure that I agree with your answer. Can you give me an example under this statute where Shell might be an arranger -- give me some hypothetical in which Shell would be an arranger?

MS. SULLIVAN: Well, Your Honor, we believe,

under arranger liability, Shell would never be an arranger here. The only thing --

JUSTICE SOUTER: What if Shell went out of business and it had some stuff left in the tanks? At that point, they might very well hire somebody to do exactly what you're saying --

MS. SULLIVAN: That's correct, Your Honor.

JUSTICE SOUTER: That would be an eccentric situation, but it could happen.

MS. SULLIVAN: Justice Souter, if Shell had residual waste product that it was seeking to dispose, then the natural reading of 107(a)(3) would apply because that would be waste product --

JUSTICE KENNEDY: Why isn't that the case in my hypothetical -- it's just a hypothetical -- where the driver catches the five gallons that spills out of the hose every week and dumps it in the creek?

MS. SULLIVAN: Your Honor --

JUSTICE KENNEDY: That's really the same as the question you answered Justice Souter, and that's an arranger under (3).

MS. SULLIVAN: Your Honor, the key difference in the two hypotheticals that you've posed is that Shell is the owner and operator of the disposal of waste there, and therefore it would be a 107(a)(2) case,

not an arranger case. The arranger liability is designed for --

JUSTICE GINSBURG: So, Ms. Sullivan, would it be altogether different if, instead of the "FOB destination" term, Shell continued as owner of the product until it had gone from -- from the hose or whatever delivers it, so that there is no transfer of ownership until the delivery is complete?

MS. SULLIVAN: Yes, Justice Ginsburg, that would be a different case. That would be a case like the so-called formulator cases, of which United States against Aceto from the 8th Circuit is paradigmatic. And in that case the key is that the company arranging -- the company was held liable for arranging to dispose of waste where it owned the product throughout a manufacturing process, sent it out to a formulator, but got it back as its own product, knowing that inherent in the formulation process was the creation of waste material. So Shell would have been the owner of the waste --

JUSTICE GINSBURG: The problem I have with that line you're pursuing is the "FOB destination" term is an eminently fixable connection, and CERCLA is -- can be a punishing statute, but the one thing that was not intended was for the party to arrange themselves out of

arranger liability by providing neatly that the moment the product reaches a destination there's no continuing responsibility on the part of the seller.

MS. SULLIVAN: Justice Ginsburg, that is correct with respect to arranging for the disposal of waste. One couldn't evade one's responsibility for arranging for the disposal of waste products. If you're shipping sludge or discarded materials or spent battery casings or waste oil, if you're shipping waste then you can't get out of your obligations by simply arranging for someone else to collect the waste FOB destination. But the difference here is that this is not a waste case. This is a --

JUSTICE KENNEDY: Isn't it waste when it spills? You deliver -- you're supposed to deliver 100 gallons, 5 gallons spills; isn't that waste?

MS. SULLIVAN: Justice Kennedy, it only matters for 107(a)(3) if we arrange for it to spill. And as Judge Posner said in Amcast, no one arranges for an accident except in the --

JUSTICE KENNEDY: They know that -- hypothetical. They know that in the course of delivery you're always going to spill about five gallons. That's waste.

MS. SULLIVAN: Well, Justice Kennedy, the

district court found in this case that Shell had knowledge of spills at the site of the bulk unloading. These were minute spills, only 80 gallons -- 80 gallons a year out of 123,000 --

JUSTICE KENNEDY: I know, but --

MS. SULLIVAN: -- or .07 percent.

JUSTICE KENNEDY: -- all I'm talking about is just a hypothetical definition of "waste," and then --

MS. SULLIVAN: Your Honor, even if the spills are waste, the key for arranger liability, the key for arranger liability is that you arrange for the spills.

JUSTICE KENNEDY: But we were talking about waste, and I just wanted to get your agreement -- maybe you won't agree -- that when the product is delivered and 5 percent of it spills, that is waste. And we can talk about the other parts of it later.

MS. SULLIVAN: Your Honor, the statute, CERCLA, by cross-reference to the Solid Waste Disposal Act, does include spills and leaks as possible waste, and the natural application of that definition would be to spills or leaks in a waste disposal. If a landfill operator spills or leaks waste, then obviously that's waste. But even if you treat drips of a useful product

-- and there's no dispute here that the D-D shipped to the agricultural facility was a useful product, shipped for commercial use for application in the fields. Even if you view it as a spill of that product if a little bit falls out of the hose upon delivery at the bulk storage tank, it does not entail that Shell was an arranger for the disposal of hazardous waste --

JUSTICE ALITO: And what if Shell --

MS. SULLIVAN: -- or that Shell knew about it.

JUSTICE ALITO: -- had the choice between two companies to do the shipping, and one would deliver it with no spillage whatsoever, but the other would deliver it with a certain amount, a small amount of spillage? And Shell chose the latter because it was cheaper.

MS. SULLIVAN: If Shell --

JUSTICE ALITO: Would it not be arranging under those circumstances?

MS. SULLIVAN: It might well be because there would be an economic benefit to Shell from the arrangement for shipment in the leaky truck. That would be quite a different case from this one. There was no economic benefit to Shell from the leaks here. In fact, Shell did everything possible, so far as the record

shows, to prevent spills.

JUSTICE SOUTER: But I thought your definition of -- of "disposal" implied the disposition of something whose use had, in effect, been exhausted, so that I would have thought your answer to Justice Alito's question would have been different because even in the case in which they hired a sloppy delivery, they're not getting rid of -- or the deliverer is not necessarily getting rid of a product whose use has been exhausted.

MS. SULLIVAN: That is correct, Your Honor. We believe the --

JUSTICE SCALIA: I would have thought you would have similarly answered Justice Kennedy's question differently and would have said that just because something's wasted doesn't mean that it is waste. I mean, you may waste part of what is delivered, but what is spilled is -- it doesn't seem to me to be waste.

MS. SULLIVAN: Justice Kennedy and Justice Souter, an easy way to hold this case and to reverse the court of appeals would be simply to hold that when a useful product is spilled, it is not waste. And the cross-reference to the Solid Waste Disposal Act would support that interpretation because in 42 U.S.C. section 6903(3), Congress defined "hazardous waste" as that

material which is discarded. It analogizes it to sludge. This is not a case about sludge or waste material or --

CHIEF JUSTICE ROBERTS: But your -- your argument assumes a sharp distinction between useful product and waste. Yet it's quite common to talk about there being waste associated with a useful product. When you use up so much of this, there's going to be a certain percentage of waste.

