No. 13-____

IN THE

Supreme Court of the United States

PCS NITROGEN, INCORPORATED,

Petitioner,

v.

ASHLEY II OF CHARLESTON, LLC; ROSS DEVELOPMENT CORPORATION; J HOLCOMBE ENTERPRISES LP; KONINKLIJKE DSM NV; DSM CHEMICALS OF NORTH AMERICA INCORPORATED; ROBIN HOOD CONTAINER EXPRESS INCORPORATED; ALL WASTE TANK CLEANING INCORPORATED, F/K/A PSC CONTAINER SERVICES, LLC, NOW KNOWN AS QUALASERVICES, LLC; AND J HENRY FAIR, JR.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, is a remedial statute directed to the costs of cleaning up hazardous substances. It imposes strict liability on the owners and operators of a site on which a disposal of hazardous substance has occurred, without regard to fault. This liability can be joint and several, imposing sweeping costs on parties that may have had little involvement with a site. To ameliorate this, CERCLA permits the harm to be divided, so that a party is responsible only for its apportioned share. In *Burlington Northern and Santa Fe Railway Co. v. United States*, 556 U.S. 599, 613-15 (2009), this Court rejected decades of lower court decisions requiring meticulous proof to divide the harm and apportion liability, clearly holding that a harm is divisible if there is any "reasonable basis" for determining the contribution of each cause to the harm. Indeed, the Court upheld divisibility in that case based on the "simplest of considerations." *Id.* at 617.

Here, the district court and the Fourth Circuit rejected divisibility, despite overwhelming evidence in the record demonstrating a reasonable basis for dividing the harm and thus apportioning liability. The question presented is:

> Whether the Fourth Circuit erred by adopting proof requirements for divisibility of harm under CERCLA that are contrary to this Court's decision in *Burlington Northern*, and compounded the error by reviewing the district court's refusal to divide the harm for clear error (as four Circuits do) rather than de novo (as three other Circuits do).

RULE 29.6 STATEMENT

PCS Nitrogen, Inc. is a wholly owned subsidiary of Potash Corporation of Saskatchewan Inc., which has no parent corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS

(continued)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.7a-54a) is reported at 714 F.3d 161. The district court's second amended opinion and order (Pet.App.55a-207a) is reported at 791 F. Supp. 2d 431.

JURISDICTION

The Fourth Circuit issued its order denying rehearing on April 30, 2013. (Pet.App.1a-6a.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Appendix D (Pet.App.208a-213a) reproduces the relevant provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*

STATEMENT

A. Apportionment under CERCLA before and after *Burlington Northern*.

CERCLA imposes strict liability for environmental cleanup on any party that owned or operated land on which a disposal of hazardous substances occurred, without consideration of fault. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2). Early draft bills would have gone further and imposed mandatory joint and several liability. But Congress eliminated all language concerning joint and several liability in order to, in the words of the seminal district court opinion on the subject, "avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases." *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983). Senator Jennings Randolph, sponsor of the bill, explained that "we have deleted any reference to joint and several liability, relying on

common law principles to determine when parties should be severally liable." 126 Cong. Rec. 30,932 (1980).

Accordingly, from CERCLA's enactment in 1980 until this Court's decision in *Burlington Northern* in 2009, the courts all agreed that, where two or more owners or operators contribute to a single harm, they may share liability for the entire harm jointly and severally, or, if that single harm is divisible, liability for the harm may be apportioned according to the contribution of each party to the harm.[1] *See Burlington Northern and Santa Fe Railway Co. v. United States*, 556 U.S. 599, 613-18 (2009). But the agreement ended there. Before *Burlington Northern*, the courts imposed varying proof requirements to establish divisibility, with some so strict that the courts veered close to imposing joint and several liability without exception. A jurisprudential fog engulfed the availability and method of proof for the divisibility analysis in CERCLA cases.

It was under these conditions that the district court in *Burlington Northern* addressed the liability of two railroads that jointly owned land they leased

[1] As reflected in the text above, "divisible" technically describes the harm, and "apportionment" the resulting liability for a divisible harm. *See, e.g.*, *Burlington Northern*, 556 U.S. at 615 (referring to "divisibility of the harm[]" as the basis for "apportioning of liability"). Courts, however, use the terms "divisibility," "apportionment," and "capable of apportionment" interchangeably, and this brief does the same. This brief, however, avoids using the term "allocation," which is typically associated with the separate analysis under another CERCLA provision, § 113(f), 42 U.S.C. § 9613(f), and is not at issue here. *See* Part II, *infra*. *But see Burlington Northern*, 556 U.S. at 618 (referring to the district court's "ultimate allocation of liability" when discussing apportionment).

to an agricultural chemical distribution business, which had since gone bankrupt. *Id.* at 602-03. The railroads categorically denied any responsibility for contamination on their parcel. The government, which had brought suit against the railroads, insisted the liability for the harm was not capable of apportionment at all. *Id.* at 615. The district court nonetheless apportioned the railroads' liability at 9 percent using the following method:

- The railroads' land was 19 percent of the site by area, was used for 45 percent of the time the facility was in operation, and contained two of the three chemicals contaminating the site;
- Multiplying 19 percent by 45 percent by two-thirds equals 6 percent (rounding up); and
- Adding a 50 percent margin of error equals 9 percent.

Id. at 616-17.

On appeal, the Ninth Circuit reversed, criticizing the district court for "rel[ying] on the simplest of considerations." *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 943 (9th Cir. 2008), *rev'd,* 556 U.S. 599 (2009). Specifically, it faulted the district court's analysis on the grounds that (1) there was "a lack of sufficient data to establish the precise proportion of contamination that occurred" on the site and "the rate of contamination" in certain years; (2) "neither the duration of the lease nor the size of the leased area alone was a reliable measure of the harm caused by activities on the property"; and (3) the district court "relied on estimates rather than specific and detailed records." *Burlington Northern*, 556 U.S. at 617.

