Nos. 02-500 and 02-506

In the Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY AND TEXACO, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

SHELL OIL COMPANY AND UNION OIL COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States "arranged for disposal" of waste within the meaning of Section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9607(a)(3), by virtue of its World War II regulation of the manufacture and purchase of a petroleum product when it did not direct or control the actual disposal of waste from that manufacture.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 294 F.3d 1045.[1] The orders of the district court issued on September 28, 1993 (Pet. App. 84a-107a), and August 11, 1998 (Pet. App. 57a-83a), are reported at 841 F. Supp. 962 and 13 F. Supp. 2d 1018. The

[1] References to "Pet. App." are to the appendix to the petition in No. 02-500.

orders of September 18, 1995 (Pet. App. 31a-47a), November 2, 1998 (Pet. App. 55a-56a), and October 12, 1999 (Pet. App. 48a-54a), are unreported.

JURISDICTION

The judgment of the court of appeals was initially entered on February 11, 2002. Petitions for rehearing were denied and a revised opinion was entered on June 28, 2002. Pet. App. 2a-3a. The petitions for a writ of certiorari were filed on September 26, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This litigation concerns payment for the cleanup of the McColl Superfund Site in Fullerton, California. Petitioners Shell Oil Co., Union Oil Co., Atlantic Richfield Co., and Texaco, Inc. used the McColl site to dispose of acid waste they generated in manufacturing various petroleum products for sale to government and private purchasers during and after World War II. The district court held both petitioners and the United States liable as "arrangers" for the disposal of the waste but allocated the United States the responsibility to pay all of the cleanup costs. The court of appeals reversed in part and affirmed in part, holding as relevant here that the United States arranged for the disposal of only a portion of the waste and is responsible for only the costs relating to that portion.

1. Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607, allows those who respond to releases or threatened releases of hazardous substances to sue certain persons for cost recovery. 42 U.S.C. 9607. Section 107(a) specifies the categories of potentially responsible parties:

> (1) the owner and operator of a * * * facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility * * * owned or operated by another party or entity and containing such hazardous substances, and
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> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities.

42 U.S.C. 9607(a). Liability under Section 107 is strict, with only certain limited defenses. 42 U.S.C. 9607(a)-(b).

Each responsible party is liable in contribution for costs incurred by other responsible parties. 42 U.S.C. 9607(a)(4)(B), 9613(f). Section 120(a)(1) of CERCLA provides in relevant part:

> Each department, agency, and instrumentality of the United States * * * shall be subject to, and comply with, [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [Section 107].

42 U.S.C. 9620(a)(1); see *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 10 (1989). Accordingly, the United States is sometimes subject to CERCLA claims.

2. a. By the early 1930s, petitioners began developing a specialized high-octane petroleum product for use in military and private aviation. Pet. App. 5a; Stip. 18-41 (L9-L13).[2] By the mid-1930s, they had negotiated contracts to sell this aviation gasoline, or "avgas," to the military and had begun discussing high-octane technology with the private aviation industry.[3] Stip. 19-28, 36, 39 (L9-L13). Through the onset of World War II, petitioners continued refining the technology and establishing the plants necessary for large-scale avgas production based on anticipated demand. Stip. 25-41, 123-136 (L10-L13, L30-L32).

Because avgas was critical to the war effort, the United States closely regulated its production during World War II. Pet. App. 6a; Stip. 4-6, 44 (L6, L14). In 1942, President Roosevelt established several agencies to oversee wartime production, including the War Production Board (WPB) and the Petroleum Administration for War (PAW). Pet. App. 6a; Stip. 42-91 (L13-L22). Under the nationwide priority rankings system, WPB regulated the flow of certain scarce goods. Pet. App. 6a; Stip. 52-55 (L15). PAW set national goals for the production of high-octane gasoline and set priorities on materials directly affecting the petroleum industry, such as avgas components and avgas itself. Stip. 17, 87-91 (L8-L9, L21-L22). Acting through such agencies, the United States had statutory authority to compel refin-

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[2] The parties agreed to 624 stipulated facts before the district court. Following the lead of petitioners Shell and Union in No. 02-506, references to a stipulation in this brief identify the number of the stipulation and the appropriate page of the material they lodged with this Court.

[3] Petitioners Shell and Union err in stating that avgas "was a wartime product produced solely for the United States." 02-506 Pet. 4.

ers to produce priority products, including avgas, to their existing capacity or even to seize refineries if necessary.[4] The government, however, very rarely used that authority, choosing instead to promote avgas production almost exclusively through non-coercive measures such as recommendations and contracts.[5] Pet. App. 6a; Stip. 43-44, 57, 59, 146-158, 200-201 (L13-L16, L36-L38, L46).