MS. SULLIVAN: Correct, Your Honor. But the -- so even if you don't draw the line simply at the useful product-waste distinction, we still do not qualify as an arranger under 107(a)(3) because we did not arrange for the spill, we did not arrange for the waste.

The government relies on facts in the record to suggest that we had some special knowledge or special responsibility, and of course the government's argument that mere knowledge of a third-party's spills would create arranger liability would disrupt commerce across a range of industries. It would mean that the chlorine company is liable when the pool supply store spills a few drops of chlorine and the place becomes a facility. It would mean that the maker of perchloroethylene is liable when the dry cleaning establishments spill dry

cleaning fluid near the dry cleaning machine --

CHIEF JUSTICE ROBERTS: Well, that's --

MS. SULLIVAN: -- even if they had nothing to do with it.

CHIEF JUSTICE ROBERTS: That's making it too easy for you. It would mean all of those people would be liable when in the course of delivering stuff they know there's going to be a certain amount that's going to spill, and even -- perhaps the Justice Alito's hypothetical -- they could have easily -- they chose the truck that causes more spill rather than the one that causes less. It's not simply here's the product, we're gone, see you later, and all of a sudden there's a spill.

MS. SULLIVAN: Your Honor, there's no suggestion in the record here that we're in Justice Alito's example. The district court found that spills were --

CHIEF JUSTICE ROBERTS: No, no, I know. But I'm trying to reach the extent of your argument. So in that type of a case would there be arranger liability?

MS. SULLIVAN: There -- we believe there would not be because spilling a useful product while it's being delivered should not count as waste. But even if you treated that as waste within the meaning of

the statute or even if you treated that as a discard of a hazardous substance, there still should not be arranger liability based on mere knowledge. There has to be knowledge of a third party's spills.

The difference from Justice Alito's example is that Shell there would be invested in the spillage as part of its own economic transaction, as in the formulator cases, where you send a material out to a manufacturer intending for it, expecting for it to spill in the process, you know you're going to get 98 percent back. That's not this case. Shell sought here, as most routine commercial sellers and shippers do, to get a third-party truck to take all of the stuff to B&B and have it used for its commercial application as pesticide in the field. It was -- there was no built-in here, no effort to build in here any benefit for Shell in the leaky truck, quite distinguishing Justice Alito's example.

Now, the government has relied --

JUSTICE GINSBURG: Well, one -- one benefit would be avoiding CERCLA liability through a means other than what I call a fixable connection. Is this the first occasion on which Shell, because of its sales of D-D, has been charged with CERCLA liability? Is this a case of first impression, or have there been other

instances in which Shell did very much the same thing, delivered the D-D FOB destination?

MS. SULLIVAN: Your Honor, this is the first and only case in the nation that has held that arranger liability applies to a mere sale of a useful product because a third-party purchaser, after acquiring possession and control, spilled the product. So there's no other case I am aware of in which it's been adjudicated that there is any liability under these facts.

But the key distinction here is that even if you don't distinguish between the useful product and waste and even if you go with Justice Kennedy's idea that spilling a useful product could be waste, it still is not arranging for the disposal of that substance unless there's an intent to dispose. Here Shell wanted every drop of D-D to be safely placed in the bulk storage tank, and then --

JUSTICE STEVENS: Ms. Sullivan, can I interrupt you? Because I'm still puzzled by your answer to Justice Alito. Are you conceding that if in this case Shell had an alternative carrier who would not have spilled a bit, that then there would be liability?

MS. SULLIVAN: No, we are not, Justice Stevens, and that's --

JUSTICE STEVENS: I thought you did in your answer to Justice Alito. Why wouldn't that be? Explain your answer a little more fully.

MS. SULLIVAN: Justice Stevens, we concede that if there is a waste product that leaves Shell and Shell deliberately arranges for a leaky carrier, there would be no issue. That would be 107(a)(3). Even if -- and we concede there might be a possible case in which Shell deliberately chooses to send a useful product in a way that it leaks. It puts the product into leaky containers when it leaves the shop. Then there might be some case in which you might attribute knowledge, infer intent from knowledge.

But this is not that case because here the transfer to the third party -- the transfer to the third party occurs at tender of delivery under ordinary UCC principles. The -- the transfer to the -- to the third-party purchaser occurs, and that's when the spillage occurs. All third-party --

JUSTICE GINSBURG: I thought there was as part of this picture that Shell had a manual which told its purchasers how to handle this material, and that Shell was well aware that B&B was not following the precautions laid out in the manual.

MS. SULLIVAN: Justice Ginsburg, two points:

The manual comes out only in 1978, and a Shell representative visits the site only in 1979. That leaves 19 years of liability unaccounted for on that theory.

But, more important, it would be terribly impractical and terribly perverse in relation to the purposes of the environmental laws that Congress passed to penalize a manufacturer for telling a third-party purchaser how to handle a product more safely. So to use the manual issued in 1978 or the inspection in 1979 as evidence that Shell knew there were spills and, therefore, was an arranger would be perverse in relation to the environmental statutes.

If there are no further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Mahoney.

ORAL ARGUMENT OF MAUREEN E. MAHONEY

ON BEHALF OF THE PETITIONERS

IN NO. 07-1601

MS. MAHONEY: Mr. Chief Justice, and may it please the Court:

I would like to start with section 912 of the Restatement because I think it really helps to demonstrate that the trial court fully understood and

properly applied the common-law standards that govern the determination of apportionment in a pollution case. That section provides that when a party bears the burden of proof, they have to establish the extent of harm and the amount of money with, quote, "as much certainty as the nature of the tort and circumstances permit," end quote.

At the time that CERCLA was adopted in 1980, common-law courts for more than a century had been using that standard to apportion damages and harm in pollution cases based on essentially rough estimates because the nature of the tort, pollution, and the circumstances don't allow for the kind of precision that we might require in some other settings such as proof of -- of fault, for instance.

And the United States -- they say that the district court departed from those common-law standards, but it's telling: They don't cite a single common-law case decided before CERCLA in their entire brief. If you were to look at section 840E of the Restatement, which governs nuisance cases and apportionment -- it's an application of the section 433A standards -- they cite -- the Restatement cites approximately 50 cases. I don't think there's a single one where a court denied apportionment for a nuisance for a harm such as this one

that is theoretically capable of apportionment --

JUSTICE GINSBURG: This court -- - this court, Ms. Mahoney, didn't deny apportionment. Apportionment was never requested. The court said: "I'm going to have to figure this out on my own." In fact, the court deplored the parties for following what he called a "scorched-earth tactic."