This Court reversed, briefly dispersing the divisibility fog by reinstating the district court's apportionment holding. In addressing "to what extent a party associated with a contaminated site may be held responsible for the full costs of remediation," this Court observed that CERCLA "did not mandate 'joint and several' liability in every case." *Id.* at 602, 613. Rather, the availability of apportionment in CERCLA cases is governed by "traditional and evolving principles of common law," as described in *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). *Id.* at 613. "[T]he universal starting point for divisibility of harm analysis in CERCLA cases is § 433A of the Restatement (Second) of Torts." *Id.* at 614 (alterations and quotation marks omitted). According to that Section of the Restatement, even "a single harm" is capable of apportionment when "there is a reasonable basis for determining the contribution of each cause." *Id.* (citing Restatement § 433A(1)(b)).

Adopting that standard, the Court held that "the facts contained in the record reasonably supported the apportionment of liability." *Id.* at 617. It specifically noted that the district court's "ultimate allocation of liability," as coarse as it was, "[wa]s supported by the evidence and comport[ed] with the apportionment principles" it had identified. *Id.* at 617-19. The "simplest of considerations" were sufficient. *Id.* at 617. Under this rough-justice standard, if there is a reasonable basis for dividing the harm according to the party's contribution, joint and several liability among all of the tortfeasors does not apply, and a party is responsible only for its apportioned contribution.

Yet, despite this Court's clarion guidance, in the more-than-forty district court opinions issued since *Burlington Northern*, not a single one has found liability from a CERCLA site to be capable of apportionment. *See* Anthony G. Hopp et al., *Four Years Later: How Has* BNSF *Changed CERCLA Practice?*, *Lexology*, 25 n.168 (Nov. 20, 2012) (collecting cases) [hereinafter *Four Years Later*].[2] Instead, courts continue to apply pre-*Burlington Northern* standards, and impose onerous requirements on defendants seeking to apportion liability. In fact, district courts have repeatedly denied apportionment on the most hyper-technical grounds, from failing to provide sufficiently precise records detailing manufacturing output, *Bd. of Cnty. Comm'rs v. Brown Grp. Retail, Inc.*, 768 F. Supp. 2d 1092, 1118 (D. Colo. 2011), to a lack of "percipient witnesses" to a particular industrial process, *United Alloys, Inc. v. Baker*, 797 F. Supp. 2d 974, 998 (C.D. Cal. 2011). And on the two occasions when divisibility cases reached the courts of appeals, they were affirmed. *United States v. NCR Corp.*, 688 F.3d 833, 838-42 (7th Cir. 2012) (affirming the district court's refusal to apportion liability); Pet.App.43a-50a (same).

Regrettably, therefore, the conflict regarding proof requirements that the Court set out to resolve in *Burlington Northern* remains as unsettled today as it was then. Indeed, if the trend among courts has shifted at all, it has improperly shifted further *against* apportionment and the guidance this Court provided in *Burlington Northern*.

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[2] *Available at* http://www.toxictortlitigationblog.com/CERCLA.pdf.

B. Proceedings and disposition below.

This case involves responsibility for CERCLA cleanup efforts at the former site of a fertilizer manufacturing plant in Charleston, South Carolina. Planters Fertilizer & Phosphate Company (now known as Ross Development Corporation) operated the plant for 60 years and contributed the "vast majority" of the worst contamination to the site. Pet.App.17a. Planters burned pyrite ore to produce sulfuric acid, and combined that sulfuric acid with phosphate rock to produce phosphate fertilizer for sale. Pet.App.16a. Burning pyrite also produces a byproduct called pyrite "slag," which is rich in arsenic and lead. Pet.App.16a. Planters spread this slag around the site, leveling ground and stabilizing roads. Pet.App.16a-17a. In the 1930s, Planters began producing sulfuric acid by other means. Pet.App.16a.

In 1966, Planters sold the site to Columbia Nitrogen Corporation, which was held in this case to be a predecessor in interest to petitioner PCS. Pet.App.26a-33a.[3] Columbia Nitrogen followed Planters's latter method of producing sulfuric acid, but wholly stopped acid production in 1970 and fertilizer production in 1972, and then sold the site in 1985. Pet.App.17-18a. Various parties, including Columbia Nitrogen and those who owned or operated the land after 1985, have played some role in spreading soil around the site as a result of

[3] PCS itself never owned or operated the site in Charleston. Instead, its predecessor bought assets from a corporation, Columbia Nitrogen, which previously owned the Charleston site. PCS's liability as an eventual successor in interest to Columbia Nitrogen was a hotly contested point in the appeal below, but is a contract-interpretation issue not presented by this petition.

construction or demolition, but none of this activity created new contaminants.

In 2003, plaintiff-respondent Ashley II of Charleston, LLC, a private equity company specializing in the redevelopment of contaminated real estate, began acquiring land on the site, consolidating its ownership in 2008. In 2005, Ashley sued PCS under CERCLA § 107, 42 U.S.C. § 9607, to recover past and future costs of cleaning up the site. As relevant here, PCS raised a divisibility defense, so that its share of the liability would be apportioned according to the contribution attributable to it (via its predecessor in interest, Columbia Nitrogen). In the event, however, that its liability were held to be joint and several, PCS brought a counterclaim against Ashley for equitable contribution under CERCLA § 113(f), 42 U.S.C. § 9613(f), and brought similar contribution claims against other owners or operators of the site, identified as respondents in the caption of this petition. Pet.App.13a. The question presented in this petition pertains only to Ashley's claims against PCS.