The United States also employed programs such as the Planned Blending Program to gather and use inventory information to maximize avgas production. Pet. App. 6a-7a. Before the war, petitioners had shared their avgas technology with each other and had commonly exchanged products to balance out their product requirements. Stip. 125-127, 135-137, 210 (L30-L33, L48). The Planned Blending Program built on that practice: industry representatives would report on their anticipated supplies and use of avgas components, and the United States would occasionally instruct them on how to shift the supplies among themselves so that they could be used to maximum advantage. Pet. App. 6a-7a; Stip. 221-241 (L51-L59). The Planned Blending Program directly affected only how companies blended avgas components after their manufacture and thus did

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[4] Petitioners ARCO and Texaco err in stating (02-500 Pet. 5) that WPB and PAW could "compel refiners to increase their existing capacity to produce certain fuels." See Stip. 57, 59 (L15-L16) (government could "require a company to produce a good needed for the war effort *where it was within the company's physical and technical capacity to do so*") (emphasis added); see also Stip. 200-201 (L46).

[5] The few seizures in the record occurred at the end of or after the war and were "paper seizures" intended to aid the petroleum industry in the face of labor problems. Stip. 289-295 (L67-L68); L226-L228.

not directly affect waste generation, which occurred during the production of avgas components, not their blending. Pet. App. 7a; Stip. 14-16, 221, 225 (L8, L51-L52).

Within the regulatory structure described above, petitioners were active and eager participants in the avgas industry. Before, during, and after the war, each of petitioners owned and operated one or more refineries that manufactured avgas and other products and that produced acid waste. Stip. 144, 174, 495-496, 499 (L35, L41, L129-L130). Petitioners actively initiated proposals before and during the war for priority rankings to obtain construction materials to expand their refineries for avgas production and, when they received the necessary approvals, invested tens of millions of dollars to do so. Stip. 147, 162, 268-278 (L36, L39, L64-L66). The United States solicited such proposals from refiners and made construction loans and tax benefits available to owners of refineries that produced avgas, but imposed no requirement that refiners submit any such proposals. Stip. 152, 155-156, 162-163, 532-542 (L37-L39, L140-L142).

Much as they made independent decisions to build and expand refineries to produce avgas, petitioners actively and independently pursued contracts to sell avgas to the United States. Pet. App. 7a; Stip. 19-26, 154-158, 166 (L9-L10, L38, L40). The contracts were negotiated individually with each refiner and contained individualized terms suiting particular refiners' interests. Stip. 159-161, 164-168, 181-183 (L39-L40, L42-L43). The United States generally agreed to purchase petitioners' entire output of avgas at a fixed price for three years. Stip. 148-158 (L36-L38). That price was negotiated individually with each company and gener-

ally included an estimated profit of six to seven percent. Stip. 164-170 (L39-L40).

Although the United States built and owned some refineries during the war, the plants relevant here existed in some form prior to the war and were designed, built, and owned in full by petitioners. Pet. App. 7a; Stip. 74, 174, 267, 281 (L19-L20, L41, L64, L66). Petitioners were responsible for the daily operation and maintenance of the physical equipment. Stip. 279, 287-288 (L66-L67). Petitioners handled their own personnel matters at the plants and selected their own officers and management. Stip. 280, 282 (L66).

Petitioners received significant benefits from the avgas program. In addition to their direct profit under the wartime contracts, petitioners made plans from the very beginning of the war to market and expand their production of high-octane gasoline at war's end. Stip. 29-41, 298-300 (L11-L13, L68-L69). After the war, petitioners retained ownership of the facilities they had built with the help of government loans. Pet. App. 7a; Stip. 152 (L37-L38). Although it was expected that military demand for avgas would drop, the oil industry anticipated that higher octane fuels would have significant application in the private automobile and aviation industries, and petitioners held a tremendous competitive advantage after the war because of their participation in the avgas program. Stip. 297-317 (L68-L72).

b. To produce avgas, refiners used sulfuric acid, which served as a catalyst in the "alkylation" process. Stip. 14, 493-494 (L8, L128-L129). That process produced an avgas component known as "alkylate" as well as "spent alkylation acid" (about 87%-90% acid by weight), which remained relatively high in acid content and thus was a valuable commodity. *Ibid.* Spent alkylation acid could be used for other purposes, reproc-

essed into fresh sulfuric acid, or sold to other users. Pet. App. 5a, 7a; Stip. 325, 329, 343, 346 (L73-L75, L77).

The production of avgas was, however, not petitioners' sole reason to use acid and produce acid waste. One important use for acid was the acid treatment process, used by refiners for decades before the war, in which refiners removed impurities from petroleum fractions for use in avgas or other products. Pet. App. 7a-8a; Stip. 15-16, 325, 344, 431, 484, 496, 499, 514-515 (L8, L73-L74, L77, L103-L104, L124, L129, L130, L133). Acid treatment converted fresh acid or spent alkylation acid into acid sludge, which had lower acid content (about 45%-65% acid by weight). Pet. App. 8a; Stip. 324, 496 (L73, L129). Refiners generally did not reuse acid sludge, and reprocessing it was technically feasible but relatively difficult and expensive. Pet. App. 8a; Stip. 329, 376, 382 (L74-L75, L84, L87). Thus, when the war began, acid sludge dumping and burning were common practices in California and nationwide. Pet. App. 8a; Stip. 326-328, 409-410, 443-448 (L74, L94, L114-L115).