So the apportionment is not something that has been denied to the PRPs in this case. It's something that the court thought was proper and fair, but it didn't deny any request made by parties, isn't that so?

MS. MAHONEY: Your Honor, in note 16 of the Ninth Circuit's opinion it actually rejects that argument by the government. It says that apportionment was pled throughout the case; that the government was on notice. That's note 16. The trial court very specifically rejected the government's claims of waiver saying, yes, apportionment was at issue here throughout the case, both in terms of the pleadings --

JUSTICE GINSBURG: Can you point to me the part of the district court opinion that conflicts with the part that I remember so well? He is saying, this is a really tough assignment; I have to figure it out.

MS. MAHONEY: Oh, he does say that, Your

Honor. But what he says is that the theory of apportionment that was offered by the railroad, the argument that they made -- they offered Kalinowski, an expert that gave substantial precision about how to allocate harm among the different chemicals on the site. He doesn't accept that approach. He accepts a different approach.

But, at 252a, he says -- he confirms -- there is, quote, "considerable evidence of the relative levels of activities and number of releases on the two parcels" that allow him to find a basis of -- for making a reasonable estimate of the apportionment, which was his responsibility as a factfinder. In addition, Your Honor --

JUSTICE GINSBURG: Is it -- is it a judge's responsibility, no matter what evidence may be in the record from which one could make a finding, when a finding hasn't been sought?

MS. MAHONEY: Well, Your Honor, the finding of apportionment was sought. The trial court -- and, again, note 16 of the -- of the Ninth Circuit's opinion makes clear -- and the government doesn't say otherwise -- that the railroads had requested apportionment. The issue was whether or not they had argued the precise theory, and the factfinder certainly has the authority

to choose the theory that it thinks best approximates what is a reasonable estimate.

And in fact, Your Honor, the theory that the trial court seized upon was actually suggested by the government's own expert on cross-examination in the transcript at -- at 4077 to '78.

And in addition, Your Honor, when it was time for closing argument, which was September 28th, 1999, at the very beginning of the transcript, page 4, the trial court said to the government -- said to the parties at the beginning of the closing argument, here's what I want to know about. I want you to address yourselves to whether or not I can apportion this harm based upon the relative area on the site and the relative time. He put the government on notice.

When the findings of fact came out, Your Honor, the government could have filed a motion to amend under Rule 52. They in fact filed a motion. They could have asked to submit additional evidence if they somehow thought that this had been unfair. They didn't do that. Shell did it for other reasons, but the government elected not to. So --

JUSTICE KENNEDY: And I suppose the district court, if it wanted additional evidence, could have said, I want additional evidence on this point.

MS. MAHONEY: It absolutely could have. And so that argument of waiver was rejected by two courts below, both by the district court in denying the motion to amend -- it granted it in certain respects, but rejected waiver -- and then by the Ninth Circuit as well.

CHIEF JUSTICE ROBERTS: What if -- what if you have a situation where it's clear under apportionment one party is liable for one-tenth and the other is liable for nine-tenths, but one-tenth is enough to pollute the -- the water. Do you have apportionment in that situation?

MS. MAHONEY: It depends, but generally yes. And the reason, if it, as here -- the cost of the remedy is driven by the mass of the contamination -- and it was undisputed that that was the case here -- then the costs have gone up based upon the aggregate harm.

CHIEF JUSTICE ROBERTS: Well, I assume it's not a linear, if that's the right word, progression, because once you've got to start a clean-up, you've got to start a clean-up, whether it's, you know, caused by one-tenth or -- or nine-tenths.

MS. MAHONEY: But it's that the whole cost -- the question under apportionment is: Are all of the damages attributable to the harm that was caused by the

defendant? And if they're not, then apportionment is appropriate. And here --

JUSTICE GINSBURG: But that hasn't been -- that hasn't been the position of most courts under CERCLA. I thought they -- I thought that there had been relatively few cases where apportionment, when requested, was even allowed because the theory is the act provides for contribution. One PRP can go after another, but the party who shouldn't be left holding the bag is the public, the innocent victims of the pollution.

MS. MAHONEY: Well, Your Honor, under -- the government has acknowledged that the apportionment standards from the Restatement apply under the -- under CERCLA. And cases -- as I indicated, the cases under 840E almost always allowed apportionment for pollution, even though it meant that a farmer or a rancher or a grower was left holding -- with harm that was caused by another defendant. But the law has always said you can't impose damages on a defendant that had no causal responsibility.

Here what we're talking about, under the Ninth Circuit's holding, that they -- they didn't question the district court's factfinding at 248a that it is indisputable that the overwhelming majority of

hazardous substances were released by B&B on its own parcel, on its own land, not on the railroad's land. Its own operations on its own --

JUSTICE GINSBURG: I thought -- I thought -- and tell me if my recollection of the facts is incorrect -- that the -- the newer parcel that enabled B&B to expand its operation, the waste went into a pond, what was called South, that was on the other side, that was on the original B&B parcel. So you had the waste flowing from one part to the other.

MS. MAHONEY: The trial court found that it was plausible that some leakage, some spills on the railroad parcel, during the 13 years of the lease made it into the groundwater by traveling nearly two football fields in an area that hardly has any rain, but said that 9 percent was the maximum of damages that could possibly be attributable to this.

What the Ninth Circuit really says is that, even though B&B began dumping thousands of gallons of chemical rinsate in 1960, which was 36 years before this case was filed, 15 years before the lease was ever entered into, that all of that harm that was caused by B&B has to be paid by the railroads, because they can't -- and that's almost $40 million now -- because they can't prove with precision whether their share of the

damages might be zero or one million or nine million or -- and so what, in essence, the Ninth Circuit did was said that because there weren't adequate records to prove what amount of -- of dumping was going on in 1960 when there wouldn't have been any reason to keep those records, that as a default matter 100 percent of the harm has to be allocated by the railroads, even though it's not -- they didn't question the district court's finding that it's indisputable that the overwhelming majority was by B&B on its own land. And the court has to --

CHIEF JUSTICE ROBERTS: Well, what about the issue of insolvency? You have talked about the Restatements. There's the comment h to one of the Restatement provisions that says you don't apportion if one of the other parties is insolvent.

MS. MAHONEY: Actually, that's -- Your Honor, what it actually says is that the district court in exceptional cases may deny apportionment due to insolvency. And here the district court, at 248a, found this was not such a case, exercised its discretion to say no.