PCS's legal predecessor in interest had operated the plant for only 6 of its 66 years of operation, and contributed a small fraction of the dangerous contaminants. By contrast, Planters's operations contributed "the vast majority" of contamination that harmed the environment. Pet.App.17a. To demonstrate at trial that the harm at the site was capable of apportionment, PCS relied on these and other facts, including extensive documentary evidence and expert-witness testimony that supported five methods, which, individually or in combination, provide a reasonable basis for

apportionment. Pet.App.151a-163a. One was even based on the analysis of an expert for plaintiff-respondent Ashley, who testified that her method itself would be a reasonable basis for apportioning the harm. Pet.App.161a-163a. And all of the methods settled on a narrow range of calculations, with two methods reinforcing one another by agreeing on 6 percent, and the analysis of Ashley's expert proposing 15 percent.

Despite this Court's guidance in *Burlington Northern*, however, the courts below joined the procession of decisions declining to apportion harm to mitigate the harshness of joint and several liability under CERCLA. The district court held, as a matter of law, that the harm at the site was theoretically capable of apportionment. Pet.App.163a-164a. But despite that conclusion, the support of experts from both sides, and an extensive record, the court "f[ound] that the record d[id] not provide . . . a reasonable basis" for apportionment. Pet.App.164a. It conceded that PCS's methods adequately dealt with the "volume of contaminants released" onto the land, but faulted them for inadequately addressing "the additional volume of soil contaminated by earth moving and development activities" (referred to as "primary" and "secondary" disposals, respectively, by the Fourth Circuit). Pet.App.164a. Accordingly, it held PCS jointly and severally liable for the harm at the site.

The Fourth Circuit affirmed, committing two significant errors in the process. Each warrants this Court's review. And because the one compounds the other, their collective effect is a profound break from the law established in *Burlington Northern*.

Proof Requirements. Most importantly, the court of appeals endorsed the district court's application of harsh proof requirements, and on that basis agreed that the record did not support apportionment. It echoed the district court's contention that PCS did not "provide an apportionment methodology that addressed both" primary and secondary disposals. Pet.App.50a. And yet PCS provided apportionment methodologies that addressed each of these factors independently, and consistently assessed PCS's liability at 6 percent of the total. Pet.App.45a. Further, Ashley's own expert crafted a methodology that did address both types of disposals and assessed PCS's liability at 15 percent. But the district court refused to apportion the harm within this narrow range, and the Fourth Circuit affirmed, leaving PCS with joint and several liability.

Standard of Review. The Fourth Circuit compounded its error by reviewing the district court's apportionment decision only for clear error. Pet.App.43a-50a. This exacerbates a conflict among the circuits on the standard of appellate review applicable to district courts' divisibility determinations under CERCLA. Three Circuits review this decision de novo; four others, including the Fourth Circuit, review it for clear error. This conflict among the courts regarding the proper standard of review was unaddressed by this Court in *Burlington Northern*.

This Court's review is urgently needed to remind courts that the approach to divisibility enunciated in *Burlington Northern* is crucial to ameliorating the harshness of CERCLA's status-based strict liability regime, and must be followed in practice.

REASONS FOR GRANTING THE WRIT

The Court's intervention is required to ensure compliance with its precedent, the CERCLA statute, and foundational principles of law. Congress chose to leave to the courts the question of how CERCLA costs would be apportioned, applying traditional and evolving principles of common law. Rejecting years of lower court case law, this Court's 2009 decision in *Burlington Northern* made clear that the divisibility analysis must be firmly rooted in § 433A of the Restatement. Only a reasonable basis to apportion harm is required; mathematical certainty is not the standard.

Yet the lower courts have largely ignored *Burlington Northern*. Instead, they have continued to misapply the Restatement and have limited *Burlington Northern* to its facts. The complicated and fact-dependent nature of CERCLA cases has to some extent masked the extent to which lower courts' decisions are contrary to this Court's precedent, but the conflict is undeniable. In *Burlington Northern*, the Court upheld apportionment by the district court in that case based on the "simplest of considerations." 556 U.S. at 617. Subsequent appellate decisions drew from this only that exceptional deference is owed to district courts' fact-finding in CERCLA cases, rather than that courts like the Ninth Circuit, the appellate court in that case, were applying inappropriate proof requirements for apportionment. *See NCR Corp.*, 688 F.3d at 842; Pet.App.46a-48a. This ignores the fundamental guidance this Court provided in *Burlington Northern*.

For instance, here, like in *Burlington Northern*, there is no dispute that the harm is theoretically

capable of apportionment. *See* 556 U.S. at 615; Pet.App.45a. Like in *Burlington Northern*, there is an extensive record of evidence detailing the contamination at the site. And, like in *Burlington Northern*, the underlying chemicals do not interact to complicate apportionment with the creation of additional harm. *Cf. United States v. Monsanto Co.*, 858 F.2d 160, 164 (4th Cir. 1988). But unlike in *Burlington Northern*, the district court here *refused* to divide the harm and apportion liability, and the Fourth Circuit upheld that determination, on a clear-error review. That analysis and result cannot be squared with the required legal analysis set forth in *Burlington Northern*. There, as here, the harm is "'divisible in terms of degree.'" *Burlington Northern*, 556 U.S. at 616 (quoting the district court in that case). And lamentably, the decision below is not an outlier. It is emblematic of how the lower courts continue to make apportionment decisions, as though *Burlington Northern* never happened. Further, if, as here, a deferential standard of review is applied, correction of an erroneous district court decision is even more difficult.

To reestablish the principles articulated in *Burlington Northern* and make clear the governing standard of review, the Court should grant the writ and conclude that a reasonable basis for apportioning liability requires reversal in this case.