During the war, petitioners contracted with Eli McColl, a former Shell employee, for the disposal of some of their acid waste. Pet. App. 9a; Stip. 1, 435-442 (L6, L111-L113). He was paid a fee per barrel of waste removed and guaranteed a minimum number of barrels. Stip. 475-478 (L122-L123). He dumped the waste at a site in Fullerton, California, from June 1942 until September 1946, more than a year after war's end. Pet. App. 9a; Stip. 2 (L6). Although the waste at the McColl site included some spent alkylation acid, the vast majority was acid sludge, the same refinery by-product that petitioners had produced and dumped or burned long before the development of avgas and the associated alkylation process. Pet. App. 9a, 70a. Although all the

spent alkylation acid at the McColl site was directly connected to the avgas program, most of the acid sludge was not.[6] *Id.* at 9a. Instead, it was the direct result of acid treatment in the production of various items for military and civilian sale.[7] *Ibid.*; Stip. 325, 427, 431, 493-496 (L73-L74, L98, L103-L104, L128-L129). A small portion of the waste at the McColl site was acid sludge resulting from Shell's treatment of a government-owned supply of a chemical called benzol. Pet. App. 9a, 69a; Stip. 432- 434, 498 (L110-L111, L130).

The United States was not directly involved with dumping operations at the McColl site. It issued no orders requiring or approving the dumping of acid waste. Pet. App. 9a; Stip. 400 (L92). It was not party to or aware of Eli McColl's disposal contracts with petitioners. Pet. App. 9a; Stip. 480 (L123). Indeed, the wartime avgas contracts between the United States and petitioners contained no provisions regarding waste ownership, handling, or disposal, which remained petitioners' responsibility. Stip. 184-185 (L43).

Although the WPB priorities system was concerned with the efficient use of goods and facilities for the war

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[6] Although the avgas program led to an increase in spent alkylation acid, which was the direct result of the alkylation process, petitioners ARCO and Texaco err in stating that the program also increased the amount of acid sludge produced at their refineries. 02-500 Pet. 8. Acid sludge production remained relatively constant even as avgas production increased greatly. Stip. 319 (L72); Gov't C.A. E.R. 475, 521, 532-533, 537, 544-546.

[7] An expert testified at trial that the avgas program resulted in at most 13% of the acid sludge. Pet. App. 70a. Petitioners ARCO and Texaco state that all the waste resulted from the manufacture of "wartime products" for which the United States was the "exclusive ultimate purchaser" (02-500 Pet. 3), but the stipulated facts indicate otherwise. Stip. 431 (L103-L104).

effort, not with waste disposal, that system did have the potential to affect the amount of acid waste eventually dumped. Pet. App. 8a. Those wishing to use scarce materials during the war to construct acid waste reprocessing facilities needed WPB approval, and the United States thus had the power to limit the reprocessing industry's capacity. Stip. 52-53, 338-342 (L15, L76). During the war, however, the WPB approved many applications to build reprocessing plants in Southern California and declined only one, on the basis that then-existing facilities appeared sufficient. Stip. 351-353, 379-383 (L78, L85-L87). Indeed, from before the war through late 1944, spent alkylation acid reprocessing capacity in Southern California appeared to meet refiners' needs. Petitioners contracted with companies such as Stauffer Chemical Company (Stauffer) to reprocess spent alkylation acid they did not use within their refineries. Stip. 343-353 (L77-L78). They dumped spent alkylation acid at the McColl site only because technical problems at a Stauffer plant led to a temporary shortfall of reprocessing capacity in Southern California. Stip. 357-365, 493 (L78-L81, L128). The dumping ended after petitioners reached agreement with another company for temporary use of a storage tank. Stip. 366-371 (L81-L83).

Government regulation similarly had little effect on petitioners' disposal choices regarding acid sludge. Petitioners generally continued their pre-war practice of dumping or burning acid sludge. Stip. 409-412, 489, 506-509 (L94-L95, L125-L126, L131). Among petitioners, only Texaco requested a priority rating to construct an additional plant to reprocess acid waste. Stip. 379-381 (L85-L87). Although WPB denied Texaco's request, it approved Stauffer's request to build a much larger plant designed to reprocess both spent

alkylation acid and acid sludge. Stip. 357, 379-381 (L78-L79, L85-L87). If not for unexpected technical problems (which were not caused by the United States), that plant would have been available to handle acid sludge when Texaco began dumping late in the war. Stip. 357, 508-511 (L78-L79, L131-L132).