And in addition, Your Honor, there are no cases cited in -- in that section of the Restatement where this was actually done. And the Third Restatement

in section 28, comment c, says that that comment was actually inconsistent with section 433A principles.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE RESPONDENTS

MR. STEWART: Mr. Chief Justice, and may it please the Court:

If I could begin with the issue of arranger liability. The Ninth Circuit distinguished what it referred to as the "useful product" cases and made it clear that it would not impose arranger liability on Shell simply under the theory that Shell had sold a useful product that was later disposed of in a way that contaminated the environment.

Rather, the court of appeals and the district court emphasized both that Shell had control over the delivery process and that Shell knew that, as the district court put it, "leaks and spills were inherent in the chosen method."

JUSTICE BREYER: So, how does that differ from you using your printer and there's an ink cartridge and you replace them after a while, and mine has a little thing attached that says don't put it in your

ordinary garbage bin because it's dangerous or whatever it is, put it in this envelope and do something?

Now, I'm sure that HP makes those and knows that several million people won't do it. They will throw it in the garbage bin, and they ship to it me. All right. Are they now arrangers?

MR. STEWART: No, I don't think they would --

JUSTICE BREYER: Because?

MR. STEWART: I don't think they would be arrangers for the disposal.

JUSTICE BREYER: Because?

MR. STEWART: Because even though they might foresee that in some --

JUSTICE BREYER: Oh, some? Oh, probably millions. I don't know anybody who does put it in the right garbage bin.

(Laughter.)

MR. STEWART: But I -- but first, I think under ordinary tort law principles a seller's knowledge that a certain percentage of its products would be misused would not be sufficient to give rise to liability --

JUSTICE BREYER: Then how is that then different from Shell? Shell here knows that to some

degree their people are going to spill this. And, of course, shell arranged the transport. And in my imaginary hypothetical -- I don't really know -- so does HP.

MR. STEWART: There are two differences. The first is that while HP might know that some percentage of its customers would dispose of the material improperly, here the district court found that Shell knew that spills and leaks occurred with every delivery. And the second --

JUSTICE BREYER: Well, now maybe HP knows that there is a particularly bad customer like Breyer who --

(Laughter.)

-- because I foolishly admitted at dinner that I dispose of them all improperly. Now are they Shell?

MR. STEWART: The second difference here is that Shell arranged for the delivery and controlled the circumstances under which the delivery would be made. That is, Shell hired the common carrier and Shell required that B&B have bulk storage facilities so that the D-D would have to be pumped from the delivery truck into the bulk storage.

JUSTICE BREYER: All right --

MR. STEWART: I think --

JUSTICE BREYER: So then, suddenly if HP, in fact, uses -- I guess they lease -- you know, they have a common carrier, imagine -- or suppose it's car batteries, same problem. They have their own trucks, and they -- or they use Fed Ex; I don't know. And they, in fact, put in an instruction, which says: Really do it; really put it in the special now.

MR. STEWART: Again, at a certain point, once the product has been used by the customer --

JUSTICE BREYER: I'm trying to find that point. And what I have found you so far to say from the briefs is that what Shell here did -- I'm not saying it easy -- but what they did was they arranged the transport, that seems to me to be common, and they put some instructions in which said the right way to dispose of it.

MR. STEWART: Well, no --

JUSTICE BREYER: Well, doesn't everybody do that?

MR. STEWART: -- because the fact circumstance here was not that Shell or the common carrier transferred control of the D-D to B&B with instructions as to how it was to be used at a later date, and the customer then violated those instructions.

The fact pattern here is that the spills occurred during the process of delivery.

And to return to Justice Alito's hypothetical, you asked what if Shell deliberately chose a particular delivery company that it knew would result in spills, but did so for economic advantage, that's exactly the case here. That is, at a prior time the D-D had been shipped to B&B's facility in sealed drums, so whatever the possibility that it might be misused later, it wouldn't be spilled or leaked during the process of delivery and transfer. But Shell decided that it was to its economic advantage to require bulk storage of D-D so that --

JUSTICE SCALIA: Excuse me. You say in the process of delivery. I thought that this material became the property of the buyer when the truck arrived. Are you saying it only -- it only became the property of the buyer when it was unloaded from the truck?

MR. STEWART: The district court specifically declined to make a finding there. That is --

JUSTICE SCALIA: What does "FOB" normally mean?

MR. STEWART: It says "FOB delivery" or place of delivery. And the district court found that

B&B acquired what it called "stewardship" over the property at the time that the truck entered the premises, but that it was --

JUSTICE SCALIA: I think -- I think it's something of a misdescription to say that this spillage is occurring in the course of delivery.

MR. STEWART: But the district court --

JUSTICE SCALIA: I think as far as Shell was concerned, delivery had been made when the truck pulled up.

MR. STEWART: Well, the district court specifically declined to find -- to make a finding as to who owned the D-D at the time it was spilled.

JUSTICE SCALIA: You're making it.

MR. STEWART: We don't think that our argument is dependent upon the question of ownership, because Shell undeniably had ownership and possession of the D-D at the time the arrangement was made, and --

JUSTICE SOUTER: Is it dependent on the question of control?

JUSTICE STEVENS: But not at the time of the spill.

MR. STEWART: That's correct. But that would be true in the paradigmatic arranger case, where one company has generated waste and hires a hauler to

pick it up and take it away. Those parties could easily provide by contract that title would pass to the hauler at the time the garbage --

JUSTICE BREYER: So then, in your view, what it is, is a company arranges with a transporter for disposal when the company knows that the transporter on arrival may spill some of the product?

MR. STEWART: It's more than --

JUSTICE BREYER: I guess then every oil company -- well, I mean, every liquid product company in the United States is going to be -- fall within that because a lot of people do spill things.

MR. STEWART: Knowledge might well be sufficient, but here we have more than knowledge; we have control.

JUSTICE SOUTER: But why do we -- I mean, do we have control? Shell says to its buyer, see that the delivery is made in the following way, so it doesn't spill all over the place. If Shell had control, it wouldn't have to say that to the buyer. In effect, it could either order the buyer, as a condition of receipt of the product, or it could require that as part of the -- its terms with the -- with the deliverer. It seems to me that the way Shell has set it up indicates that control has passed to somebody else at the moment that

the spigot starts going in the tank.

MR. STEWART: Well, as Ms. Sullivan said, the instructions were given in 1978, fairly far into the period of contamination. But even before that date Shell had control in the sense that it required bulk storage on the B&B facility --

JUSTICE SOUTER: He says, we won't sell you to unless you -- you -- you have these tanks, correct?