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT, THE DECISIONS OF OTHER CIRCUITS, AND GOVERNING COMMON-LAW PRINCIPLES.

A. The courts below imposed proof requirements inconsistent with *Burlington Northern*.

Burlington Northern's message has been lost on the lower courts. Although liability under CERCLA is strict and not based on fault, even the "simplest of considerations" are sufficient to divide harm and avoid the harshness of joint and several liability.

1. *Burlington Northern* resolved the proof requirements for establishing divisibility in CERCLA cases.

Before this Court decided *Burlington Northern*, a variety of courts of appeals decisions were on the books addressing the proof requirements necessary to apportion harm in CERCLA cases, and setting forth a range of standards. For example, the Fifth Circuit in *In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 903 (5th Cir. 1993), endorsed a reasonable basis test. *Bell Petroleum* held that if there is "a factual basis for making a reasonable estimate," then "joint and several liability should not be imposed in the absence of exceptional circumstances." *Id.* Similarly, "[t]he fact that apportionment may be difficult, because each defendant's exact contribution to the harm cannot be proved to an absolute certainty, or the fact that it will require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability." *Id.* This standard adhered closely to § 433A of the Restatement, which *Bell Petroleum* cited repeatedly.

In contrast, the First Circuit, in *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989), imposed a much more stringent test that frequently made it "impossible to determine the amount of environmental harm caused by each party." *Picillo* said that "responsible parties rarely escape joint and several liability," *id.* at 178, and cited the Restatement for placing the burden of establishing apportionment on the defendant, but did not cite § 433A. The effect was to impose a much more demanding standard for demonstrating the divisibility of a harm. *See also United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992) ("We observe in this regard that [the] burden in attempting to prove . . . divisibility . . . is substantial . . . .").

When this Court decided *Burlington Northern*, it resolved the question by refocusing the divisibility inquiry on § 433A. *See* 556 U.S. at 613-15. That Section is "the universal starting point for divisibility of harm analyses in CERCLA cases," and requires only "a reasonable basis for determining the contribution of each cause to a single harm." *Id.* at 614 (alterations omitted). The Restatement authors provide, as an example, a situation "where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop." Restatement (Second) of Torts § 433A cmt. d. The illustration states:

> the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number. Where such apportionment can be made

> without injustice to any of the parties, the court may require it to be made.

Id.

Applying § 433A's approach, the Court evaluated whether the record "provided a reasonable basis for the District Court's conclusion that the [r]ailroads were liable for only 9% of the harm caused by contamination at the [site]." *Burlington Northern*, 556 U.S. at 615. It concluded that there was, albeit based on the "simplest of considerations: percentages of land area, time of ownership, and types of hazardous products." *Id.* at 617. And even though the railroads had not provided evidence identifying "the exact quantity of chemical spills on each part in each year of the facility's operation," the Court nonetheless found the harm capable of apportionment. *Id.* at 617 & 606 n.4.

In this way, the Court actually went far beyond *Bell Petroleum*, which permitted apportionment after being presented with much more detailed evidence. In *Bell Petroleum*, there was "sufficient evidence . . . of each defendant's individual contribution to the contamination." 3 F.3d at 903. This was based not only on the period of ownership, as in *Burlington Northern*, but also on details of sales involving the polluting substance, and testimony from multiple experts on the volume of contaminants generated during production. *Id.* at 892-94, 902-04. In *Burlington Northern*, by contrast, apportionment was based on a simple multiplication of fractions—land area, duration, and fraction of chemicals, 556 U.S. at 616-17—that commentators have described as "very, very rough math." *Four Years Later* at 24.

This approach, the Court emphasized, would "ensure that the costs of [the] cleanup efforts were borne by those responsible for the contamination." *Burlington Northern*, 556 U.S. at 602. Accordingly, in upholding the railroads' apportionment of 9 percent of the harm, the Court divided their responsibility from that of the main polluter. *Id.* at 606 n.4 ("[T]he overwhelming majority of hazardous substances were released from the . . . parcel" of an insolvent party not involved in the case.). This approach essentially rejected years of lower court precedent, all of which pointed to a stricter standard, and instead made clear that no-fault, status-based, strict liability must not also be joint and several automatically.

2. Cases since *Burlington Northern* have routinely ignored its proof requirements.

Although *Burlington Northern* endorsed both § 433A of the Restatement and *Bell Petroleum*—taking the Fifth Circuit's approach one step further—lower courts have largely continued as though nothing happened in that watershed decision. In the four years since *Burlington Northern* was decided, dozens of CERCLA cases across the country have been litigated. But by most accounts there has been little difference in approach or outcome from the state of affairs that existed in the lower courts before *Burlington Northern*. *See Four Years Later* at 17 ("The lower courts, however, have either ignored or completely rejected the [*Burlington Northern*] court's approach."); Steven Ferrey, *Reconfiguration of Superfund Liability?: The Disconnection Between Supreme Court Decisions and the Lower Federal Courts*, 41 *Sw. L. Rev.* 589, 610-12 (2012) ("There has

not been any watershed change on this point in the lower courts to date."). District courts have not followed the direction of this Court to apportion liability where there is a reasonable basis to do so.

In fact, they have rejected apportionment in *every case* decided since *Burlington Northern*. *Four Years Later* at 25 n.168 (collecting cases). And they have done so on the most hyper-technical of grounds. For example, in *Brown Group Retail, Inc.*, 768 F. Supp. 2d at 1118, the court refused to apportion the defendant's contribution to the harm, even after concluding that other parties were "the primary source of contamination" in a particular area, because of a single "abandon[ed]" "sediment trap" and the potential of underground water flows. *Id.* It criticized methods proposed by the defendant for "focus[ing] on the relative measures of [contaminants] present at different sites," rather than on how those differences "impacted the recoverable response costs." *Id.* And even though the defendant "operated the [site] for approximately the same period of time using the same or similar processes" as another party, the court refused to apportion liability based on time because the "records presented at trial did not establish" with sufficient specificity the volume of production or contaminants consumed. *Id.*

In *United Alloys*, 797 F. Supp. 2d at 998, the court rejected divisibility in part because there were "no percipient witnesses or contemporaneous records identifying the procedure for filling" a particular "excavation area" and the extensive expert testimony did not provide what the court considered "a reliable explanation" for certain transportation of soil.