Another alternative to dumping or burning acid sludge, occasionally used by petitioners, was to ship acid sludge using railroad tank cars to Shell's fertilizer plant near San Francisco. Stip. 411, 513 (L94, L132-L133). Tank car shortages were an issue during the war, but dumping rarely resulted from tank car shortages.[8] Stip. 404-405 (L93). Furthermore, although WPB took steps to try to alleviate such shortages, companies were ultimately responsible for making their own arrangements for tank cars. Stip. 403 (L93). Petitioners introduced no evidence that they ever requested WPB to use its authority to provide them with tank cars.[9] In any case, whatever the effect of wartime controls, petitioners continued dumping acid sludge after the war, both at the McColl site and elsewhere.[10] Pet. App. 29a; Stip. 2, 428 (L6, L98-L99).

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[8] The periods of dumping did not correlate well with the periods of tank car shortages. Stip. 414-420 (L95-L97); Gov't C.A. E.R. 506-518. Indeed, during the war, Shell's fertilizer plant had virtually all the acid sludge it needed from local sources. Gov't C.A. E.R. 4-5, 529-530.

[9] Eli McColl testified before a county commission in 1942 that "the government [would] not allow [him or the companies he represented] to use tank cars," but he did not indicate whether he had ever requested tank cars or was merely making a prediction. Stip. 487 (L125).

[10] Petitioners ARCO and Texaco err in stating that dumping "ceased when wartime production controls ceased and reprocessing alternatives again became available." 02-500 Pet. 8 n.4.

3. On February 1, 1991, the United States and the State of California sued petitioners and other companies no longer involved to recover costs incurred at the McColl site. In response, petitioners filed counterclaims alleging that, through its wartime regulation of the petroleum industry, the United States "arranged for disposal" of the waste at the McColl site and was thus liable under Section 107(a)(3) of CERCLA. While litigation continued, petitioners implemented a cleanup remedy at the site pursuant to an administrative order issued by the United States Environmental Protection Agency under Section 106, 42 U.S.C. 9606. Cleanup at the McColl site ultimately cost close to $100 million. Pet. App. 9a. In 1998, the site was converted into a wildlife sanctuary and community recreation facility. *Ibid.*

On September 28, 1993, the district court entered partial summary judgment for the plaintiffs regarding petitioners' liability. Pet. App. 106a. The United States and petitioners thereafter submitted 431 stipulated facts (L1-L106) and filed cross-motions for partial summary judgment on the counterclaims. On September 18, 1995, the district court entered partial summary judgment for petitioners regarding the liability of the United States. Pet. App. 46a.

In February 1998, after the submission of another 193 stipulated facts (L107-L168), the district court conducted a trial to allocate the response costs between petitioners and the United States. Pet. App. 58a. On August 11, 1998, based on its conclusions that all the waste in question was attributable to the avgas and benzol programs and that the United States should bear total responsibility for such waste, the district court issued a memorandum and order assigning the United States responsibility for all the cleanup costs at

the McColl site. *Id.* at 83a. The district court later entered a final judgment under Federal Rule of Civil Procedure 54(b). Pet. App. 51a.

4. The court of appeals reversed in relevant part. Pet. App. 1a-30a. The United States had earlier conceded that it had arranged for disposal of the portion of waste at the McColl site related to Shell's processing of government-owned benzol. *Id.* at 4a. About 5.5% of the waste at the site was related to benzol. *Id.* at 9a, 69a. Thus, the court of appeals considered whether the United States arranged for disposal of the "non-benzol waste" comprising the other 94.5% of the waste. *Id.* at 14a-24a.

The court of appeals first rejected the possibility of "direct arranger liability." Pet. App. 15a-17a. The district court had found that the United States had affirmatively "undertak[en] the responsibility for disposing" of the waste at the McColl site. *Id.* at 45a-46a. Referring to the stipulated facts, the court of appeals stated: "There are simply insufficient facts in the record to support a conclusion that the United States directly entered into arrangements to dispose of acid waste at the McColl site." *Id.* at 16a-17a.

The court of appeals next concluded that the facts also would not support arranger liability for non-benzol waste on a broader theory based on the United States' supposed control over avgas manufacture. Pet. App. 17a-24a. The court of appeals agreed with petitioners that "control is a crucial element of the determination of whether a party is an arranger" under Section 107(a)(3). *Id.* at 17a. Furthermore, it recognized that "[t]here is no bright-line test, either in the statute or in the case law, for a broad theory of arranger liability." *Ibid.* Thus, it recognized that its task required comparing the facts here with those of other decisions—in

particular, decisions considering what kind of control a party must exercise over a process that produced hazardous waste in order to impute arranger liability to that party for the eventual disposal of that waste. *Id.* at 17a-24a. Based on a detailed comparison of the facts here with those in other cases, the court of appeals concluded that the United States did not exercise the kind of control over the avgas process necessary to find that the United States indirectly arranged for the disposal of non-benzol waste. *Ibid.*

The court of appeals disagreed with petitioners' contention based on *United States* v. *Northeastern Pharmaceutical & Chemical Co.* (*NEPACCO*), 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987), that "mere 'authority to control' is sufficient." Pet. App. 20a. Unlike a party found responsible as an arranger in that decision because he held direct authority to control through a corporate chain of command, "the United States neither exercised actual control, nor had the direct ability to control, in the sense intended in *NEPACCO*." *Id.* at 21a. The court of appeals agreed with a district court decision that arranger liability should not apply to "a party who never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue." *Id.* at 22a (quoting *United States* v. *Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1451 (E.D. Cal. 1995)).