MR. STEWART: And its contract with the common carrier required that the common carrier have particular equipment for pumping the D-D out of the truck and into the bulk storage facility.

JUSTICE SOUTER: Okay, but what is your -- I mean, those -- no question, those are -- those are terms of their willingness to deal. But what is your basis for saying that when the truck pulls up and they -- the hose is turned on to deliver, that at that point Shell is controlling the process?

MR. STEWART: They have -- they have control of the process in the sense of defining the way it is to be done. You're correct that the actual process of unloading is being done by employees of the common carrier and employees of B&B rather than employees of Shell. But again, the whole point of arranger liability is to not allow the people who set in motion the process

that culminates in disposal to get off the hook because they're --

JUSTICE SOUTER: So you don't -- maybe you do claim, I'm not sure of this -- that Shell actually could, in effect, get damages from its deliverer as a result of the -- the deliverer's incidental spillage. Is that your position?

MR. STEWART: That is --

JUSTICE SOUTER: Is it that the spillage is a breach of the contract between the transporter and Shell?

MR. STEWART: Well, I think if -- if Shell had pursued such a cause of action, then the delivery company might well have argued that these -- this was foreseeable and that there was --

JUSTICE SOUTER: No, but do you have any basis for saying that if it had pursued that course of action, it would have -- Shell would have succeeded?

MR. STEWART: No. And --

JUSTICE SOUTER: Then -- then why is Shell in control?

MR. STEWART: I mean, that's my point. Shell would not have succeeded in such a suit, because the delivery company would have argued successfully this was known to be an inherent consequence of the delivery

process that Shell has chosen.

JUSTICE SOUTER: Well, yes, but you're saying that the delivery company would have had a defense, but you are -- are saying that Shell would have had at least a theoretical right under its actual contract with the deliverer to assert the -- the control over the manner of delivery that would have prevented the spill; is that what you're saying?

MR. STEWART: Well, it certainly insisted by contract on the use of the pumping equipment of -- to pump the D-D from the truck into the bulk storage facility. And that was --

JUSTICE SOUTER: That's the -- that's the only way they could do it if the buyer did have bulk storage, isn't that correct?

MR. STEWART: That's correct.

JUSTICE SOUTER: Okay.

MR. STEWART: And so -- to use an analogy --

JUSTICE STEVENS: May I ask, is it essential to your theory that Shell had title to the material until delivery?

MR. STEWART: It's not essential to our theory. That is, the point of the arranger liability provision is to get at situations in which one person sets in motion a --

JUSTICE STEVENS: What if it were a fungible product and the purchaser just agreed to take either some product of this -- this quantity and quality and so forth, but they could substitute other -- other goods from another source? Would Shell still be liable?

MR. STEWART: I mean, I guess I would have to know more about the hypothetical in -- as to the circumstances in which the disposal occurred.

JUSTICE STEVENS: Well, Shell gave all the same instructions they gave here, but they just didn't insist that it be their product rather than somebody else's, another oil company's product.

MR. STEWART: I guess I just -- I don't really understand the hypothetical, because I don't understand the situation in which Shell would be indifferent as to whether its product was being bought or the product of a competitor was being bought.

JUSTICE STEVENS: Well --

JUSTICE SOUTER: Mr. Stewart, could I go back to a -- we have been arguing about details. Can I go back to the -- to the broader question? What is your best response to the argument that Ms. Sullivan makes that "arrange for disposal" implies something significantly different from "arrange for transfer," "arrange for release," "arrange for delivery" -- that

the -- that the combination of arrangement as an intentional act and disposal, as opposed to one of these -- these other processes, implies that the -- in effect, the use of the product intended has become exhausted and that one in getting rid of waste as distinct from merely wasting something. What is -- what is your best answer to that?

MR. STEWART: We agree that the term "arrange for" connotes intentionality, and we think it's satisfied here because Shell intentionally set in motion the process of delivery. It insisted upon the delivery being done in a particular fashion, and it knew that spills and leaks were inherent in that process. To use an analogy --

JUSTICE SCALIA: Excuse me.

JUSTICE SOUTER: But if we're not arguing about that, what you are arguing about, then, is the -- is the implication of disposal, as opposed to a more neutral term like "transfer" or "delivery" or what-not. What's your answer to that?

MR. STEWART: The further point I would make is that the term "disposal" is specifically defined to include spilling and leaking.

JUSTICE SOUTER: Oh, but those are certainly ways in which disposal can occur, as I -- I think came

out in the argument. If the -- if Waste Management spills things along the highway on the way to the dump, it may be leakage, but a disposal is going on because in fact it is a way of getting rid of something that no longer has any use.

So I -- I can -- I don't think the -- the inclusion of leakage within the definition answers the question whether disposal is something different from transfer.

MR. STEWART: To use a couple of analogies, I think if I know that my car leaks oil whenever it's operated and I choose to drive it on the public highway, I think I could naturally be said to have intentionally discharged oil onto the highway. It may be --

JUSTICE SOUTER: Well, you have discharged, but you -- the question is whether it is disposal.

MR. STEWART: Well --

JUSTICE SOUTER: "Discharge" is a more neutral term.

MR. STEWART: Well, again, the term "disposal" is specifically defined to include spilling and leaking. You're right that one --

JUSTICE SOUTER: No, but I mean, that -- that -- that begs the question. Because in the course of disposing, in the sense that she argues for, there

can be leakage.

MR. STEWART: That's true, but --

JUSTICE SOUTER: The question is "disposal" versus "transfer" or some more neutral term.

MR. STEWART: If you had a situation where -- for instance, where the trash company was hauling waste and intended to dispose of it in a more classic sense by dumping it at a landfill, but along the way the truck leaked, and some of the items spilled out --

JUSTICE SOUTER: When?

MR. STEWART: -- I think everybody acknowledges that there is disposal there, and I think we would also say that a company that contracted with that trash hauler, knowing that the vehicle tended to leak trash on -- on every delivery, could be said to have arranged for --

JUSTICE BREYER: No, but that's the point.

MR. STEWART: -- not only the ultimate disposal, but the --

JUSTICE BREYER: That is that point, because I think you're focusing on the word -- you don't use the word "for" disposal, and I think that is the key word, and the question is intention versus purpose.

So that in your trash hauler case, it seems to work pretty well for me that when we say that that

trash truck of course intended in the sense that it was its purpose to dispose of the trash when it got to the dump, but the leakage along the way -- it was not its purpose.

So how do we deal with that? The statute tells us that they are an owner of a facility or a vessel that leaks, and therefore they are liable that way. Now, that seems to work.