And in *ITT Industries, Inc. v. Borgwarner, Inc.*, 700 F. Supp. 2d 848, 870-76 (W.D. Mich. 2010), the court imposed joint and several liability on two defendants who contaminated a site only indirectly—their operations were based on a site not part of the lawsuit. Acknowledging that "the majority" of contamination "likely originated from on-site operations," the court nonetheless refused to divide the harm because the defendants discharged *some* contaminants at their sites, and "*there was evidence to suggest* that those contaminants reached" the site at issue. *Id.* at 879 (emphasis added). Of course, all of the evidence in a case need not point to divisibility for there to be a reasonable basis.

A fair summary of this state of affairs is that lower courts' opinions have been affected by *Burlington Northern*, but in the *opposite* direction than intended by this Court. Courts are even less likely to apportion liability than they were before the decision was issued.

3. The courts below, like others after *Burlington Northern*, ignored its proof requirements.

The proceedings in this case provide another dramatic illustration. The district court purported to follow *Burlington Northern*. It first recognized that "a reasonable basis for apportionment need not be mathematically precise, and may be based on the simplest of considerations." Pet.App.46a-48a (internal quotation marks omitted). But it refused to divide the harm, despite there being five reasonable ways to do so—and indeed, one way in which the plaintiff's own expert *agreed* there was a reasonable basis for apportionment. As a result, PCS, which had

never owned or operated the site, was held to be jointly and severally liable for millions of dollars of anticipated cleanup costs.

This result cannot be squared with *Burlington Northern* or with the Restatement. The apportionment methods the district court *rejected* here were far more sophisticated than what was *upheld* by this Court in *Burlington Northern*. Moreover, the parties in this case put forward several apportionment methods themselves, in contrast to the "scorched earth" approach taken by the parties in *Burlington Northern*, who advanced all-or-nothing positions on apportionment, and refused to argue any link at all between the evidence and divisibility. 556 U.S. at 615.

PCS itself suggested four methods to establish divisibility, accounting for the period of ownership, volume of contaminants, volume of soil, and surface-area impact. Pet.App.151a-161a. These were precisely the types of evidence that are "relevant to the apportionment analysis." *Burlington Northern*, 556 U.S. at 617 (emphasis omitted). Each method called for roughly 6 percent of the harm to be attributable to PCS. Meanwhile, Ashley's *own expert* called for 15 percent of the harm to be attributable to PCS. Pet.App.161a-163a. Despite this narrow range and apparent agreement, the Fourth Circuit demanded, or deferred to the district court's demand, that PCS develop a mathematically rigorous method to apportion the harm. Pet.App.43a-50a. It focused on whether the methods addressed both "primary" and "secondary" disposals, seeming to envision, without defining, a particular approach that would be acceptable. The court ignored that one of PCS's

experts described a method dealing exclusively with the "secondary disposals" caused by the spread of contamination on the site, which reached approximately the same conclusion as a method dealing exclusively with "initial disposals." *See* Pet.App.159a-161a (discussing Method 4). It also ignored Ashley's own expert, who, incorporating both primary and secondary disposals into her methodology, affirmatively stated that "it would be reasonable to determine [PCS's] contribution to the contamination on the Site based upon the contaminated soil samples" that she attributed to PCS. Pet.App.161a. In short, the lower courts rejected all proposals for apportionment, pronouncing, for example, that they would consider only "apportionment methodolog[ies] that addressed both types of disposals," Pet.App.50a; *see* Pet.App.163a-165a, without acknowledging that two of the methodologies collectively *did just that*, and one methodology did so *by itself*.

If this incredibly comprehensive evidence, including agreement from the plaintiff's own expert, is not enough to establish divisibility, it is unclear what would ever suffice. And the Fourth Circuit is not alone. No court has found divisibility since *Burlington Northern*. If not now, when?

4. The court of appeals misapprehended *Burlington Northern* in other key ways.

The Fourth Circuit also made a number of other comments in the course of its reasoning that demonstrate its misapprehension and misapplication of the Restatement and of this Court's decision in *Burlington Northern*.

First, the Fourth Circuit favorably cited the Seventh Circuit's decision in *NCR Corp.* for the proposition that requiring courts to "always" adopt a "rough . . . calculation" for apportioning harm "would in essence replace an evidence-based apportionment calculation with a rougher appeal to equity." 688 F.3d at 842; *see* Pet.App.47a (citing *NCR Corp.*, 688 F.3d at 842). The portion of *NCR Corp.* cited by the Fourth Circuit is a non-sequitur to a footnoted aside in *Burlington Northern*. 688 F.3d at 842 (citing *Burlington Northern*, 556 U.S. at 615 n.9). The relevant portions of *Burlington Northern* describe the standard called for by § 433A and make no reference to equity, favorably or unfavorably. It is true, and *Burlington Northern* affirms, that equity plays no role in the divisibility calculus. This was a mistake made by the district court in that case, which this Court found harmless. *See Burlington Northern*, 556 U.S. at 615 n.9. But to recognize that *equity* plays no role in the divisibility analysis says nothing about the relevance and adequacy of "rough . . . calculation[s]," which this Court expressly endorsed. Both courts of appeals erred in drawing a contrary conclusion.