The court of appeals also rejected the contention that "the government's activities * * * constituted an 'act of war'" that absolved petitioners of liability under Section 107(b). Pet. App. 27a-29a. Even if petitioners had shown that the government's activities constituted such an "act of war," those activities were not the sole cause of petitioners' disposal actions, as required to defeat liability under that provision:

> The undisputed facts indicate that [petitioners] had other disposal options for their acid waste, that they dumped acid waste from operations other than avgas production at the McColl site, and that they were not compelled by the government to dump waste in any particular manner.

Id. at 29a.[11]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. It is also highly fact-specific, involving the legal consequences under CERCLA of a unique World War II-era system of regulation, as applied to the production and disposal of particular products. Further review is not warranted.

1. The decision of the court of appeals is correct. This case does not involve the ordinary scenario for arranger liability, in which a party generates hazardous waste and directly contracts with another party for disposal or treatment of that waste, for the United States neither generated nor made any arrangements regarding the waste at the McColl site. Stip. 184-185, 400 (L43, L92). Petitioners claim that the United States is liable under a broader theory of arranger liability, both because of the government's purchase of avgas and regulation of avgas manufacture and because

[11] The court of appeals affirmed the district court's conclusions that the United States had waived its sovereign immunity to petitioners' counterclaims and that the United States should bear full responsibility for cleanup of benzol-related costs. Pet. App. 10a-14a, 24a-27a.

of its actions affecting petitioners' disposal options other than dumping.[12]

a. Under CERCLA, one who effectively controls another party may be found liable for that party's arrangements for disposal of waste. In such a case, the question is "whether in light of all the circumstances the transaction involved an arrangement for disposal or treatment of a hazardous waste." *Cadillac Fairview/Cal., Inc.* v. *United States*, 41 F.3d 562, 566 (9th Cir. 1994) (per curiam); see *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F.2d 1313, 1317-1318 (11th Cir. 1990); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380-1381 (8th Cir. 1989). As the court of appeals concluded, the facts of this case do not support a finding of arranger liability under that principle.

Petitioners argue (02-500 Pet. i, 3; 02-506 Pet. 13-16) that the United States is liable because it coerced them into producing avgas. Petitioners, however, were willing and eager participants in the avgas market. They began developing avgas technology well before the war. Stip. 18-41 (L9-L13). They actively sought avgas con-

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[12] The United States denies petitioners' contention (02-500 Pet. 19-20) that it would seek to impose arranger liability upon a private party in its position. The Environmental Protection Agency enforces CERCLA against federal agencies and has issued guidance requiring that it treat federal entities as it would treat private parties. See Jerry Clifford, Director, Office of Site Remediation Enforcement, *Documentation of Reason(s) for Not Issuing CERCLA §106 UAOs to All Identified PRPs* 3 & n.2 (Aug. 2, 1996), <http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/reason-cer106-rpt.pdf>. On a related note, petitioners' contention (02-500 Pet. 25-26; 02-506 Pet. 20, 27-28) that the court of appeals improperly treated the United States differently from private parties is also mistaken. The court of appeals applied general principles under CERCLA to the unique facts presented in this case.

tracts and initiated proposals before and during the war to expand their refineries to meet demand. Stip. 147, 154-158, 268-278 (L36, L38, L64-L66). There is no evidence that petitioners ever desired to stop producing as much avgas as the United States would buy.[13] The United States did not coerce petitioners to produce avgas.

Petitioners also err (02-500 Pet. 7 n.3 (quoting Pet. App. 45a)) when they state that it was "undisputed" that the United States "controlled the specifications, quantities, delivery, and price of avgas". The United States controlled those terms only in the sense that every party controls the terms on which it chooses to contract; petitioners exercised similar control. The avgas contracts were based on petitioners' own proposals and included unique terms tailored to each company's particular interests. Stip. 159-161, 166, 181-183 (L39-L40, L42-L43). Contrary to petitioners' contentions (02-500 Pet. 7 & n.3; 02-506 Pet. 6-13), the Planned Blending Program did not provide the United States with substantial control over avgas production. That program did not involve the production of avgas components, which was responsible for the waste at issue here, see Stip. 9, 14-16 (L7-L8), but rather the blending of those components after production. Stip. 212, 221-225 (L49, L51-L52). Moreover, although the United States could require a transfer when one refinery's surplus of an avgas component could offset a deficit of another (in a fashion similar to refiners' pre-war pro-

[13] Former PAW official J. Howard Marshall, one of the witnesses whose testimony petitioners emphasize, testified that the United States "never really had to" invoke its wartime powers to force refiners to produce avgas. L174. Indeed, the President of Union Oil urged the United States to assume greater regulatory authority over avgas production. Stip. 101 (L24).