So we get your example. What doesn't seem to work is when you import the notion of intention, in the sense of knowing that, to the arranger provision, because at that point I don't see how -- and I have to buy that to get your argument. At that point I do not see how you get every thing of Clorox on the shelf in the supermarket and don't put Clorox right in the arranger provision and lots of other companies that shouldn't be held as arrangers. That's my problem. Are you following that?

MR. STEWART: I am following that, but I think that the court of appeals dealt with this and said: Our holding does not suggest that every manufacturer of a useful product is liable down the road if the customer ultimately disposes of it --

JUSTICE BREYER: It does say that, but my problem is I can't find in the distinctions that they

made useful distinctions that will do that. It will say "many," but it won't say, for example, the car battery manufacturer who sends his car batteries out in his own trucks to places where people will get them, and he knows that they're not going to do it properly no matter how hard he tries.

Well, he's not an arranger. He didn't arrange the transport for disposal; he arranged the transport for sale.

MR. STEWART: I mean, I think in a sense the argument for liability there would depend in part on an assumption that people will systematically violate the law, like it would be an easy thing for the Court to say we will not assume and we will not impose liability on the basis of the assumption that battery customers will systematically violate the law.

But the second thing that would be missing in that hypothetical, even if the battery manufacturer were assumed to know that every one of his customers would dispose of them ultimately in an improper way, is that the battery manufacturer would not be in control of that process.

The manufacturer's control over the use of the batteries and their ultimate disposal would be severed once he turned them over, and that was not the

case here. And again I think to return to the purposes of the arranger liability provision, the operator liability provision deals very well with the people who undertake the actual disposal, but Congress evidently thought that that was not enough.

JUSTICE KENNEDY: Well, is Shell liable because it -- it knew of the transportation arrangements?

MR. STEWART: I think it is a combination of knowledge and control. Knowledge might be sufficient, but knowledge and control together form a basis for arranger liability. Again, if I know that a particular common carrier uses a truck -- to use a variant of my earlier hypothetical, if I know that a particular common carrier uses a truck that leaks oil whenever it's operated on the highway and I contract with that carrier and ask it to haul goods, I think I can naturally be said to have arranged for the discharge of oil on --

JUSTICE SOUTER: Yes, but you -- in that case, you have knowledge, but you don't have control because you're using a common carrier.

MR. STEWART: I have -- I have control in the sense that I have deliberately selected a mode of delivery, a particular common --

JUSTICE SOUTER: Then you mean simply

control over your own choice process?

MR. STEWART: Well --

JUSTICE SOUTER: Not control over the behavior of your hauler?

MR. STEWART: Not -- not control in the sense of using my own personnel to drive the truck.

JUSTICE KENNEDY: Well, you have -- you might have knowledge that one chemical broker is more careless than another in the way the product was ultimately sold. I don't see why your theory doesn't make the seller liable as an arranger if it knows or ought to know that at some point in the distribution process there is likely to be spillage which will enter the waters of the United States. I think that's what your argument implies. I don't see that in the statute.

MR. STEWART: Again, because here Shell had control over the very aspect of the process that resulted in spills and leaks.

JUSTICE SCALIA: You mean it could have -- could have adopted some other means?

MR. STEWART: Not only that --

JUSTICE SCALIA: That's all you mean by having control over it.

MR. STEWART: Well, not only that it could have adopted some other means, but that it insisted upon

the particular means --

JUSTICE SCALIA: All right. So all you're requiring is knowledge that using this means will -- will result in a spill. I don't think knowledge alone is enough for -- I think you need purpose. If you arrange for disposal, I think you have to have a purpose. It -- it has to be your object to have the oil leaking along the highway as you go. Merely knowing that it's going to be leaking -- I mean, there may be some other way under the statute that you could find liability on the part of the shipper, but not, it seems to me, on the -- on the ground that the shipper arranged for this leak. He didn't want the leak. He knew it was happening, but that was not the object of the transport.

MR. STEWART: Clearly, if the Court reads the term "arrange for" to require purpose, we lose in this case --

JUSTICE SCALIA: All right.

MR. STEWART: -- because that was not the purpose of the transaction. But here there was both knowledge and control.

And in terms of fairness to Shell, I think it is worth noting that in the typical arranger setting, where a person asks a trash hauler to come pick up my trash and deposit it in an appropriate place, that the

arranger's ultimate liability may be determined very substantially by steps that the hauler takes afterwards; that is, if the arranger believes that the trash is going to be disposed of safely, but in fact the hauler dumps it in a way that will contaminate the environment, the arranger was --

JUSTICE ALITO: Can I ask you a question about your argument that the Petitioners waived their apportionment argument? Aren't there many pages of the district court record in which the parties address apportionment? For example, in the government's response to the Petitioners' apportionment argument, don't you have more than 20 pages of findings of fact and conclusions of law on the issue of apportionment?

MR. STEWART: We haven't used the word "waiver" in our brief and -- but we concede that the railroads and Shell, at least in a cursory way, raised the issue of apportionment at trial, and the Ninth Circuit found that was sufficient to preserve it.

In our view, this is like any case in which a party with the burden of proof on a particular issue asserts that a particular proposition is true but fails to introduce sufficient evidence to carry its burden. You wouldn't speak of that as waiver, but it's still a failure of the party to come forward with enough to

carry the day. And you --

CHIEF JUSTICE ROBERTS: On the question of apportionment, is it really your position that because of the precision you would require, that if there's a big fight over whether it's 10 percent responsibility or 30 percent and there's no way to tell, that if the parties said, look, we'll take 40 percent, that that's no good?

MR. STEWART: No, I think that would be an acceptable approach. I think that --

CHIEF JUSTICE ROBERTS: Isn't that what happened here? I mean, whatever -- I guess the railroads said 6 percent, and the district court said, well, just to be on the safe side, we'll give them 9 percent.

MR. STEWART: Well, I guess we would have two responses. The first is, although the district court certainly believed that he was -- the district judge believed he was building in a margin of safety, in our view it's still speculative as to whether the railroads' share of the contamination exceeded or was less than 9 percent.

But the more fundamental point is the one that you raised in one of your questions; that is, the ultimate harm to the government in a practical sense is

the incurrence of response costs, and in general that's the way that damages are measured in a CERCLA case. You don't ask, what threat -- what was the degree of public -- of threat to the public safety that was posed by the contamination? You ask, how much did it cost to clean it up? And it --

JUSTICE ALITO: Do you -- do you dispute what Ms. Mahoney said, that it costs a great deal more to clean up some of the other chemicals than the ones that the railroad was responsible for?