Ignored by both courts below is the very essence of *Burlington Northern*'s holding on apportionment. Although a court cannot divide the harm based on nothing but its own or a party's conjecture, the evidence and calculations need not be exact. *Burlington Northern* illustrates just how little evidence is required. Using coarse estimates of three different factors, the Court determined that multiplying those three factors was close enough. 556 U.S. at 615-16. In this case, multiple experts from both sides agreed on a range between 6 and 15 percent, and agreed that the harm was capable of

apportionment. These conclusions reinforce one another, easily satisfying *Burlington Northern*'s standard. In rejecting all of them in favor of joint and several liability, the courts below ignored that far rougher calculations have supported apportionment.

Second, the Fourth Circuit misapplied this Court's discussion of the special case "when two or more causes produce a single, indivisible harm," 556 U.S. at 614-15 (alteration and citation omitted), to any situation where there is "uncertain causation of harm" (Pet.App.48a). This Court wrote that "[w]hen two or more causes produce a single, indivisible harm, 'courts have refused to make an arbitrary apportionment for its own sake.'" 556 U.S. at 614-15 (quoting *Restatement (Second) of Torts* § 433A, cmt. i (1963)). Restatement § 433A comment i refers to a particular type of "single, indivisible harm," which, "by [its] nature, [is] normally incapable of any logical, reasonable, or practical division," such as death, a broken limb, "the destruction of a house by fire," or "the sinking of a barge." The comment refers to situations "where either cause would have been sufficient in itself to bring about the results, as in the case of merging fires which burn a building." *Id.* It does not pertain, as the Fourth Circuit claimed, whenever there is "*uncertain* causation of harm." Pet.App.48a (emphasis added). Certainty is not the standard. *See Burlington Northern*, 556 U.S. at 617 (rejecting the Ninth Circuit's demand for "precise," "specific and detailed records as a basis" for dividing the harm). Moreover, apportionment in this case would not be "for its own sake," but rather on the basis that the harm could be simply divided based on

better-than-rough calculations available to the district court.

Third, the Fourth Circuit misread *Burlington Northern* when blithely remarking that it "neither mandates" the "simplest of considerations" it upheld, "nor establishes their presumptive propriety in every case." Pet.App.47a (internal quotation marks and citation omitted). That misses the point. *Burlington Northern* "mandates" that courts uphold the traditional and evolving principles of the common law, identified by *Chem-Dyne* and articulated in the Restatement. And it made clear that liability should be apportioned when there is a "reasonable basis" for doing so. *Burlington Northern* even gave lower courts an example of what such a reasonable basis could be based on. True, a court need not divide the harm in *every* CERCLA case that presents information on the duration, area, and chemical composition of a site. But it should certainly divide the harm in a case like this. Here, there are hundreds of pages of expert reports detailing possible bases for apportionment, and statements from experts on both sides saying there is a reasonable basis for apportionment.[4] And again, the lower courts' contrary conclusion leaves a party that never

[4] The limited apportionment of liability in CERCLA cases displayed by lower courts is particularly odd given the broad applicability of apportionment in other contexts. *See, e.g.*, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) (upholding the apportioning of damages in admiralty cases); *Fed. Sav. & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 135-37 (4th Cir. 1987) (upholding jury apportionment of damages for fraud and breach of fiduciary duties); *Meyers v. Cruzan Motors, Ltd.*, No. 1985/118, 1986 WL 10123, at *3-5 (D.V.I. July 24, 1986) (admitting seat-belt evidence for the purpose of apportioning damages from an automobile collision).

owned or operated the site jointly and severally liable for millions of dollars.

Apportionment in CERCLA cases continues to befuddle lower courts. Despite this Court's opinion in *Burlington Northern*, CERCLA apportionment remains in a fog. Given Congress's deliberate decision to leave questions of apportionment to development under the common law, this Court's guidance in *Burlington Northern* was significant. But with the courts distinguishing *Burlington Northern* on its facts, its procedural posture, or both, the fog has rolled back in. *See, e.g.*, Pet.App.46a-48a; *NCR Corp.*, 688 F.3d at 842; *3000 E. Imperial, LLC v. Robertshaw Controls Co.*, No. CV 08-3985, 2010 WL 5464296 at *8-11 (C.D. Cal. Dec. 29, 2010). This Court should grant certiorari to reinforce the proof requirements set forth in *Burlington Northern*.

B. The Fourth Circuit's clear-error standard conflicts with three other Circuits and the Restatement (Second) of Torts.

The lower courts' erroneous view of proof requirements in CERCLA cases makes crucial the standard of review applied by courts of appeals. Reviewing apportionment decisions only for clear error means that, once a defendant has lost in the district court, there is no reasonable hope of ameliorating the harness of CERCLA's strict liability at any further stage of the case. In this way, the Fourth Circuit's position on the standard of review compounds its substantive mistake. Of course, given the posture and outcome of *Burlington Northern* itself, the standard of review was not directly at issue. But because proof requirements and the standard of review are both critical to a proper

apportionment analysis, this Court's guidance on both issues is needed.

Factual findings of a district court are reviewed for clear error, and this is undisputed. The question at issue here is whether, given a particular set of facts, a proposed method of apportionment in a CERCLA case is a "reasonable basis" or is too imprecise. On this question, the Circuits are divided three to four.