duct exchanges), the government usually accepted refiners' blending recommendations without alteration. Stip. 210, 225 (L48, L52). Accordingly, the parties stipulated that "[t]here is no direct evidence linking the Planned Blending Program to waste dumping at the McColl Site." Stip. 610 (L163).

b. Petitioners also contend (02-500 Pet. 3, 7; 02-506 Pet. 16-18, 23) that the United States "arranged for disposal" of the waste at the McColl site because it allegedly denied them resources for waste disposal. Petitioners, however, had alternatives to dumping at the McColl Site. See pp. 10-11, *supra*. Petitioners contend, for instance, that burning was an unpleasant option (02- 500 Pet. 8-9 n.4; 02-506 Pet. 17), but it was one they had used before the war and continued using during the war despite their professions of distaste today. Stip. 327, 372, 489, 500, 507-509, 513, 519, 521 (L74, L83, L125-L126, L130-L138). Contrary to petitioners' contention (02-500 Pet. 7; see *id.* at 8 n.4, 9), "[t]he undisputed facts indicate that [petitioners] had other disposal options for their acid waste * * * and that they were not compelled by the government to dump waste in any particular manner." Pet. App. 29a. Moreover, dumping was an option that petitioners had used before the war and continued using after the war, both at the McColl site and elsewhere. Stip. 2, 327-328, 409-410, 428, 443-448 (L6, L74, L94, L98-L99, L114-L115).

In addition, petitioners' theory that the government is liable as an "arranger" under CERCLA because it limited their disposal options is legally unsound. CERCLA requires proof of an "arrange[ment] for disposal or treatment" of a hazardous substance. 42 U.S.C. 9607(a)(3). That language predicates arranger liability on a party's affirmative acts regarding disposal. See *United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d

1227, 1232 (6th Cir. 1996); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1506 (11th Cir. 1996); *Amcast Indus. Corp.* v. *Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993), cert. denied, 510 U.S. 1044 (1994). It is inconsistent with petitioner's theory that the United States arranged for disposal of the waste simply by taking unrelated actions that made it harder for petitioners to dispose of that waste.

In sum, while petitioners independently decided to manufacture avgas, controlled the day-to-day operations that produced waste, and arranged for that waste's disposal, the United States was two steps removed from dumping: it had no significant presence at or operational control over petitioners' refineries, and it had nothing to do with the site where Eli McColl eventually dumped petitioners' waste from those refineries. At root, petitioners' argument is that the United States is liable for the disposal of all waste produced by a closely-regulated industry. There is no indication that Congress meant to ascribe such a broad scope to arranger liability and so drastically burden government regulation of industrial practices.

2. Petitioners argue (02-500 Pet. 16-27; 02-506 Pet. 23-26) that the decision of the court of appeals conflicts with decisions of other courts addressing arranger liability under CERCLA. Petitioners contend that what they term "the Ninth Circuit's narrow focus on actual ownership or direct control over the disposal arrangements" conflicts with the decisions of several other courts of appeals, which in petitioners' view hold "that a causal nexus between a party's conduct and the waste disposal is *sufficient* to establish arranger liability." 02-500 Pet. 24 (emphasis added). The decision of the Ninth Circuit is consistent with the decisions of the other courts petitioners cite (*id.* at 20-24), many of

which the Ninth Circuit itself cited approvingly in its opinion.[14]

a. Initially, petitioners misread the Ninth Circuit's decision when they state (02-500 Pet. 16) that it "held that arranger liability requires either: (1) ownership of raw materials or intermediate products at another's facility or (2) direct control of the disposal of hazardous waste at a particular location." The Ninth Circuit did discuss the concepts of "ownership" and "direct control" in the process of distinguishing this case from the Eighth Circuit's decision in *NEPACCO*. But, contrary to petitioners' contention, the court of appeals did not hold that those are the exclusive factors on which arranger liability may be based. See Pet. App. 20a-21a. Instead, it explicitly and properly recognized that a party might be liable if it bore a "duty to dispose" of the hazardous materials, even if it did not directly arrange for disposal. *Id.* at 22a (quoting *United States* v. *Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1451 (E.D. Cal. 1995)). Based on an analysis of the facts of this case, the court simply disagreed with petitioners' contention that the government's actions resulted in such a "duty to dispose" here.