MR. STEWART: Well, I think -- I don't think that the record kind of establishes the relative costs of different contaminants. What I understood Ms. Mahoney to say --

JUSTICE ALITO: The volume, the volume of the --

MR. STEWART: What I understood her to say was that the cost of the remedial action is proportional to the mass of chemicals to be removed, and we do dispute that proposition. The railroads' expert, Dr. Kalinowski, testified about the remedial action that the government at that time was contemplating, and it was what was referred to as "a pump-and-treat system," where water would be pumped out of the aquifer and it would be treated with granular-activated carbon, or GAC, and that

was a method of removing the contaminants so that the water could be pumped back in. And Dr. Kalinowski said that the amount of GAC that would be needed to implement that remedy would be proportional to the mass of the chemicals involved, but that the crucial point for these purposes is the treatment with GAC is only a small portion of the pump-and-treat remedy; that is, it's essential to drill wells, pump the water out, then treat it, and then under the prior remedial approach, pump it back in. And the --

CHIEF JUSTICE ROBERTS: But that still doesn't address the question, if you have varying degrees of whatever you want to call it -- fault or causal relationship -- that that's a sensible way to apportion the liability.

MR. STEWART: I think the first preliminary point is there's no reason to think that the cost of the remedy as a whole would be proportional to the mass of the contaminants because you have very substantial fixed costs, but the other point I would make is this is where the insolvency of B&B really seems to us to become crucial because, if you had all solvent defendants and the evidence showed that the remedy the government implemented would have been more or less the same if it had only been 10 percent of the contamination, 30

percent of the contamination, or 100 percent of the contamination, that so much of the costs were fixed costs that reducing the volume was really not going to affect the cost in any meaningful way -- if you had all solvent defendants, it might still be the case that dividing the costs up in proportion to the contamination they caused would do rough justice.

CHIEF JUSTICE ROBERTS: Well, what -- what about Ms. Mahoney's three answers, when I asked that question of her?

MR. STEWART: Well, I believe her first answer was the cost of the remedy would be proportional to the amount of contamination, which we disagree with, and we don't think Dr. Kalinowski's testimony bears that out, because all he said was the amount of granular-activated carbon that would be necessary is proportional to the mass of contaminants. And that --

CHIEF JUSTICE ROBERTS: She also said that the Restatement comment h that you rely on cites no cases, and the Third Restatement backs away from that comment.

MR. STEWART: Well, as to the first point, the comment h, you're right, doesn't cite cases, and it does say that this -- the insolvency of the defendant need not prevent apportionment, only that it would

provide a basis for doing so in exceptional cases. But in our view, the exceptional case would be one in which the ultimate determination was that the cost of the remedy, the amount of the relevant harm, would be more or less the same even if only one defendant's contamination were at issue, that it --

CHIEF JUSTICE ROBERTS: So you don't -- you don't think that the insolvency should prevent apportionment if you have a situation where a party is 1 percent responsible and the 99 percent responsible party is insolvent?

MR. STEWART: Well, we would say even as to 10 or 20 percent, if it were established that the remedy the government would have been required to implement, had the only source of contamination been leakage on the railroad parcel -- if it were established that the government could have cleaned that up at 10 percent or 20 percent of the cost of the remedy that was actually chosen, then there might be a sound basis for apportionment despite the insolvency of B&B.

But our big point is, at the very least, the government should not be left holding the bag for costs that it would have been required to incur if the railroad parcel had been the only source of contamination, because --

CHIEF JUSTICE ROBERTS: And what do we have in the way of findings on that question?

MR. STEWART: We don't have findings either way. That is, the district court framed the relevant inquiry as what percentage of the contamination was attributable to the railroad parcel, to the Shell-controlled deliveries, and to the B&B parcel. But it made no finding one way or the other as to what the cost of the remedy would have been if only the -- if the only source of contamination had been the railroad parcel.

And certainly the -- the primary equitable thrust of the argument on the other side is it's unfair to make us pay for somebody else's contamination. But to the extent that the government would have been required to implement a remedy this costly or even 60 percent this costly, had the railroads or Shell been the only source of contamination, by imposing at least that amount of liability, we're not asking for them to pay for B&B's contamination. We're simply asking for them to pay for the response costs that their own --

CHIEF JUSTICE ROBERTS: But is that right? I mean, doesn't it -- aren't you challenging the whole basis for apportionment? I mean -- I don't think when you're apportioning responsibility, you allocate whether

or not the actors independently caused the harm. I thought the assumption was, yes, everybody's -- all of this group has contributed to the harm, but now we're going to apportion their responsibility.

MR. STEWART: Well, indeed, the Second Restatement says as a categorical matter that if either of two causes would have been independently sufficient to bring about the result, then there's joint and several liability. The example that the Restatement gives is two merging fires that destroyed a building.

And so I think it is established in -- in the Second Restatement that the -- there is no apportionment if either of two causes would have brought about the -- the feared harm.

With -- with respect to the Third Restatement, I would say that at least in the case of -- you're -- you're right. There is no exact counterpart to comment h in the Third Restatement. But at least as to indivisible harms -- and I think this is potentially an indivisible harm that the government would have been required to undertake more or less the same response action regardless of the source of contamination.

At least as to individual harms, the Third Restatement gives a variety of approaches that a local jurisdiction could take. There's joint and several

liability, pure several liability, and then there are several permutations. And the Third Restatement is --

JUSTICE SCALIA: Is that a finding? Do we have to take it as a given that this was an indivisible harm?

MR. STEWART: I don't -- I think you should take it as a given because it was the defendants' burden to prove divisibility. But I think if you don't regard the defendants as having the burden, I don't believe there's an evidentiary basis for feeling confident one way or the other as to whether the harm was indivisible. But with respect to --

JUSTICE ALITO: What's the basis for thinking that every little detail in the latest Restatement, including comments, is binding in a CERCLA case?

MR. STEWART: I don't think so, and this Court in Norfolk and Western -- it was dealing with a different statute, but it said when you're looking at the Restatement, it's more important what the state of the law was when Congress enacted the statute rather than what the common-law principles are now. And as we've said in our brief, we think for that reason the Second Restatement is the more crucial document.

But if you were to look at the Third

Restatement, one of the things you would find is that the drafters, as to indivisible harms, identified a variety of approaches that a local jurisdiction could take, expressly declined to choose a preferred one among them, but said the most important determinant in choosing between them is how the risk that a particular defendant be insolvent will be allocated.