The Fifth, Eighth, and D.C. Circuits treat the availability of apportionment as a question of law, reviewed de novo, following the Restatement. *See Bell Petroleum*, 3 F.3d at 896; *United States v. Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir. 2001); *Chem-Nuclear Sys., Inc. v. Bush*, 292 F.3d 254, 260 (D.C. Cir. 2002).[5] These Circuits treat the issue as similar to whether a district court may reverse jury findings that lack "a legally sufficient evidentiary basis." Fed. R. Civ. P. 50(a)(1). As the legal holding of a court, such a determination is reviewed de novo. *See, e.g.*, *United States v. Kivanc*, 714 F.3d 782, 795 (4th Cir. 2013) (Rule 50(a) motions challenging the sufficiency of the evidence are reviewed de novo).

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[5] At § 434(1)(b), the Restatement provides that courts decide, as a question of law, "whether the harm to the plaintiff is capable of apportionment among two or more causes." § 434(1)(b). In contrast, "the apportionment of the harm to two or more causes" is a question of fact. *Id.* § 434(2)(b). So the court determines whether an apportionment analysis applies, and this issue is reviewed de novo. If an apportionment analysis applies, "the actual apportionment of damages"—e.g., Party A is responsible for 50 percent, Party B is responsible for 20 percent, etc.—"is a question of fact," reviewed for clear error. *Bell Petroleum*, 3 F.3d at 896 (citing Restatement § 434(2)(b) & cmt. d.); *see Hercules*, 247 F.3d at 718.

The Fourth, Sixth, Seventh, and Ninth Circuits, however, treat this ultimate determination as essentially discretionary, and review it only for clear error. *See* Pet.App.43a-44a (describing the resolution of apportionment as "a fact-intensive, site-specific determination" and "review[ing] the factual findings underlying such a determination for clear error"); *United States v. Twp. of Brighton*, 153 F.3d 307, 318 (6th Cir. 1998) (saying it will uphold a "district court's determination of indivisibility unless it is clearly erroneous"); *NCR Corp.*, 688 F.3d at 838 ("In reviewing the district court findings of the facts that underlie the ultimate decision, our review . . proceeds under the clear error standard."); *Burlington Northern*, 520 F.3d at 941-43 ("[W]e review for clear error whether the defendant submitted evidence sufficient to establish a reasonable basis for the apportionment of liability, taking into account that the burden of proof is on the party seeking allocation, as well as the district court's actual division of liability."), *rev'd on other grounds*, 556 U.S. 599.

Among those Circuits on the "clear error" side of the ledger, including the Fourth, Seventh, and Ninth, some maintain that, in at least some sense, apportionment is in fact reviewed de novo. But this fiction buckles under the slightest pressure. In fact, these Circuits are referring only to the academic question of whether a harm is "*theoretically* capable of apportionment" (emphasis added).[6] This question

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[6] *See* Pet.App.43a-45a (noting first that it "review[ed] a district court's determination of whether a harm is capable of apportionment de novo" and then agreeing with the district court's conclusion that a party could prove harm "was at least 'theoretically divisible'" if it provided sufficient evidence); *NCR*

is rarely in dispute in all but the most complex of environmental cases. It therefore has no practical effect, and discussing it is little more than an advisory opinion. The real dispute is over whether a *particular method of divisibility* is in fact a reasonable basis for apportioning liability. And by cabining this ultimate question into one of fact, these Circuits effectively collapse the entire inquiry into one reviewed for clear error, and thus prevent meaningful review of district court decisions.

This case, therefore, presents an opportunity to establish a uniform approach to appellate review of CERCLA apportionment decisions. In a way that was unavailable to it in *Burlington Northern*, this Court can, and now should, clarify that whether a harm is capable of apportionment is reviewed de novo. Here, by *reversing* a decision *refusing* apportionment, the Court can emphasize the importance of apportionment itself, rather than any deference owed to district courts regardless their apportionment conclusion. It would show that, if apportionment is appropriate, it is not necessary to defer to a district court's erroneous conclusion that it is not.

(continued…)

Corp., 688 F.3d at 838 ("First, we must determine whether the harm at issue is theoretically 'capable of apportionment.' . . . [T]his is a question of law." (internal quotation marks omitted)); *Burlington Northern*, 520 F.3d at 942 ("We inquire, first, whether the particular harm at issue in the case is theoretically capable of apportionment—i.e., whether it could ever be apportioned or whether it is, by nature, too unified for apportionment. That question is one of law, reviewed de novo."), *rev'd on other grounds*, 556 U.S. 599.

II. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE THAT URGENTLY REQUIRE THE COURT'S REVIEW.

The lower courts' continuing refusal to apportion liability is of great national importance due to the large number of Superfund sites. There are currently 1,320 final sites on the U.S. Environmental Protection Agency's National Priorities List ("NPL") throughout the country.[7] *See* 42 U.S.C. § 9605(a)(8)(B). The Fourth Circuit alone contains 141.[8] EPA may also bring CERCLA actions against owners or operators of sites not on the list. The EPA's database lists over 12,000 active non-NPL sites, 993 of which are located in the Fourth Circuit.[9]

The expense to clean up any one of these Superfund sites is extraordinary. On average, the cost to remediate a site on the NPL is $30 million, and can be far higher. *N. States Power Co. v. Fidelity & Cas. Co. of N.Y.*, 523 N.W.2d 657, 660 (Minn. 1994). In one case, the Third Circuit noted that remediation of chemical leakage at a rail yard site would likely exceed $53 million. *United States v. Se. Pa. Transp. Auth.*, 235 F.3d 817, 824 (3d Cir. 2000). Remediation at the Helen Kramer Landfill Superfund Site in New Jersey cost $123 million. *United States v. Kramer,* 19 F. Supp. 2d 273, 277, 287 (D.N.J. 1998). Ohio's Fields Brook Site could cost $100 million. *United States v. Gencorp, Inc.*, 935 F. Supp. 928, 930 n.5 (N.D. Ohio 1996). According to

[7] EPA, NPL Site Totals by Status and Milestone, http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm.

[8] EPA, Superfund Site Information, http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm.