Petitioners also misread the decisions of the other courts they cite to hold that a "causal nexus" between a party's conduct and the disposal of waste is "sufficient" to result in arranger liability under CERCLA. Although a "causal nexus" is no doubt necessary for arranger liability, no court has held that it is sufficient. A

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[14] Compare, *e.g.*, 02-500 Pet. 21-22 and 02-506 Pet. 23-24 (relying on *General Elec. Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (per curiam)), with Pet. App. 22a (citing and quoting the same case); 02-500 Pet. 21 (relying on *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803, 811 (8th Cir.), cert. denied, 515 U.S. 1158 (1995)), with Pet. App. 23a-24a (relying on the same case).

manufacturer would not produce hazardous waste if not for its customers, for instance, but Congress obviously did not mean to impose arranger liability on every purchaser of a product whose manufacture generated hazardous waste. The question in cases like this one is not whether the putative arranger shares *any* causal relationship with waste disposal, but whether the putative arranger exercised sufficient control over the process of waste generation and disposal.

b. There is no conflict between the decision of the Ninth Circuit that the United States is not liable as an arranger on the facts of this case and the decisions of the other courts that petitioners cite holding that arranger liability under CERCLA was appropriate on the facts of those cases.

The decision in this case does not conflict with the Eighth Circuit's decision in *Aceto Agricultural Chemicals Corp.*, *supra* (cited at 02-500 Pet. 16-17). As the Ninth Circuit explained (Pet. App. 18a), *Aceto* involved a far closer relationship between the arranger and the waste, in which the arranger owned the raw materials, contracted out a crucial waste-producing intermediate step in the production process to another firm, and then received back the resulting product. See *Aceto*, 872 F.2d at 1381. Although ownership of the raw materials and finished products is not dispositive of arranger liability in all cases, it is a relevant factor that, together with the other differences between the cases, distinguishes this case from *Aceto*.

Similarly, the decision in this case does not conflict with the Eighth Circuit's decision in *NEPACCO* (cited at 02-500 Pet. 17-20). In that case, the court held that the president of a corporation could be held liable as an arranger for the disposal of waste, where a subordinate official exercised actual control over the disposal of the

waste at issue. As the court of appeals explained in distinguishing *NEPACCO*, the United States would be liable as an arranger in this case if "authority to control * * * were sufficient without more" to establish liability. Pet. App. 20a. The decision in *NEPACCO* was based, however, not on an abstract "authority to control," but on the fact that "responsible officials in the chain of command of a corporation may be held responsible as arrangers when one of those officers has exercised actual control over the disposition of waste on behalf of the corporation, and the other officer has the authority to control the first officer." *Id.* at 20a-21a. See *United States* v. *TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995) (test is whether purported arranger "*exercise[d]* actual or substantial control, directly or indirectly, over the arrangement for disposal") (emphasis added), cert. denied, 519 U.S. 808 (1996). The mere fact that the United States had the (largely unexercised) regulatory authority to order petitioners to take various actions during World War II does not put the United States in the same position with respect to the disposal of petitioners' waste that a president of a corporation occupies with respect to other corporate officers who directly arrange for the disposal of waste.

Petitioners' other claims of conflict are similarly mistaken. In *General Electric Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992) (per curiam) (cited at 02-500 Pet. 22), the court held that certain oil companies were not liable under CERCLA as "arrangers" for the disposal of motor oil that was stored by dealers at service stations leased from the companies. That holding is entirely consistent with the court of appeals' decision that the government is not liable as an arranger in this case. Indeed, the court of appeals here relied in part on *General Electric*'s statement, cited by

petitioners (02-500 Pet. 22), that arranger liability turns in part on whether there is "the *obligation* to exercise control over hazardous waste disposal." 962 F.2d at 286 (cited at Pet. App. 22a). The court of appeals' decision is also entirely consistent with petitioners' position that "whether such [an] obligation exists is based on the party's conduct as it relates to the disposal of hazardous waste." 02-500 Pet. 22 (citing *General Electric*). The court of appeals simply concluded that, on the facts of this case, as in *General Electric*, the government's conduct did not lead to such an "obligation to exercise control."[15]

Petitioners contend (02-500 Pet. 22-23) that the decision in this case conflicts with decisions of the Fifth and Eleventh Circuits that a determination of arranger liability must "focus on all of the facts in a particular case." *South Fla. Water Mgmt. Dist.* v. *Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996); see *Geraghty & Miller, Inc.* v. *Conoco, Inc.*, 234 F.3d 917, 929 (5th Cir. 2000) ("totality of the circumstances"). The court of appeals in this case similarly concluded that "[t]here is no bright-line test, either in the statute or in the case law, for a broad theory of arranger liability under [CERCLA]." Pet. App. 17a. Indeed, the court in this case undertook an exhaustive review of all of the relevant facts in this case before concluding that arranger liability should not be imposed. See *ibid.* ("[W]e are required to sort through the fact patterns of the decided cases in order to find similarities and dissimilari-

[15] For the same reason, the decision of the court of appeals is entirely consistent with the Eleventh Circuit's recognition of "the possibility that a party could so control and benefit from another company's production of hazardous waste that arranger liability would arise." 02-500 Pet. 23 (quoting *Concrete Sales & Servs., Inc.* v. *Blue Bird Body Co.*, 211 F.3d 1333, 1339 (11th Cir. 2000)).

ties to the fact pattern of [this] case."). The reasoning and result of the court of appeals in this case are consistent with the Fifth and Eleventh Circuit cases cited.