So the drafters of the Third Restatement certainly didn't treat insolvency as a factor that should be ignored in citing questions of an apportionability.

JUSTICE GINSBURG: May I -- may I just ask one question about the -- the situation of -- of these two potentially responsible parties? They are the only ones left, right? Because B&B is bankrupt, and there's nobody else that has been identified.

MR. STEWART: That's correct.

JUSTICE GINSBURG: So it's only those two. And one question about the arranger liability -- well, first on the apportionment. Assuming we don't accept your entire position, would a remand so that proof could be put in by both sides focusing on the issue of apportionment be appropriate? You questioned the district, even -- even if apportionment were possible, you questioned how he arrived at it.

MR. STEWART: I guess that's true. To the argument that I've just been sketching out, that -- that the crucial question is what response costs the government would have been required to bear if -- if only the railroad parcel's contamination had been at issue, our argument is that the -- the railroads failed to prove divisibility. But another option would be to remand for factual proceedings to address that question.

JUSTICE GINSBURG: And is it true, as Ms. Sullivan said, that there is no other arranger case like this one where the, quote, "arranger" is the seller of a product?

MR. STEWART: I think there is no "arranger" case going in either direction that's on all fours with this one where there is the sale of a useful product during the course of a delivery that the seller arranged -- that the seller controlled.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Sullivan, we will give you five minutes.

REBUTTAL ARGUMENT OF KATHLEEN M. SULLIVAN

ON BEHALF OF THE PETITIONER

IN NO. 07-1607

JUSTICE KENNEDY: Ms. Sullivan, just on the apportionment point, do you agree that it's your burden to show that this is a divisible harm, and can you tell

me how you showed that?

MS. SULLIVAN: Yes, Justice Kennedy. The -- there is no dispute in this case that this was a divisible harm. Mr. Stewart answered Justice Scalia's question incorrectly.

The district court found and the circuit court also found -- the circuit court's finding is on page 36a of the petition appendix, the cert appendix -- that there is no dispute that the harm here is divisible; that is, there -- the -- the harm here is capable of apportionment. That is not disputed before this Court.

What is disputed is whether at the second stage of analysis the railroads and Shell met our burden -- and we agree it is our burden under Restatement principles -- of showing the -- the quantum of division, the reasonable basis for how the shares were allocated by the District Court. And Justice Alito is correct. There are meticulous findings, 20 pages of findings, based on record evidence from the government's witnesses and from the extensive expert testimony that both Shell and the railroads put in that went to the apportionment issue. Shell argued --

CHIEF JUSTICE ROBERTS: I'm not sure I know what it means to say it's a divisible harm.

MS. SULLIVAN: It's capable of apportionment. The Restatement suggests in the cases applying this -- it said you ask at the first stage: Is the harm capable of apportionment as a matter of law? And then as a matter of --

CHIEF JUSTICE ROBERTS: So that means that whatever percentage of responsibility the parties have, that's the percentage of cost that they --

MS. SULLIVAN: They should bear. But then they -- it's up to the parties to prove a reasonable basis for apportionment. But both Shell and the railroads did argue, Justice Ginsburg -- put into evidence and argued at the district court that there should be apportionment --

CHIEF JUSTICE ROBERTS: So does that mean that, let's say, the -- how does that work when it costs $2 million to sort of start a clean-up, no matter who, and then, you know, the more stuff there is, the extra million it is? Is that -- is -- is the initial cost a divisible harm?

MS. SULLIVAN: Well, Mr. Chief Justice, the district court here was conservative. It allocated all of the costs, fixed and specific, to the parties. So the conservative estimate of six percent for Shell, nine percent for the railroads, was based on the heroic

assumption that a few drops spilled two football fields away of a volatile substance that evaporates twice as fast as water would be picked up by rainfall that could happen at the relevant quantities only once every ten years according to our expert, once every seven years according to the government's expert -- on the heroic assumption that all of those drips reached the pond which created the single plume of contamination, assuming that, then we award six percent or nine percent of liability.

But the point is there was record evidence, Justice Ginsburg -- and there's no need for a remand on this. There was ample evidence for which the six percent and the nine percent could be -- we -- and we didn't -- to say we --

JUSTICE GINSBURG: That's not normally how -- when -- when someone has a burden of proof, it's a burden of coming forward. And the one thing that we do know from this district judge is he's saying, I was left largely to make it up. What he -- the components of his allocation did not come from -- yes, there is some evidence in the record. But ordinarily when you talk about a party who has a burden of proof, we don't mean they put in a piece here and a piece there and left it to the district judge to figure out.

MS. SULLIVAN: Justice Ginsburg, there's no question that both the railroads and Shell argued for zero percent liability. But the same evidence that we put in and the proposed findings of fact -- for example, if you want to look at Docket Nos. 1317 and 1318, Shell's proposed findings of fact did suggest a basis for apportionment. So we met our burden of production as well as proof. But the -- to return to the question --

JUSTICE KENNEDY: I'm really concerned about the time and the white light, but I'm -- I'm not sure you answered the Chief Justice's hypothetical about the $2 million, which was an initial clean-up that has to be expended no matter how large the -- the spill was. How did you discharge your burden of proof to show that that is not the case here or that that is divisible?

MS. SULLIVAN: Justice Kennedy, here -- and I refer you to the petition appendix at page -- excuse me, to the joint appendix at page 288, to the expert Kalinowski who described this as a single mass removal scheme.

This is not a case like a toxic soup case in a landfill with 238 different chemicals that require different extraction procedures. This is a case in which two chemicals reached the groundwater and were to

be removed by a single mass extraction scheme, a single -- what the expert called -- at joint appendix 288 -- a mass removal scheme. It was not disputed or argued on appeal that there was a single remediation process. So this is a simple case in which we are relying --

JUSTICE BREYER: Well, no, but suppose that that cost -- that single thing cost $2 million, and you will have to hire that $2 million machine even if there is one drop. So for the cost of that machine it couldn't matter if your client put in one drop and nobody else put in any, or the others put in 40 billion drops. Can you allocate it? It would seem fair to allocate it, but I guess maybe in the Restatement or there's some law somewhere saying you can't, because it's just one single cost that takes place regardless. What's the state of the law on that?

MS. SULLIVAN: May I answer? A reasonable basis is all that's required. Practical approximation is appropriate here. Here the court did not distinguish between fixed capital costs and operating costs that might matter in a different case.

But the key point here is that you should affirm as a matter of Federal common law that Restatement 433A provides only a demand for a reasonable basis and not exactitude.

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:19 a.m., the case in the above-entitled matter was submitted.)

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