[9] *Id.*

the U.S. General Accountability Office ("GAO"), "[t]he effort to clean up federal hazardous waste sites is likely to be among the costliest public works projects ever attempted by the government."[10] In 1997, the GAO estimated that cleaning up Superfund sites "could amount to over $300 billion in federal costs and many billions more in private expenditures."[11] In 2004, the EPA estimated private expenditure at $209 billion.[12] Some "peg ultimate cleanup costs as high as $1 trillion."[13] "One commentator has described the resolution of insurance coverage for clean-up costs under CERCLA as 'a trillion-dollar question.'"[14] Jill E. Fisch, *Captive Courts: The Destruction of Judicial Decisions by Agreement of the Parties,* 2 *N.Y.U. Envtl. L.J.* 191, 206 (1993) (citing

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[10] GAO, GAO/RCFD-94-73, *Federal Facilities: Agencies Slow to Define the Scope and Cost of Hazardous Waste Site Cleanups, Report to the Subcomm. on Investigations and Oversight, Comm. on Public Works and Transp.* 7 (1994), *available at* http://www.gao.gov/assets/220/219623.pdf.

[11] GAO, GAO/HR-97-14, *Superfund Program Management* 6 (1997), *available at* http://www.gao.gov/assets/230/223624.pdf.

[12] EPA, *Cleaning Up the Nation's Waste Sites: Markets and Technology Trends* at viii (2004 ed.), *available at* http://www.clu-in.org/download/market/2004market.pdf.

[13] *Consolidating and Restructuring the Executive Branch: Hearing Before the Subcomm. on Gov't Mgmt., Info., & Tech. of the Comm. on Gov't Reform and Oversight*, 104th Cong. 55 (1995) (statement of Jerry Taylor, Director of Nat'l Res. Studies, Cato Institute).

[14] The A.M. Best Company and the Society of Actuaries reported that "total estimated Superfund and environmental cleanup costs (including transaction fees) estimate liabilities at over $1 trillion." Donald Sutherland, *Superfund Awakes in State Supreme Courts*, *RiskWorld*, (Dec. 5, 1997), *available at* http://www.riskworld.com/news/97q4/nw7aa055.htm.

Roger Parloff, *Rigging The Common Law*, *Am. Lawyer* 74, 76 (Mar. 1992)).

The Fourth Circuit's erroneous and unfair apportionment standard, joined by similar approaches in other courts, has the potential to impose hundreds of millions of dollars of unwarranted joint and several liability on thousands of parties who are actually responsible for only a limited amount of contamination. If *Burlington Northern* had been properly followed, the decisions of the Fourth Circuit and the district court below, and some meaningful portion of the other cases to consider apportionment since *Burlington Northern*, would have recognized the appropriateness of dividing the harm and come out the other way.

For parties facing massive, joint and several liability far out of proportion to their actual responsibility for an environmental harm, the prospects are bleak. Although CERCLA cases are often settled through negotiated consent decrees with the government, 42 U.S.C. § 9622(c), that option is not always available, as the case below illustrates. Indeed, the prospect of joint and several liability looms over every settlement negotiation, often forcing parties to settle for more than their fair share, in order to avoid paying for other parties' shares.[15]

Nor is equitable contribution under CERCLA § 113(f), 42 U.S.C. § 9613(f), an answer in many cases. This provision of CERCLA allows parties sued under 42 U.S.C. § 9607(a), as PCS was, to seek contribution against other parties potentially responsible for CERCLA costs. In evaluating these

[15] Although the EPA has been in communication with certain parties in this case, no agreement has been reached.

claims, "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.* § 9613(f)(1). But contribution is unavailable against parties who have resolved their liability against the United States or another state. 42 U.S.C. § 9613(f). And even where equitable contribution is ordered, it is a toothless remedy against the insolvent. *See Picillo,* 883 F.2d at 179. "Orphan shares" of responsibility attributable to absent or insolvent parties are a common occurrence at CERCLA sites, because these cases typically involve conduct by many parties stretching decades into the past.[16] If liability is joint and several, these orphan shares can be reassigned to solvent parties. *See* Pet.App.15a n.1.

Here, many of the owners and operators of the Charleston site found liable under § 113(f) are small entities and thus may not have sufficient funds to meaningfully contribute to the more than $8 million of cleanup costs, and another party (Ross Development Corporation) is now insolvent. *See* Pet.App.63a-64a, 206a. Accordingly, the § 113(f) contribution claims on which PCS succeeded could largely be ineffective in ameliorating the strict, no-fault liability of CERCLA. This would "impose

[16] In a 1993 EPA study of 78 sites, two thirds had an orphan share, and the average size of the orphan share was 26.9 percent. Ridgeway M. Hall, Jr. et al., *Superfund Response Cost Allocations: The Law, the Science and the Practice,* 49 *Bus. Lawyer* 1489, 1503 n.74 (1994). The EPA has itself said that "[a]t almost every Superfund site, some parties responsible for contamination cannot be found, have gone out of business, or are no longer financially able to contribute to cleanup efforts." EPA, *Superfund Enforcement: Success in Enhancing Fairness and Expediting Settlements*, *available at* http://www.epa.gov/superfund/accomp/17yrrept/report3.htm.

financial responsibility for massive costs and damages awards on persons who contributed minimally (if at all) to a release or injury," which was the precise motivation for writing joint and several liability out of the statutory framework to begin with. 126 Cong. Rec. 30,972 (1980).

Given the uniform approach of the lower courts and the number of CERCLA sites to be remediated, PCS, and other Fourth Circuit litigants, are unfortunately not alone. The Court should grant review to clarify rules for the apportionment of hundreds of billions of dollars of cleanup costs imposed by CERCLA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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