3. a. Petitioners also assert (*e.g.*, 02-506 Pet. 3) that the court of appeals' decision conflicts with the Third Circuit's en banc decision in *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833 (1994). *FMC* involved "operator" liability under Section 107(a)(2), not, as in this case, "arranger" liability under Section 107(a)(3). Under Section 107(a)(2) of CERCLA, liability attaches to any party who "operated" a facility at a time when hazardous waste was disposed there. 42 U.S.C. 9607(a)(2). Petitioners contend (02-506 Pet. 26) that the statutory distinction between "operator" liability and "arranger" liability "has no bearing," and that the Ninth Circuit's decision conflicts with *FMC*.

Petitioners are mistaken (02-506 Pet. 26-28) that the distinction between "operator" liability and "arranger" liability is of no significance. The two species of liability are based on different statutory provisions and require different elements of proof. Under Section 107(a)(2), a party who "owned or operated" a facility at which "hazardous substances were disposed of" is liable. 42 U.S.C. 9607(a)(2). By contrast, Section 107(a)(3) imposes liability on a party that "arranged for disposal or treatment * * * of hazardous substances." 42 U.S.C. 9607(a)(3). Whereas the former inquiry focuses on the question of ownership or operation *of the facility*, the latter inquiry focuses on the question of arranging for the disposal *of the substances*. See *TIC Inv. Corp.*, 68 F.3d at 1090 n.7 ("The language related to operator liability * * * does not require any involvement in the disposal activities themselves."). Petitioners cannot simply import analyses relating to "operator" liability

without accounting for the differences in the statutory formulae.

In any event, even if the two types of liability had identical prerequisites, petitioners' claim of conflict would be mistaken. As the court of appeals in this case explained, the court in *FMC* found the United States liable as an operator of a wartime plant where the United States required the owner of that plant to convert it to manufacture rayon; owned much of the manufacturing equipment; required the use of government-supplied raw materials; participated in managing and supervising the workers; and directly controlled the manufacturing process. Pet. App. 22a-23a; see *FMC*, 29 F.3d at 836-837. In this case, the government did not require petitioners to manufacture any product that they sought to avoid; did not own any of the manufacturing equipment; did not supply the raw materials; did not participate in managing and supervising the workers at petitioners' facilities; and did not directly control the manufacturing process. The degree of control in *FMC* was substantially greater than that here. There is thus no conflict.[16]

b. Petitioners invoke (02-506 Pet. 3, 22, 26) this Court's decision regarding "operator" liability under Section 107(a)(2) in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), although they do not expressly assert that the decision of the court of appeals conflicts with it. In

[16] Moreover, as the court of appeals found, the *FMC* court divided evenly on the question whether the United States bore arranger liability. Pet. App. 23a; *FMC*, 29 F.3d at 845-846. The court of appeals thus recognized: "If it was a close question on the facts of *FMC* * * * , it cannot possibly be a close question on the facts in the case before us." Pet. App. 23a. The result in *FMC* also shows the error in petitioners' attempt to eliminate the distinction between operator liability and arranger liability.

Bestfoods, this Court considered whether and when a parent corporation would share its subsidiary's "operator" liability under Section 107(a)(2). 524 U.S. at 61-64. Petitioners contend that their wartime relationship with the United States was comparable to a parent-subsidiary relationship. 02-506 Pet. 15-16, 21-23. That comparison is weak. Unlike a parent corporation, the United States held no interest in petitioners' refineries, made no profits from petitioners' business, and did not manage petitioners' operations. Its relationship with petitioners' plants was based on contract and regulation, not ownership and management. Accordingly, there is no basis in this case to apply to the United States the "veil piercing" theory of "operator" liability that the Court discussed in *Bestfoods*.

Absent piercing, the pertinent question under *Bestfoods* is whether the parent's actual actions regarding hazardous waste (as opposed to the parent's general control over the subsidiary) make the parent directly (as opposed to derivatively) liable. 524 U.S. at 64-67. This Court explained:

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66-67. The United States did not "operate" petitioners' refineries within the meaning of CERCLA and thus should not be held responsible for the arrangements for disposal of the waste generated there. In-

deed, numerous courts have declined to impose "operator" liability on the United States on similar facts dealing with wartime industrial regulation. See *East Bay Mun. Util. Dist.* v. *United States Dep't of Commerce*, 142 F.3d 479, 484-487 (D.C. Cir. 1998); *United States* v. *Vertac*, 46 F.3d 803, 808 (8th Cir.), cert. denied, 515 U.S. 1158 (1995); *Washington* v. *United States*, 930 F. Supp. 474, 483-485 (W.D. Wash. 1996); *Maxus Energy Corp.* v. *United States*, 898 F. Supp. 399, 408 (N.D. Tex. 1995), aff'd, 95 F.3d 1148 (5th Cir. 1996) (Table); *Iron Mountain Mines, Inc.*, 881 F. Supp. at 1450-1451. The decision of the court of appeals comports fully with those decisions and with *Bestfoods*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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